APPENDIX C

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

EDWIN APONTE, Petitioner,	:	CIVIL ACTION
v.	:	
JAMES ECKARD, *et al.*, Respondents.	:	NO. 15-561

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

June 3, 2016

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Edwin Aponte ("Petitioner"), an individual currently incarcerated at the State Correctional Institution -Smithfield in Huntingdon, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be **DENIED**.

I. BACKGROUND[1]

The Pennsylvania Superior Court provided the following recitation of the facts:

> [Petitioner]'s convictions stem from the August 17, 2006 shooting death of M.W., to whom [Petitioner] owed money. At approximately 3:30 p.m. on the day in question, M.W. was driving his car in Philadelphia with his girlfriend, Sheena G. As they approached C and Ruscomb Streets, M.W. saw [Petitioner], exited the car, and began to converse with [Petitioner]. The two men began to engage in a fistfight which was broken up a number of times by people in a crowd that had gathered, but then was resumed by the two pugilists. The final time the fight was stopped, [Petitioner] was bleeding. At that point, [Petitioner] retrieved a

[1] Respondents have submitted the relevant transcripts and portions of the state court record ("SCR") in hard-copy format. Documents contained in the SCR are indexed and numbered D1 through D23 and will be cited to as "SCR No. ___".

> gun and shot M.W. multiple times, including twice in the back. Sheena G[eiger] witnessed the entire incident and testified that [Petitioner] pulled the gun from his person before he shot M.W.
>
> [Emmanuel Ramos] was also an eyewitness to the events. His testimony was consistent with that of Sheena G[eiger], with the exception that [Ramos] stated that [Petitioner] obtained the gun from a bystander. [Elijah Velez] was called as a Commonwealth witness, but from the stand said that while he saw the fight, he did not witness the shooting. A March 6, 2007 statement that [Velez] gave to police and adopted was then introduced as substantive evidence. In that statement, [Velez] informed police that he viewed the fight and the shooting; [Velez] indicated that [Petitioner] pulled the gun from his waist. The Commonwealth established that the victim had seven wounds that were made by six bullets and that eight fired casings were found at the crime scene.
>
> [Petitioner] testified in his own defense and maintained that while he and [Ward] were engaged in the physical altercation, [Petitioner] retrieved a gun from the victim's waistband and then shot [Ward].

(*Commonwealth v. Aponte*, No. 1865 EDA 2009, slip op. at 1-2 (Pa. Super. Ct. Oct. 26, 2010), ECF No. 9-1 [hereinafter "Sup. Ct. Oct. 26, 2010 Dec."]).

Following a jury trial in the Court of Common Pleas of Philadelphia County, Petitioner was convicted of murder in the first degree, 18 Pa. Cons. Stat. § 2502(a), and possession of an instrument of crime, 18 Pa. Cons. Stat. § 907(a). (*Commonwealth v. Aponte*, No. CP-51-CR-0009701-2007 (Phila. Cnty. Com. Pl.), Criminal Docket at 3-4). On January 12, 2009, Petitioner was sentenced to life in prison without parole for the murder conviction and to a concurrent term of one-to-two years' incarceration for possessing an instrument of crime. (Crim. Docket at 3).

Following the denial of Petitioner's timely post-sentence motions, Petitioner, through trial counsel, filed a direct appeal raising the following claims (recited verbatim)

> (1) [Petitioner] should be awarded an arrest of judgment on the charge of first degree murder as the Commonwealth did not prove all of

the elements of that crime beyond a reasonable doubt. More specifically, the Commonwealth did not prove that the [Petitioner] acted with malice or a specific intent to kill.

(2) [Petitioner] must be awarded a new trial as the Court erred where it failed and refused to give a self-defense or justification charge . . . where said charge was mandatory pursuant to the evidence as the [Petitioner] raised the issue of self-defense when he took the stand and testified.

(3) [Petitioner] must be awarded a new trial as the result of Trial Court error, where the Court permitted evidence of "prior bad acts," pursuant to Rule 404(b) but . . . the alleged probative value was outweighed by unfair prejudice and . . . the Commonwealth could not make out a prima facie case that the alleged conduct was a prior bad act. More specifically, the Commonwealth's theory was that certain letters written by [Petitioner] were "threats"; the [Petitioner] has a right of free speech and, more importantly, has a right to defend himself where he was writing letters to a third party in an attempt to make further investigation of the case, these acts did not constitute prior bad acts.

(4) [Petitioner] should be awarded a new trial as the result of the Trial Court's error where the Court failed and refused to grant a mistrial after it learned that the [Petitioner's] brother had made inappropriate remarks to at least one member of the jury who then communicated those remarks to many of the other members of the jury and where, upon a fair reading of a later colloquy of those jurors, it was apparent that some of the jurors were uncomfortable and that the trial should not have been permitted to proceed.

(5) [Petitioner] should be awarded a new trial as a result of Court error where it failed and refused to grant a mistrial even though the prosecutor engaged in highly, and unfairly prejudicial closing argument that was contemporaneously objected to.

(Statement of Matters Complained of Pursuant to Rule of Appellate Procedure 1925(b), SCR No. D9). The Trial Court issued an opinion pursuant to Rule of Appellate Procedure 1925(a), finding each of these claims to be without merit. (*Commonwealth v. Aponte*, No. CP-51-CR-0009701-2007, slip op. (Phila. Cnty. Com. Pl. Feb. 22, 2010), SCR No. D10 [hereinafter, "Phila. Cnty.

Com. Pl. Feb. 22, 2010 Dec."]). On October 26, 2010, the Superior Court affirmed, (Sup. Ct. Oct. 26, 2010 Dec.), and on April 13, 2001, the Pennsylvania Supreme Court denied a petition for allowance of appeal, (Crim. Docket at 10).

On June 30, 2011, Petitioner filed a *pro se* petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"), contending that the trial court's denial of his motion for a mistrial violated Petitioner's Sixth Amendment rights because the jury was not impartial and unbiased following improper contact by Petitioner's brother, and that counsel was ineffective for failing to argue on direct appeal that Petitioner was denied his rights under the Confrontation Clause of the Sixth Amendment when a police officer testified at trial to a police report which he did not prepare. (Pet'r's Mot. for Post-Conviction Collateral Relief 3, SCR No. D14).

Counsel was subsequently appointed. On June 28, 2012, counsel filed a no-merit letter pursuant to the rule set forth in *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213, 215 (Pa. Super. Ct. 1988). (No-Merit Letter, SCR No. D15). In the letter, counsel stated that neither of Petitioner's claims had arguable merit, and requested to withdraw as counsel. (*Id.*). The PCRA Court then issued a notice of intent to dismiss pursuant to Pennsylvania Rule of Criminal Procedure 907.[2] Petitioner filed a *pro se* response to that notice, setting forth additional support for the claims set forth in the *pro se* PCRA petition. (Pet'r's Reply to Rule 907 Notice 2-3, SCR No. D16). Petitioner also raised two new claims: (1) ineffective assistance of trial counsel for failing to request a curative

[2] The Rule 907 Notice does not appear on the docket, nor is the document itself contained within the State Court record. However, Petitioner does not presently contest that the PCRA Court issued such a notice, nor did he so argue before the Superior Court on PCRA appeal. (*See Commonwealth v. Aponte*, No. 1849 EDA 2013, slip op. at 3 n.3 (Pa. Super. Ct. Oct. 6, 2014)).

instruction after the jury overheard or learned that Petitioner's brother said "not guilty" to a member of the jury; and (2) ineffective assistance of all counsel for failing to pursue a *Brady* claim where the Commonwealth did not disclose that one of its testifying witnesses, Emmanuel Ramos, was incarcerated, and was promised leniency in an unrelated criminal case in return for his testimony. (*Id.* at 4-5). Petitioner further alleged that PCRA counsel was ineffective for failing to diligently communicate with Petitioner. (*Id.* at 5-6). In response, PCRA counsel filed a second letter with the PCRA Court on October 26, 2012 explaining that Petitioner's *Brady* claim was without merit, and that his claim of PCRA counsel ineffectiveness was not cognizable. (Resp. to Pet'r's Reply, SCR No. D17).

On June 3, 2013, the PCRA Court dismissed Petitioner's PCRA petition without a hearing and permitted PCRA counsel to withdraw. (Order, SCR No. D19). Petitioner timely appealed, raising the following claims in his *pro se* statement of matters complained of on appeal (recited verbatim):

> (1) Ineffective assistance of . . . trial counsel for failure to raise a 6th amendment violation, when officer gave testimony which denied [P]etitioner fair opportunity to confront accuser;
>
> (2) Ineffective assistance of counsel for failing to ask for a curative instruction to [the] jury. [Petitioner] was prejudiced when trial counsel asked for a mistrial and not . . . for a curative instruction.
>
> (3) Ineffective assistance of counsel for failure to raise Brady Violation. Trial counsel and appointed PCRA counsel both failed to raise claim, when witness was offered leniency for his cooperation in [Petitioner's] trial and [Petitioner] has letters asking PCRA counsel to raise claim.
>
> (4) Ineffective assistance of PCRA counsel for a defective *Finley* letter. Counsel did not list each issue appellant wished to have reviewed, in doing [s]o counsel did not do what was necessary to secure a withdrawal.

(Statement of Matters Complained of on Appeal Pursuant to Pa. R.A.P. 1925(b), SCR No. D22). The PCRA Court issued a 1925 (a) opinion denying these claims on March 21, 2014, (*Commonwealth v. Aponte*, No. CP-51-CR-0009701-2007, slip op. (Phila. Cnty. Com. Pl. March 21, 2014 [hereinafter, "Phila. Cnty. Com. Pl. March 21, 2014 Dec."]), SCR No. D23), and the Superior Court affirmed on October 6, 2014, finding the claims meritless, (*Commonwealth v. Aponte*, No. 1849 EDA 2013, slip op. at 3 n.3 (Pa. Super. Ct. Oct. 6, 2014), ECF No. 9-2 [hereinafter, "Sup. Ct. Oct. 6, 2014 Dec."]). Petitioner did not seek an allowance of appeal to the Pennsylvania Supreme Court.

