

defaulted. Additionally, Magistrate Judge Rice recommended that the Court issue a certificate of appealability on the closing argument prosecutorial misconduct claim, concluding that reasonable jurists could debate the proper resolution of the petition.

Both petitioner and respondents filed Objections to the Report and Recommendation. Petitioner also filed a Motion to Dismiss as Untimely Filed Respondent's Objections to Magistrate Judge's Report and Recommendation. For the reasons set forth below, the Court approves and adopts the Report and Recommendation, denies petitioner's Motion to Dismiss, overrules petitioner's Objections and respondents' Objections, **denies in part and dismisses in part the *pro se* Petition and counseled Amended Petition for Writ of Habeas Corpus**, and issues a Certificate of Appealability as to the prosecutorial misconduct due process claim.

II. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are detailed in the Report and Recommendation and are included in this Memorandum insofar as necessary to address the issues raised by the two sets of objections. and the Motion to Dismiss respondents' objections.

The case arises out of a December 13, 2005 shoot-out witnessed by the victim's friend, Lorenzo Andrews, who testified against Walker at trial in the Court of Common Pleas of Philadelphia County. Andrews testified that he saw Walker, apparently unprovoked, shoot the victim, William Hamlin, multiple times at close range. Twenty-four shell casings from at least three guns were found at the scene of the homicide. In the course of the altercation, Walker himself was shot once in the leg. Walker's defense at trial was based primarily on the argument that because so many shots were fired by so many guns, it was impossible to prove beyond a

reasonable doubt that it was Walker who was responsible for the death of the victim.¹

In addition to Andrews, the prosecution presented two purported eyewitnesses, Reginald Hale and Mitchell Pearce, who had previously given statements to the police in which they identified Walker as the shooter. On the stand, however, both witnesses recanted their previous identifications of Walker. Hale explained that when interviewed by detectives after the shooting, the detectives pointed to Walker's picture and said "this is the guy, this is the guy right here, he's shot in the hospital. . . this is what Mitch said, this is what Will said." Id. at 85. Hale then responded that "Well, if that is what you say, this is him." Id. Pearce denied that he had identified Walker's picture in a photo array and stated that instead of a lengthy statement about the shooting he recalled "telling him [Detective Mee] that by the time I went out to the door it was nothing but cops out there." Id. at 123. Pearce also claimed that he was mistreated by the police interrogators stating that "they were roughing us up and down there, them D.A.s – I mean them homicide detectives that day." Id. When asked if he had given a description of Walker to the detective he stated "[the] detective described that description to me. That's what he done." Id. at 124.

In his closing argument, the prosecutor theorized for the jury about possible explanations for the inconsistencies between Hale and Pearce's statements to the police (admitted in evidence as prior inconsistent statements) and their trial testimony. The prosecutor also addressed accusations of sloppiness leveled against the Commonwealth by defense counsel. The trial court

¹In his opening statement, trial counsel stated that "What you will come to understand is that on December the 13th, 1995, Mr. Hamlin did indeed die. Mr. Walker was in fact shot, but that they may not have shot each other, probably didn't, that there was a hail of bullets and they came from the white Pathfinder that was parked on the street . . ." N.T. 7/2/97, at 17.

sustained numerous objections of defense counsel throughout the argument and issued strong curative instructions that the jury was to be guided only by their recollection of the evidence, and not by sympathy.

Walker was convicted of first-degree murder and possession of an instrument of a crime by a jury on July 7, 1997. He is currently serving a sentence of life imprisonment.

The Superior Court of Pennsylvania affirmed the judgment of sentence on August 16, 1999. On December 28, 1999, the Supreme Court of Pennsylvania denied allocatur.

Commonwealth v. Walker, 747 A.2d 900 (Pa. 1999). On September 6, 2000, Walker filed a *pro se* application for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541, *et seq.* Counsel was subsequently appointed, and the trial court dismissed the PCRA petition on September 6, 2002, after appointed Counsel filed a "no merit" letter. The Superior Court affirmed the dismissal on May 5, 2004. Commonwealth v. Walker, No. 2907 EDA 2002, slip op. (Pa. Super. May 5, 2004). On January 4, 2005, the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Walker, 864 A.2d 1205 (Pa. 2005).

Walker filed a timely *pro se* petition for a Writ of Habeas Corpus on February 8, 2005. On August 30, 2005, a counseled amended petition was filed.

Magistrate Judge Timothy R. Rice issued a Report and Recommendation on January 30, 2006. It was his recommendation that (a) Walker's denial of due process claim based on prosecutorial misconduct in closing argument be denied on the merits; (b) Walker's ineffectiveness of counsel claim and denial of due process claim based on jury instruction error be dismissed as procedurally defaulted; and (c) a certificate of appealability be issued on the prosecutorial misconduct claim.

Petitioner and respondents filed Objections to the Report and Recommendation.

Additionally, petitioner filed a Motion to Dismiss As Untimely Filed Respondents' Objections.

III. SUMMARY OF OBJECTIONS

Respondents raise two objections to the Report and Recommendation. First, respondents object to Magistrate Judge Rice's conclusion that petitioner's prosecutorial misconduct claim had been fairly presented in state court. In reaching that conclusion the Magistrate Judge stated that the state claim was the substantial equivalent of the federal due process claim for closing argument misconduct. Respondents argue that this substantial equivalence standard is not sufficient to meet the requirements of fair presentment, and that the federal claim must have been explicitly stated in the state court action.

