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

ELMER DAVENPORT,	:	CIVIL ACTION
Petitioner	:	
	:	
	:	
v.	:	
	:	
DONALD T. VAUGHN, et al,	:	
Respondents	:	NO. 00-5316

M E M O R A N D U M

Gene E.K. Pratter, J. April 14, 2005

Presently before the Court is an amended *pro se* petition for writ of habeas corpus filed by Petitioner Elmer Davenport, a state prisoner, pursuant to 28 U.S.C. § 2241. On July 22, 1992, Mr. Davenport, following a bench trial, was convicted of second degree murder, rape, and theft. He received a life sentence for the second degree murder. After Mr. Davenport's direct and collateral appeals were all denied by the Pennsylvania courts, Mr. Davenport filed a *pro se* petition for writ of habeas corpus on March 17, 2000. Mr. Davenport, with leave of the Court, amended his petition on October 13, 2000.

Mr. Davenport is now pursuing three claims:[1] (1) insufficiency of the evidence to support the rape conviction; (2) his trial counsel rendered ineffective assistance with respect to using a diminished capacity defense without Mr. Davenport's consent; and (3) his trial counsel rendered ineffective assistance with respect to counsel's discouraging Mr. Davenport from testifying at the suppression hearing. For the reasons discussed *infra*, the Court adopts the Report and

[1] Mr. Davenport's amended petition, filed on October 13, 2000, presented six claims. After reviewing the Response, Mr. Davenport voluntarily withdrew three of these claims and modified two of the others to be consistent with the claims he had exhausted in the state courts. The three claims discussed in this Memorandum are the claims that Mr. Davenport did not withdraw.

Recommendation, issued by the Honorable Diane M. Welsh, United States Magistrate Judge, recommending denial of the petition. Accordingly, Mr. Davenport's petition is denied.

I. BACKGROUND

Pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, this matter was referred to Magistrate Judge Welsh for a Report and Recommendation. On October 1, 2001, Magistrate Judge Welsh recommended that the petition be denied. Objections by both parties were made to this Report and Recommendation, and the Honorable Judge Bruce R. Kauffman, United States District Judge, conducted a *de novo* review of the portions of the Report and Recommendation to which objections were made, pursuant to 28 U.S.C. § 636(b)(1)(C). On August 22, 2002, Judge Kauffman remanded the case to Magistrate Judge Welsh for further proceedings.

Magistrate Judge Welsh issued a Supplemental Report and Recommendation on October 23, 2002, once again, recommending that the petition be denied. On November 8, 2002, Mr. Davenport (through counsel) filed objections to the Supplemental Report and Recommendation. In his objections, Mr. Davenport asserts that Magistrate Judge Welsh erred by not finding: (1) that the state court had applied a more stringent standard than is constitutionally allowed for ineffective assistance of counsel; (2) the record does not support a conclusion that Mr. Davenport knowingly, voluntarily, and intentionally waived his right to testify at the suppression hearing or gave consent to the diminished capacity defense; and (3) the evidence does not support a finding that Mr. Davenport used forcible penetration, so the rape conviction is not supported by the evidence and, therefore, the second degree murder is also not supported by the evidence.

The Respondents, collectively represented by the District Attorney's Office of

Philadelphia, ("District Attorney") filed her own objections to the Supplemental Report and Recommendation on November 12, 2002. The District Attorney agrees with Magistrate Judge Welsh on the denial of the petition, but disagrees with the grounds for the denial articulated by Magistrate Judge Welsh. The District Attorney asserts five objections. Two of these objections argue that the petition was time-barred by being filed more than a year after judgment was final due to Judge Kauffman's allegedly inappropriate granting of a 120-day extension and treating this petition as if it related back to the earlier filing. A third argument posed by the District Attorney is that Mr. Davenport has failed to exhaust his ineffective assistance of counsel claim related to his testifying at the suppression hearing. The Court finds the remaining two objections of the District Attorney are moot due to the Court's finding the Petition is denied. Thus, the Court will not discuss those objections.

The Court denies all of the objections of the Petitioner and the District Attorney for the reasons discussed below. Therefore, the Court adopts the Report and Recommendation, and Mr. Davenport's petition is denied.

A. Factual Background

The facts of this case have been well-documented in the numerous prior opinions before the state courts and this Court. Nonetheless, the Court finds that the Petitioner's objections to the Supplemental Report and Recommendation required a *de novo* review of the entire record. The Court finds that the initial trial judge's summary of the facts in her opinion of March 1991 to be supported by the record, and so shall adopt it here:

> On October 21, 1990, the defendant, Elmer Davenport, went to Ted's High Spot at 58th and Chester Avenues in Philadelphia, where he was employed as a bouncer. (N.T., 7/22/92, p. 100, 101). During the evening, Mr. Davenport

consumed his usual two pints of beer and a couple of shots of liquor. (N.T., 7/22/92, p. 103).