On February 2, 2015, Petitioner filed a *pro se* petition for writ of habeas corpus, raising the following claims for relief (restated for clarity):

(1) Insufficiency of the evidence to support Petitioner's conviction for first degree murder because malice, ill will, and specific intent to kill were not proven beyond a reasonable doubt; the jury charge should have included self-defense and mistaken belief voluntary manslaughter, and trial counsel was ineffective for failing to request that mistaken belief be part of the charge;

(2) The trial court erred by allowing letters written by Petitioner to be admitted as evidence of Petitioner's prior bad acts where the Commonwealth could not make out that the evidence in question constituted a bad act and where the probative value of the letters was outweighed by unfair prejudice, and trial counsel was ineffective for failing to object to the admission of this evidence;

(3) Petitioner was denied his rights under Article 1 § 9 of the Constitution of the Commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States of America when the trial judge refused to grant a mistrial after the Petitioner's brother had improper contact with the jury;

(4) Prosecutorial misconduct for violating Petitioner's Sixth Amendment confrontation rights by allowing an official report to be entered into evidence from other than the official source;

(5) Cumulative errors made by counsel must be considered in evaluating the ineffective assistance of counsel claim;

(6) Ineffective assistance of trial and direct appeal counsel for failing to raise a violation of Petitioner's confrontation clause rights when a police officer testified as to the contents of a report produced by a different, non-testifying officers;

(7) Ineffective assistance of counsel of trial, direct appeal, and PCRA counsel for failing to litigate a *Brady* claim based on the prosecution's failure to disclose that Emmanuel Ramos was offered leniency in an unrelated criminal matter for testifying in Petitioner's case

(Pet'r's Mem. of Law 15-50, ECF No. 1-1).[3]

The petition for writ of habeas corpus was assigned to the Honorable Lawrence F. Stengel, who referred it to me for a Report and Recommendation. (Order, ECF No. 5). The Commonwealth filed a response, (ECF No. 9) and Petitioner a Reply, (ECF No. 10). The matter has been fully briefed and is ripe for disposition.

II. LEGAL STANDARD

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA, "a district court ordinarily cannot grant a petition for a writ of habeas corpus arising from a petitioner's custody under a state court judgment unless the petitioner first has exhausted his available remedies in state court." *Houck v. Stickman*, 625 F.3d 88, 93 (3d Cir. 2010) (citing 28 U.S.C. § 2254(b)). The exhaustion requirement is rooted in considerations of comity, and "is principally designed to protect the state courts' role in the enforcement of federal law and [to] prevent disruption of state

[3] Only the first four of these claims are set forth in Petitioner's *pro se* habeas petition, while the rest of the claims are alleged throughout memorandum of law filed on the same day as the habeas petition. Accordingly, the Court has opted to follow the claims presented in his supporting memorandum, rather than the habeas petition.

judicial proceedings." *Duncan v. Walker*, 533 U.S. 167, 179 (2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)); *see also Castille v. Peoples*, 489 U.S. 346, 349 (1989). "Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (citing *Rose*, 455 U.S. at 515-16).

For a claim to be exhausted, "'[b]oth the legal theory and facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court.'" *Tome v. Stickman*, 167 F. App'x 320, 322-23 (3d Cir. 2006) (not precedential) (quoting *Evans v. Court of Common Pleas, Del. Cnty., Pa.*, 959 F.2d 1227, 1231 (3d Cir. 1992)). A state prisoner must "fairly present" his federal claims to the state courts before seeking federal habeas relief by invoking "one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845; *see Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) (quoting *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) ("'Fair presentation' of a claim means that the petitioner 'must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.'")). In Pennsylvania, one complete round includes presenting the federal claim to the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009) (quoting *Lambert*, 134 F.3d at 513).

Although exhaustion is required before seeking federal habeas review, a federal court may excuse the exhaustion requirement if it would be futile for petitioner to seek relief in the state court system. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000). However, a claim deemed exhausted because of a state procedural bar is "procedurally defaulted." *Lines*, 208 F.3d at 160; *Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001) (explaining that if a petitioner is barred from seeking further relief in state court for an unexhausted claim, the claim is considered procedurally defaulted).

This Court may not address the merits of a procedurally defaulted claim unless the Petitioner can establish cause and prejudice to excuse his default, or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750. To demonstrate cause, the petitioner must show that "'some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule.'" *Fogg v. Phelps*, 414 F. App'x 420, 429-30 (3d Cir. 2011) (*quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice, the petitioner must show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Murray*, 477 U.S. at 496). This showing of probability is satisfied if petitioner can show that, in light of new evidence, "it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327.

B. Standard of Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts v.*

Vaughn, 228 F.3d 178, 196 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus that has been adjudicated on the merits may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or that involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (*citing* 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, "'[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413.

The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable

application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citing *Williams*, 529 U.S. at 389).

III. DISCUSSION

Petitioner presents seven claims for relief in the instant habeas petition and memorandum of law. Grounds One through Four largely consist of allegations of state trial court error that are not cognizable on federal habeas review. Insofar as Petitioner asserts constitutional violations in Grounds One through Four, those claims are unexhausted and procedurally defaulted, with the exception of Petitioner's claim of insufficiency of the evidence asserted as a sub-claim within Ground One. I respectfully recommend that Petitioner's insufficiency claim be denied as meritless. Grounds Six and Seven are claims of ineffective assistance of counsel, which Petitioner exhausted on collateral appeal; however, this Court recommends these claims be denied as without merit. Lastly, Ground Five is a claim that errors of counsel must be assessed cumulatively. This Court recommends that this claim be denied as non-cognizable, or, in the alternative, denied as without merit as there are no cumulative errors of counsel to aggregate.

A. Ground One

Petitioner's first claim for relief contains two sub-claims. First, Petitioner argues that his conviction for first-degree murder was not supported by sufficient evidence, and he should have been convicted of only unreasonable belief involuntary manslaughter. Second, Petitioner asserts

that the trial court erred in refusing to instruct the jury on self-defense. (Pet'r's Mem. of Law 16-23).

1. Sufficiency of the Evidence

Petitioner argues that the evidence was insufficient to establish beyond a reasonable doubt that he committed the crime of first degree murder because the Commonwealth did not prove that Petitioner acted with malice or a specific intent to kill. (Pet'r's Mem. of Law 16-17, 20-21). He contends that the jury should have found him guilty only of voluntary manslaughter because he was acting under the unreasonable, but sincerely held, belief that the use of deadly force was justifiable under the circumstances; however, the trial court excluded an instruction on "mistaken belief" voluntary manslaughter from the jury charge, and counsel unreasonably failed to challenge this aspect of the instructions. (Pet'rs *pro se* Hab. Pet. ¶ 12(a); Pet'r's Mem. of Law 17-20; Pet'r's Reply Br. 9).

The clearly-established federal law governing Petitioner's claim that his conviction was based on insufficient evidence is set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson*, the Supreme Court held that, when reviewing a habeas petitioner's challenge to the sufficiency of the evidence, federal courts must ask "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." *Id.* at 319 (emphasis in original). This standard does not allow a reviewing court to substitute its judgment for that of the jury. *Id.* at 318-19 ("[T]his inquiry does not require a court to 'ask' itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."). In fact, the court must defer to the jury's findings regarding the credibility of witnesses, the resolution of conflicts of

evidence, and the drawing of reasonable inferences. *Id.* To determine if the evidence could reasonably support of a finding of guilt beyond a reasonable doubt, the court must review the evidence "with reference to 'the substantive elements of the criminal offense as defined by state law.'" *Eley v. Erickson*, 712 F.3d 837, 848 (3d Cir. 2013) (quoting *Jackson*, 443 U.S. at 324). However, the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law. *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) ("[F]ederal courts must look to state law for 'the substantive elements of the criminal offense,' but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.") (quoting *Jackson*, 443 U.S. at 324 n.16).

Petitioner exhausted his sufficiency of the evidence claim on direct appeal. In addressing this claim, the Superior Court applied the following standard:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all of the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. . . . Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of all evidence produced, is free to believe all, part or none of the evidence.

(Sup. Ct. Oct. 26, 2010 Dec., slip op. at 4) (citing *Commonwealth v. Abed*, 989 A.2d 23, 26-27 (Pa. Super. 2010)). The Third Circuit has explained that the Pennsylvania standard for the sufficiency of the evidence claims is consistent with the federal standard established in *Jackson*. *See Eley*, 712 F.3d at 848. Therefore, the state court did not apply a standard "contrary to" clearly established federal law, and habeas relief is only appropriate for this claim if Petitioner

can demonstrate that the Superior Court's decision was based on unreasonable application of *Jackson* or involved an unreasonable determination of the facts.

Under Pennsylvania law, a person is guilty of murder in the first-degree when all three of these elements are met: "(1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill." *Commonwealth v. Rivera*, 983 A.2d 1211, 1220 (Pa. 2009) (citing 18 Pa.C.S. § 2502(d)); *see also Commonwealth v. VanDivner*, 962 A.2d 1170, 1176 (2009). The element of specific intent to kill may be proven by circumstantial evidence alone, and may be inferred from the use of a deadly weapon upon a vital part of the victim's body. *Commonwealth v. Fletcher*, 750 A.2d 261, 267 (2000). The period of reflection required for premeditation to establish the specific intent to kill may be very brief; indeed, "[t]he design to kill can be formulated in a fraction of a second. Premeditation and deliberation exist whenever the assailant possesses the conscious purpose to bring about death." *Commonwealth v. Drumheller*, 808 A.2d 893, 910 (Pa. 2002) (internal quotation omitted). A person is guilty of voluntary manslaughter if: (1) he acted under a sudden and intense passion resulting from a serious provocation; or (2) he "knowingly and intentionally kills an individual" under the unreasonable belief that the killing was justified. 18 Pa. C.S. § 2503(a), (b). The latter definition, or "unreasonable belief involuntary manslaughter," has been colloquially referred to as imperfect self-defense. *See Commonwealth v. Tilley*, 595 A.2d 575, 582 (1991).