Second, respondents object to Magistrate Judge Rice's recommendation that the Court issue a certificate of appealability with respect to the due process claim of prosecutorial misconduct in the closing argument. On this issue, Magistrate Judge Rice determined that the issue was subject to debate amongst reasonable jurists, and therefore a certificate of appealability was warranted. Respondents argue that because Magistrate Judge Rice, applying the deferential standards of AEDPA, did not conclude that the state courts had erred, no certificate of appealability is warranted.

Petitioner raises five objections to the Report and Recommendations. In the first three objections petitioner argues that Magistrate Judge Rice incorrectly concluded that the prosecutorial misconduct in closing argument, petitioner's first claim, did not violate due process. Specifically, petitioner argues that (1) **Magistrate Judge Rice mis-characterized the evidence against petitioner, and erred in weighing that evidence to determine that the impact of**

the prosecutorial misconduct in closing argument, in the context of the trial as a whole, was insufficient to rise to the level of a due process violation because the evidence against petitioner was weak; (2) Magistrate Judge Rice failed to address the claim that the prosecutor improperly vouched for the credibility of government witnesses; and (3) Magistrate Judge Rice “failed to consider the closing argument in its entirety and the cumulative impact each individual improper comment would have.” Pet. Obj. 5.

In his fourth objection, also related to the first claim, petitioner argues that Magistrate Judge Rice erred in his determination that the state court had adjudicated petitioner’s prosecutorial misconduct claim on the merits. Accordingly, petitioner argues that the Report and Recommendation improperly evaluates petitioner’s prosecutorial misconduct claim under AEDPA’s deferential standard of review rather than applying a *de novo* standard of review.

Finally, with respect to the second claim, petitioner argues in his fifth objection that the Magistrate Judge erred in determining that the trial judge’s jury instructions properly stated the law when he instructed the jury that they could infer malice from the actor’s use of a deadly weapon on a vital part of the victim’s body. Petitioner contends that although Pennsylvania law permits an inference of intent from the use of a deadly weapon on a vital part of the victim’s body, an inference of malice is impermissible.

No objections were raised in relation to Magistrate Judge Rice’s recommendation that Walker’s ineffective assistance of counsel claim should be dismissed as procedurally defaulted. The Court agrees with Magistrate Judge Rice’s recommendation on this issue and concludes that this claim must be dismissed as procedurally defaulted.

IV. STANDARD OF REVIEW

Where a court refers a habeas petition to a magistrate judge, “the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [and] the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. §636(b)(1)(c). Accordingly, the Court must make a *de novo* determination of those portions of Magistrate Judge Rice’s Report and Recommendation to which the parties objected.

The Court’s review of the Report and Recommendation is governed by the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 2254(d), a petition for habeas corpus may be granted only if (1) the state court adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, “clearly established Federal law, as determined by the Supreme Court of United States;” or if (2) the adjudication resulted in a decision that was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2).

The Supreme Court addressed this standard of review in Williams v. Taylor, 529 U.S. 362 (2000). In Williams, the Court explained that “under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” Hameen v. State of Delaware, 212 F.3d 226, 235 (3d Cir. 2000) (citing Williams, 529 U.S. at 389-90). The Court in Williams further stated that “under the ‘unreasonable application’ clause, a federal habeas court

may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id.

Finally, in reviewing the state court record, factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000) (citing 28 U.S.C. § 2254(e)(1)).

V. PETITIONER'S MOTION TO DISMISS AS UNTIMELY FILED
RESPONDENTS' OBJECTIONS

Respondents were served a copy of the Report and Recommendation on February 8, 2006 and filed their objections to the Report and Recommendation on February 23, 2006. Petitioner filed a motion to dismiss respondents' objections arguing that respondents' objections were due by February 18, 2006 under Local Civil Rule 72.1(IV)(b) which provides that "[a]ny party may object to a magistrate judge's proposed findings, recommendations or report under 28 U.S.C. § 636 (b)(1)(B), and subsections 1(c) and (d) of this Rule within ten (10) days after being served with a copy thereof."

Respondents correctly argue that pursuant to Federal Rule of Civil Procedure 6(a), the computation of time for the purpose of local civil rules for any period less than eleven days shall exclude intermediate Saturdays, Sundays, and federal holidays. Excluding those days, respondents' deadline for filing objections was February 23, 2006, the date on which the objections were filed. Therefore, respondents' objections were timely and petitioner's motion to dismiss the objections on timeliness grounds is denied.

VI. RESPONDENTS' OBJECTIONS TO THE REPORT AND RECOMMENDATION

A. The Magistrate Judge Correctly Concluded in the Report and Recommendation That Walker's Claim Of Prosecutorial Misconduct Was Not Procedurally Defaulted

Respondents argue in their first objection that the Report and Recommendation incorrectly concludes petitioner's allegations of prosecutorial misconduct were exhausted because those claims were not "fairly presented" to the state courts. This argument is rejected.

