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

RAYMOND ALEXANDER	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT SHANNON, et al.	:	NO. 03-3514

MEMORANDUM

Dalzell, J. February 2, 2005

A Pennsylvania jury convicted Raymond Alexander of statutory sexual assault, involuntary deviate sexual intercourse, and corruption of a minor. He has served four of the eight to sixteen year sentence imposed on him. We here consider his objections to Magistrate Judge Carol Sandra Moore Wells's Report and Recommendation that we deny his petition.

To be sure, Alexander received an imperfect trial. Most notably, the prosecutor made an inflammatory comment during closing argument. But it is well-settled that our Constitution does not guarantee criminal defendants the right to a perfect trial, Delaware v. Van Arsdall, 475 U.S. 673, 681 (1988) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."). As we explain below, although not free from doubt, Alexander got the fair trial that our Constitution requires.

A. Factual and Procedural Background

The Superior Court summarized the tawdry facts of this case:

> In the spring of 2000, Alexander responded to a personal advertisement placed

on the Yahoo.com website by Carrie Williams. At the time, Williams was 15 years old and living in Kentucky. Over the next couple of months, the pair developed a relationship wherein they would engage in telephone and Internet "sex" and role-playing. Throughout their relationship, Williams represented that she was 18 but still living with her parents.

On May 5, 2000, Alexander drove to Kentucky to meet Williams in person. Alexander picked up Williams at the entrance of her development and drove to a nearby soccer field where the two fondled and kissed each other. Thereafter, Alexander drove Williams home before going back to his hotel. That evening, Williams got into an argument with her parents and ran away from home. Using her mother's cellular phone, Williams called Alexander at his hotel and arranged to have him pick her up. When Alexander arrived, Williams showed him a fake identification card in an attempt to prove she was 18. At Alexander's request, Williams accompanied Alexander back to Buck's [sic] County. Upon arriving at Alexander's house, the two engaged in anal and oral intercourse.

Williams's parents conducted a search of her belongings and discerned that she had been communicating with Alexander and that he had been staying at a local hotel. Shortly thereafter, the Louisville Police Department contacted Corporal Getters of the Doylestown Police Department and apprised him of the situation. Corporal Getters, along with three other officers, proceeded to Alexander's residence. Corporal Getters knocked on the door and asked Alexander as to Williams's whereabouts. Alexander directed Corporal Getters to the bedroom where Williams was then hiding. Corporal Getters arrested Alexander for Interfering with the Custody of a Minor. In response Alexander stated, "She's 18. I have proof that she's 18." The police found Williams in Alexander's bedroom lying naked under the sheets and took her into protective custody.

The Commonwealth charged Alexander with the aforementioned crimes as well as two drug

> violations that were later severed for a separate trial. In this matter, Alexander attempted to defend against the charges by demonstrating he was mistaken as to Williams's age. A jury [on March 28, 2001] found Alexander guilty of [Involuntary Deviate Sexual Intercourse ("IDSI")], Statutory Sexual Assault and Corruption of a Minor.

Commonwealth v. Alexander, No. 2194, EDA 2001, Mem. Op., at 1-3 (Pa.Super. Apr. 25, 2002) ("Sup. Ct. Op.").

On August 1, 2001, Judge Edward G. Biester, Jr., of the Bucks County Court of Common Pleas, sentenced Alexander to eight to sixteen years in prison for the IDSI conviction to be followed by twenty years of state probation. Commonwealth v. Alexander, Aug. 1, 2001 Sentencing Hrg., at 26-27. On October 10, 2001, Judge Biester denied Alexander's direct appeal of his sentence and conviction.[1] See Commonwealth v. Raymond Alexander, No. 6019-00, Direct Appeal Opinion ("Trial Ct. Op."), at 1-22. Alexander then appealed to the Superior Court of Pennsylvania, which, on April 25, 2002, affirmed Judge Biester. See Sup. Ct. Op., at 15.

On June 6, 2003, Alexander filed the instant petition for a writ of habeas corpus, which the Commonwealth answered on August 4, 2003. We referred his petition to the Honorable Carol Sandra Moore Wells for a Report and Recommendation. On August 30, 2004, Judge Wells recommended that we deny the petition.

---

1. Alexander filed a Motion for Reconsideration of Sentence. By order dated August 13, 2001, Judge Biester reduced his term of probation for the IDSI conviction to ten years. August 30, 2004 Report and Recommendation ("Rep. & Rec."), at 3.

Alexander then filed both counseled objections and, later, pro se objections. After carefully reviewing the Report and Recommendation and considering both sets of objections, we shall deny his petition.

B. Legal Analysis

Alexander interposes six broad objections to Judge Wells's Report and Recommendation:

> 1. Petitioner objects to the Magistrate Judge's determination that his Due Process rights were not violated by the prosecutor's closing argument that an acquittal was tantamount to a second rape of the complainant.
>
> 2. Petitioner objects to the Magistrate Judge's determination that his Due Process rights were not violated by the prosecutor's use of evidence known to be false, and the related finding of the Magistrate Judge that trial counsel was not ineffective in failing to object or prove the falsity of the proffered testimony.
>
> 3. Petitioner objects to the Magistrate Judge's determination that he was not denied Confrontation rights, and the correlate right to present a defense (as well as the effective assistance of counsel), by exclusion of evidence of the complainant's behavior *and words*, all critical to his defense; and to the related determination of the Magistrate Judge that the state court properly considered and applied federal law in denying relief on this claim.
>
> 4. Petitioner objects to the Magistrate Judge's determination that his sentence is constitutional.
>
> 5. Petitioner objects to the Magistrate Judge's determination that his counsel was effective when counsel failed to

> present character evidence or evidence supportive of his defense.
>
> 6. Petitioner objects to the Magistrate Judge's determination that certain claims are defaulted.

Petitioner's Objections to the Magistrate Judge's Proposed Findings, Report and Recommendation ("Pet.'s Obj."), at 1-2. We review Alexander's objections *de novo*. See 28 U.S.C. § 636(b)(1).

In evaluating a habeas petition, we must give deference to state courts' legal and factual determinations. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") mandates this deference:

> (d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) 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).

Section 2254(d)(1) requires deference to state courts' legal conclusions. Under § 2254(d)(1), a state-court decision is "contrary to" clearly established federal law if it (1) "contradicts the governing law set forth in [the Supreme Court's]

cases" or (2) "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result." Williams v. Taylor, 529 U.S. 362, 405, 406 (2000). In this regard, the "state court need not even be aware of [Supreme Court] precedents, so long as neither the reasoning nor the result of the state-court decision contradicts them." Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (per curiam) (internal quotation marks omitted).

Under the same section, a state court decision involves an "unreasonable application"[2] of clearly established federal law when it (1) "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case;" or (2) "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that

2. In conducting the "unreasonable application" inquiry, "decisions of federal courts below the level of the United States Supreme Court may be helpful to [a federal court] in ascertaining the reasonableness of state courts' application of clearly established United States Supreme Court precedent." Marshall v. Hendricks, 307 F.3d 36, 71 n.24 (3d Cir. 2002). At the same time, however, "cases not decided by the Supreme Court do not serve as the legal benchmark against which to compare the state decision. At the end of the day, AEDPA 'confine[s] the authorities on which federal courts may rely' in a habeas case to Supreme Court decisions." Fishetti v. Johnson, 384 F.3d 140, 149-50 (3d Cir. 2004) (quoting Lewis v. Johnson, 359 F.3d 646, 652 (3d Cir. 2004)).

principle to a new context where it should apply."[3] Williams, 529 U.S. at 407.

Section 2254(d)(2) requires deference to state courts' factual conclusions. Under it, "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Moreover, a reviewing court must read § 2254(d)(2) in conjunction with § 2254(e), which requires that "a determination of a factual issue made by a State court shall be presumed to be correct" unless the petitioner rebuts "the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

With these principles in mind, we address Alexander's objections.

1. Petitioner objects to the Magistrate Judge's determination that his Due Process rights were not violated by the prosecutor's closing argument that an acquittal was tantamount to a second rape of the complainant.