In denying Petitioner's sufficiency of the evidence claim, the Superior Court on direct appeal found "that the Commonwealth's evidence was sufficient to establish [Petitioner's] specific intent to kill in the moments during which he retrieved a gun and emptied six bullets

from that weapon into the unarmed victim's body." (Sup. Ct. Oct. 26, 2010 Dec., slip op. at 4-5). The Superior Court further explained that it was "within the province of the jury to determine whether [Petitioner], based upon the beating that was being inflicted by the victim, acted in the heat of passion or with the unreasonable belief that he needed to act in self-defense." (*Id.* at 6). Accordingly, the Superior Court rejected Petitioner's argument that the evidence was insufficient for a jury to convict him of first degree murder. The Court finds this determination was not an unreasonable application of *Jackson*, nor did it involve an unreasonable determination of the facts. Viewing the evidence admitted at trial in the light most favorable to the Commonwealth, any rational fact finder could find all the elements of first degree murder satisfied beyond a reasonable doubt.

Sheena Geiger, the victim's girlfriend, testified that on August 17, 2006, she was sitting in the front passenger seat of a car being driven by Marquis Ward, the victim, when she saw Petitioner. (N.T. 10/29/08 at 105-07). Ward got out of the car, spoke to Petitioner, and a fight ensued. (*Id.* at 114-16). Geiger testified that a crowd developed and unsuccessfully attempted to break up the fight, but eventually succeeded in breaking up the fight because Petitioner "was bleeding" and was "pretty beat up. (*Id.*). According to Geiger, Petitioner then "pulled out his gun and shot [Ward]." (*Id.* at 116-17). The crowd scattered and Ward attempted to flee, but Petitioner shot Ward multiple times, pulling "the clip until he couldn't pull it no more." (*Id.* at 118-19). Geiger testified that she subsequently identified Petitioner as the shooter in a photo array and in an in-person line-up conducted approximately one year after the death of Ward. (*Id.* at 127-29).

Emmanuel Ramos, another witness to the fight, also testified at trial. (N.T. 10/29/08 at 193-47). Ramos testified that on the afternoon of the shooting, he was playing basketball with his brother and Elijah Velez, a friend, when he saw Ward and Petitioner get into an altercation. (*Id.* at 198). Consistent with Geiger's testimony, Ramos testified that at one point, the fight was halted, but subsequently resumed. (*Id.* at 201). Ramos stated that after the fight was stopped a second time, Petitioner took a gun "off of one of the other kids that was with him" and fired at Ward. (*Id.*). According to Ramos, Ward tried to run but collapsed. (*Id.*). On cross-examination, Ramos testified that he was approximately half a block away when he observed these events, but he had no doubt that Petitioner obtained the gun from another individual. (*Id.* at 229-32).

Velez was also called as a witness for the Commonwealth, and denied that he was present at the shooting. (N.T. 10/29/08 at 249). Velez was then confronted with a signed statement he gave to two police detectives on March 6, 2007. In the statement, Velez said that he was present during the fistfight and shooting, along with Ramos and Ramos' brother. (*Id.* at 255-57). The statement was then read to the jury:

> Q: "Question: Tell me what happened?
>
> "Answer: We was playing basketball and some beef started to go on between . . . Marquis and the guy. There was some fist-fighting going on at first. Then as the fist-fighting was going on, the guy pulled out the gun and shot Marquis. Then the guy who shot Marquis ran off."
>
> . . .
>
> Q: "Question: How long was Marquis and the other guy fist-fighting before the shooting?
>
> "Answer: For a good five minutes before the gun came out."

. . .

Q: "Question: Were you able to see where the guy who shot Marquis pulled the gun from?

"Answer: From his waist."

. . .

Q: "Question: Would you recognize the male who shot Marquis?

"Answer: Yes, I used to hang out with him."

. . .

Q: "Question: I am showing you a photo array. Do you recognize anyone in this array?

"Answer: Yes. (Indicating number four)."

. . .

Q: "You just identified the male in position number four. Where do you recognize this male from?

"Answer: I recognize him. I used to hang out with him about a year ago on Albanus street. I saw him shoot Marquis."

. . .

Q: "Question: what was the fistfight over?
"Answer: It was over I.D. and drug product."

. . .

Q: "Question: What happened to Marquis' I.D. and drug product?
Answer: He, (indicating the male in position number four) took it."

. . .

Q: "Question: How did you hear about the I.D. and drug product being taken?
Answer: I was there at the first fight when they were talking about it."

(*Id.* at 257-73). Velez denied that he had been asked those questions or given those answers. (*Id.*). However, he admitted that there had previously been a fight between Petitioner and Ward. (*Id.* at 275).

The medical examiner, Dr. Gregory McDonald, testified that Ward died as a result of multiple gunshot wounds. (N.T. 10/29/08 at 43). Dr. McDonald testified that Ward was hit by no fewer than seven bullets, and had entry wounds in the left upper arm, chest, back, both legs, and right hand. (*Id.* at 44-51). He testified that a bullet entered the left upper arm, exited the arm and reentered Ward's chest, grazing the lower lobe of the left lung and going through the lower and upper lobes of the right lung. (*Id.* at 45). He further testified that another bullet entered the left leg, travelled in an upward trajectory through the bladder and portions of small intestine, and was recovered near the hipbone area. (*Id.* at 48-49). The shot which entered the right leg also proceeded upwards and backward, into the liver. (*Id.* at 49-50). Dr. McDonald testified that the trajectory of right leg bullet was consistent with a person lying on the ground and having a bullet fired into them. (*Id.* at 50). Eight fired cartridge casings were found at the crime scene. (*Id.* at 68).

Petitioner testified that he and Ward got into a heated argument which escalated into a fistfight. (N.T. 11/03/08 at 38). After fighting for approximately five to ten minutes, Petitioner stated that he put his hands up in a "stop" motion and said he did not want to continue fighting, because he was bleeding and losing the fistfight. (*Id.* at 40-41). Petitioner turned to walk away, and Ward hit him again. (*Id.* at 41). Then, according to Petitioner, he saw Ward reach towards

his waist and believed that Ward was going to pull out a firearm. (*Id.*). He testified: "as I saw that, I grabbed Mr. Ward. After wrestling with him . . . I grabbed the gun off his waist." (*Id.* at 42:3-6). Petitioner testified that they continued to wrestle, he "got scared" and shot Ward. (*Id.* at 42:11-12). On cross-examination, Petitioner confirmed that Ward was unarmed after Petitioner obtained the weapon. (*Id.* at 60). When asked why he was scared of an unarmed man while Petitioner was in possession of a weapon, Petitioner testified "At the time, Sir, I wasn't thinking. We was fighting, we was wrestling, I got ahold of the gun, we was still wrestling, I got scared and I shot." (*Id.* at 60:10-17). He confirmed that he shot Ward multiple times, but remained frightened of Ward throughout. (*Id.* at 60-61).

Petitioner has not demonstrated that the Superior Court unreasonably applied *Jackson* or unreasonably determined the facts. The crux of Petitioner's argument is that if the jury had been instructed on unreasonable belief voluntary manslaughter, they would have convicted him of this lesser offense rather than first degree murder. However, the jury was so instructed, (*see* Phila. Cnty. Com. Pl. Feb. 22, 2010 Dec., slip op. at 5 & n.5); (*see also* N.T. 11/03/08 at 75:4-5, 157-59), but rejected the contention that Petitioner acted with an unreasonable belief that deadly force was necessary, and instead found the evidence sufficient to convict Petitioner for first degree murder.[4] The evidence could lead a rational fact finder to conclude beyond a reasonable doubt that Petitioner intentionally caused the death of Ward by firing a gun multiple times into Ward's body, that his intent to do so developed in the moments when he reached for the gun, and that he did not act out of the unreasonable belief that the use of deadly force was justified. The only conflict in the evidence Petitioner has identified was that Geiger testified that Petitioner

[4] Any argument Petitioner makes that trial counsel was ineffective for failing to request an instruction on unreasonable belief voluntary manslaughter, (Pet'r's Mem. of Law 20), in addition to being unexhausted and procedurally defaulted, fails on its merits.

pulled the gun from his waist, whereas Ramos testified that Petitioner obtained the gun from another man in the vicinity. (Pet'r's Mem. of Law 19). However, the jury heard this varying testimony, and could have reasonably determined that notwithstanding disagreement among the witnesses as to where Petitioner obtained the gun, his use of the weapon upon the unarmed Ward satisfied the elements of first-degree murder. Accordingly, Petitioner's claim that the evidence was insufficient to support his conviction for first degree murder is meritless.

2. Self-Defense Instruction

Petitioner further asserts within Ground One that he is entitled to habeas relief because the trial court erred in refusing to instruct the jury on self-defense. (Pet'r's Mem. of Law 18, 20). Petitioner argues he was entitled to a self-defense instruction because the evidence, including his own testimony, established that he and Ward were engaged in a fistfight prior to the shooting; Petitioner was badly losing the fight, yet Ward refused to relent; and Petitioner acted out of the reasonable belief he needed to protect himself from imminent serious bodily injury. (*Id.* at 19, 22-23).