About 7 p.m. Theresa Dickerson, the victim, entered the bar and the defendant bought her a drink at her request. (N.T., 7/22/92, p. 106).

About a half an hour later, the defendant's girlfriend, Lisa Sharp, arrived. She and the defendant argued because he was speaking with Ms. Dickerson. Ms. Sharp then left, screaming, "It's over. I never want to see you again." (N.T., 7/22/92, p. 108).

Between 2:30 and 3 a.m., the defendant went home to discover Ms. Sharp was not there and he was locked out. (N.T., 7/22/92, p. 109, 110). He began walking the streets, hoping to find Ms. Sharp but instead ran into Ms. Dickerson at 55th and Chester Avenue. The defendant had already purchased some caps of cocaine but since Ms. Dickerson indicated she wanted to smoke some, the defendant stopped and purchased additional caps. (N.T., 7/22/92, p. 110). The two then proceeded to Myers playground at 59th and Chester Ave. where they found a secluded spot behind some bushes to drink beer and smoke the caps of cocaine. (N.T., 7/20/92, p. 41).

The defendant began to have intercourse with the victim. The victim, punching the defendant, begged him to stop but he would not. The victim called out for Crest, her boyfriend, to help her. To stifle her screams, the defendant grabbed her by the throat and began choking her. The victim was valiantly trying to fight him off, but the defendant only became angrier. He stopped momentarily, but when the victim began to breathe again, he continued choking her until she was still. (N.T., 7/20/92, p. 41). Although the defendant realized the victim was still breathing, he sat there about an hour and watched her die. (N.T., 7/20/92, p. 115, 119).

Around 6:30 a.m., the defendant returned home. Ms. Sharp, noticing a bruise and scratches on his face asked him where he had been. The defendant responded that he had killed somebody. (N.T., 7/20/92, pp. 57, 58). When Ms. Sharp indicated that she didn't believe the defendant, he took her to the park and showed her the body. (N.T., 7/20/92, p. 59, 60). When they returned home, the defendant pulled the victim's pocketbook from his jacket pocket. Ms. Sharp told him to get it out of the house, which he did. (N.T., 7/20/92, pp. 61, 62, 78). Then, in a matter-of-fact tone, he stated to Ms. Sharp how he had strangled the victim. (N.T., 7/20/92, p. 63).

The victim's body was not found until the afternoon of October 22, 1990. (N.T., 7/20/92, p. 29). The victim was pronounced dead at 2:40 p.m. on that date. (N.T. 7/20/92, p. 85). The cause of death was manual strangulation, the manner of death, homicide. (N.T., 7/20/92, p. 94).

Pennsylvania v. Davenport, No. 1442-46 (Pa. Ct. Com. Pl. March Term, 1991).

B. Procedural History

On February 1, 1991, while he was being held in police custody for unrelated charges, Elmer Davenport was arrested and charged with the underlying charges of murder, rape, robbery, and theft. All of these charges stemmed from the investigation by the police of the death of Theresa Dickerson on October 22, 1990. On July 20, 1992, before the bench trial commenced, Judge Lisa A. Richette held a suppression hearing, where Judge Richette denied Mr. Davenport's pretrial motion to suppress a confession he made to the police. Immediately after this hearing, the trial commenced. Mr. Davenport was represented by appointed counsel, Michael F. Giampietro.

On July 22, 1992, Judge Richette found Mr. Davenport guilty of second-degree murder, rape, and theft. On January 29, 1993, Mr. Davenport requested new counsel, and Harvey Anderson was appointed. Mr. Davenport then moved for a new trial, asserting ineffective assistance of counsel. One of Mr. Davenport's arguments in the motion for new trial was that he had ineffective assistance of counsel due to the failure of Mr. Giampietro to consult with Mr. Davenport as to whether he should testify at his suppression hearing. A hearing before Judge Richette was held on March 1, 1994. Judge Richette denied Mr. Davenport's motion and sentenced him to life imprisonment for the second-degree murder conviction and concurrent sentences of ten to twenty years for rape and eleven and one-half to twenty-three months for theft.

After Mr. Davenport appealed her decision, Judge Richette wrote an opinion for appellate review, which the Court cited to supra. In this appeal, Mr. Davenport made the argument, along with many others, that trial counsel rendered ineffective assistance of counsel for failing to

consult with Mr. Davenport about whether to testify at the suppression hearing. On April 11, 1995, the Pennsylvania Superior Court affirmed Judge Richette's decision.

Mr. Davenport then filed a Petition for Allowance of Appeal on May 11, 1995, seeking allowance to appeal the ruling of the Pennsylvania Superior Court. Mr. Davenport once again argued that Mr. Giampietro had rendered ineffective assistance of counsel for failing to consult with Mr. Davenport about whether to testify at the suppression hearing. The Pennsylvania Supreme Court denied the Petition on October 2, 1995.