---

3. As our Court of Appeals recently commented, "The Supreme Court has not fully fleshed out [the] 'extension of legal principle' approach to § 2254(d)(1)." Fishetti v. Johnson, 384 F.3d 140, 148 (2004). Compare Rompilla v. Horn, 355 F.3d 233, 240 (3d Cir. 2004) (unreasonable application includes unreasonable failure to extend) with Marshall v. Hendricks, 307 F.3d 36, 51 n.2 (3d Cir. 2002) (noting the Supreme Court has not definitively adopted unreasonable extension theory).

During his closing argument, the prosecutor made the following remark:

> We heard Mr. Schneider [defense trial counsel] go on and on about her, and she's been dragged through the mud, she's been victimized by this man under the facts of this case, and they would like you to victimize her again.[4]

3/28/01 Trial Tr., at 116. Alexander argues that, by likening an acquittal to the re-victimization of Williams, the prosecutor engaged in misconduct so prejudicial that it robbed him of due process. He relies on Moore v. Morton, 255 F.3d 95, 105 (3d Cir. 2001), in which our Court of Appeals condemned the following statement:

> The last thing I have to say is that if you don't believe [the victim] and you think she's lying, then you've probably perpetrated a worse assault on her.

Id. at 101. Because the two statements are similar, Alexander argues, we must likewise condemn his prosecutor's comment.[5]

---

4. Trial counsel objected, and Judge Biester responded, "It's argument."

5. He relies on the "contrary to" clause of § 2254(d)(1). Pet.'s Mem. of Law in Support of His Previously Filed Pet. for Writ of Habeas Corpus ("Pet.'s Mem."), at 15.

Regarding this issue, the Superior Court noted that the prosecutor's remark was subject to multiple interpretations; therefore, Alexander failed to "demonstrate that the prosecution's comments had the unavoidable effect of, [sic] forming in the jury's mind a fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." Sup. Ct. Op., at 13.

In her Report and Recommendation, Judge Wells concluded that Alexander's reliance on Moore is misplaced, mainly because the Court of Appeals held that the "perpetrating a worse assault" argument, standing alone, amounted to no due process violation.

(continued...)

Prosecutorial misconduct may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). To rise to a due process violation, the misconduct must constitute a "'failure to observe that fundamental fairness essential to the very concept of justice.'" Id. at 642 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

In making this determination, Supreme Court precedent requires us to weigh (1) the severity of the prosecutor's misconduct, (2) the effect of any curative instruction, and (3) the quantum of evidence against the defendant. Moore, 255 F.3d at 107 (citing Darden v. Wainwright, 477 U.S. 168, 182 (1986), reh'g denied, 478 U.S. 1036 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643-44 (1974)).

As noted, Alexander relies on Moore, a case where a white female was sleeping alone in her bedroom when she awoke to a sexual predator's chokehold. 255 F.3d at 97. He proceeded violently to rape her. Id. During the rape, the victim glanced at her attacker just once. Id. at 119. In the aftermath, she could identify the alleged rapist, Clarence Moore, an African-American, only with the aid of "hypnotically enhanced memory.". Id. at 98.

In his closing argument at Moore's trial, the prosecutor made three inflammatory comments. First, he suggested

---

5. (...continued)
Rep. & Rec., at 11-13.

that Moore, whose wife was white, had a proclivity for white women and, therefore, selected the victim because of her race. Id. at 99-100. Second, he argued that, because Moore's wife -- who recently gave birth -- had "bleeding breasts," Moore raped the victim when his "need for sexual release" was the "greatest." Id. at 100-01. Last, the prosecutor uttered the remark that Alexander likens to his prosecutor's: "The last thing I have to say is that if you don't believe [the victim] and you think she's lying, then you've probably perpetrated a worse assault on her." Id. at 101. The trial court sustained Moore's objection and issued a curative instruction for each comment. Id. at 100-02.

In his habeas petition, Moore argued that the prosecutor's statements deprived him of due process. Id. at 97. Our Court of Appeals agreed, and reversed the district court's denial of his petition. Id. at 120.

The Court of Appeals weighed (1) the severity of the prosecutor's misconduct, (2) the effect of the curative instructions, and (3) the quantum of evidence against Moore. Id. at 107, 113-20. It concluded that the "selection" argument and "perpetrating a worse assault" argument were both severe but tempered somewhat by the curative instructions.[6] Id. at 118. It found that the "sexual release" argument was less worrisome and easily remedied by the trial judge's curative instruction. Id.

---

6. The panel emphasized, however, that, were the "perpetrating a worse assault" argument "the only improper argument, we do not believe Supreme Court precedent would require finding a denial of due process." Id. at 118.

at 116. Lastly, the court looked to the weight of inculpatory evidence and found it weak. Id. at 118-19; see also United States v. Thomas, 315 F.3d 190, 203 n.5 (3d Cir. 2002) ("The court [in Moore] found the trial so infected with unfairness that it warranted a finding of prejudice, *especially given that the bona fide evidence for the prosecution was not sufficiently strong*") (emphasis added). Because the misconduct, cumulatively, was severe and the evidence was weak, the court held the prosecutor violated Moore's rights. Id. at 119-20.

Upon careful analysis, Alexander's reliance on Moore, while entirely legitimate, must in the end fail. Viewed in isolation, the words of both prosecutors -- Alexander's and Moore's -- do bear some resemblance, but close scrutiny reveals material differences.

In the first place, the comments are not cognates. In Alexander's case, the prosecutor stressed that Williams had "been victimized by this man under the facts of this case," which properly focused the jury's attention on the evidence before adding the gratuitous comment that the defense "would like you to victimize her again." The prosecutor's statement in Moore was tantamount to a threat: If "you think she's lying, then you probably perpetrated a worse assault on her," which may fairly be taken as meaning, if you don't accept her testimony, then you will do something worse to her than the strangling and brutal rape you heard about. The equation of the jury's finding that "she's lying" with "perpetrat[ing] a worse assault on her" is

thus not only inflammatory, but tells the jury that it would be committing a more heinous offense than the defendant was charged with committing. Thus, the prosecutor's victimization remark here, though improper, pales in comparison to the prosecutor's lurid threat in Moore.

This textual comparison anticipates a second crucial difference, and that is context. In Moore, the defendant invaded the victim's bedroom in the middle of the night, strangling and raping her brutally. In contrast, Williams testified that her sex with Alexander was factually, though not legally, consensual. There certainly was no violence of any sort. The comment made here was thus not said in anything like the context of Moore's savagery. In short, the remark in the context of this case was much milder than the one in Moore.[7]

We now turn to the second factor, the efficacy of a curative instruction. Troublingly, there was none, although Judge Biester minimized the remark as "argument" immediately after the prosecutor made it.[8] This factor weighs in Alexander's

---

7. It is also well to remember that metaphor is often the hallmark of effective advocacy, though such devices carry the perils we meet here.

8. A part of Judge Biester's general instruction also softened the comment's prejudicial effect when he gave "argument" this extended explanation:

> The speeches of the attorneys as you know and as they both have forthrightly told you are not part of the evidence in the case, and you should not consider them as such. However, in deciding the case you should

(continued...)

favor.

Last, we consider the quantum of evidence against Alexander. In Moore, the evidence was weak. During the assault, the victim briefly glanced at her attacker, and she identified Moore only after undergoing hypnosis. 255 F.3d at 119-20. By contrast, the incriminating evidence in Alexander's case was either not in dispute or substantial, as we now show.[9]

We first highlight the elements of each offense. One commits involuntary deviate sexual intercourse when he (1)

---

8. (...continued)

> carefully consider the evidence in light of the various reasons and arguments which each lawyer has presented to you.
>
> It's the right, in fact it's the duty of each of these attorneys to discuss the evidence in a manner which is most favorable to the side that lawyer represents, and you should be guided by each lawyer's arguments to the extent they're supported by the evidence and insofar as they help you in applying your own reason and your own common sense.
>
> However, you're not required to accept the arguments of either lawyer. It's for you and you alone to decide the case based on the evidence as it was presented from the witness stand and in accordance with the instructions I'm now providing to you.

3/28/01 Trial Tr., at 138-39.