Under Pennsylvania law, "[t]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." 18 Pa. Cons. Stat. § 505(a). Where an accused raises the defense of self-defense, the burden is on the Commonwealth to prove beyond a reasonable doubt that the homicide was not a justifiable act of self-defense. *Commonwealth v. Burns*, 416 A.2d 506 (1980). The Commonwealth sustains its burden of disproving self-defense if it establishes at least one of the following: (1) the accused did not reasonably believe that he was in danger of death or serious bodily injury; or (2) the

accused provoked the use of force; or (3) the accused had a duty to retreat and the retreat was possible with complete safety. 18 Pa. Cons. Stat. § 505(b)(2); *see also Commonwealth v. Stonehouse*, 555 A.2d 772, 781 (1989).

As an initial matter, the Commonwealth suggests that the Petitioner has not raised a constitutional challenge to the exclusion of the self-defense instruction, and his claim of state law error is not cognizable on federal habeas review.[5] (Resp. 12). However, Petitioner is *pro se,* and his pleadings must be construed liberally. *See Royce v. Hahn*, 151 F.3d 116, 118 (3d Cir. 1998). For the most part, Petitioner asserts only a violation of state law; however, within the section of his brief discussing the sufficiency of the evidence and the exclusion of the self-defense charge, Petitioner cites to *In Re Winship*, 397 U.S. 358 (1990), for the proposition that "[t]he due process clause protect[s] the accused against a conviction except under proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," and to *Sandstrom v. Montana*, 442 U.S. 510 (1979), which held that jury instructions that suggest a jury may convict without proving each element of a crime beyond a reasonable doubt violate the constitutional rights of the accused, *id.* at 523. (Pet'r's Mem. of Law 16-18). Thus, a liberal reading of Petitioner's submissions to this Court suggests that he attempts to allege violations of both state and federal law with regard to the exclusion of the self-defense instruction. Giving Petitioner every benefit of the doubt, and out of an abundance of caution, the Court will interpret Petitioner's memorandum of law as raising both state and federal law challenges to the decision to exclude the self-defense instruction.

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[5] The Commonwealth construes Petitioner's *pro se* pleadings as raising a claim of trial counsel ineffectiveness for failure to request a self-defense instruction. (Resp. 12). Petitioner's Reply Brief clarifies that this is not his contention. Rather, he states "[trial] counsel was remiss for only requesting self-defense be apart [sic] of the charge and neglect[ing] to include "Mistaken Belief." (Pet'r's Reply Br. 9).

Insofar as Petitioner argues that the trial court erred in refusing to instruct the jury on self-defense, this argument is non-cognizable because the AEDPA restricts federal habeas review of a petition filed by a petitioner to claims based "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Accordingly, "[f]ederal courts reviewing habeas claims cannot 'reexamine state court determinations on state law questions.'" *Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004) (quoting E*stelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *Johnson v. Rosemeyer*, 117 F.3d 104, 109 (3d Cir. 1997) ("The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.") (internal quotation omitted). In this case, the trial court found that it did not err in excluding a self-defense instruction because such an instruction was not supported by the evidence:

> On direct examination, [Petitioner] testified he grabbed the gun from the decedent's waist. He then testified, "So as I grabbed the gun off the waist, we was wrestling some more. I got scared and I shot Mr. Ward." N.T. 11/3/08, 42. On cross examination, [Petitioner] testified after he took possession of the gun, the decedent was unarmed and that [Petitioner] repeatedly shot the decedent allegedly because he was scared. N.T. 11/3/08, 60.

(Phila. Cnty. Com. Pl. Feb. 22, 2010 Dec., slip op. at 5). Thus, the trial court determined that "[a]s a matter of law, the jury had no evidence before it in which it could properly conclude that [Petitioner] reasonably needed to use immediate deadly force then and there in order to avoid death or serious bodily injury at the hands of the decedent." (*Id.*). On appeal, the Pennsylvania Superior Court agreed that the evidence did not support the finding that Petitioner acted in self-defense because:

> [A]t the moment of the shooting, the victim was defenseless and Petitioner had possession of the weapon. Petitioner's testimony established that when he shot [Ward] Petitioner could not have

> actually been in fear of death of serious bodily injury since he, rather than his purported assailant, was in possession of the firearm. Petitioner was, therefore, not justified under § 505 in using deadly force.

(Sup. Ct. Oct. 26, 2010 Dec., slip op. at 6-9) (internal citations omitted). Accordingly, the Superior Court concluded that the trial court did not abuse its discretion in refusing to charge the jury in that respect. (*Id.*). This Court on federal habeas review has no adjudicatory power over the state courts' determination that the evidence did not satisfy the elements of self-defense under state law, and therefore the exclusion of the self-defense instruction was proper.[6]

To the extent Petitioner presently claims that the exclusion of the self-defense instruction violated his federal due process rights, such a claim is unexhausted and procedurally defaulted. As noted, to exhaust this claim, Petitioner would have had to fairly present its factual and legal substance to the state courts through one complete round of review. *O'Sullivan*, 526 U.S. at 845. In this case, Petitioner argued in his 1925(b) Statement of Matters Complained of on Appeal that he was entitled to a new trial because the "Court erred where it failed and refused to give a self-defense, or justification charge, and . . . where said charge was mandatory pursuant to the evidence as [Petitioner] raised the issue of self-defense when he took the stand and testified." (Statement of Matters Complained of on Appeal ¶ 2, SCR No. D9). After the trial court denied that claim on the merits, Petitioner argued to the Superior Court that he was entitled to a new a trial because the trial court refused to charge on self-defense. (Sup. Ct. Oct. 26, 2010 Dec., slip

[6] Even if the state court was incorrect in this application of Pennsylvania law, "[a] federal court may re-examine a state court's interpretation of its own law only where this interpretation 'appears to be an obvious subterfuge to evade consideration of a federal issue . . . .'" *Real v. Shannon*, 600 F.3d 302, 310 (3d Cir. 2010) (quoting *Hallowell v. Keve*, 555 F.2d 103, 107 (3d Cir. 1977)). Because there is nothing in the record to suggest that the Superior Court was attempting "to evade consideration of a federal issue," this Court must accept the Superior Court's conclusion that the trial court's exclusion of the self-defense instruction was consistent with Pennsylvania law.

op. at 3).[7] In light of the foregoing, Petitioner did not present the factual and legal substance of a federal due process claim related to the denial of the self-defense instruction to the state courts in a manner that put them on a notice of such a claim; rather, he exclusively argued that issue as one of trial court error. Accordingly, any claim that the exclusion of the self-defense instruction violated Petitioner's due process rights is unexhausted.

If, at this juncture, Petitioner attempted to obtain review of this claim by returning to state court, such an attempt would be futile because the claim is procedurally defaulted due to expiration of the statute of limitations and waiver of the claim on direct appeal. *See Mason v. Kerestes*, No. 12-4060, 2014 WL 1909358, at *8 (E.D. Pa. May 12, 2014), *certificate of appealability denied* (Feb. 5, 2015). Since it would be futile for Petitioner to return to state court to exhaust this claim, the exhaustion requirement is technically excused; however, a claim deemed exhausted because of the application of state procedural bar — in this case, the statute of limitations and waiver doctrine — is procedurally defaulted. *Lines*, 208 F.3d at 160; *Keller*, 251 F.3d at 415. This Court may not address the merits of a procedurally defaulted claim unless the Petitioner can establish cause and prejudice to excuse his default, or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750. Petitioner has not shown, or even argued, that any of these exceptions apply to his procedurally defaulted claim that the trial court's failure to instruct the jury on self-defense denied Petitioner his due process rights.

[7] Petitioner's appellate brief to the Superior Court is not included in the state court record; accordingly, the Court relies upon the Superior Court's recitation of the claims raised by Petitioner. (Sup. Ct. Oct. 26, 2010 Dec., slip op. at 3). Even if Petitioner presented a due process argument elsewhere in his briefing to the Superior Court, *see McCandless*, 172 F.3d at 261 (explaining that a claim can be fairly presented, *inter alia*, by citation to pertinent federal case law), the claim would not be exhausted since it was not initially raised in Petitioner's 1925(b) Statement to the trial court.

Accordingly, the Court finds Petitioner is not entitled to habeas relief on Ground One, and respectfully recommends that it be denied.

B. Ground Two

Next, Petitioner contends that the trial court erred when it admitted into evidence a letter that Petitioner wrote and sent to his friend J.R. while Petitioner was incarcerated and awaiting trial in this case. (Pet'r's Mem. of Law 23-29). In the letter, Petitioner included several witness statements, together with the following note:

> What's the deal my n ....? Here are those statements you asked for and make sure a man sees them. I want ya'll to expose these n..... and if ya'll put the paperwork out there may sure ya'll cross my info out[.] I don't need them n..... snitchin on me some more. Also they pushed my court date back from May 12th to October 27th so ya'll got time to handle that situation for me and do it right.

(Phila. Cnty. Com. Pl. Feb. 22, 2010 Dec., slip op. at 6). Petitioner contends that the trial court should have precluded the letter pursuant to Pennsylvania Rule of Evidence 404(b), because the letter reflected Petitioner's lawful attempt to investigate his case and develop evidence that witnesses were lying about his involvement. (Pet'r's Mem. of Law 25-26). Additionally, Petitioner argues that the letter should have been precluded because any probative value was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. (*Id.* at 27-28) (citing Pa. R. Evid. 401, 403).

As the Commonwealth points out, (Resp. 12-14), Petitioner's claim that the trial court erred in admitting the letter under Pennsylvania Rule of Evidence 404(b) is not cognizable on federal habeas review because Petitioner does not assert a constitutional claim. In his *pro se* habeas petition, Petitioner alleges that the introduction of the letter was "improper" under Rule 404(b). (Pet'r's *pro se* Hab. Pet. ¶ 12(e)). The text of his argument contained in his habeas

memorandum of law refers only to state court decisions and treatises on evidence. (Pet'r's Mem. of Law 23-29). As explained above, the AEDPA restricts federal habeas review of a petition filed by a petitioner to claims based "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Claims based on errors of state law are not cognizable on federal habeas review. *See Estelle*, 502 U.S. at 67–68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state law questions."); *Gilmore v. Taylor*, 508 U.S. 333, 348-49 (1993) ("mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas"); *Wells v. Petsock*, 941 F.2d 253, 256 (3d Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992) ("Our review of a federal habeas corpus petition is limited to remedying deprivations of a petitioner's federal constitutional rights."). Accordingly, because Ground Two asserts only a violation of state evidentiary rules, Petitioner has not alleged a cognizable claim for federal habeas relief.