As amended by AEDPA, 28 U.S.C. § 2254 provides that "an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State" 28 U.S.C. §2254(b)(1). To satisfy this exhaustion requirement, a petitioner must "afford each level of the state courts a fair opportunity to address the claim." Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); see McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). More specifically, a habeas petitioner "must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." McCandless, 172 F.3d at 261 (citing Anderson v. Harless 459 U.S. 4, 6 (1982)). Making a "somewhat similar state-law claim is insufficient," see id., yet the petitioner need not cite "book and verse of the federal constitution." Lutz v. Brennan, 67 F. App'x 151, 156 (3d Cir. 2003).

Fair presentation requires that the "substantial equivalent" of a petitioner's federal habeas claims be presented to the state courts. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). This does not require petitioner's state court claims to explicitly rely on a federal right; "even if

the petitioner's claims do not explicitly rely on a federal right, a claim is exhausted if, for example, the briefs in question describe a claim in terms so particular as to call to mind a specific right protected by the Constitution." Mack v. Folino, 383 F. Supp. 2d 780, 787 (E.D. Pa. 2005).

The Report and Recommendation concluded that petitioner's prosecutorial misconduct claim was fairly presented in state court because the state claim was the substantial equivalent of the federal due process claim for misconduct in closing argument; the relevant inquiries for both the state and federal claims are identical. Respondents disagree and argue that to satisfy the requirements of fair presentation, the federal claim must have been explicitly raised in state court.

The Third Circuit recently stated in Tome v. Stickman, 167 F. App'x 320 (3d Cir. 2006) that "Fair presentation 'requires that the claim brought in federal court be the substantial equivalent of that presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court.'" Id. at 322-3 (quoting Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992)); see also Albrecht v. Horn, 2006 U.S. App. LEXIS 28854, at *45 (3d Cir. Nov. 21, 2006) ("A habeas petitioner must present a federal claim's factual and legal substance to the state courts.").

Petitioner claimed on direct appeal that his right to a fair trial had been denied due to prosecutorial misconduct. Although citing only state precedent in support of this claim, that state precedent was grounded in federal law. The state and federal due process inquiries for a claim of prosecutorial misconduct are substantively identical; both focus on the fundamental fairness of the trial based on potential prejudice from the alleged prosecutorial misconduct. See Jackson v. Edwards, 404 F.3d 612, 619 (2d Cir. 2005) (holding that petitioner "exhausted his federal claim

because, in this case, the legal standards for his federal and state claims were so similar that by presenting his state claim, he also presented his federal claim.”). Moreover, before the state courts, petitioner presented the same instances of prosecutorial misconduct as are alleged in support of the federal claim. Cf. Sistrunk v. Dragovich, 96 F. App’x 796, 798-99 (3d Cir. 2004) (questioning whether the specific instances of misconduct raised in the federal petition were presented to the state court to determine whether the claim had been fairly presented). Accordingly, the Court adopts the Magistrate Judge’s conclusion that petitioner had fairly presented the prosecutorial misconduct claim in state court, and respondents’ objection on this ground is overruled.

B. The Magistrate Judge Did Not Err in Concluding that a Certificate of Appealability Should Issue On Petitioner’s Prosecutorial Misconduct Claim

The merits of petitioner’s prosecutorial misconduct claim are addressed at Section VII.B. Respondents’ second objection to the Report and Recommendation relating to the claimed error of the Magistrate Judge in recommending the issuance of a certificate of appealability on this claim is addressed in Section VIII after the discussion in Section VII.B.

VII. PETITIONER’S OBJECTIONS TO THE REPORT AND RECOMMENDATION

A. The Magistrate Judge Did Not Err in Applying the More Deferential Standard of AEDPA to the Prosecutorial Misconduct Claim Because the State Court Adjudicated this Claim on the Merits—Petitioner’s Fourth Objection

Because Magistrate Judge Rice concluded that the prosecutorial misconduct claim had been fairly presented, the Report and Recommendation addressed the merits of Walker’s claim that the conduct of the prosecutor in closing argument violated Walker’s due process rights. In so doing, Magistrate Judge Rice applied the deferential AEDPA standard for review of the state

court's determination. **Petitioner argues that the state court's opinion on his appeal did not sufficiently address the merits of his claim, and thus a *de novo* standard of review should have been applied.** Petitioner characterizes the state court's opinion as "simply den[ying] the claim with no explanation whatever, no legal support, no reference to the record." Amended Pet. 18.

AEDPA's deferential standard of review should only be applied if the federal claim was adjudicated on the merits in state court proceedings. 28 U.S.C. § 2254(d). Where the claim was not adjudicated on the merits, federal courts apply the pre-AEDPA, *de novo* standard of review. See Coles v. Folino, 162 F. App'x 100, 102 (3d Cir. 2005).

Magistrate Judge Rice determined that the Superior Court "squarely addressed" petitioner's prosecutorial misconduct claim. Report and Recommendation 10. The Court agrees with Magistrate Judge Rice and finds that the state court adjudicated petitioner's due process claim of prosecutorial misconduct in closing argument on the merits, and thus AEDPA's deferential standard of review is appropriate.

In Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), *rev'd on other grounds* at 543 U.S. 374 (2005), the Third Circuit stated that "a state court may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever." Id. at 247-48 (citing Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002)). In this case, the Superior Court "identified the correct governing legal principle, and then purported to apply it, which constitutes an adjudication on the merits sufficient for purposes of the statute." Albrecht, 2006 U.S. App. LEXIS 28854, *25 (3d Cir. Nov. 21, 2006); see also Veal v. Myers, 326 F. Supp. 2d 612, 624 (E.D. Pa. 2004). **Therefore, the Court concludes that the state court adjudicated petitioner's federal prosecutorial misconduct claim on the merits and, consequently, that the**

Report and Recommendation correctly analyzed that claim under the deferential AEDPA standard of review. Moreover, Magistrate Judge Rice noted, and this Court agrees, that the same conclusion would have been reached on petitioner's due process claim applying a *de novo* standard of review. Report & Recommendation 20 n.4. Accordingly, petitioner's objection on this issue is overruled.

B. The Magistrate Judge Did Not Err in Concluding that the Prosecutor's Conduct Did Not Violate Due Process.

1. Introduction

The Amended § 2254 Petition presents the claim that petitioner's right to due process was violated by egregious prosecutorial misconduct in closing argument. Applying the deferential AEDPA standard of review to petitioner's due process claim, Magistrate Judge Rice evaluated the state court record and concluded that the state court did not unreasonably apply the relevant federal law. Petitioner advances three separate objections as to why Magistrate Judge Rice erred in concluding that the prosecutor's remarks did not deny petitioner's due process rights. Petitioner argues that: (1) Magistrate Judge Rice erred in his determination that the impact of the prosecutorial misconduct in closing argument in the context of the trial as a whole, was insufficient to rise to the level of a due process violation because the evidence against petitioner was weak; (2) the Magistrate Judge failed to address the claim that the prosecutor's closing argument was improper because he vouched for the credibility of the state's witnesses; and (3) the Magistrate Judge erred in isolating the alleged improprieties in the prosecutor's closing argument.

A court may grant habeas relief when prosecutorial misconduct "so infect[s] the trial with

unfairness as to make the resulting conviction a denial of due process.” Werts, 228 F.3d at 197 (quoting Greer v. Miller, 483 U.S. 756, 765 (1987)). For due process to have been offended, “the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant’s right to a fair trial.” Id.

In deciding whether the remarks of the prosecutor rise to the level of a constitutional violation, a federal habeas court is required to examine those remarks in the context of the whole trial. Id. at 198 (citing Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992) and Greer, 483 U.S. at 766). The remarks must be sufficiently prejudicial in the context of the entire trial to violate a petitioner’s due process rights. Id. (citing Greer, 483 U.S. at 766 and Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). To make this determination, the Court must “examine the prosecutor’s offensive actions in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant.” Moore v. Morton, 255 F.3d 95, 108 (3d Cir. 2001).

Petitioner faces a “very high burden” in attempting to prove that the statements of the prosecutor “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Todaro v. Fulcomer, 944 F.2d 1079, 1082 (3d Cir. 1991). Even a demonstration that the prosecutor’s statements “were undesirable or even universally condemned” in and of itself is not sufficient to meet this high burden. Id. However, “the cumulative effect of prosecutorial misconduct can amount to a constitutional violation where each instance, standing alone, does not warrant relief.” Pursell v. Horn, 187 F. Supp. 2d 260, 352 (M.D. Pa. 2002).

2. Alleged Instances of Misconduct

The Amended Petition refers to three types of comments in alleging prosecutorial

misconduct in the closing argument. First, the prosecutor repeatedly characterized the City of Philadelphia, and the site of the crime as “crime ridden” and filled with gunfire, a place “where homicide is the order of the day.” N.T. 7/7/97, at 22, 31, 39. Petitioner argues that these types of comments were improper because they were directed to “passion and prejudice rather than to an understanding of the facts and of the law.” Peterkin v. Horn, 176 F. Supp. 2d 342, 371 (E.D. Pa. 2001).

Second, petitioner argues that the prosecutor improperly vouched for the credibility of Commonwealth witnesses. Petitioner refers to two specific comments of the prosecutor. In the first, the prosecutor began his closing argument noting that “I will only tell you that the men who have been called as witnesses in this case are among the finest human beings I know.” N.T. 7/7/97, at 22. The second alleged instance of vouching occurred when the prosecutor was attempting to explain the impeachment of the witnesses Hale and Pearce by stating “[a]nd along comes the District Attorney like me and I got to go through this exercise with the man to demonstrate to you that once upon a time the man stepped forward and told the truth about who was in the doorway calling out the victim and now in the face of this man right here he can’t do it.” Id. at 34-35. Petitioner argues that these comments constitute improper vouching because the prosecutor’s statements placed the imprimatur of the government behind those witnesses such that the jury could substitute the prosecutor’s judgment of the witnesses’s credibility for their own collective judgment. See, e.g., United States v. Young, 470 U.S. 1, 18 (1985).

The third type of comments referenced by petitioner are comments that allegedly misconstrued the statements of Hale and Pearce and suggested that the jury’s decision could impact the safety and well-being of those witnesses. For example, the prosecutor stated, in

reference to Mr. Hale's prior statement to the police: "Will that cost him later on in life? I dearly hope not, because between him and whatever fate could befall him as an accused witness in a murder case, there stands a jury." N.T. 7/7/97, at 35. In contrast, when discussing the testimony of William Benjamin, a witness who had consistently stated that he did not see anything, the prosecutor stated: "When Mr. Benjamin told his story he successfully evaded having to come into court to acknowledge any accusation against this defendant or ever have to worry about perhaps who might be spotting him on the street after he leaves the courtroom." *Id.* at 47. Petitioner argues that these types of comments were improper because there was no evidence in the record to support the idea that petitioner or anyone else had threatened the witnesses and thus these comments invited the jury to consider evidence outside of the record in rendering their verdict.