9. We here note that, in Marshall v. Hendricks, 307 F.3d 36, 69 (3d Cir. 2002), our Court of Appeals interpreted Moore as "establishing the principle that the stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker."

engages in "deviate sexual intercourse" with another person (2) under sixteen (3) if the culprit is four or more years older than the complainant and (4) they are unmarried. 18 Pa.C.S.A. § 3123(a)(7). "Deviate sexual intercourse" includes "[s]exual intercourse per os or per anus between human beings. . . ." 18 Pa.C.S.A. § 3101.

Statutory sexual assault occurs when one (1) engages in "sexual intercourse" (2) with a complainant under sixteen (3) if the culprit is four or more years older than the complainant. 18 Pa.C.S.A. § 3122.1. "Sexual intercourse," in addition to describing the "ordinary meaning" of the term, "includes intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa.C.S.A. § 3101.

Last, corruption of a minor occurs when (1) one over eighteen, (2) "by any act corrupts or tends to corrupt the morals" (3) of any minor under eighteen. 18 Pa.C.S.A. § 6301(a).

Because none of these statutes specifies a *mens rea* requirement, Pennsylvania law requires that, at the very least, the defendant act negligently. See 18 Pa.C.S.A. § 302(a).[10] Furthermore, 18 Pa.C.S.A. § 3102 provided Alexander with an

---

10. Under Pennsylvania law, one acts negligently with respect to a material element of an offense when "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." 18 Pa.C.S.A. § 302(b)(4). Furthermore, the "risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Id.

affirmative defense to statutory sexual assault and involuntary deviate sexual intercourse: "When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age." A section of the corruption-of-minors statute precluded this affirmative defense, however. See 18 Pa.C.S.A. § 6301(d)(1) ("Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years").

At the time of the events, Williams was fifteen, and Alexander was fifty-two. Trial Ct. Op., at 1, 2. The trial court found that, upon their arrival at Alexander's home, he and Williams twice had sexual relations: "Shortly after arriving at the house. [sic] Appellant expressed his desire to engage in sexual intercourse with C.W. Appellant and C.W. proceeded to the bedroom where Appellant performed oral sex on C.W. The two later engaged in anal sex." Id. at 3. The trial court prefaced this quotation by noting, "The evidence at trial revealed, without contradiction, the following. . . ." Id. at 1. Thus, we view the findings subsumed in this language as factual findings worthy of AEDPA deference. See 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e). This evidence alone permitted the jury to convict Alexander.

Williams also described four other lubricious episodes. First, she testified that, almost immediately after arriving at his home, Alexander "put his mouth on [her] vagina." 3/27/01 Tr., 124. Second, she testified that Alexander then "rubb[ed]" her anus with his fingers. Id. Third, later in the day, Williams performed fellatio on Alexander, at his request. Id. at 129-30. Fourth, shortly after receiving fellatio, Alexander "put his penis inside of [Williams's] vagina. . . ." Id. at 131.

At trial, Alexander asserted an 18 Pa.C.S.A. § 3102 "reasonable mistake of age" defense.[11] To be sure, Alexander presented evidence showing that Williams attempted to deceive him about her age. But much stronger evidence suggested that he either knew or suspected or should have known she was a minor.

To begin, the prosecution adduced direct evidence of Alexander's mental state. After their first sexual encounter in Alexander's home, Williams joined him in the family room and said she "didn't feel like he wanted me there; like he didn't want to be with me." 3/27/01 Trial Tr., at 129. Alexander then took her in his arms and said, "Of course I want you here, baby. I'm risking *25 years in jail* to be with you." Id. (emphasis added).

Circumstantial evidence also incriminated him. First, Alexander demanded that Williams call him "Daddy," Id. at 92, 115, 181, and she acceded. Id. at 93, 193, 223. Second, Alexander usually referred to Williams as "baby" or "little

---

11. Also, evidence about the extent to which Williams deceived Alexander was relevant to negate his *mens rea*.

girl," and he liked her to say she was a virgin. Id. at 93. Third, Alexander and Williams role-played telephonically, with Alexander playing a principal and Williams playing a student sent for discipline. Id. at 92, 114. Fourth, Alexander knew that Williams was a high-school student who lived at home with her parents. Id. at 176-77, 105. Fifth, Alexander felt the need, on multiple occasions, to demand proof of William's age. Id. at 106, 107, 183, 184, 195. Once, he exclaimed, "Swear to me that you're 18." Id. at 106.

Tellingly, the evidence also showed that Alexander appeared sensitive about being seen publicly with Williams. During the entire car ride from Kentucky to his home in Pennsylvania, Alexander stopped twice, at a gas station and a grocery store, id. at 121-22, but Williams did not get out. Id. Furthermore, when Williams walked to the window of Alexander's home -- where neighbors presumably could see her -- Alexander immediately "seemed kind of nervous about [her] being there." Id. at 128.

Alexander also seemed physically uncomfortable with having Williams in his house. Shortly after they arrived, Alexander began vomiting. Id. at 126. Williams also testified that he was "Not too good, cold sweat, he looked sick. He looked real sick. He had a towel around his shoulders." Id. at 127. From this physical reaction, the jury could have inferred that he feared she was underage.

To summarize, on one side of the scale, there was no curative instruction other than Judge Biester's description fo the remark as "argument", and that weighs in Alexander's favor. 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.

We now address two additional objections Alexander raises. First, Judge Wells found Moore inapposite because our Court of Appeals condemned the "perpetrating a worse assault" argument in conjunction with others, a finding Alexander argues was error. But as the Court of Appeals emphasized, "Were this the only improper argument, we do not believe Supreme Court precedent would require finding a denial of due process."[12] 255 F.3d at 118. With this emphasis, Judge Moore's holding that Moore offers little help to Alexander is not entirely without foundation.

Second, Alexander objects to Judge Wells's conclusion that the Superior Court's decision was not "contrary to" or an unreasonable application of federal law, despite the Superior Court's use of the wrong test. The Superior Court applied Pennsylvania law and asked whether "the prosecution's comments

---

12. The Court reasoned, "Taken in isolation, any prejudice stemming from the 'perpetrating a worse assault' argument could be cured with strong instructions like those the trial judge issued here." Id. at 118.

had the unavoidable effect of, [sic] forming in the jury's mind a fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." Sup. Ct. Op., at 13. While the Superior Court did, in fact, employ the incorrect test -- they should have used the three-factor balancing test set out above -- this is immaterial. As the Supreme Court holds, the "state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (per curiam) (quoting Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam)).

2. Petitioner objects to the Magistrate Judge's determination that his Due Process rights were not violated by the prosecutor's use of evidence known to be false, and the related finding of the Magistrate Judge that trial counsel was not ineffective in failing to object or prove the falsity of the proffered testimony.

Alexander claims that the prosecutor presented evidence -- and then referenced it in closing argument -- that he either knew or should have known was false, and this constituted a due process violation. He also argues that his own lawyer's failure to object or refute this evidence constituted ineffective assistance of counsel.[13]

---

13. Alexander proceeds under 28 U.S.C. § 2254(d)(2). He alleges that the Superior Court's "failure to acknowledge the 'fact' of the report's existence resulted 'in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." Pet.'s Mem., (continued...)

13. (...continued)
at 20. He also claims that the Superior Court's analysis is "contrary to" settled federal law. Id. at 20 n.8. See 28 U.S.C. § 2254(d)(1).

The Superior Court addressed this argument:

> Initially, we observe that the offending testimony was merely a recollection of events leading to Alexander's identification and apprehension. Whether the proffered testimony was false is a question left in the hands of the jury. See Commonwealth v. Yaninas, 722 A.2d 187, 189 (Pa.Super. 1999) (stating "[t]he jury, as the finder of fact, is free to believe all, some, or none of the testimony presented to it"). Accordingly, we are precluded from accepting Alexander's premise that such testimony was false.
>
> With respect to the prosecutor's reference to the "false area code" in his closing remarks, it is well established that a prosecutor, just as a defense attorney, must have reasonable latitude in presenting a case to the jury and must be free to present his or her argument with logical force and vigor. See Commonwealth v. Chmiel, 777 A.2d 459, 466 (Pa.Super. 2001). The prosecutor's closing remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the testimony. See id. Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. See id.
>
> . . . .
>
> In light of the testimony offered by Williams's father, we conclude that the prosecution's reference to the "fake area code" merely raised a legitimate inference of deception based upon properly admitted evidence and thus the prosecutor did not

(continued...)