Petitioner further claims that trial counsel was ineffective for failing object to the admission of the letter or for failing to seek a curative instruction. (Pet'r's Mem. of Law 28; Pet'r's Reply Br. 10). The Commonwealth does not directly respond to this contention, but the Court finds this argument to be unexhausted and procedurally defaulted because Petitioner did not raise this claim of counsel error before the state courts. In his *pro se* PCRA petition and accompanying memorandum of law, Petitioner argued that trial counsel was ineffective for failing to contend that Petitioner's confrontation clause rights were denied when a police officer testified to a report authored by a different officer and that the jury was not impartial after an *ex parte* communication by Petitioner's brother. (Mem. of Law in Supp. of Pet'r's PCRA Pet. 3-4,

SCR No. D14). In his response to the Court's Rule 907 notice of intent to dismiss, Petitioner additionally alleged that trial counsel was ineffective for failing to seek a curative instruction based on statements made by Petitioner's brother to the jury, and that PCRA counsel was ineffective for failing to set forth a claim of trial counsel ineffectiveness predicated on the failure to press an alleged *Brady* violation. (Pet'r's Reply to Notice ¶¶ 2, 3, SCR No. D16). PCRA counsel filed two *Finley* letters explaining that these claims were without merit. Accordingly, this claim of trial counsel ineffectiveness for failing to object to the introduction of the letter was never presented to the state courts, and is unexhausted and procedurally defaulted. This Court may not review the merits of this portion of Ground Two unless Petitioner demonstrates cause and prejudice to excuse his default of this claim, or that a fundamental miscarriage of justice would arise.

In his Reply Brief, Petitioner generally invokes *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012). (Pet'r's Reply Br. 7). In *Martinez*, the Supreme Court recognized that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for prisoner's procedural default of a claim of ineffective assistance at trial" under certain narrow circumstances. 132 S.Ct. at 1315. Where state law requires a prisoner to raise claims of ineffective assistance of trial counsel in a collateral proceeding, rather than on direct review, a procedural default of those claims will not bar their review by a federal habeas court if three conditions are met: (a) the default was caused by ineffective assistance of post-conviction counsel or the absence of counsel; (b) counsel was ineffective in the initial-review collateral proceeding, i.e., the first collateral proceeding in which the claim could be heard; and (c) the underlying claim of trial counsel ineffectiveness is "substantial," meaning "the claim has some

merit," analogous to the substantiality requirement for issuance of a certificate of appealability. *Martinez*, 132 S. Ct. at 1318-20.

Petitioner's argument with respect to the applicability of *Martinez* to provide cause for the default of this claim of ineffective assistance of counsel is not entirely clear. Petitioner asserts that *Martinez* gives the Court "jurisdiction on the claim of [C]ollateral attack nullifying the elements of 28 U.S.C. § 2254(i)." (Pet'r's Reply Br. 7) (alterations in original). 28 U.S.C. § 2254(i) provides that ineffective assistance of post-conviction counsel is not a substantive ground for habeas relief under the AEDPA. Thus, Petitioner appears to be relying on *Martinez* not to excuse his default of the ineffective assistance of counsel claim set forth in Ground Two, but to contend that the Court should consider the ineffectiveness of PCRA counsel as its own substantive claim entitling Petitioner to habeas relief. This misconstrues the narrow holding of *Martinez*, which allows for consideration only of a defaulted claim of ineffective assistance of trial counsel, and in no way implicates 28 U.S.C. § 2254(i).

In any event, *Martinez* does not offer cause to excuse the default of this claim of ineffective assistance of counsel for failure to object to admission of the letter because that claim is not substantial. The record reflects that counsel did challenge the admission of this evidence. In particular, counsel argued that the trial court should not admit the letter because there was nothing in the letter that suggested an attempt to intimidate the witnesses. (N.T. 10/29/08 at 4-6). The Court admitted the letter over trial counsel's objection, explaining that his argument went to weight, not admissibility. (*Id.* at 6). Because this claim of trial counsel ineffectiveness for failing to object is without merit, PCRA counsel is also not ineffective for failing to raise this argument on PCRA appeal. *See Real*, 600 F.3d at 310 (counsel cannot be ineffective for failing

to raise a meritless claim). Accordingly, the Court finds this claim to be procedurally defaulted, and that *Martinez* does not offer cause to excuse this default.

For these reasons, I recommend that the claim of trial court evidentiary error asserted in Ground Two be denied as non-cognizable, and that the related claim of ineffective assistance of counsel be denied as procedurally defaulted.

C. Ground Three

In this third claim for relief, Petitioner argues that the trial court erred by not granting his request for a mistrial, resulting in a violation of his rights under "Article I § 9 of the Constitution of the commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States." (Pet'r's Mem. of Law 29-33). Petitioner contends that he was entitled to a mistrial following improper comments made by his brother in the presence of the jury. (Pet'r's Mem. of Law 29). Specifically, Petitioner's brother said "not guilty" as a juror was passing by. (*Id.*) (citing N.T. 10/30/08 at 234-35). Other jurors then became aware that this comment had been made. (*Id.* at 29-30) (citing N.T. 10/30/08 at 246, 256, 262, 266-68). Petitioner acknowledges that the jurors were colloquied over this incident, but contends that the trial court erred in not granting the mistrial because several jurors stated the comment made them feel uncomfortable. (*Id.* at 30, 31). The Commonwealth responds that this claim is procedurally defaulted, non-cognizable, and meritless. (Resp. 14-16).

I agree that this claim is non-cognizable. Petitioner argues that the trial court abused its discretion in denying his motion for a mistrial, exercised judgment that was "manifestly unreasonable," and misapplied the law. (*Id.*). The only reference to a federal right is Petitioner's allegation in the heading of this section of his memorandum of law, when he cursorily states that

he was denied his Sixth Amendment rights because the jury was not fair or impartial following this comment. (Pet'r's Mem. of Law 29). However, this alleged Sixth Amendment violation is not explained or developed anywhere in Petitioner's briefing or *pro se* habeas petition. Rather, Petitioner exclusively invokes Pennsylvania law and centers his claim for relief on the contention that the trial court abused its discretion in denying his motion for a mistrial. "Habeas claims which rely exclusively upon state law in asserting error in a state court's evidentiary ruling, like any other assertion of state court error in the application of state law, are not cognizable on habeas review." *Israel v. Lawler*, No. 08-4175, 2009 WL 805138, 6 n. 12 (E.D. Pa. March 19, 2009). Accordingly, I find that Petitioner has not raised a cognizable claim for relief in Ground Three. *See, e.g.*, *Wallace v. Wydner*, No. 05-6197, 2010 WL 173598, at *6 (E.D. Pa. Jan. 15, 2010) (citation to exclusively state law and American Bar Association standards, along with "singular reference to his inability to get a 'fair trial'" held insufficient to allege a constitutional violation); *Greene v. Palakovich*, 482 F. Supp. 2d 624, 640 n. 15 (E.D. Pa. 2007), *aff'd*, 606 F.3d 85 (3d Cir. 2010), *aff'd sub nom. Greene v. Fisher*, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011) (petitioner failed to raise cognizable due process claim, where he "cites no cases which rely upon the Due Process Clause and, except for one, brief mention of his constitutional right to a fair trial, the rest of this section of his brief is devoted to explaining why, under state law, the trial judge erred in admitting any evidence concerning the . . . robbery.")

Given that Petitioner fails to state a federal claim in terms of a constitutional violation and that a federal habeas court must limit its review to issues of federal law, this Court may not review a claim arising under an alleged violation of state law. *See Estelle*, 502 U.S. at 67-68.

Accordingly, I respectfully recommend that Petitioner's claim for habeas relief because the trial court erred in denying his motion for a mistrial be denied as non-cognizable.

D. Ground Four

In Ground Four, Petitioner asserts that that the trial court erred in refusing to grant a mistrial based on the prosecutor's remarks during closing argument. (Pet'r's Mem. of Law 33). The Commonwealth responds that the claim of trial court error is non-cognizable, and any constitutional claim Petitioner presents to this Court is procedurally defaulted. (Resp. 16-18). I agree.

The facts underlying this claim are as follows. During his closing argument, the prosecutor told that jury that it could consider a prior verbatim witness statement to be substantive evidence because "the law recognizes that from the time someone gives a statement to homicide detectives until they get in that chair, they can be talked to, the witnesses can be intimidated, and, very frequently, the statement they initially told the police is, indeed, the truth and now, out of fear, they recant while he [sic] is up there on the stand." (N.T. 11/03/08 at 121). Trial counsel objected to this comment, the objection was sustained, and the trial court told the jury that it alone would instruct them on the law regarding prior consistent and inconsistent statements.[8] (*Id.* at 121:21-122:5). Shortly thereafter, the prosecutor reviewed Mr. Velez' statement as against his testimony, and suggested that "what [Velez] told you there on the stand makes perfect sense as of the truth of that statement." (*Id.* at 124:8-11). Trial counsel's objection to this comment was also sustained, and the trial court immediately instructed the jury

[8] The trial court subsequently instructed the jury "to the extent you find that [a] witness's trial testimony was inconsistent with . . . a prior verbatim statement that was adopted by the witness at the time he gave it, you may, if you choose regard this evidence as proof of the truth of anything that the witness said in the earlier prior . . . statement." (N.T. 11/03/08 at 146-47). The court also instructed that the jury could use the prior statement to judge the credibility of the witness at trial. (*Id.*).