Next, Mr. Davenport filed a *pro se* Motion for Post Conviction Collateral Relief on April 1, 1996. This Motion was dismissed by Judge Richette on November 6, 1997. Mr. Davenport appealed this opinion on October 28, 1997 with the Pennsylvania Superior Court. The Pennsylvania Superior Court denied this appeal, and Mr. Davenport filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied this Petition on April 20, 1999.

On March 17, 2000, Mr. Davenport signed and dated a *pro se* petition for writ of habeas corpus. On June 26, 2000, Judge Kauffman of this Court issued an Order allowing Mr. Davenport an additional 120 days to file a new all-inclusive petition. This new petition was signed and dated on October 13, 2000. On October 2, 2001, Magistrate Judge Welsh issued a Report and Recommendation recommending denial of Mr. Davenport's Petition. On January 9, 2002, Judge Kauffman ordered that counsel should be appointed, and on March 27, 2002, Cheryl J. Sturm was appointed.

After objections by both petitioner and respondent were filed, Judge Kauffman remanded this matter to Magistrate Judge Welsh on August 22, 2002 for further proceedings. On October

24, 2002, Magistrate Judge Welsh issued a Supplemental Report and Recommendation. Both petitioner and respondent have filed objections to this Supplemental Report and Recommendation. As stated above, all of the objections are denied and the Court adopts the Supplemental Report and Recommendation. With this opinion, the Court now closes another chapter, albeit a lengthy and drawn-out chapter, in this almost 15 year saga.

II. SUPPLEMENTAL REPORT AND RECOMMENDATION

A. Ineffective Assistance of Counsel Claims

In her discussion of the ineffective assistance of counsel claims, Magistrate Judge Welsh noted the standard of review for granting habeas relief, pursuant to 28 U.S.C. § 2254(d)(1), restricts the federal court to granting habeas relief only if it believes a claim has merit. (Supplemental Report & Recommendation ("SRR") at 5). Magistrate Judge Welsh concluded, without any further discussion, that the claim did not have merit.[2] (SSR at 5).

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[2] Both parties had objected to supposed "claim-splitting" in the initial Report and Recommendation. "Claim-splitting" is when a court inappropriately divides up one claim into separate "components" and determines whether each of the "components" separately is exhausted. The District Attorney renewed this objection in her Objections to the Supplemental Report and Recommendation. Although the Court agrees with the analysis of the parties that claim-splitting is flatly rejected by the Court of Appeals for the Third Circuit and the United States Supreme Court, Engle v. Isaac, 456 U.S. 107, 123 n.25 (1982); Henderson v. Frank, 155 F.3d 159, 165 (3d Cir. 1998), the Court finds that "claim-splitting" is not an issue in this case, because the Supplemental Report and Recommendation concluded that the ineffective assistance of counsel claim was exhausted in its entirety and lacked merit.

Although only one of the "components of the claim" was discussed in the Supplemental Report and Recommendation, the end determination was that the claim, in its entirety, was exhausted. Since the Court will not assume that an inappropriate "claim-split" was made in the exhaustion analysis, the Court finds that the analysis of the one component was undertaken not as a means of "claim-splitting" but as a means to determine if the ineffective assistance claim, with the same *facts* and legal theory, had been fairly presented to all levels of the state judicial system. O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999); Castille v. Peoples, 489 U.S. 346, 351 (1989); Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000). Thus, the Court will not address the objections related to "claim-splitting," but will address whether the ineffective assistance claim

In her earlier Report and Recommendation, Magistrate Judge Welsh went into more discussion on this issue. She noted that the state courts had implicitly found that his attorney, Mr. Giampietro, had not advised Mr. Davenport against testifying and that Mr. Davenport had agreed to pursue the diminished capacity defense. (Report and Recommendation, at 15-18). Therefore, Magistrate Judge Welsh found the claims lacked merit, since Mr. Davenport's only argument was that the state court had given more credence to the statements of Mr. Giampietro than those of Mr. Davenport. (Report and Recommendation, at 16, 18).

B. Insufficiency of Evidence Claim

As to the insufficiency of evidence claim, Magistrate Judge Welsh found that sufficient evidence supported the rape conviction. (SRR at 24). Specifically, Magistrate Judge Welsh rejected the Petitioner's assertion that only the initial act of penetration counts as penetration under the rape statute, so a withdrawal of consent after sexual intercourse has begun is not rape unless the man withdraws and then "penetrates" again. (SRR at 7). Magistrate Judge Welsh noted that the requirements for rape, in this circumstance, are that force is directed against the victim and that the force is sufficient to "'establish [the victim's] lack of consent and to induce the victim to submit [to intercourse] without additional resistance.'" (SRR at 7 (quoting Commonwealth v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994) (quoting Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986)))).