The issue involves an area code. In his May 6, 2000 police report, Corporal Daniel T. Getters wrote that Alexander registered at the Fairfield Inn in Louisville, Kentucky using a "215" area code. See Pet.'s Mem., Ex. C. The prosecution provided this document to defense counsel. Nevertheless, during direct testimony, Williams's father, John M. Williams, testified that Alexander used a different area code.

Specifically, while investigating Carrie's disappearance, John Williams deduced that Alexander had stayed at the Fairfield Inn. He then drove there and examined the Inn's registration cards:

---

13. (...continued)

> engage in misconduct. Therefore, we conclude that Alexander failed to demonstrate reversible error. See Chmiel, 777 A.2d at 466. Further, because the prosecution was permitted to refer to properly admitted evidence in his closing remarks, defense counsel had a reasonable basis not to object. Therefore, we conclude that counsel did not render [ineffective assistance of counsel].

Sup. Ct. Op., at 8-9.

In her Report and Recommendation, Judge Wells first noted that Alexander's claim that the Superior Court never referred to Corporal Getter's report was incorrect. See Rep. & Rec., at 16-17; Sup. Ct. Op., at 7. Then, she concluded that "No *Miller* [v. Pate, 386 U.S. 1 (1967)] type deception transpired in the case at bar. Rather, a remark by the prosecutor was forwarded to the jury as a matter of opinion." Rep. & Rec., at 17. (In Miller, the Supreme Court held that a state prisoner was entitled to habeas relief when he showed that a pair of stained undershorts he owned that the State repeatedly described as stained with blood were really stained with paint). Thus, she recommended that we deny this claim. Id.

Q: Okay. The hotel showed you the information, however; is that correct?

A: They did.

Q: Did they also show you his phone number?

A: As part of the registration card a phone number was on there. What I recognized was not the area code, the area code was different, but the last seven digits were very familiar from what we had in our home. I remember calling my wife and I asked her to repeat the last seven digits. And there was an identical match on the last seven digits.

Q: Just so I'm clear, the last seven digits of the telephone number on the registration card at the hotel matched the last seven digits of this piece of paper that you and your wife had pieced together that was ripped up in Carrie's room; is that correct?

A: That's correct.

. . . .

Q: The registration card at the hotel, did that have a 215 area code on it?

A: No it did not.

Q: It had some other numbers?

A: Yes.

3/27/01 Trial Tr., at 66-67. In other words, Corporal Getter wrote that Alexander used a "215" area code, but John Williams testified that he used a different one. Nevertheless, Alexander's lawyer never objected or entered the report into evidence.

At the end of trial, during closing argument, the prosecutor referenced John Williams's version: "He wanted her so

bad that he put a fake or false area code on the registration at the hotel so hopefully he couldn't be traced. Do you want to talk about deception? Look there, not to a 15-year old." 3/28/01 Trial Tr., at 122. Again, Alexander's lawyer voiced no objection.

A conviction obtained through false testimony is repugnant to our Constitution. See Mooney v. Holohan, 294 U.S. 103, 112 (1935). Specifically, it is unconstitutional when the prosecution's case "includes perjured testimony and [] the prosecution knew, or should have known, of the perjury." United States v. Agurs, 427 U.S. 97, 103 (1976). "The same is true when the government, although not soliciting false evidence, allows it to go uncorrected when it appears at trial." United States v. Biberfeld, 957 F.2d 98, 102 (3d Cir. 1992) (citing Giglio v. United States, 405 U.S. 150, 153 (1972)).

Nonetheless, the "touchstone of due process analysis is not prosecutorial misconduct, but the fairness of the trial." Biberfeld, 957 F.2d at 102. Thus, discovering that a prosecutor obtained a conviction using false evidence by no means ends the inquiry; instead, the court may reverse the conviction only "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976); Giglio, 405 U.S. at 154.

To synthesize, we must ask four questions: (1) whether false testimony was introduced, (2) whether the testimony either was or should have been known to the prosecution to be false, (3)

whether the testimony went uncorrected, and (4) whether the false testimony was prejudicial in the sense defined above. Shih Wei Su v. Filion, 335 F.3d 119, 127 (2d Cir. 2003) (Calabresi, J.).

It is by no means clear whether the prosecution offered false evidence.[14] The police report stating Alexander used a "215" area code does not automatically refute John Williams's testimony. There is, at least, an equal chance that Corporal Getters erred: he was subject to the same cognitive dangers -- particularly memory and perception -- as Williams. Furthermore, because no party entered the police report into evidence, the jury never tested its veracity. We refuse now to assume the jury's role and hold that Getter was correct and John Williams wrong.

But even if we did conclude that Williams testified falsely, the prosecution knew about it, and the testimony went uncorrected, we would still have as a final question whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). Here, there is none. Overwhelming evidence inculpated Alexander. See supra pp. 14-18.

---

14. It is also unclear whether the prosecutor's implication, during closing, that Alexander "saw" Carrie Williams's $42 pay stub was false. See pro se Supp. Obj., at 29. In fact, all the prosecutor did was invite the jury to "[l]ook at her stub", 3/28/01 Trial Tr. at 122, and said nothing about whether Alexander "saw" it. What is clear is that Alexander himself argues that, at most, the prosecutor merely referred "evidence not of record," Supp. Obj., at 30, and, more importantly, whether he "saw" it had no bearing on whether he had sex with her, the acts for which he was convicted.

Furthermore, whether Alexander used his real area code at a Kentucky motel at most tangentially bore on the jury's two main inquiries: (1) whether he had sex with a minor and (2) whether he reasonably mistook her age. This reality animated Judge Biester's remark, "In any event, any misstatement by the complainant's father on this point was immaterial and could not have reasonably affected the outcome of the trial." Trial Ct. Op., at 13. We agree.

Alexander also contends that the prosecutor deprived him of due process by referencing John Williams's allegedly false testimony during his closing. Because we do not conclude that John Williams testified falsely, we reject this claim. In any event, even if John Williams did testify falsely, the evidence against Alexander was so strong that we would still find no due process violation. See Marshall v. Hendricks, 307 F.3d 36, 69 (3d Cir. 2002) ("[T]he stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker").

We last turn to Alexander's ineffective-assistance claim. Strickland v. Washington, 466 U.S. 668 (1984) sets forth the clearly established law:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the

> Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. Essentially, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," meaning "reasonableness under prevailing professional norms." Id. at 688.

When engaging in this inquiry, we must 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. In other words, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. That is to say, the "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

We must first determine whether counsel performed deficiently. Alexander claims, "Ineffectiveness is clear -- the failure to use significant impeachment material cannot be justified as a reasonable trial strategy." Pet.'s Obj., at 17-18. He relies on Berryman v. Morton, 100 F.3d 1089, 1098-99 (3d Cir. 1996). See Pet.'s Obj., at 18. In Berryman, the defendant's rape conviction rested solely on the alleged victim's

uncorroborated, out-of-court identification of him and her in-court identification two years later. Id. at 1097. Our Court of Appeals emphasized that "the reliability of this victim's uncorroborated identification of Berryman cuts directly to the heart of the only evidence against Berryman." Id. at 1099. It then held that trial counsel's failure to use extensive inconsistent identification testimony of the alleged victim from three prior trials -- including recanted testimony from one -- constituted ineffective assistance. Id. at 1097-99, 1101-02.

Alexander's reliance on Berryman is misplaced. In Berryman, the "heart of the only evidence against Berryman" was the alleged victim's identification testimony; thus, her previous inconsistent identifications directly bore on Berryman's culpability. Id. at 1099. Unlike the inconsistency in Berryman, Corporal Getter's claim that Alexander used a "215" area code and John Williams's testimony that he didn't was, at most, peripheral.