"you are the fact-finders. You may consider counsel's argument, but you are the finders of fact and only you make a determination of whether what a witness said is true as to some, all or none of the evidence." (*Id.* at 124:13-21). At the close of the prosecutor's summation, Petitioner's counsel moved for a mistrial based on the prosecutor's statements, which the trial court denied. (*Id.* at 129). Petitioner now contends that the trial court erred in denying his request for a mistrial, because the prosecutor impermissibly vouched for the credibility of Velez' police statement over his trial testimony based on facts not in evidence. (Pet'r's Mem. of Law 34-36).

Insofar as Petitioner argues that the trial court abused its discretion in denying his motion for a mistrial, (Pet'r's Mem. of Law 34-35), this claim is not cognizable on federal habeas review under 28 U.S.C. § 2254(a). The trial court on direct appeal explained that under Pennsylvania law, an abuse of discretion occurs not merely where the trial court has "an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, ill-will . . . ." (Phila. Cnty. Com. Pl. Com. Pl. Feb. 22, 2010 Dec., slip op. at 7) (quoting *Commonwealth v. Simpson*, 754 A.2d 1264, 1272 (Pa. 2000)). The court concluded that it did not abuse its discretion in denying Petitioner's motion for mistrial because the prosecutor's comments did not unavoidably prejudice the jury under state precedent. (*Id.* at 7-8). On appeal, the Superior Court also set forth the state standard for abuse of discretion in denying a mistrial. (Sup. Ct. Oct. 26, 2010 Dec., slip op. at 11-12). Considering Petitioner's argument, the Superior Court found that the trial court had not abused its discretion in Petitioner's case because the prosecutor's comments were not impermissible vouching, and because any prejudice was remedied by the trial court's issuance of prompt, curative instructions, which the jury was presumed to have followed. (*Id.* at

13-14). This Court on federal habeas review has no adjudicatory power over the state courts' determination that, as a matter of state law, the trial court did not abuse its discretion in denying the motion for mistrial. *See Lewis v. Fisher*, No. 11-5035, 2013 WL 2334540, at *9 (E.D. Pa. May 28, 2013) ("A trial court's abuse of discretion is a question of state law and not a federal constitutional claim.")

Before this Court, Petitioner additionally argues that the prosecutor's comments violated his Fourteenth Amendment due process right to a fair trial and his Sixth Amendment right to an impartial jury. (Pet'r's Mem. of Law 34-36) (citing, *inter alia*, *Floyd v. Meachum*, 907 F.2d 34 (2d Cir. 1990) and *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990)). Petitioner did not exhaust these constitutional claims in state court. Again, to satisfy the exhaustion requirement, Petitioner must have fairly presented the factual and legal substance of his federal claims to the state courts through one complete round of state court review. *O'Sullivan*, 526 U.S. at 845. Here, Petitioner argued before the trial court that he "should be awarded a new trial as the result of Court error where it failed and refused to grant a mistrial even though the prosecutor engaged in highly, and unfairly prejudicial closing argument that was contemporaneously objected to." (1925(b) Statement ¶ 4, SCR No. D19). On appeal, the Superior Court stated that the claim before it was whether Petitioner was "entitled to a new a trial as a result of Court error where the Court failed to grant a mistrial in the face [of] egregious prosecutorial misconduct." (Sup. Ct. Oct. 26, 2010 Dec., slip op. at 3). Thus, Petitioner did not argue to the state courts that the prosecutor's comments independently violated his due process or Sixth Amendment rights, but rather argued that the state trial court erred as a matter of state law in denying his motion for

a mistrial.[9] Accordingly, neither constitutional claim asserted in Petitioner's habeas memorandum of law is exhausted under the AEDPA, resulting in a procedural default. *See Lewis*, No. 2013 WL 2334540, at *9 (due process claim not exhausted where petitioner only argued that trial court abused its discretion in denying a mistrial when Commonwealth witness violated a sequestration order); *Hatcher v. Giroux*, No. 14-1022, 2014 WL 9865760, at *2 (E.D. Pa. Oct. 24, 2014), *report and recommendation adopted*, No. 14-1022, 2015 WL 3477655 (E.D. Pa. May 29, 2015) (due process claims not exhausted where petitioner argued on direct appeal that trial court "improperly denied" motion for mistrial or that "motion for mistrial should have been granted). Petitioner has not argued that cause and prejudice excuse his default, or that a fundamental miscarriage of justice would result if the Court were to decline to consider these claims on the merits. Therefore, the Court may not consider the merits of Petitioner's claims that the prosecutor's comments violated his rights arising under the Due Process Clause of the Fourteenth Amendment or the Sixth Amendment.

Accordingly, I respectfully recommend that Petitioner's claim of trial court error be denied as non-cognizable, and his constitutional claims of prosecutorial misconduct in violation of his due process and Sixth Amendment rights be denied as procedurally defaulted.

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[9] It is arguable that Petitioner presented a claim of prosecutorial misconduct to the Superior Court in the context of arguing that the trial court abused its discretion in denying his motion for a mistrial. The Superior Court considered whether the prosecutor's comments amounted to prosecutorial misconduct under *Commonwealth v. Laird*, 988 A.2d 618, 644 (Pa. 2010), and concluded that they did not because they did not "constitute impermissible vouching for the believability of the statement over the testimony." (Sup. Ct. Oct. 26, 2010 Dec., slip op. at 13). Again, the Court does not have access to Petitioner's appellate brief to the Superior Court, and cannot verify whether such a claim may have been exhausted; however, this is of no moment because it is apparent that the claim of prosecutorial misconduct was not presented to the state trial court in the 1925(b) statement, and therefore did not undergo one complete round of state court review.

E. Ineffective Assistance of Counsel Claims (Grounds Five, Six and Seven)

Next, Petitioner raises two claims of ineffective assistance of counsel. He asserts in Ground Six that trial counsel was ineffective for failing to object to Police Officer Nicholas DeNofa's testimony on the basis that it violated his Confrontation Clause rights, (Pet'r's Mem. of Law 41-47); and in Ground Seven that all counsel were ineffective for failing to raise a *Brady* claim relating to witness Emmanuel Ramos, (*id.* at 47-50). Petitioner further asserts in Ground Five that the cumulative errors of counsel must be considered in evaluating his ineffectiveness claims. (*Id.* at 37). The Commonwealth responds that both of Petitioner's ineffectiveness claims were reasonably rejected by the state courts as meritless on PCRA review, and Petitioner's contention that the errors of counsel must be assessed cumulatively does not present a claim for review. (Resp. 19-24).

The clearly established Supreme Court precedent governing ineffective assistance of counsel claims is the two-pronged standard enunciated by *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Under the first *Strickland* prong, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness," with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. *Strickland*, 466 U.S. at 688. Under the second *Strickland* prong, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's error the result would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

When Petitioner presented his ineffectiveness claims on PCRA appeal, the PCRA Court and Pennsylvania Superior Court analyzed the claims under the three-part Pennsylvania test,

which requires the state petitioner to establish the following: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for their action; and (3) the petitioner was prejudiced by the ineffectiveness. (Phila. Cnty. Com. Pl. March 21, 2014 Dec., slip op. at 5) (citing *Commonwealth v. Johnson*, 815 A.2d 563, 573 (Pa. 2002)); (Pa. Super. Ct. Oct. 6, 2014 Dec., slip op. at 5) (internal citations omitted). Petitioner contends that the PCRA Court applied law "contrary to" *Strickland* because it used the Pennsylvania standard. (Pet'r's Mem. of Law 40). However, the Third Circuit has held that Pennsylvania's ineffectiveness test is not contrary to the *Strickland* standard. *See Werts*, 228 F.3d at 203-04. Thus, since the PCRA Court and Superior Court did not apply law contrary to clearly established Supreme Court precedent, Petitioner is entitled to habeas relief only if he can demonstrate that the state courts' denial of his ineffective claims were an unreasonable application of *Strickland*, or involved an unreasonable determination of the facts. As set forth below, he has not made this showing with regard to either of his substantive claims of ineffective assistance of counsel.

1. Ground Six: Failure to Raise Confrontation Clause Argument

Petitioner contends that trial counsel was ineffective for failing to object to the introduction of inadmissible hearsay, which violated the Confrontation Clause of the United States and Pennsylvania Constitutions. (Pet'r's Mem. of Law 41-46). Specifically, Petitioner argues that Officer DeNofa's testimony about the contents of a police report drafted by Officer DeNofa's partner at the crime scene was testimonial hearsay precluded by *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). (*Id.*).

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Under *Crawford* and its progeny, evidence may be inadmissible under the Confrontation Clause where it is (1) hearsay, (2) by an unavailable declarant not previously subject to cross-examination by the defendant, and (3) a "testimonial" statement. *See United States v. Price*, 458 F.3d 202, 209 n.2 (3d Cir. 2006) (citing *Davis v. Washington*, 547 U.S. 813 (2006)). To be "testimonial," a statement must be the product of either a police investigation or comparable circumstances intended "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822; *see also Bullcoming*, 131 S.Ct. at 2714 n.6 (testimonial statements are those that "have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.") (alteration in original, citation omitted). In subsequent cases applying *Crawford*, the Supreme Court has held that scientific reports were testimonial in nature and were inadmissible as substantive evidence against the defendant unless the analyst who prepared the report was confronted. *See Melendez-Diaz*, 557 U.S. at 310 (certificate of analysis identifying substance as cocaine); *Bullcoming*, 131 S. Ct. at 2710-12 (forensic report certifying blood-alcohol level).

