

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

MARK KANE : CIVIL ACTION
 :
 v. :
 :
 KENNETH D. KYLER, et al. : NO. 97-4208

ORDER - MEMORANDUM

AND NOW, this 18th day of August, 1999, the following is ordered:

1. The Commonwealth of Pennsylvania's objections to the Report and Recommendation are overruled. As stated in the Report and Recommendation, petitioner Mark Kane has exhausted his ineffective assistance claim. Under the Antiterrorism and Effective Death Penalty Act:

the federal habeas court must determine whether the state court decision was 'contrary to' Supreme Court precedent that governs the petitioner's claim. . . . In the absence of such a showing, the federal habeas court must ask whether the state court decision represents an 'unreasonable application of' Supreme Court precedent: that is, whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified. If so, then the petition should be granted.

Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 891 (3d Cir. 1999). In this case, the Supreme Court has not established a sufficiently specific precedent as to require an outcome "contrary to" that reached by the state court. However, as discussed in the Report and Recommendation, the Pennsylvania Superior Court's finding — that appellate counsel was not ineffective in failing to challenge the trial

court's preclusion of the testimony of the defense's key alibi witness — was an "unreasonable application of" Strickland v. Washington, 466 U.S. 668 (1984).

2. The Report and Recommendation is approved.¹
3. The petition for writ of habeas corpus is granted. 28 U.S.C. § 2254.
4. Petitioner shall be released from custody, unless within one hundred twenty (120) days the Commonwealth commences a new trial.
5. There is no probable cause for appeal.

Edmund V. Ludwig, J.

¹For reasons explained in the Report and Recommendation, the turnaround time required by the Magistrate Judge was unusually extended.