Moreover, standing in defense counsel's shoes, compelling reasons could have led him to refrain from attacking John Williams on this inconsistency. First, whether Alexander used his real area code at the hotel was relatively tangential; hence, the value of stressing the inconsistency was low. Second, as the father of a teenage rape victim, John Williams was sympathetic. Hence, Alexander's lawyer may have declined to confront John Williams on this point to avoid antagonizing the jury. Perhaps this is why defense counsel chose to limit his

cross-examination to under three transcript pages. See 3/27/01 Trial Tr., at 71-73.

In short, Alexander fails to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

3. Petitioner objects to the Magistrate Judge's determination that he was not denied Confrontation rights, and the correlate right to present a defense (as well as the effective assistance of counsel), by exclusion of evidence of the complainant's behavior *and words*, all critical to his defense; and to the related determination of the Magistrate Judge that the state court properly considered and applied federal law in denying relief on this claim.

Under Pennsylvania's Rape Shield Law, 18 Pa.C.S.A. § 3104(a), the trial court precluded Alexander from presenting evidence that would have shown the following:

1. In her Internet advertisement, Williams described herself as "slightly experienced," 3/27/01 Trial Tr., at 248; 3/28/01 Trial Tr., at 79-80;[15]

---

15. Judge Biester tried to strike a compromise:

> THE COURT: I have a solution for this one that you're all going to like. It's going to satisfy everybody. Obviously you can't use this form because its got writing on it or print and so forth. So there must be a clean form somewhere. Is there?
>
> [DEFENSE]: Absolutely.
>
> THE COURT: This can be received as an exhibit in exactly the manner in which it was

(continued...)

2. About a year before her advertisement, Williams had sexual relations with another older man, 3/26/01 Mot. *in Limine* Hrg. Tr., at 33-38; and

3. Williams received three responses to her advertisement, and she selected Alexander because

---

15. (...continued)
originally created.

[DEFENSE]: Very good.

THE COURT: You guys can stipulate that this contains a fabrication, 18; the age. Slightly experienced, a fabrication. That way -- sir, listen to me before you do this body language with me.
That way you get what you really legitimately want, which is to show that she was portraying herself as something more than just a 15-year-old child. And I get the satisfaction of protecting her rights and the law with respect to the Rape Shield law. It solves your legitimate needs and it solves the Rape Shield problem.

[PROSECUTION]: I stipulate to that, you Honor.

[DEFENSE]: To quote you, the gritty truth is that she is not slightly experienced. She is more than -- that she is "slightly experienced" I will not stipulate to that, your Honor, with all due respect.

THE COURT: That's fine. You've declined it. I've offered you a solution which meets your legitimate needs without going into the illegitimate requirements that you want. That's fine. We're in recess.

3/27/01 Trial Tr., at 247-48. See also 3/28/01 Trial Tr., at 79-81.

he was the only one who would accept her collect calls, 3/27/01 Trial Tr., at 172.[16]

Alexander wanted to "prove that [he] did not know that [Williams] was under the age of eighteen. . . ." Pet.'s Mem., at 23.[17] See also Commonwealth v. Alexander, No. 6019/2000, Mot. to Admit Evid. of Victim's Prior Relationship, at 2 ("The evidence is admissible to show that Carrie Williams has a unique interest in older men, that she deceives those men into believing she is over eighteen years of age and that she is skilled at this deception. Such deception led the Defendant to reasonably believe her age to be eighteen years at the time of this incident").

He first argues that the trial court's rulings violated his right to confront witnesses.[18] The Sixth Amendment guarantees the criminal defendant a right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The core of the Confrontation Clause is the right of every defendant to test

---

16. Judge Biester did not allow questioning of Williams as to the first and third subjects during cross-examination, while he barred Alexander from probing into the second subject at a pretrial hearing.

17. For each claim subsumed in this objection, Alexander proceeds under 28 U.S.C. § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses. See Pet.'s Mem., at 24.

18. Judge Wells's Report and Recommendation chronicles the Commonwealth courts' treatment of Alexander's confrontation claim. See Rep. & Rec., at 22-23. Evaluating their analyses, Judge Wells found "no state court error in balancing competing interests." Id. at 23. She also concluded, "[N]o constitutional right was implicated by the suppression of these facts." Id. at 23-24.

the credibility of witnesses through cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16 (1974).

But the Confrontation Clause does not grant defendants *carte blanche* to employ all conceivable methods: "It does not follow . . . that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). On the contrary, trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Id. In this way, the Confrontation Clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)).

Interpreting established federal law, our Court of Appeals has formulated a two-step test. First, we must determine whether the trial court's ruling "significantly inhibited" the defendant's right to inquire into the witness's "motivation in testifying". Second, if the ruling did significantly inhibit the defendant's exercise of that right, we must decide whether the "constraints it imposed on the scope of [the defendant's] cross-examination fell within those 'reasonable limits' which a trial

court, in due exercise of its discretion, has authority to establish." United States v. Chandler, 326 F.3d 210, 219 (3d Cir. 2003). Also, as a third step, we must conduct a harmless-error analysis, if warranted. Olden v. Kentucky, 488 U.S. 227, 232-33 (1988) ("[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless-error analysis").

At the outset, Alexander's proffered evidence did not concern Williams's bias or motivation in testifying. Alexander himself argues that he sought to introduce this evidence to "prove that [he] did not know that [she] was under the age of eighteen. . . ." Pet.'s Mem., at 23. In other words, he wanted to introduce this evidence to advance his affirmative defense, not prove bias. Thus, he did not even seek to question Williams about bias or "motivation in testifying" -- the concern of the courts in four cases he cites. See Pet.'s Obj., at 21; Davis v. Alaska, 415 U.S. 308, 318 (1974) (holding that trial court unconstitutionally prevented petitioner from cross-examining key prosecution witness about his probationary status and concern that he might be a suspect in the burglary for which petitioner was tried); Olden v. Kentucky, 488 U.S. 227, 233 (1988) (holding that trial court unconstitutionally blocked petitioner from cross-examining the prosecution's primary witness about his co-habitation with rape victim); Redmund v. Kingston, 240 F.3d 590,

591, 593 (7th Cir. 2001) (holding that petitioner's confrontation right was infringed when trial court precluded him from cross-examining alleged statutory rape victim regarding her previous fabricated rape report); Wealot v. Armontrout, 948 F.2d 497, 500 (8th Cir. 1991) (holding that trial court unconstitutionally precluded petitioner from cross-examining alleged rape victim about possibility that she fabricated story because she feared jealous, abusive husband).

Moreover, to the extent Alexander's proffered evidence concerned Williams's bias or motivation in testifying, Judge Biester's rulings "fell within those 'reasonable limits' which a trial court, in due exercise of its discretion, has authority to establish." Chandler, 326 F.3d at 219. Judge Biester excluded the evidence under Pennsylvania's Rape Shield Law, 18 Pa.C.S.A. § 3104(a); Trial Ct. Op., at 7-10; 3/26/01 Mot. *in Limine* Hrg. Tr., at 33-38.[19] Pennsylvania's interest in trial judges applying the Rape Shield Law is compelling: it prevents rape trials from sinking into inquisitions of victims' sexual history and practices. See Commonwealth v. Killen, 680 A.2d 851, 853 (1996); see also Davis v. Alaska, 415 U.S. 308, 319 (1974) (weighing Alaska's interest in enforcement of law preserving anonymity of juvenile offenders). Furthermore, Judge Biester narrowly applied

---

19. In his supplemental objections, Alexander disagrees with Judge Biester's interpretation of Pennsylvania's Rape Shield Law. Supp. Obj., at 37. The Superior Court *didn't*, though, and it -- not a federal court -- is the final arbiter of Pennsylvania law. See Sup. Ct. Op., at 5.

the Rape Shield Law by extending Alexander wide latitude.[20] He

---

20. Alexander claims that, under the Confrontation Clause, "proving the complainant's communication to establish the accused's state of mind," Pet.'s Obj., at 22, is automatically admissible. He cites Doe v. United States, 666 F.2d 43 (4th Cir. 1981) and United States v. Stamper, 766 F.Supp. 1396 (W.D.N.C. 1999). His reliance on these cases is misplaced.