Magistrate Judge Welsh then extensively reviewed the evidence, including the trial testimony of Detective Thomas Augustine who read Mr. Davenport's confession into the record, (SRR at 8-11 (quoting the Trial Tr. 7/20/92 at 39-44)), the testimony of the medical examiner,

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was exhausted, and, if so, the merits of the claim.

Dr. Bennet G. Preston, (SRR at 11-16 (quoting the Trial Tr. 7/20/92 at 85-95)), the testimony of Lisa Sharp, Mr. Davenport's girlfriend at the time of the murder, (SRR at 16-20 (quoting the Trial Tr. 7/22/92 at 109-19)), and the trial testimony of Mr. Davenport, (SRR at 21-22 (quoting the Trial Tr. 7/22/92 at 127-29)). Magistrate Judge Welsh noted that Mr. Davenport's trial testimony was inconsistent with a finding of rape, but that the trial judge did not appear to believe Mr. Davenport's testimony. (SRR at 22).

Finally, Magistrate Judge Welsh discussed her role in reviewing a sufficiency of evidence claim, and properly confirmed that she is not to re-weigh the evidence. (SRR at 23 (citing Tibbs v. Florida, 457 U.S. 31, 37-38 (1982)). Instead, Magistrate Judge Welsh correctly determined that she was to draw inferences "that are consistent with guilt, not innocence." (SRR at 24 (citing Jackson v. Virginia, 443 U.S. 307, 326 (1979)). Therefore, Magistrate Judge Welsh concluded that, based on the trial court's findings and the inferences she was required to draw, there was sufficient evidence to find Mr. Davenport guilty of rape. (SRR at 24).

III. DISCUSSION

The breadth of the objections by both parties has led the Court to the conclusion that a complete *de novo* review of the record is necessary to properly address the objections made by the parties. The Court will first address the three pertinent objections made by the District Attorney, since, if these objections were granted, the Court would not necessarily need to address the merits of the Petition. The District Attorney's objections related to timeliness of the Petition are denied for the reasons given below, but the District Attorney's objection related to exhaustion is granted. Nonetheless, the Court shall address Mr. Davenport's objections and the merits of his Petition. Mr. Davenport's objections are denied for the reasons discussed below.

A. Timeliness of the Petition

In her first objection, the District Attorney argues the Petition was time-barred by being filed more than a year after judgment was final, due to Judge Kauffman's granting a 120-day extension and treating this Petition as if related back to the earlier filing. The Respondent argues that the controlling cases, Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000) and United States v. Miller, 197 F.3d 644 (3d Cir. 1999), while allowing a 120 day tolling for special circumstances, do not apply to this case, where the Petitioner was given a warning about the need to file an "all-inclusive" petition prior to the expiration of the one-year filing limit. According to the Respondents, the "special circumstance" allowed by Mason and Miller is for the circumstance where the notice discussing the "all-inclusive" petition is not received until after the statute of limitations for habeas petitions has expired.

The District Attorney's fourth objection also addresses timeliness in that she argues that even if the Amended Petition was timely filed, the sufficiency of the evidence claim pertaining to the rape charge was added after the one-year time bar, so should be dismissed. Similarly to the first objection, this objection is founded on the alleged misinterpretation of Mason and Miller by Judge Kaufman. The District Attorney argues that, even if the arguments in the original petition can "relate back" due to the Court's earlier order granting a 120 day filing extension, there was no tolling of the time-bar that would allow additional claims.

The District Attorney concedes that Mr. Davenport was relying on a court order when he filed untimely, but argues that the order violated the precedents of the Court of Appeals for the Third Circuit and granted Mr. Davenport an extension that he was not permitted. This Court need not rule on the merits of the objections related to the timeliness of Mr. Davenport's Petition,

because the objections, even if assumed to be interpreting the law correctly, are effectively met by the well-settled doctrine of equitable tolling.

Under the doctrine of equitable tolling, the statute of limitations is tolled "when the petitioner has 'in some extraordinary way ... been prevented from asserting his or her rights.'" Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998) (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)). This doctrine is to be applied in only narrow circumstances, including "where the court has misled the plaintiff into believing that [he] has done everything required of [him]." Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 240 (3d Cir. 1999).

In this matter, Mr. Davenport clearly relied on a court order allowing him additional time to file beyond the one year "period of limitation" for filing a habeas corpus petition, pursuant to 28 U.S.C. § 2244(d)(1). If, as the District Attorney argues, the court misled Mr. Davenport that he had additional time to file his Petition, Mr. Davenport's Petition would still be timely filed, since the 120 days were equitably tolled. Mr Davenport did everything he believed was required of him and obeyed the requirements of the June 26, 2000 Order granting him an additional 120 days to file an amended petition. Therefore, the Court finds the objections of the District Attorney relating to the timeliness of Mr. Davenport's Petition to be without merit in the face of the doctrine of equitable tolling.