Petitioner raised his *Crawford* claim in the context of an ineffective assistance of counsel claim in his PCRA proceedings. In addressing the merits of this claim, the PCRA Court and Superior Court both discussed federal Confrontation Clause jurisprudence. (Phila. Cnty. Com. Pl. March 21, 2014 Dec., slip op. at 6); (Pa. Super. Ct. Oct. 6, 2014 Dec., slip op. at 5-6). The PCRA Court found that counsel acted reasonably in failing to object to Officer DeNofa's

testimony about the report in question — a "75-48" preliminary report, which is produced whenever police respond to a crime scene — because, even though Officer DeNofa did not physically prepare the 75-48, he testified that it was filled out in his presence, he was present at the crime scene, and he was involved in gathering the facts contained in the report. (Phila. Cnty. Com. Pl. March 21, 2014 Dec., slip op. at 6) (citing N.T. 10/30/08 at 9, 11, 17-18). On appeal, the Superior Court noted that Petitioner had not presented any argument as to whether counsel may have had a reasonable basis for failing to object, which was fatal to his ineffectiveness claim. (Pa. Super. Ct. Oct. 6, 2014 Dec., slip op. at 6-7). Additionally, and in the alternative, the Superior Court explained that Petitioner had failed to demonstrate prejudice from counsel's failure to object because:

> The report in question is entitled "Complaint or Incident Report," and is referred to at trial as a "75-48." N.T. 10/30/08, at 13; Commonwealth's Exhiibt C-16. It includes general information, including the location of the alleged crime, the date of its occurrence, and a description of the incident – here, the shooting of the victim. Commonwealth's Exhibit C-16. It also included a general description of two possible suspects: "#1 6'00"[,] 150[,] med. compl.[,] clean shaven[,] white t-shirt, dark shorts[.] Def #2 5'8"-6'0"[,] clean shaven[,] white t-shirt, blue shorts." *Id.* Though [Petitioner] claims that the description of the potential suspects was prejudicial, the record reflects that [Petitioner] testified at trial and admitted that he shot the victim, claiming that he did so because he believed he saw the victim reaching for a gun, and [Petitioner] grabbed the gun from the victim's waistband and shot him instead. N.T. 11/3/08, at 41-42. As [Petitioner] admitted that he was the person that shot the victim, Officer DeNofa's testimony regarding a description of the shooter was not prejudicial.

(*Id.* at 7) (alterations in original). Accordingly, the Superior Court denied Petitioner's ineffectiveness claim under the prejudice prong of *Strickland.* (*Id.*).

Petitioner has not demonstrated that the Superior Court's determination involved an unreasonable application of *Strickland*, or rested upon an unreasonable determination of the facts. At trial, Officer DeNofa testified:

> Q: Officer, let me ask do you, do you recognize that?
>
> A: Yes, I do, Sir.
>
> Q: What exactly is it?
>
> A: It's a 75-48. This is an incident report of the initial job.
>
> Q: Now, just so we're clear, could you explain to the jurors exactly what a 75-48 is?
>
> A: Yes, I can. Any time police respond to a job, whether it's in reference to a shooting [or] any type of police incident, we do prepare this report. This is the initial report of --- it's a preliminary report that we take for the initial job.
>
> Q: . . . Just so I'm clear, this would be a page from . . . a little pad that we see officers with around on the street, is that correct?
>
> A: That's correct, Sir.
>
> . . .
>
> Q: Now, if we could scroll down to the middle section. Now, this would be a brief synopsis that you write in, correct?
>
> A: That's correct, Sir.
>
> Q: What did either you or your partner report there?
>
> A: This report was prepared by Officer Crawford in my presence.
>
> Police responded to a radio call of a shooting at the above location and found at above [sic] lying on the curb line suffering from three gunshot wounds; two to the chest and one to the leg.

Q: Now, under "Offender Information" could you explain what that is?

A: Yes, Sir. . . . [W]e try to get information as soon as we can from either a complainant, witnesses, and that would go in that block there for the offender right here (indicating).

And what that does is it just gives us where we can go back to for any information that we received from either the complainant or the witnesses. And that information would go in that box.

Q: What information, exactly, did you record here and for how many people?

A: The Information Offender block is two black males, 20 to 21 years of age; male number one was approximately 6-foot, 150 pounds, medium complexion, clean-shaven, white T-shirt, dark shorts.

. . . the second person, he would have been - - he would have been approximately 5'8" to 6-foot, clean shaved, light complected [sic], white T-shirt, blue shorts.

(N.T. 10/30/08 at 12-17). When he testified, Petitioner admitted that he was present at the crime scene and that he shot Ward. Thus, Petitioner has failed to demonstrate that there is a reasonable probability of a different result at trial had counsel objected to Officer DeNofa's testimony on confrontation grounds. Petitioner presently argues that "there was no way" he was not prejudiced by Officer DeNofa's testimony about the report, (Pet'r's Reply Br. 14), but he fails to further elaborate or to explain how the Superior Court's reasoning was an unreasonable application of *Strickland*. Accordingly, Petitioner has failed to carry his burden to show entitlement to relief as to this claim under the AEDPA.

I respectfully recommend that this claim of ineffective assistance of counsel be denied as meritless.

2. Ground Seven: Failure to Raise *Brady* Claim

Petitioner next contends that the Commonwealth committed misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that that Emmanuel Ramos, a testifying witness, was promised leniency on an unrelated criminal case in another county in return for his testimony in Petitioner's trial, and that trial and PCRA counsel were ineffective for failing to raise and litigate this issue. (Pet'r's Mem. of Law 47-51).

Before the Court addresses the specifics of this ineffectiveness claim, it will briefly review the standards used to evaluate a "*Brady* claim." A violation of *Brady* occurs when the government fails to disclose evidence materially favorable to the accused, including both impeachment evidence and exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). There are three components of a *Brady* violation: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or it had impeachment value; (2) the prosecution suppressed the evidence, either willfully or inadvertently; and (3) the evidence was material. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Lambert*, 387 F.3d at 252 (citing *Banks v. Dretke*, 540 U.S. 668 (2004)). A movant demonstrates the materiality of suppressed evidence by showing a "reasonable probability of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). In turn, "a reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.*

Petitioner raised his *Brady* claim in the context of an ineffective assistance of counsel claim in his PCRA proceedings. The Superior Court of Pennsylvania, affirming dismissal of petitioner's PCRA petition, rejected this claim as follows:

> The record reflects that when the Commonwealth called Ramos to testify, the first questions the prosecutor asked him surrounded his incarceration in Montgomery County for pending criminal charges and the Commonwealth's offer to make his cooperation in the case at bar known to the judge hearing his pending case. N.T. 10/29/08 at 192-93. Ramos agreed and testified that there were no deals or promises made in return for his testimony. *Id.* at 193. At the conclusion of his direct testimony, counsel for [Petitioner] cross-examined Ramos extensively about his incarceration in Montgomery County and the nature of the Commonwealth's promise. *Id.* at 216, 218-19. Trial counsel further questioned Ramos about an outstanding warrant for his arrest in Philadelphia County, a recent probation violation, and his criminal history, including an adjudication of delinquency in 2000. *Id.* at 216-18, 220-21.
>
> Thus, as the PCRA court found, the record does not support a finding that the Commonwealth failed to disclose to trial counsel that Ramos was incarcerated or the nature of its offer in exchange for Ramos' testimony. Even if the Commonwealth withheld that information prior to trial, we cannot say that any prejudice ensued, as counsel thoroughly and extensively cross-examined Ramos on this issue, bringing it before the jury for its consideration. In short, there is not support in the record that a *Brady* violation occurred, rendering [Petitioner's] claim meritless. Thus, neither trial nor appellate counsel can be found to have rendered ineffective assistance on this basis.

(Pa. Super. Ct. Oct. 6, 2014 Dec., slip op. at 10-12).

Petitioner has failed to demonstrate that the Superior Court's adjudication of this claim was an unreasonable application of *Strickland*, or rested on an unreasonable determination of the facts. A *Brady* violation does not occur unless the defendant suffered prejudice, *i.e.*, there is a reasonable probability that the suppressed evidence would have produced a different verdict. *Strickler*, 527 U.S. at 281. Here, Petitioner failed to prove the prejudice prong of the *Brady* standard. The Superior Court, citing to *Brady* and applying the same standard set forth in *Brady*, concluded that the outcome of Petitioner's trial would not have been any different had trial counsel possessed additional or prior knowledge of the agreement between Ramos and the

Commonwealth, because counsel was nonetheless able to "thoroughly and extensively cross-examined Ramos on this issue, bringing it before the jury for its consideration." (Pa. Super. Ct. Oct. 6, 2014 Dec., slip op. at 11-12). Petitioner does not challenge, or even address, this finding. Since the underlying *Brady* claim was meritless, counsel cannot be found to be ineffective for failing to raise a meritless claim.[10] Accordingly, the Superior Court's conclusion that trial counsel was not ineffective was not an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Therefore, I respectfully recommend that this claim of ineffective assistance of counsel be denied.

3. Ground Five: Cumulative Errors of Counsel

Petitioner's last claim of ineffective assistance of counsel is that "cumulative errors of counsel 'must' be considered in evaluating the ineffective assistance of counsel." (Pet'r's Mem. of Law 37). The Commonwealth responds that Petitioner has failed to present a claim for review. (Resp. 19). I agree.

The sum total of Petitioner's argument is citation to two cases from outside this Circuit. First, Petitioner cites to *Sanders vs. Ryder*, 342 F.3d 991 (9th Cir. 2003), for the proposition that in evaluating claims of ineffective assistance of counsel under *Strickland*, the Court must consider "all aspects of counsel's performance at different stages" and analyze them together "to see whether their cumulative effect deprived the defendant of his right to effective assistance of

[10] To the extent Petitioner argues that PCRA counsel was ineffective in failing to raise a *Brady* claim, this claim must be denied as not cognizable in a federal habeas proceeding. *See* 28 U.S.C. § 2254(i) (ineffective assistance of state post-conviction counsel is not ground for federal habeas relief).

counsel," *id.* at 1000. Additionally, Petitioner cites to *Linstadt vs. Keane*, 239 F.3d 191 (2d Cir. 2001), to argue that *Strickland* requires the Court to look at the totality of the evidence to determine if errors in the aggregate had such a pervasive effect that it "alter[ed] the evidentiary picture," *id.* at 199. Petitioner has not articulated any facts relating the quoted cases to the issues in his own case. Accordingly, Petitioner has failed to explain how the cumulative errors of counsel might entitle him entitle him to federal habeas relief.