First, as a general matter, even if these cases had a direct bearing on Alexander's claim, they would not constitute "clearly established Federal law, as interpreted by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Second, these cases have no bearing on Alexander's claim. Rather than resting on the Confrontation Clause, Doe rested on Fed. R. Evid. 412. Under Rule 412 -- *not the Confrontation Clause* -- the Court of Appeals for the Fourth Circuit held that an accused rapist's knowledge of "the victim's past sexual behavior is relevant" as to intent:

> The legislative history discloses that reputation and opinion evidence of the past sexual behavior of an alleged victim was excluded because Congress considered that this evidence was not relevant to the issues of the victims [sic] consent or her veracity. Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the Committee on the Judiciary, 94th Cong., 2d Sess. 14-15, 45 (1976). There is no indication, however, that this evidence was intended to be excluded when offered solely to show the accused's state of mind. Therefore, its admission is governed by the Rules of Evidence dealing with relevancy in general.

666 F.2d at 48.

Stamper also does not stand for the proposition for which Alexander cites it. In Stamper, the United States District Court for the Western District of North Carolina held that, under the Confrontation Clause, the defendant was entitled to present bias evidence. 766 F.Supp. at 1407. Specifically, the court permitted the defendant to show that, in the past, the complainant had falsely accused three men of sexual abuse. Id. at 1397-99. Thus, rather than dealing with the extent to which the Confrontation Clause requires trial courts to admit evidence bearing an accused rapist's state of mind, Stamper -- like the four cases Alexander principally relies on, Davis, Olden, Wealot, and Redmond -- deals with bias evidence.

permitted Alexander to explore Williams's potential bias, her credibility, her intent to deceive, and even some of her sexual practices and predilections. See Trial Tr., at 139-240, 260-63.[21] Alexander himself concedes that "[t]he jury had heard much about the complainant's practices and predilections: she claimed to have engaged in consensual sex of varying types; she admitted to having lied to and deceived her parents; and she admitted to having lied in an Internet advertisement precisely to engage in a sexual relationship with an older man." Pet.'s Obj., at 19 n.8.

We now turn to Alexander's objection to Judge Wells's conclusion that his "right to present a defense" claim is procedurally defaulted. Alexander contends that Judge Biester breached his right to present a defense. Judge Wells concluded that Alexander never raised this claim in the Commonwealth's courts and, therefore, cannot do so here.

Alexander raised this claim before the Superior Court. In his brief, under STATEMENT OF SCOPE AND STANDARD OF REVIEW, he wrote, "[W]here the exclusion of evidence deprives an accused of the right *to present a defense*, or to confront witnesses, the matter is assessed applying principles of Due Process of Law and the rights ensured under the Confrontation Clause." Pet.'s Reply to Respondent's Answer to Writ of Habeas Corpus Relief ("Pet.'s Reply"), at 11 (emphasis added). Next, under STATEMENT OF

---

21. To the extent the trial court's exclusion infringed upon Alexander's confrontation right, the error was harmless beyond a reasonable doubt. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); see also supra pp. 14-18.

QUESTIONS INVOLVED, Alexander wrote, "Appellant was deprived of the constitutional *rights* to confront witnesses *and to present critical defense evidence* by the rulings of the lower court and by trial counsel's ineffectiveness." Id. (emphasis added). Then, in the ARGUMENT section, he wrote, "The Admission of This Evidence Is Compelled by Precedent and Due Process Principles: The purpose of the Pennsylvania Rape Shield statute, and its interplay with the constitutional *due process right to present evidence* and confront witnesses, has been explicated by our Supreme Court. . . ." Id. (emphasis added).

The Superior Court confirmed that he raised this argument when it described his first claim: "Appellant was deprived of the constitutional *rights* to confront witnesses *and to present critical defense evidence* by the rulings of the lower court and by trial counsel's ineffectiveness." Sup. Ct. Op., at 3 (emphasis added). Thus, Alexander adequately exhausted his state-court remedies.

We now consider his claim on the merits. The Sixth Amendment provides the accused in a criminal prosecution the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. To set forth a compulsory process violation, a defendant must make three showings:

> First, that he was deprived of the opportunity to present evidence in his favor; second, that the excluded testimony would have been material and favorable to his defense; and third, that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose.

Government of the Virgin Islands v. Mills, 956 F.2d 443, 446 (3d Cir. 1992) (citing Rock v. Arkansas, 483 U.S. 44, 56 (1987)).

Judge Biester did prevent Alexander from presenting evidence that would have presumably been material and favorable to his defense. Mills, 956 F.2d at 446. Judge Biester precluded him from showing that Williams described herself online as "slightly experienced" and that she had sexual relations with another older man. The judge also barred him from showing that Williams chose him because, of the three men who responded to her online advertisement, he was the only one willing to accept her collect calls.

This does not end our inquiry, however. A court must last ask whether "the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." Id. Judge Biester had a legitimate evidentiary purpose. Pennsylvania's Rape Shield Law, at least in theory, prevents rape defendants from transforming trials of themselves into trials of their victims. See Commonwealth v. Killen, 680 A.2d 851, 853 (Pa. 1996). But that policy is furthered only when trial judges enforce it. Far from acting arbitrarily or disproportionately, Judge Biester performed his gatekeeping role fairly, balancing Alexander's right to defend himself against the Commonwealth's interest in protecting Williams's reputation. He permitted Alexander to explore Williams's potential bias, her credibility, her intent to deceive, and some of her sexual practices and predilections. See Trial Tr., at 139-240, 260-63.

He also offered Alexander a fair compromise as to the "slightly experienced" advertisement: Alexander could introduce it if he would stipulate that Williams was inexperienced. Alexander elected to reject this middle path. 3/27/01 Trial Tr., at 248; 3/28/01 Trial Tr., at 79-80. Thus, his compulsory process claim fails.

Two final points are worth making here. First, because Alexander's compulsory process and Confrontation Clause claims are meritless, his correlative ineffective-assistance argument must fail. Counsel cannot be faulted for not advancing fruitless argument. See Strickland v. Washington, 466 U.S. U.S. 668, 688 (1984) ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness," meaning "reasonableness under prevailing professional norms").

Second, the Superior Court's failure to cite federal law when it addressed Alexander's compulsory process and Confrontation claims is irrelevant. As noted earlier, the "state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (per curiam) (quoting Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam)). Here, the state courts properly balanced competing interests, forging a just result consistent with established federal law.

4. Petitioner objects to the Magistrate Judge's determination that his sentence is constitutional.

Alexander next claims that Judge Biester violated his Sixth Amendment right to have every element of the three offenses proved to the jury beyond a reasonable doubt.[22] See Apprendi v. New Jersey, 530 U.S. 466 (2000). Specifically, he argues that Judge Biester failed *sue sponte* to use a special verdict form. This, he claims, led the jury to render an unconstitutionally ambiguous verdict.

As we highlighted above, the jury could have found that Alexander and Williams engaged in six sex acts. Judge Biester was under no duty to require it to delineate each. His use of a general verdict form was constitutional, Alexander's claim is meritless, and we adopt Judge Wells's conclusion and reasoning. See Rep. & Rec., at 25-26. Furthermore, we refuse to hold counsel ineffective for never advancing a fruitless claim.

22. For this claim, Alexander proceeds under 28 U.S.C. § 2254(b)(1)'s "contrary to" clause. Pet.'s Mem., at 44. In the Report and Recommendation, Judge Wells describes and evaluates the Superior Court's denial of this claim, concluding that, "Since ample testimony supports a finding of multiple sex acts, the verdict is properly supported." Rep. & Rec. at 26.

Alexander next argues[23] that the Information inadequately apprised him of the corrupting-a-minor charge:

> Petitioner was charged, by Information, with having corrupted the morals of a minor *by enticing her to engage in sexual intercourse*. Nonetheless, the trial court instructed the jury that it could consider, as proof of this offense, *any* event of *any* nature that might tend to corrupt the morals of a minor.

Pet.'s Obj., at 27. In other words, Alexander contends that, by defining the offense more broadly in the jury charge than the prosecution did in the Information, Judge Biester deprived him of due process.