Petitioner acknowledges that when defense counsel objected to the prosecutor's comments, those objections were sustained and the judge gave curative instructions. Moreover, at times during the closing argument, the judge *sua sponte* interrupted the prosecutor to give curative instructions. Petitioner argues, however that "it is the breadth and scope and repetition of these comments and sheer disregard of the judge's warnings that brings the cumulative impact of all of these improper statements within the ambit of a due process violation." Amended Pet. 16.

3. Analysis

Both the Pennsylvania Superior Court and Magistrate Judge Rice determined that, when viewed together and in the context of the trial as a whole, the prosecutor's statements in closing argument did not so infect the trial with unfairness as to deprive petitioner of due process. The

Magistrate Judge ultimately concluded that, considering the fact that Andrews' testimony gave the jury a sufficient basis to convict petitioner, and the strong curative instructions of the trial judge throughout the closing argument, any impropriety from the closing argument as a whole was insufficient to rise to the level of a due process violation. The Court approves and adopts the conclusions of Magistrate Judge Rice on this claim, and overrules petitioner's objections. Each such objection will be addressed in turn.

a. The Magistrate Judge Correctly Characterized and Weighed the Evidence Presented Against Petitioner at Trial—Petitioner's First Objection

Petitioner's first objection argues that the Magistrate Judge erred in characterizing the incriminating evidence as "strong" and the eyewitness testimony as "independent." Essentially petitioner takes issue with the finding of the Magistrate Judge that the prosecutor's conduct in the closing argument was not sufficiently egregious to outweigh the Commonwealth's case against petitioner.

The Report and Recommendation states that the Andrews' eyewitness testimony gave the jury a strong independent basis to convict petitioner. Report & Recommendation 19. Petitioner argues that this testimony was not in fact a sufficient basis to convict petitioner because "the Magistrate Judge failed to recognize that petitioner's defense at trial was self-defense, that he conceded his presence at the scene and that identification was not an issue." Pet. Obj. 2. A review of the trial record, and the Amended Petition itself, demonstrates that petitioner's defense at trial was not self-defense. See, e.g., Amended Pet. 3 ("It is also unclear what defense Mr. Wittels [trial counsel] presented, but it is clear that he did not argue self-defense.")² There is

² Moreover, in petitioner's PCRA Motion, one of petitioner's claims of ineffectiveness of appellate counsel was ineffective was based on appellate counsel's argument that the evidence

absolutely no support for petitioner's argument that his defense at trial was self-defense.

Instead, a review of the trial record shows that petitioner's trial defense was that the evidence was insufficient to demonstrate that it was petitioner who shot and killed the victim. This defense was based on the fact that over 24 shell casings from at least three guns were found at the scene and the prosecution was unable to explain the origin of this heavy gunfire. In this context, Mr. Andrews' testimony that he saw petitioner shoot the victim at close range supports petitioner's conviction.

Petitioner also challenges the credibility of Andrews as a witness, noting contradictions between his testimony and that of other witnesses, the fact that Andrews was a friend of the victim, and that Andrews' testimony did not comport with the physical evidence in the case. Pet. Obj. 2-3. However, with respect to the credibility of Mr. Andrews as a witness, "as fact-finder, the trial court was free to reject or accept all, part, or none of the testimony of any witness." Commonwealth v. Gonzales, 609 A.2d 1368, 1370 (Pa. Super. Ct. 1992); see also United States v. Katzin, 94 F. App'x 134, 137 (3d Cir. 2004). It is not the role of this Court to determine whether that testimony should have been rejected by the fact-finder; it is sufficient that, if accepted, the Andrews testimony gave the jury a basis for conviction. Under AEDPA, in reviewing the state court record, factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000) (citing 28 U.S.C. § 2254(e)(1)).

supported a finding of voluntary manslaughter, not first degree murder because the evidence supported an inference of self defense. To the contrary, in rejecting any claim of self defense, petitioner stated that "he never met with or ever discussed with prior appellate counsel any involvement of shooting the decedent or ever mistakenly firing any gun." Amended PCRA Pet. ¶ 11-A.

As petitioner has not presented evidence to rebut this presumption, the Court will not review the credibility of the trial testimony.

For these reasons, the Court overrules petitioner's first objection to the Magistrate Judge's conclusion in the Report and Recommendation that there was no due process violation arising from prosecutorial misconduct in closing argument.

b. The Magistrate Judge Addressed Petitioner's Prosecutorial Vouching Argument and Correctly Concluded in the Report and Recommendation that the Alleged Prosecutorial Vouching Did Not Violate Due Process—Petitioner's Second Objection

Petitioner next objects on the ground that the Magistrate Judge failed to address the claim that the prosecutor improperly vouched for the credibility of the government's witnesses. That is not so. To the contrary, the Report and Recommendation specifically refers to the claim of vouching. See Report and Recommendation 11. Therefore, the Court will construe petitioner's objection as an objection to the Magistrate Judge's conclusion that such vouching did not constitute a due process violation.