B. Exhaustion of Petitioner's Ineffective Assistance of Counsel Claim

The third objection by the District Attorney asserts that Mr. Davenport has presented two distinct arguments on the ineffectiveness of counsel claim relating to testifying at the suppression hearing. According to the District Attorney, Mr. Davenport has alternated between a "passive"

and "active" assertion of ineffectiveness of counsel.[3] The "passive"assertion is that Mr. Giampietro, trial counsel, failed to consult with Mr. Davenport about testifying at the suppression hearing, while the "active" assertion is that Mr. Giampietro did consult, but refused to permit him to testify. The District Attorney argues that these assertions are distinctive enough to merit the argument that Petitioner has failed to satisfy the exhaustion requirement.

To satisfy the exhaustion requirement, both the legal theory and the facts supporting a federal claim must be fairly presented to the state courts before bringing a habeas corpus petition. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000); Landano v. Rafferty, 897 F.2d 661, 669-670 (3d Cir.), cert. denied, 498 U.S. 811 (1990). To satisfy this "fair presentation" requirement, the petitioner must demonstrate that the legal theory and supporting facts asserted in the habeas petition are "substantially equivalent" to those that were presented to the state courts. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). Further, the legal arguments must be presented to the state court in a manner that gives the state courts notice that a federal claim is being raised. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). Finally, the same claims must be fairly presented at all levels of the state courts. Lines v. Larkins, 208 F.3d 153, 159-60 (3d Cir. 2000).

These requirements ensure "that the same method of legal analysis that is used by the federal court in resolving the petitioner's claim was also readily available to the state court when it adjudicated the claim." Landano, 897 F.2d at 669. To decide whether a claim has been fairly

[3] Specifically, the District Attorney argues that Mr. Davenport initially argued before the state trial court that Mr. Giampietro had "failed to prepare and consult with" him for the suppression hearing, but, in the state appellate courts, Mr. Davenport admitted that counsel did consult with him, but refused to permit him to testify.

presented to the state court, the court should examine not only the state court decisions, but also the briefs submitted to the state courts. Gonce v. Redman, 780 F.2d 333, 336 (3d Cir. 1985). However, the state courts do not have to discuss or base their decision on the petitioner's claims for those claims to be considered exhausted. Doctor, 96 F.3d at 678.

The District Attorney argues that both the facts and, therefore, the legal arguments were different before the state trial court and the state appellate courts in this instance. The District Attorney refers to the language in Mr. Davenport's initial appeal to the trial court on May 4, 1993, which was also referred to by Judge Richette in her opinion, stating that Mr. Giampietro "failed to prepare for and consult" with Mr. Davenport about the suppression hearing. The District Attorney is correct that Judge Richette focused on this formulation of the issues in denying Mr. Davenport's appeal, given Judge Richette's determination that Mr. Giampietro had in fact consulted with Mr. Davenport. Mr. Davenport also noted that Mr. Giampietro had failed to "determine whether [Mr. Davenport] wished to testify on the motion to suppress" and Mr. Davenport requested an evidentiary hearing to determine whether Mr. Giampietro and Mr. Davenport "concurred on the strategy followed, to wit: defendant did not testify."

Petitioner's trial counsel, Mr. Giampietro, was called to testify at an evidentiary hearing on Petitioner's appeal with the trial court. At this hearing, Mr. Giampietro responded to Mr. Davenport's assertions that he was ineffective in "fail[ing] to prepare for and consult" with Mr. Davenport regarding his hearing:

> I asked [Mr. Davenport] at the suppression hearing, I said, "Look, we don't have anything. There is your detective's statement. We have no basis to suppress that." From what he said – I said to him, "You want to get up there and tell your side of it?" He basically went to me and went "no."

(Transcript from March 1, 1994 Evidentiary Hearing, at p. 27, ll. 15-20).

In Mr. Davenport's appeal to the Superior Court of Pennsylvania, the caption to the relevant argument in the brief states that he received ineffective assistance of counsel because his counsel "refus[ed] and fail[ed] to permit appellant to testify at the suppression hearing." (Appellant's Br. for Pa. Super. Ct. filed Aug. 23, 1994, at p.36). Mr. Davenport clarified this argument in the ensuing discussion by noting that "[e]ven if the statement of trial defense counsel is accepted, it reveals that the only discussion occurred during the suppression hearing, and, without any comprehensive advice, the defendant was given, at best seconds to decide, in open court, and he could only give some sign to counsel." (Appellant's Br. for Pa. Super. Ct. filed Aug. 23, 1994, at p. 37). In other words, Mr. Davenport's argument remained substantially the same, that Mr. Giampietro failed to discuss with Mr. Davenport prior to the hearing and did not ever consult with Mr. Davenport about his right to testify. The same argument was made to the Pennsylvania Supreme Court.