In any event, habeas relief is not merited on this claim of cumulative error. The Third Circuit Court of Appeals has explained the cumulative error doctrine as follows:

> The cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so undermined the verdict as to constitute a denial of his constitutional right to due process. *See Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) (holding that petitioner could not show that the cumulative prejudice of trial errors "undermined the reliability of the verdict"). Specifically, the Third Circuit has said that:
>
> > Individual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process. Cumulative errors are not harmless if they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish actual prejudice.
>
> *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008) (internal quotation marks omitted) (citations omitted).

Collins v. Sec'y of Pa. Dep't of Corrs., 742 F.3d 528, 542 (3d Cir. 2014); *see also United States v. Ware*, 2013 WL 6283955, at *7 (E.D. Pa. Dec. 2, 2013) ("'[A] cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore

not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.'") (quoting *Albrecht*, 485 F.3d at 139); *see also Saget v. Bickell,* 2014 WL 4992572, at *24–*25 (E.D. Pa. Oct. 6, 2014) (same).

Here, the state court concluded, and this Court agrees, that none of Petitioner's claims of ineffective assistance of counsel have merit. The cumulative error doctrine requires the existence of "errors" to aggregate. Absent such errors by counsel, the cumulative error doctrine does not apply. *See Saget*, 2014 WL 4992572, at *25 (when counsel's performance was not deficient under the first prong of *Strickland*, there is no need to look to prejudice in the aggregate) (citations omitted); *Williams v. Sup't, SCI Greene*, 2012 WL 6057929, at *2 (E.D. Pa. Dec. 4, 2012) (because only one ineffectiveness claim had merit, there was nothing to aggregate). Accordingly, Petitioner is not entitled to relief even when the errors of counsel are assessed cumulatively.[11]

IV. CONCLUSION

As fully explained herein, I conclude that Petitioner's petition for writ of habeas corpus should be **DENIED** and no certificate of appealability should issue.[12]

---

[11] The Court notes that in *Collins*, the Third Circuit held that a claim of cumulative error must be exhausted in the state courts before it may provide a basis for habeas relief. *Collins*, 742 F.3d at 543. However, Petitioner argues that he was unable to bring a cumulative error claim because Pennsylvania refused to recognize cumulative error as a basis for relief on a claim of ineffective assistance of counsel at the time of his PCRA petition. (Pet'r's Reply 16-17). Rather than consider this contention, the Court has opted to address the merits of this unexhausted claim as it is permitted to do pursuant to 28 U.S.C. § 2254(b)(2). *See Roman v. DiGuglielmo*, 675 F.3d 204, 209 (3d Cir. 2012) (explaining that under 28 U.S.C. § 2254(b)(2), a federal court "may bypass the exhaustion issue altogether should [it] decide that the petitioner's habeas claim fails on the merits.")

[12] Petitioner has failed to show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," or that jurists of reason would

Therefore, I make the following:

find this Court's procedural rulings debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, I recommend that no certificate of appealability be issued.

RECOMMENDATION

AND NOW this 3RD day of June, 2016, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without the issuance of a certificate of appealability.

Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

Lynne A. Sitarski

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

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

EDWIN APONTE,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	
	:	
JAMES ECKARD, *et al.*,	:	**NO. 15-561**
Respondents.	:	

ORDER

AND NOW, this day of , 2016, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for a writ for habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

LAWRENCE F. STENGEL, J.

APPENDIX D

[redacted]
APPENDIX D

FILED FEB 03 2017

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

EDWIN APONTE,	:	
	:	
Petitioner,	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 15-561**
JAMES ECKARD, et al.,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this 2nd day of February, 2017, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the thorough and well-reasoned Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, **IT IS HEREBY ORDERED** that:

ENTERED
FEB 03 2017
CLERK OF COURT

1. Upon *de novo* review, petitioner's objections are **OVERRULED**;

2. The report and recommendation is **APPROVED** and **ADOPTED**;[1]

---

[1] Petitioner Edwin Aponte brings this *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On June 3, 2016, United States Magistrate Judge Lynne A. Sitarski issued a Report and Recommendation, recommending that the petition be dismissed. Petitioner filed Objections to the Report and Recommendation on September 8, 2016. For the following reasons, I will overrule the Objections, approve and adopt the Report and Recommendation, and dismiss the petition with prejudice without an evidentiary hearing.

I will review *de novo* the portions of the Report and Recommendation to which petitioner objects and I may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Petitioner makes several objections, which I will address in turn.

First, Petitioner argues that his conviction for murder in the first degree was not supported by substantial evidence and that the Commonwealth did not prove its case beyond a reasonable doubt. (Pet.'s Written Objections to the Rep. & Rec. 4 [hereinafter Objections]). Petitioner's objection to Judge Sitarski's well-reasoned and thorough discussion of this claim is overruled.

Petitioner next objects to Judge Sitarski's finding that (1) his claim that a self-defense

3. The petition for a writ of habeas corpus is **DISMISSED** with prejudice;

4. A certificate of appealability **WILL NOT ISSUE**; and

5. The Clerk is directed to mark this case **CLOSED**.

BY THE COURT

LAWRENCE F. STENGEL, J.

---

instruction should have been given to the jury is procedurally defaulted, and (2) that none of the exceptions apply such that the claim may nonetheless be considered. This objection is also overruled for the same reasons stated in the Report and Recommendation.

In petitioner's next objection, he misunderstands that, with respect to ground two of the petition, Judge Sitarski made two distinct findings: first, that petitioner's claim that the trial court erred in admitting a letter into evidence is not cognizable on federal habeas review because it asserts only a violation of state evidentiary rules; and second, that petitioner's claim of ineffective assistance of counsel for failure to object to the admission of the letter or to seek a curative instruction is procedurally defaulted and that petitioner has not shown cause and prejudice to excuse the default. Accordingly, this objection is overruled.

Next, petitioner asserts that he should have been granted a new trial because his brother made improper comments in the presence of the jury. The Report and Recommendation correctly points out that a federal habeas court may not review a claim arising under an alleged violation of state law and that therefore this claim is non-cognizable. Thus, this objection is also overruled.

Petitioner's objection to Judge Sitarski's recommendation with respect to ground four is also overruled. The Report and Recommendation thoroughly explained why Petitioner's claim regarding the prosecutor's statements at closing is non-cognizable and that his constitutional claims regarding his due process and Sixth Amendment rights are procedurally defaulted.

Petitioner also objects to Judge Sitarski's recommendation as to his claims of ineffective assistance of counsel, in which he asserts that his trial counsel was ineffective for failing to object to a police officer's testimony on Confrontation Clause grounds, that all of his counsel were ineffective for failing to raise a claim pursuant to Brady v. Maryland as to witness Emmanuel Ramos, and that his ineffectiveness claims should be evaluated by taking into consideration the cumulative errors of counsel. Judge Sitarski thoroughly addressed each of Petitioner's claims and explained why the claims of ineffective assistance of counsel should be denied. Accordingly, Petitioner's objections as to grounds five, six, and seven are overruled.

APPENDIX E

APPENDIX E

DLD-310 July 20, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-1522**

EDWIN APONTE, Appellant

VS.

SUPERINTENDENT SMITHFIELD SCI, ET AL.

(E.D. Pa. Civ. No. 2-15-cv-00561)

Present: CHAGARES, VANASKIE, and KRAUSE, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

in the above-captioned case.

Respectfully,

Clerk

MMW/AS/kr

ORDER

The foregoing application for a certificate of appealability is denied. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jurists of reason would not disagree that Aponte's claims that state post-conviction counsel provided ineffective assistance and that the state court erred in its evidentiary rulings are not cognizable on habeas review. See 28 U.S.C. § 2254(i); Estelle v. McGuire, 502 U.S. 62, 67 (1991). Jurists of reason would not disagree that the trial court's refusal to instruct the jury on self-defense did not constitute a Due Process violation. Cupp v. Naughten, 414 U.S. 141, 147 (1973); Albrecht v. Horn, 485 F.3d 103, 129 (3d Cir. 2007). Jurists of reason would not disagree that Aponte's constitutional rights were not violated when the trial judge declined to grant a mistrial based on Aponte's brother's comment to a juror or based on the prosecutor's closing argument. Darden v. Wainwright, 477 U.S. 168, 181 (1986); United States v. Vega, 285 F.3d 256, 266 (3d Cir. 2002). Aponte has not arguably shown that no rational juror could

have convicted him based on the evidence presented at trial. Jackson v. Virginia, 443 U.S. 307, 319 (1979). For substantially the reasons provided by the District Court, Aponte has not arguably shown that trial or appellate counsel performed deficiently. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Finally, Aponte has not arguably shown that cumulative errors justify relief. Collins v. Sec'y of Pa. Dep't of Corr., 742 F.3d 528, 542 (3d Cir. 2014).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: August 30, 2017

kr/cc: Edwin Aponte
Jennifer O. Andress, Esq.

A True Copy
Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

APPENDIX F

APPENDIX [redacted] F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1522

EDWIN APONTE,
Appellant

v.

SUPERINTENDENT SMITHFIELD SCI;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-15-cv-00561)
District Judge: Honorable Lawrence F. Stengel

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, and RESTREPO, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: October 19, 2017

kr/cc: Edwin Aponte
Jennifer O. Andress, Esq.

Additional material from this filing is available in the Clerk's Office.