To find vouching, "two criteria must be met: (1) the prosecutor must assure the jury that the testimony of a Government witness is credible; and (2) this assurance is based on either the prosecutor's personal knowledge, or other information not contained in the record." United States v. Walker, 155 F.3d 180, 187 (3d Cir. 1998); see also United States v. Harris, 2006 U.S. App. LEXIS 32047, *11 (3d Cir. Dec. 29, 2006). As with other forms of prosecutorial misconduct, vouching in and of itself is not sufficient to deny due process; "vouching does not rise to the level of a federal due process violation unless it affects fundamental fairness of the trial." Choi Chun Lam v. Kelchner, 304 F.3d 256, 271-72 (3d Cir. 2002).

The prosecutor's first instance of alleged vouching, when viewed in context, was a direct

response to defense counsel’s closing argument in which counsel accused the detectives investigating the crime of extreme sloppiness and indifference. Defense counsel stated in closing argument that:

I don’t mean to be directly critical of anyone in this courtroom today. But if you knew about the case and the way the investigation was conducted, one word comes to mind. Sloppy. I’ll say it again, sloppy, sloppy, sloppy. It’s as if they said well, you know, some guy is [sic] around 7th and Diamond, in the ghetto died. We have to investigate it because a death is a death is a death. We know another guy from the same area did it. Yeah, pick up the usual suspects”

N.T. 7/7/97, at 7. The prosecutor responded to these statements in his closing argument, stating:

Where the broad brush of accusation is made against people that I work with and they are called a few bad apples, without any real evidence, he would have you convict the detectives, the police, of being bad apples on no evidence at all. . . . I will only tell you that the men who have been called as witnesses in this case are among the finest human beings I know. With respect to that hit-and-run smeared on the detectives, I will leave that alone now.

Id. at 21-22.

Prosecutors are typically ceded some latitude in responding to accusations leveled against government witnesses. See United States v. Vazquez-Rivera, 407 F.3d 476, 484 (1st Cir. 2005); see also Werts, 228 F.3d at 198 (“While the trial court made clear that it did not condone the remarks of the prosecutor, it nonetheless found that those remarks were motivated, at least in part by the conduct and statements of defense counsel in his closing statement to the jury.”). Seen in context, this statement of “vouching” was made in response to the allegations of the defense counsel, and was proper as an invited response to the argument of defense counsel.

The second example of vouching, the prosecutor’s statement as to the prior statement of Hale, was also proper. The prosecutor’s statement, when viewed in context, purported to explain to the jury the impeachment of Hale’s trial testimony. The prosecutor explained that in

impeaching the testimony of Hale, he had to “go through this exercise with the man to demonstrate to you that once upon a time the man stepped forward and told the truth about who was in the doorway calling out the victim and now in the face of this man right here he can’t do it. He did acknowledge before you, though, that everything that was written down there was something he said. He did acknowledge that.” N.T. 7/7/97, at 34-35.

To support a claim of vouching, petitioner “must be able to identify as the basis for that comment an explicit or implicit reference to either the personal knowledge of the prosecuting attorney or information not contained in the record.” Walker, 155 F.3d at 184. This showing is necessary because “the Third Circuit distinguishes between expressions of personal opinion based on the evidence and those based on facts not in evidence.” Thomas v. Varner, 2003 U.S. Dist. LEXIS 26051, *48 (E.D. Pa. June 10, 2003). Here, “[t]he prosecutor did not engage in vouching because he grounded his comments on the evidence presented at trial.” United States v. Saada, 212 F.3d 210, 225 (3d Cir. 2000). Specifically, the prosecutor commented on the fact that Hale had previously made a statement to the police and then subsequently recanted. Hale’s prior statement had been admitted in evidence as a prior inconsistent statement, see Commonwealth v. Carody, 799 A.2d 143, 148 (Pa. Super. 2002), and therefore the prosecutor’s comment on that statement was permissible.

Accordingly, the Court overrules petitioner’s second objection, and concludes that the Magistrate Judge properly rejected petitioner’s claims relating to prosecutorial vouching.

c. The Magistrate Judge Correctly Analyzed the Cumulative Impact of the Alleged Improper Statements of the Prosecutor–Petitioner’s Third Objection

Finally, petitioner objects on the ground that the Magistrate Judge failed to analyze the cumulative impact of each improper statement in the prosecutor’s closing argument. Magistrate

Judge Rice found that the prosecutor's arguments suggesting that a not guilty verdict could jeopardize the witnesses' lives were improper as appeals to fear and sympathy; he concluded that all other comments were proper. Petitioner argues that the Magistrate Judge erred in isolating the improprieties in the prosecutor's closing argument by failing to evaluate those comments which the Magistrate Judge found to be proper against the backdrop of the other comments which the Magistrate Judge found to be improper. Pet. Obj. 5-6. Essentially petitioner asserts that the improper comments of the prosecutor demonstrate that the Court should be more skeptical of "innocent" explanations for the other allegedly improper comments.

Petitioner cites no authority for the proposition that the presence of some improper statements is sufficient to impugn other statements that the court deems to be proper. To the contrary, what a court must do is consider that although an single improper statement, without more, may not be sufficient to result in a denial of due process, numerous improper statements examined together in the context of the trial as a whole, may infect a trial with unfairness. See Pursell, 187 F. Supp. 2d at 365. This is the approach taken by the Magistrate Judge, which the Court approves and adopts.