To this Court it appears that the District Attorney splits hairs by distinguishing a "failure to... consult" and a "failure to permit" arguments as if they are not substantially the same argument. The Court does not find this argument to be persuasive. In his first appeal, Mr. Davenport does not simply state that Mr. Giampietro did not consult at all with Mr. Davenport, but includes the argument that Mr. Giampietro failed "to determine whether defendant wished to testify." Although linguistically these arguments are distinguishable, they are substantially the same argument that Mr. Giampietro did not *consult* with Mr. Davenport about his options, but simply led Mr. Davenport to the conclusion that he should not or could not testify.

Certainly, the argument appears to be refined following the evidentiary hearing, but this

Court is unclear how a petitioner's response to testimony at an evidentiary hearing could be used as evidence of a failure to exhaust. In that scenario, an individual would be limited to the exact phrasing of his or her argument regardless of the testimony presented. The exhaustion doctrine was not intended as a mechanism designed to frustrate petitioners, but rather to ensure that, prior to a federal court reviewing an issue, it has been fairly presented to all levels of the state court. The exhaustion doctrine does not prohibit a petitioner from refining his argument as he goes from court to court, only from presenting novel arguments to the federal court or arguments that were not heard at all levels of the state court. Nonetheless, the Court must also look to the current petition to determine if the argument before this Court is the same as that presented to the state courts.

In his brief in support of the petition, Mr. Davenport's third statement of issue was "defense counsel rendered ineffective assistance by giving advice so unreasonable as to vitiate a knowing, and intelligent decision." (Pet'r's Br., at viii). However, the Court cannot rely simply on the "statement of issue," but must look to the brief itself. See Gonce v. Redman, 780 F.2d 333, 336 (3d Cir. 1985). In his brief, Mr. Davenport discussed the testimony of Mr. Giampietro at the evidentiary hearing and stated "[a]s a result of [Mr. Giampietro's] assessment, Mr. Davenport declined testifying to his account of the events because the effect of [Mr. Giampietro's] advice was that regardless of what Mr. Davenport said the statement would not be suppressed." (Pet'r's Br., at 26). Mr. Davenport went on to argue that this advice was faulty, because Mr. Giampietro ignored information that could have been used to support the suppression and he did not make Mr. Davenport aware of this information.

The key issue remains that Mr. Giampietro allegedly did not *consult* with Mr. Davenport,

but led him to the conclusion that testifying was pointless. See RANDOM HOUSE DICTIONARY437 (2d ed. 1987) (defines "consult" as "1. to seek advice or information from;... 5. to consider or deliberate; take counsel; confer"). Although Mr. Davenport has conceded that some *communication* occurred between Mr. Giampietro and himself, Mr. Davenport has consistently asserted that this communication was not a consultation but akin to a statement of fact. According to Mr. Davenport, Mr. Giampietro did not seek advice or information from Mr. Davenport regarding his desire to testify at the suppression hearing; nor did he confer with Mr. Davenport about his options, but he simply stated that there was no point in Mr. Davenport testifying. The state courts had an opportunity to resolve this argument and on all levels found Mr. Davenport's claims to be baseless.

Although the Court is certainly cognizant that these arguments have progressed from the more "passive" notion that Mr. Giampietro did not inform Mr. Davenport at all to the current "active" argument that Mr. Giampietro discouraged Mr. Davenport, the underlying facts and arguments remain the same. First, Mr. Giampietro did not consult with Mr. Davenport about his rights or what evidence was available at the suppression hearing. Second, Mr. Giampietro's failure to consult led Mr. Davenport to not testify. Finally, this failure to consult was ineffective assistance of counsel and led to Mr. Davenport's conviction. The argument has certainly been refined from level to level, but the arguments at all levels have been "substantially equivalent." Therefore, this objection is denied.

C. Application of the *Strickland* Test

In his first objection, Mr. Davenport asserts that the state court applied a more stringent standard than the Strickland test for ineffective assistance of counsel, thereby violating federal

law and, therefore, the Supplemental Report and Recommendation's reliance on the state court's finding is erroneous.[4] Specifically, Mr. Davenport argues that instead of using the "reasonable probability" that the attorney's deficient performance caused the defendant to lose the case as required in Strickland v. Washington, 466 U.S. 668, 695 (1984), the state court required the petitioner establish that the ineffective assistance of counsel resulted in the conviction of an innocent person. To succeed in this claim, Mr. Davenport must show "that the Pennsylvania Supreme Court's rejection of this claim either is contrary to, or involved an objectively unreasonable application of, Strickland." Jacobs v. Horn, 395 F.3d 92, 106 (3d Cir. 2005) (citing 28 U.S.C. § 2254(d)(1); Wiggins v. Smith, 539 U.S. 510 520-21 (2003); Gattis v. Snyder, 278 F.3d 222, 228 (3d Cir. 2002)).