To enable criminal defendants to prepare their defense, a state's charging method must fairly apprise them of the charges they face:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948). This requires that the state describe the offense with precision sufficient to

---

23. For this and the next claim, Alexander is entitled to *de novo* review. The Superior Court adopted the reasoning of the trial court on these issues, Sup. Ct. Op., at 5, but the trial court never addressed them.

Judge Wells counseled that we should deny both claims. For the first -- that Judge Biester breached Alexander's due process rights by defining corruption of a minor more broadly than it was charged in the Information -- she found that the instruction accurately described Pennsylvania law, and the disparity did not violate his rights. Rep. & Rec., at 26-29. We describe her treatment of the second in the text, *infra*.

notify the defendant of the specific charge against him. Id. See also Bibby v. Tard, 741 F.2d 26, 29 (3d Cir. 1984) (requiring, when defendant charged by indictment, "reasonable notice and information of the specific charge").

Alexander received adequate notice of the corrupting-a-minor charge. First, he complains that the sentence in the Information charging him with corrupting a minor alleged only that he "did entice a minor," but he omits the preceding sentence:

> In that the defendant, Raymond Alexander, did while being 18 years of age and upward, by *any act corrupts or tends to corrupt* the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime.

Information, at 2 (emphasis added). This sentence aligned with Judge Biester's definition of the offense.

Second, due process requires not that criminal defendants receive detailed outlines of the state's case, but notice adequate to prepare a defense. Here, the Information (1) named the offense, (2) cited the relevant statute, (3) identified Williams, (4) stated her age and Alexander's, and (5) accused him of having "sexual intercourse" with her. This accusation gave Alexander sufficient notice to defend himself, rendering any disparity between the jury charge and Information harmless.

Alexander next argues that the jury charge defined corruption of a minor as an unconstitutional strict liability

offense. But we must first address his objection to Judge Wells's conclusion that this claim is procedurally defaulted.

In Alexander's brief to the Superior Court, under STATEMENT OF MATTERS COMPLAINED OF ON APPEAL, Alexander described this claim:

> The trial court jury instruction on Corrupting the Morals of a Minor was deficient in a third aspect, one resulting in Constitutional error. The instruction permitted a conviction for conduct which occurred before defendant Alexander ever saw/met the complainant, and thus had no basis for even suspecting she might be a minor. To that extent, a conviction deprived petitioner of Due Process of Law, as there is no *mens rea* requirement and as the statute is therefore impermissibly overbroad.

Pet.'s Obj., at 28. The Superior Court itself confirmed that Alexander raised it:

> Alexander raises the following for our consideration: . . .
>
> 6. [Alexander] was deprived of due process of law, a fair trial and the effective assistance of counsel, when his jury was instructed that it could convict on the charge of Corrupting the Morals of a Minor for acts which occurred when it was impossible for [Alexander] to know, or even suspect, that the complainant was less than 18 years old.

Sup. Ct. Op., at 4. Because Alexander raised this issue before the Superior Court, it is not procedurally defaulted, and we now consider it on the merits.

Alexander contends that Judge Biester defined corrupting a minor as an overbroad strict liability offense:

> The record confirms that when petitioner initially responded to the Internet advertisement placed by the complainant, it was impossible for him to discern her true age. As the telephone and Internet contact continued, and even as it became sexually explicit, this remained true -- there was no indicator which could make any correspondent with Carrie Williams suspect that she might be underage. Nonetheless, the trial court instructed the jury that it could convict on the charge of Corrupting the Morals of a Minor for acts which occurred when he was in Pennsylvania and Williams was in Kentucky, without regard for the fact that it was impossible for anyone to detect, or have grounds to suspect, that he was violating the law.

Pet.'s Obj., at 27-28.

We need not apply established federal law to this claim[24] because his premise -- "there was no indicator which could make any correspondent with Carrie Williams suspect that she might be underage" -- is flawed. On the contrary, the evidence strongly suggested that Alexander either knew or should have known that Williams was underage. See supra pp. 15-18 (explaining why the jury could have concluded Alexander knew or should have known Williams was underage). Among the multiple reasons we underscored earlier, Alexander (1) knew she was a high-school student living with her parents, 3/27/01 Trial Tr., at 105, 176-77; (2) demanded that she call him "Daddy," id. at

---

24. This also permits us to avoid applying murky jurisprudence about the constitutionality of strict liability offenses. While the Supreme Court has suggested that procedural due process limits the extent to which courts may impose strict liability, it has never fleshed out this doctrine. States v. Engler, 806 F.2d 425, 434 (3d Cir. 1986).

92, 115, 181; and (3) often called her "baby" or "little girl." Id. at 93.

5. Petitioner objects to the Magistrate Judge's determination that his counsel was effective when counsel failed to present character evidence or evidence supportive of his defense.

Alexander claims his lawyer erred in two ways. First, his lawyer failed to call three witnesses who would have testified that Alexander had a reputation for non-violence, see Pa. R. Evid. 404(a)(1). Second, he neglected to mitigate the damage wrought on his case by a "fantasy" email Alexander sent Williams. Alexander contends that defense counsel should have illuminated that he actually wrote the email for his thirty-two-year-old girlfriend a year before he first corresponded with Williams.[25]

---

25. To establish ineffective assistance for not calling a character witness, the Superior Court required Alexander to prove (1) the witness existed; (2) the witness was available to testify; (3) counsel was informed of the existence of the witness or counsel should otherwise have known of him; (4) the witness was prepared to cooperate and testify for defendant at trial; and (5) the absence of the testimony prejudiced defendant so as to deny him a fair trial. Sup. Ct. Op., at 10 (citing Commonwealth v. Ervin, 766 A.2d 859, 865-66 (Pa.Super. 2000). It concluded that Alexander failed to prove the witnesses were available to testify, and, in any event, his lawyer had a good reason for not calling them because the prosecution then would have unveiled one or more of Alexander's four previous convictions. Id. at 10-12.

In her Report and Recommendation, Judge Wells found that the Superior Court's and Strickland's tests are functionally equivalent. Rep. & Rec., at 32. She then concluded that counsel performed sufficiently because he "strategically decided not to call them to avoid potentially damaging cross-examination regarding Plaintiff's criminal record." Id.

Beginning with his lawyer's failure to call three character witnesses, federal courts have never articulated any "specific paradigm for evaluating an attorney's failure to call certain witnesses other than the general standard of *Strickland*." Clark v. Klem, Civ. No. 02-2850, 2004 WL 534038, at *5 (E.D.Pa. Mar. 10, 2004). As a general matter, whether to put a criminal defendant's character in issue is a classic tactical decision, one reviewing courts should refrain from second-guessing in all but the most egregious circumstances.

Defense counsel's decision constituted trial strategy that, at the time, was tactically prudent. The affidavits Alexander submitted demonstrate that his lawyer interviewed each potential witness. See United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997) ("While counsel is entitled to substantial deference with respect to strategic judgment, an attorney must investigate a case, when he has cause to do so, in order to provide minimally competent professional representation"); see also Pet.'s Ex. E (affidavits of the three potential witnesses, with each attesting, "Mr. Fioravanti[26] was the only attorney who

---

26. In his supplemental objections, Alexander -- for the first time, despite multiple previous filings -- takes the Superior Court and Judge Wells to task because they had a "mistaken belief that Mr. Fioravanti was petitioner's trial counsel." Supp. Obj., at 60. See also id. at 63. Nothing before us indicates that Mr. Fioravanti and Alexander's other lawyer, Mr. Schneider, did not collaborate in representing him.

In fact, the record strongly suggests the contrary. Before Judge Biester, for example, Mr. Schneider said "I will be trying [the case.]" 3/26/01 Tr., at 10. Immediately after that, Mr. Fioravanti added, "I originally represented Mr.

(continued...)

interviewed me regarding my testimony"). Thus, we know Alexander's counsel contemplated calling these people but elected not to.