The Court agrees with Magistrate Judge Rice and concludes that, even taken together, the cumulative effect of the prosecutor's improper statements, when considered in the context of the trial as a whole, did not constitute a level of misconduct sufficient to result in a denial of due process. The objection to this determination of the Magistrate Judge is therefore overruled.

d. Petitioner's Due Process Claim Based on Closing Argument Misconduct by the Prosecutor is Denied

In sum, the Court overrules petitioner's three objections to Magistrate Judge Rice's conclusion in the Report and Recommendation that the prosecutor's remarks did not violate

petitioner's due process rights, and the Court approves and adopts that conclusion. Accordingly, petitioner's due process claim of prosecutorial misconduct in closing argument is denied.

C. The Magistrate Judge Correctly Analyzed Petitioner's Claim Regarding the Erroneous Jury Instruction on the Inference of "Malice" in the Report and Recommendation—Petitioner's Fifth Objection

1. Standard of Review

In his Amended Petition, **Walker** argues that the trial court's instruction that the jury could infer the element of malice from the accused's use of a deadly weapon on a vital part of the victim's body was erroneous, relieving the Commonwealth of the burden of proving all elements of first degree murder, and disproving voluntary manslaughter. This claim was not raised in state court. Thus, the claim is procedurally defaulted and can only be considered by this Court if petitioner can demonstrate that a failure to consider the claim would result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). This fundamental miscarriage of justice exception requires petitioner to demonstrate "actual innocence;" specifically petitioner's allegation of jury instruction error must make it more likely than not that "no jury, acting reasonably, would have voted to find [him] guilty beyond a reasonable doubt." Shlup v. Delo, 513 U.S. 298, 324, 329 (1995). Magistrate Judge Rice concluded that because the jury instructions correctly stated Pennsylvania law, petitioner could not satisfy this burden. Petitioner objects to this determination, arguing that "the Magistrate Judge failed to understand petitioner's claim regarding the erroneous jury instruction on the inference of 'malice.'" Pet. Obj. 5.

In a habeas proceeding, the Court "must analyze the challenged portions of the jury instruction in context with the entire charge and determine whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the

Constitution.” Laird v. Horn, 414 F. 3d 419, 426 (3d Cir. 2005) (quoting Smith v. Horn, 120 F.3d 400, 411 (3d Cir. 1997)).

2. Jury Charge

The trial judge instructed the jury, *inter alia*, on malice in general, first degree murder, third degree murder, and voluntary manslaughter. N.T. 7/7/97, at 67-75. The judge explained that the difference between murder (both first and third) and manslaughter is the element of malice and instructed that the jury was able to (but not required to) infer that the defendant acted with malice if the jury found that the defendant intentionally used a deadly weapon on a vital part of the victim’s body. Id. at 71. In explaining the distinction between manslaughter and murder, the judge stressed that “there can be no malice when certain reducing circumstances are present. When these circumstances are present, a killing may be voluntary manslaughter but never murder.” Id. The judge’s instructions clearly stated that the jury had to find, beyond a reasonable doubt, that the reducing circumstances (heat of passion or self defense) were not present in order to find the defendant guilty of murder, and that the burden was on the prosecution to disprove those circumstances. Id. at 72-73

3. Analysis

The Amended Petition states:

In his instructions to the jury, the trial judge erred when he allowed the jury to infer the element of ‘malice’ from the defendant’s use of a deadly weapon on a vital part of the body. The Court meant to instruct the jury on the well-established Pennsylvania law that the jury may infer that the killing was ‘intentional’ where the actor used a deadly weapon on a vital part of the victim’s body.

Amended Pet. 21.

A review of Pennsylvania law demonstrates that petitioner’s position is simply incorrect;

“[u]nder Pennsylvania law, a jury may infer the requisite malice to establish first-degree murder from the defendant’s use of a deadly weapon upon a vital part of the victim’s body.” Platel v. Coloran, 2006 U.S. Dist. LEXIS 57760, *44 (E.D. Pa. Aug. 15, 2006); see also, e.g., Pennsylvania v. Hinchcliffe, 388 A.2d 1068, 1071 (Pa. 1974) (“It is well established that the fact finder may draw a permissible inference of malice from the intentional use of a deadly weapon on a vital part of the body.”).

The thrust of petitioner’s argument is that the prosecution bore the burden of proving the elements of first degree murder (including malice) and to disprove voluntary manslaughter, and the judge’s instruction relieved the prosecution of this burden. Specifically, petitioner argues that the jury instruction “allowed the prosecution to disprove voluntary manslaughter (and self-defense) with less evidence than it would need had the jury been correctly instructed.” Amended Pet. 21.

Petitioner’s argument is not supported by Pennsylvania law. The Pennsylvania Supreme Court has ruled that “malice and self-defense are mutually exclusive concepts,” and therefore, if there is “evidence from which a jury could at least reasonably infer malice, the Commonwealth has met its burden of proving beyond a reasonable doubt that [petitioner] did not act in self-defense.” Hinchcliffe, 388 A.2d at 1071. Moreover, taking the disputed instruction in the context of the charge as a whole, it is clear that the permissible inference of malice did not result in a shifting of the burden of proof to the defendant; the judge emphasized that it was the Commonwealth’s burden both to prove first degree murder and disprove voluntary manslaughter. Because affirmative evidence of malice necessarily disproves the circumstances necessary to reduce a crime to manslaughter, the prosecutor’s showing of malice through the circumstantial

evidence of intentional use of a deadly weapon on a vital part of the body was sufficient to meet their burden both to prove malice and disprove voluntary manslaughter. See Commonwealth v. Miller, 634 A.2d 614, 619 (Pa. Super. Ct. 1993) (“[I]f there is evidence from which the factfinder can infer malice, the Commonwealth has disproved self-defense beyond a reasonable doubt.”).