In Strickland, the Supreme Court established the two-part test for ineffective assistance of counsel. First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. When making this analysis the court should be "highly deferential" and make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

Second, the petitioner "must show that the deficient performance prejudiced the defense. This requires showing the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. In making this analysis the court must consider

[4] The Court notes that this objection is more of a restatement of the argument presented in Mr. Davenport's brief than an actual objection to the Supplemental Report and Recommendation. However, Mr. Davenport does appear to be objecting to the Supplemental Report and Recommendation's reliance on the state court's findings because of the allegedly erroneous test used. Therefore, the Court will review this argument *de novo*.

the totality of the evidence and determine if "there is a *reasonable probability* that, absent the errors, the factfinder would have had a reasonable doubt." Id. at 695 (emphasis added).

In this case, the state courts used the Pennsylvania three-part test for ineffective assistance of counsel. This test states that the petitioner "must demonstrate that his claim is of arguable merit, that counsel's chosen course had no reasonable basis designed to effectuate [petitioner's] interests, and that but for the arguably ineffective act or omission there is a *reasonable probability* that the result would have been different." Commonwealth v. Flood, 627 A.2d 1193, 1201 (Pa. Super. 1993), appeal denied, 641 A.2d 583 (Pa. 1994) (emphasis added). The Pennsylvania Supreme Court has explicitly held that this three-part test is the same standard as that in Strickland and that Pennsylvania law does not provide "any greater or lesser protection" than the Sixth Amendment. Commonwealth v. Pierce, 527 A.2d 973, 976-77 (Pa. 1987)).

In this case, the Pennsylvania Superior Court did apply the requisite three-part test. Petitioner does not reference any specific error, but simply makes a generic attack on the State's precedent. Mr. Davenport asserts "the state court's definition of ineffective assistance of counsel applied in this case required the petitioner to establish the ineffective assistance of counsel led to the conviction of an innocent person.... Clearly, the state's standard for ineffective is much higher than the Strickland standard." (Pet'r's Obj. Nov. 8, 2002, at 15). While this argument certainly is stated strongly, it is also made wrongly, and the Court does not find the standard used by the Superior Court in this matter to be at all different than the standard articulated in Strickland.

A similar conclusion was reached by the Court of Appeals for the Third Circuit in Rompilla v. Horn, 355 F.3d 233, 248 (3d Cir. 2004), in which the Court of Appeals found that

the first and second prongs of the Pennsylvania test were substantially similar to the first prong of Strickland. The Court of Appeals did not address the third prong, but this Court does not find any significant difference between the second prong of Strickland and the third prong of the Pennsylvania test. As such, we find this objection to be meritless inasmuch as the test used by the state courts is not more stringent than the Strickland test.

D. Record Does Not Support Conclusions in the Report and Recommendation

Mr. Davenport argues in his second objection that the record evidence does not support a conclusion that he knowingly, voluntarily, and intentionally waived his right to testify at the suppression hearing or gave consent to the diminished capacity defense. Specifically, Mr. Davenport asserts that the evidence demonstrates that if Mr. Giampietro had done a proper investigation, he would have discovered relevant evidence that would have supported a self-defense claim. Additionally, Mr. Davenport alleges that the defense used by Mr. Giampietro without his consent was in direct contradiction to Mr. Davenport's not guilty plea. According to Mr. Davenport, this inconsistent defense raises a presumption of prejudice. United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991); Brown v. Rice, 693 F. Supp. 381, 396 (W.D.N.C. 1988). Finally, Mr. Davenport asserts that no evidence shows Mr. Davenport voluntarily and intentionally waived his right to testify at the suppression hearing.

This argument fails because there is record evidence that Mr. Giampietro communicated with Mr. Davenport, namely Mr. Giampietro's testimony at the evidentiary hearing. Mr. Davenport focuses on a narrow statement by Mr. Giampietro, but throughout the hearing Mr. Giampietro made it clear that Mr. Davenport was informed of his options and involved in the decisionmaking process. Further, Judge Richette specifically noted that Mr. Davenport was a

vocal person, who clearly was involved in his case.

Mr. Davenport asks this Court to not give Mr. Giampietro's testimony credence or to otherwise weigh the evidence in favor of Mr. Davenport. However, the state courts clearly have concluded that Mr. Giampietro's testimony is credible and should be given weight. Such a conclusion by the state court has a presumption of correctness. Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000). It is Mr. Davenport's burden to rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Mr. Davenport's blanket statements and leaps of logic do not satisfy this requirement. Therefore, the Court finds this objection is entirely without merit.