Pennsylvania's Rules of Evidence demonstrate why counsel never called them. Under Pa. R. Evid. ("Rule") 404(a)(1) and Rule 405(a), a criminal defendant may offer reputation evidence about a pertinent character trait. But, by doing so, he "runs certain risks. . . ." Commonwealth v. Ross, 856 A.2d 93, 101 (Pa.Super. 2004) (quoting Commonwealth v. Nellom, 565 A.2d 770, 775 (Pa.Super. 1989)). By putting his "character in issue," Alexander would have allowed the prosecution to present otherwise inadmissible, derogatory evidence. First, he would have permitted the prosecution to present its own anti-character witnesses. See Rule 404(a)(1); 1 West's Pa. Prac., Evidence § 404-3 (2d ed. 2004) ("Another consequence of putting character in issue is that the prosecution may call anti-character witnesses"). Second, while Alexander's witnesses would have been able to testify only about his reputation -- by answering "what have you heard" questions -- the prosecution would have been able to ask about "specific instances" of noncriminal misconduct. Rule 405(a). Third, the prosecution would have been able to attack each witness's foundation by asking its own "have you

---

(...continued)
Alexander. I drafted that motion [*in limine*]. And I also have one other legal issue that will probably arise later on in the case which I have briefed." Id. at 11. Thus, the record indicates that Fioravanti and Schneider functioned together.

heard" questions. See Commonwealth v. Fletcher, 861 A.2d 898, 915-16 (Pa. 2004) ("[A] character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct by the defendant to test the accuracy of his or her testimony and the standard by which he or she measures reputation") (quoting Commonwealth v. Busanet, 817 A.2d 1060, 1069 (Pa. 2002), cert. denied, 514 U.S. 1085 (2003)). Most notably, it could have asked whether two of the witnesses -- William Hutton and Patrick Kutzler -- knew that a jury had convicted Alexander of risking catastrophe.[27]

Turning to Alexander's second ineffectiveness argument, he claims that his lawyer should have demonstrated that he wrote

---

27. Alexander argues that the prosecution would have been barred from probing into his prior convictions. We agree that the prosecution could not have inquired about his non-violent drug convictions in 1976, 1978, and 1980. We disagree as to the 1976 risking-a-catastrophe conviction because it bears on his propensity for violence.

His claim that remoteness would bar use of the prior conviction misses the mark. William Hutton and Patrick Kutzler knew Alexander when the jury convicted him, defeating any remoteness claim. See Commonwealth v. Farrior, 458 A.2d 1356, 1361 (Pa.Super. 1983) (holding that prosecution could question two character witnesses about defendant's nineteen-year-old conviction because they knew him at the time). The third prospective witness -- Lynn Hutton -- did not know Alexander in 1976, but once the jury learned about this conviction, the damage would have been done -- that the prosecution asked only two people, not three, would have been immaterial.

Last, the mere fact that the prosecutor, pretrial, said he would not introduce Alexander's "past criminal record," 3/26/01 Tr., at 6, does not mean the trial judge would have precluded him from impeaching the foundations of Alexander's character witnesses. Moreover, the prosecutor made this statement the day before trial, presumably after defense counsel had already submitted his witness list, bereft of character witnesses.

the "fantasy" email a year before he corresponded with Williams. Alexander also claims defense counsel should have proved that he initially wrote it for his thirty-two-year-old girlfriend.

This claim also fails. Alexander mistakes the relevance of the "fantasy" email. In it, Alexander called his partner "little girl" six times.[28] In one line, for example, he

---

28. The entire email reads as follows, with each reference to "little girl" italicized:

> Here is the story. . .
>
> Wearing my favorite outfit (a little jewelry, a little perfume, little white socks), with your hair up, to expose every inch of your adoring gaze. . .
>
> Face down on my bed, hands and feet restrained to the four corners. . .
>
> The restraints are silk, so as not to hurt you, but they are secure. . .
>
> There is no escape until I release you from your bonds. . .
>
> Two pillows under your hips, to present you at the perfect angle. . .
>
> I'll put "the monster" in your cunt for a while, just to get you hot. . .
>
> But you know what is coming. . .
>
> My finger is working you [sic] asshole, wetting it, getting you loose. . .
>
> Every time I pull the monster from your pussy you wonder whether this is the time I will bury it in your ass. . .
>
> And after you're crying loudly, one of those times will be the one. . .

(continued...)

28. (...continued)

You feel him entering you, stretching your tight little asshole. . .

Every muscle in your beautiful body tenses as you struggle against your bonds. . .

But there is no escape!! Your legs and hips tremble as I give you just the head. . .

It's such a thrill to watch your little ass swallow the monster's head!! Take another in [sic] or two. . .

Yes, *little girl*, you are really crying now. . .

Go ahead, cry louder. . .

No one can hear you!! Your *little girl* voice is begging the monster to cum in your ass. . .

And it's been so long and you're so tight that he can't resist. . .

Ohhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhh. . .

Feel that liquid fire deep in your ass, *little girl*. . .

But I have a surprise for you! Your ass is so hot and tight and wet from my cum that the monster stays hard. . .

This time it's going to be a long, slow ass fucking. . .

One you will never forget!! As the minutes pass you're thrashing against the restraints. . .

Your *little girl* voice tells me your ass is cumming, knowing I love to hear that. . .

But I'm still pounding you. . .

Deeper, harder, faster, the monster is

(continued...)

wrote "No one can hear you!! Your little girl voice is begging the monster [Alexander's penis] to cum in your ass. . ." "Feel that liquid fire deep in your ass, little girl. . ." he wrote in another line. By calling his partner "little girl" over and over and then sending it to Williams, Alexander revealed his suspicion -- or at the very least, desire -- that Williams was exactly that, a little girl. Hence, the mere fact that he initially wrote the email for someone else, who was of age, is, to quote the Superior Court, "immaterial to the case." Sup. Ct. Op., at 10.

Thus, we cannot fault defense counsel for wanting as little stress on this highly inflammatory email as possible.

6. Petitioner objects to the Magistrate Judge's determination that certain claims are defaulted.

---

28. (...continued)

> building to a frenzy. . .
>
> You're saying everything and anything in your *little girl* voice, hoping I will relent. . .
>
> But I'm still fucking that sweet little ass of yours. . .
>
> And then it comes to you. . .
>
> You know what to say that I won't be able to resist. . .
>
> You promise me, in your best *little girl* voice, that you will come back again. . .
>
> You know I am unable to resist you when you are coming back to(ward) me!!!'

(emphasis added).

Alexander last objects to Judge Wells's conclusion that two of his claims were procedurally defaulted. He asserts that neither his "right to present a defense" claim nor "strict liability" claim were procedurally defaulted. We agree and, for the reasons articulated in Parts B.3 and B.4, sustain his procedural objections, nevertheless denying relief on the merits.

C. Conclusion

For the above reasons, we shall adopt and approve the Report and Recommendation, denying Alexander's petition. Because of the closeness of the closing argument question under Moore, we shall, as noted, issue a certificate of appealability.

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

RAYMOND ALEXANDER	:	CIVIL ACTION
		:
v.	:	
		:
ROBERT SHANNON, et al.	:	NO. 03-3514

ORDER

AND NOW, this 2nd day of February, 2005, upon consideration of Alexander's petition for a writ of habeas corpus

filed pursuant to 28 U.S.C. § 2254 (docket entry # 1), Alexander's memorandum in support of it (docket entry # 3), respondent's answer (docket entry # 6), Alexander's reply (docket entry # 7), the Report and Recommendation of Magistrate Judge Carol Sandra Moore Wells (docket entry # 9), Alexander's objections thereto (docket entry # 10), and Alexander's pro se supplemental objections, and for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that:

1. Alexander's objections are OVERRULED;

2. The Report and Recommendation of Magistrate Judge Carol Sandra Moore Wells is APPROVED and ADOPTED as supplemented by the foregoing Memorandum;

3. Alexander's petition for a writ of habeas corpus is DENIED;

4. Alexander having made a substantial showing of the denial of a constitutional right, we ISSUE a certificate of appealability, see 28 U.S.C. § 2253(c); and

5. The Clerk of Court shall CLOSE this case statistically.

BY THE COURT:

_____
Stewart Dalzell, J.