The Court therefore approves and adopts the Magistrate Judge’s conclusion that the jury instructions on malice correctly stated Pennsylvania law, and overrules petitioner’s objection on this issue. Because petitioner cannot demonstrate that failing to review this claim would constitute a miscarriage of justice, the Court dismisses this claim as procedurally defaulted.

VIII. RESPONDENTS’ SECOND OBJECTION TO THE REPORT AND RECOMMENDATION: CERTIFICATE OF APPEALABILITY

Magistrate Judge Rice recommended that the Court issue a certificate of appealability on the due process claim based on prosecutorial misconduct in the closing argument, finding that resolution of that claim is subject to debate among reasonable jurists. Respondents object to this recommendation, arguing that no grounds for a certificate of appealability were shown.

A certificate of appealability may issue only if petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Petitioner must show that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The Magistrate Judge concluded in the Report and Recommendation that because the denial of due process claim presented a close question, that a certificate of appealability was appropriate. See, e.g., Alexander v. Shannon, 2005 U.S. Dist. LEXIS 1626, at * 24 (E.D. Pa. 2005) (“The prejudicial effect of the improper statement in this case was, however, on its terms and in context low, and the evidence against Alexander was weighty. Although a close question –

certainly close enough to warrant a certificate of appealability – we find no due process violation.”); Washington v. Sobina, 2004 U.S. Dist. LEXIS 6170, at *43-44 (E.D. Pa. 2004). This Court agrees with Magistrate Judge Rice’s determination that because the issue is a close one, reasonable jurists could debate petitioner’s procedural due process claim. Therefore respondents’ objection is overruled and a certificate of appealability will issue on this claim.

IX. CONCLUSION

For the foregoing reasons, the Court approves and adopts Magistrate Judge Rice’s Report and Recommendation dated January 30, 2006, denies petitioner’s motion to dismiss respondents’ objections, overrules petitioner’s Objections to the Report and Recommendation, overrules respondents’ Objections to the Report and Recommendation, and denies in part and dismisses in part the Habeas Petition. A certificate of appealability will issue on the due process claim of prosecutorial misconduct in closing argument because the resolution of that claim is subject to debate among reasonable jurists.

An appropriate Order follows

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GARY WALKER	:	CIVIL ACTION
	:	
vs.	:	
	:	
JOHN PALAHOVICH, et al.	:	
	:	
	:	NO. 05-0609

ORDER

AND NOW, this 26th day of February, 2007, upon consideration of the *pro se* Petition for Writ of Habeas Corpus filed by petitioner, Gary Walker, pursuant to 28 U.S.C. § 2254 (Document No. 1, filed February 8, 2005); and the counseled Amended Habeas Petition and Supporting Memorandum of Law (Document No. 9, filed August 30, 2005), and after review of the Report and Recommendation of United States Magistrate Judge Timothy R. Rice (Document No. 13, filed January 1, 2006); Petitioner’s Objections to the Report and Recommendation (Document No. 14, filed February 13, 2006); Objections by the District Attorney of the County of Philadelphia to the Report and Recommendation (Document No. 15, filed February 23, 2006); Petitioner’s Motion to Dismiss as Untimely Filed Respondents’ Objections to Magistrate Judge’s Report and Recommendation (Document No. 16, filed March 6, 2006); and Response to Petitioner’s Motion to Dismiss filed by the District Attorney of the County of Philadelphia (Document No. 17, filed March 8, 2006) **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Timothy R. Rice dated January 31, 2006, is **APPROVED** and **ADOPTED**;
2. Petitioner’s Objections to the Report and Recommendation of United States Magistrate Judge Timothy R. Rice dated January 31, 2006, are **OVERRULED**;

3. Petitioner's Motion to Dismiss as Untimely Filed Respondents' Objections to Magistrate Judge's Report and Recommendation is **DENIED**;

4. Respondents' Objections to Magistrate Judge's Report and Recommendation are **OVERRULED**;

5. The *pro se* Petition for Writ of Habeas Corpus filed by petitioner, Gary Walker, pursuant to 28 U.S.C. § 2254 and the counseled Amended Habeas Petition and Supporting Memorandum of Law are **DENIED IN PART AND DISMISSED IN PART**, as follows:

- a. Walker's claim of ineffective assistance of counsel is **DISMISSED WITH PREJUDICE**;
- b. Walker's denial of due process claim based on erroneous first-degree murder jury instruction is **DISMISSED WITH PREJUDICE**;
- c. Walker's claim denial of due process claim based on prosecutorial misconduct in closing argument is **DENIED**; and,

6. A certificate of appealability is granted with respect to petitioner's claim that the prosecutor's closing argument conduct resulted in a denial of due process on the ground that petitioner has made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2).

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.