E. Sufficiency of Evidence for a Rape Conviction

Mr. Davenport's third and final objection is the evidence in the record does not support a finding that he used forcible penetration, so the rape conviction, and indirectly the second degree felony murder conviction, are not supported by the evidence. Mr. Davenport argues that the evidence supports a finding that the original penetration was consensual and a withdrawal of that consent did occur, but no evidence supports that a second act of penetration occurred by use of force. According to Mr. Davenport, the evidence, which shows nonconsensual sexual intercourse, does not support a rape conviction, since rape requires forcible penetration.

The sufficiency of evidence test was articulated in Jackson v. Virginia, 443 U.S. 307 (1979). This test requires a court to ask:

> whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.... [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 318-19. Further, a federal court should "look to the evidence the state considers adequate to meet the elements of a crime governed by state law." Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997).

Under 18 Pa.C.S.A. § 3121(a), rape is defined as "engag[ing] in sexual intercourse with a complainant: (1) By forcible compulsion. (2) By threat of forcible compulsion...." Sexual intercourse is defined as "some penetration however slight." 18 Pa.C.S.A. § 3101. Forcible compulsion is defined as "compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." Id.

The Pennsylvania Superior Court found that Mr. Davenport's own confession directly contradicted his argument that the victim never withdrew after the initial, consensual penetration. The Superior Court referred to Mr. Davenport's confession where he stated:

> We started to have sex and we were doing it while we were standing up. She got mad at me because she said that I was doing it too rough. So she jumped back and punched me because I wouldn't stop having sex with her. We got to fighting and I just went wild, she wanted me to stop fucking her and I wouldn't stop.

(Statement of Elmer Davenport, Feb. 1, 1991, at p. 4). There is little argument that a rational trier of fact could infer from this statement that Mr. Davenport engaged in sexual intercourse by "forcible compulsion." The Court is at a loss to determine how Mr. Davenport could ignore his own confession. Further, there is medical evidence supporting a conviction of rape, even if the confession had been suppressed.

Finally, Mr. Davenport has admitted that he had consensual sexual relations with the victim and that she eventually withdrew her consent. Even if the Court were to assume that Mr. Davenport was entirely truthful in his assertion that there was no withdrawal between the sexual

relations being consensual and being non-consensual, the Court does not find that there would be no forcible penetration. Mr. Davenport had previously stated that this situation is akin to Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994), where the Pennsylvania Supreme Court held that where the victim said "no" throughout the sexual encounter but there is no evidence of the defendant using any form of force or coercion, the "forcible compulsion" requirement is not met. Id. at 149. This is an entirely distinguishable situation. Mr. Davenport has repeatedly admitted to using force, in fact lethal force, to effectuate the rape. This is not the Berkowitz situation where the alleged victim says "no," but is not prevented from ending the encounter by force or threat of force. In this case, force was clearly applied and only the most limited definition of "penetration" could possibly justify Mr. Davenport's assertion. The Pennsylvania legislature could have but did not intend for a limited definition of "penetration," but specifically stated in 18 Pa.C.S.A. § 3101 that "penetration however slight" would suffice. As such, the Court finds this objection has no merit and is denied.

IV. CONCLUSION

For the foregoing reasons, the Court denies all objections and adopts the Supplemental Report and Recommendation. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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

ELMER DAVENPORT,	:	CIVIL ACTION
Petitioner	:	
	:	
	:	
v.	:	
	:	
DONALD T. VAUGHN, et al	:	
Respondents	:	NO. 00-5316

O R D E R

Gene E.K. Pratter, J. April 14, 2005

AND NOW, this 14th day of April, 2005, upon consideration of the following: the Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 of Elmer Davenport; the Government's response thereto; the Report and Recommendation of Judge Diane M. Welsh, United States Magistrate Judge; the Memorandum and Order of Judge Bruce W. Kauffman, United States District Court Judge; the Supplemental Report and Recommendation of Judge Welsh; and the Objections by the Parties to the Supplemental Report and Recommendation;

And for the reasons contained in the accompanying Memorandum, it is hereby ORDERED that:

(1) the Supplemental Report and Recommendation is ADOPTED;

(2) the Petition and Amended Petition for Writ of Habeas Corpus are DENIED and DISMISSED;

(3) the Objections of Both Parties are DENIED; and

(4) there is no basis on which to issue a Certificate of Appealability under 28 U.S.C. § 2253.[5]

BY THE COURT:

/S/_____
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

[5] Petitioner, Mr. Davenport, has not made "a substantial showing of the denial of a constitutional right" for any of his claims as required under 28 U.S.C. § 2253(c)(2).