No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

.....♦.....

**STEVEN LAZAR,**
***Petitioner,***
**vs.**
**SUPERINTENDENT OF FAYETTE SCI et al**
***Respondent(s)***

.....♦.....

**JOINT APPENDIX**

► Appendage "A" — Lazar v. Superintendent Fayette SCI, 2018 U.S. App. LEXIS 10311 (3d Cir. 2018) (Ambro, Restrepo, and Fuentes.)

► Appendage "B" — Lazar v. Superintendent Fayette SCI, No. 17-1491 (3d Cir. August 3, 2018) (Petition for Rehearing denied).

► Appendage "C"— Lazar v. Coleman, 2017 U.S. Dist. LEXIS 28564 (E.D. Pa., Mar. 1, 2017). Judge Gerald McHugh

► Appendage "D"— Lazar v. Coleman, 2016 U.S. Dist. LEXIS 13789 ( E.D. Sept. 29, 2016) Report and Recommendation. Judge Faith Angell

Appendage "A"

**STEVEN LAZAR, Appellant v. SUPERINTENDENT FAYETTE SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA**
**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**
**2018 U.S. App. LEXIS 10311**
**No. 17-1491**
**February 21, 2018, Argued**
**April 24, 2018, Filed**

**Notice:**

**NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.**

**Editorial Information: Prior History**

On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. No. 2-14-cv-06907). District Judge: Honorable Gerald A. McHugh.Lazar v. Coleman, 2017 U.S. Dist. LEXIS 28564 (E.D. Pa., Mar. 1, 2017)

**Counsel** For Appellant: Jules Epstein, Kairys, Rudovsky, Messing & Feinberg, LLP, Philadelphia, PA.

For Appellee: John W. Goldsborough, Max C. Kaufman, Susan E. Affronti, Ronald Eisenberg, John Delaney, Kelley B. Hodge, Philadelphia County Office of District Attorney, Philadelphia, PA.

**Judges:** Before: AMBRO, RESTREPO, FUENTES, Circuit Judges.

**CASE SUMMARY**Where the state post-conviction court found that defense counsel performed deficiently, but that defendant was not prejudiced under Strickland, the state court's application of the prejudice prong of Strickland did not involve an unreasonable application of Strickland under 28 U.S.C.S. § 2254(d)(1).

**OVERVIEW:** HOLDINGS: [1]-Where the state post-conviction court found that defense counsel performed deficiently, but that defendant was not prejudiced under Strickland, the state court's application of the prejudice prong of Strickland did not involve an unreasonable application of Strickland under 28 U.S.C.S. § 2254(d)(1).

**OUTCOME:** Judgment affirmed.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act***
***Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Contrary & Unreasonable Standard > Clearly Established Federal Law***
***Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law***

***Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application***

The Antiterrorism and Effective Death Penalty Act limits the ability of a federal court to grant habeas corpus relief to a petitioner based upon a federal constitutional claim that was adjudicated on the merits in state court. 28 U.S.C.S. § 2254(d). Under § 2254(d), habeas relief shall not be granted unless the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Under § 2254(d)(1), a state court decision involves an unreasonable application if the court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests***

Under Strickland, prejudice is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome.

**Opinion**

**Opinion by:** RESTREPO

**Opinion**

OPINION*

RESTREPO, Circuit Judge.

Appellant Steven Lazar was convicted by a Pennsylvania jury of second degree murder. The District Court denied his petition for a writ of habeas corpus. We will affirm.

**I**

**A**

In January 2007, an elderly man, Dario Gutierrez, was killed in his home. Gutierrez's daughter discovered her father's body and observed that his keys and wallet were missing. Police officers observed that drawers appeared ransacked and that there was a gold chain on the floor. The police, however, neglected to process the victim's yard as part of the crime scene.

In April 2007, the victim's daughter returned to her father's home, found a suitcase in the yard, and contacted the police. The suitcase contained Lazar's identification and other personal items. In July 2007, the police questioned Lazar, who admitted that the suitcase was his. He told the police that he had been using drugs with someone named "John" who took the suitcase and, in turn, gave it to an older man to hold. The police released Lazar with the suitcase.

Lazar then told his roommate, Russell Angely, that he had been questioned by the police and confessed to Angely that he committed the murder. In November 2007, Lazar and Angely got into a fight. Angely called the police and informed them that Lazar had confessed to murder. Lazar also confessed to four other civilian witnesses. All five civilian witnesses testified at trial, although Lazar

challenged their credibility. Two of these witnesses also testified to seeing Lazar with weapons, such as hatchets, consistent with the murder weapon.

On the morning of November 19, 2007, the police arrested Lazar on a bench warrant and questioned him about the murder. At around 7:30 p.m., Lazar gave his second statement to the police. He said that he had been using drugs with John when John left, armed with a hatchet, to recover a debt allegedly owed by the victim. Lazar told the police that he later entered the victim's house where he saw the victim dead and John, covered with blood, ransacking the drawers.

The police held Lazar overnight. He gave a third and final statement to the police the next day, November 20, 2007, from 2:45 to 4:20 p.m. This time, Lazar confessed that he was present when John struck the victim with the hatchet; that Lazar himself struck and punched the victim; that John took the victim's wallet and searched his drawers; and that Lazar accepted money from John.1

Around 10:00 p.m. that night, the police took Lazar to a hospital emergency room after he reported pain while urinating. At the hospital, Lazar complained of shaking leg pain, stomach pain, dizziness, nausea, diarrhea, and stated that he was suicidal. Lazar was examined by a doctor in the psychiatric department, who found that Lazar was "irritable and cooperative," that his "thought process was goal directed," that he was "oriented and expressed suicidal ideation but had no plans," and that his "insight and judgment were fair." State Court Record 399 (quotation marks omitted). Lazar also tested positive for cocaine, marijuana and benzodiazepine. He was given a low dose of medication prescribed for withdrawal and was discharged after only a few hours.

**B**

Unbeknownst to the jury and central to this appeal, Lazar was being treated with methadone for drug addiction at the time of his arrest. Lazar received his last dose of methadone the day before he was arrested, November 18, 2007, at 10:34 a.m. When he gave his second statement to the police, Lazar had been without methadone for thirty-three hours. When he gave his third statement, he had been without methadone for approximately fifty-two hours.

The jury did not hear that Lazar was entering or in withdrawal from methadone when he confessed to the police. To the contrary, trial counsel incorrectly stipulated that Lazar had his last dose of methadone a month earlier, on October 24, 2007. Although trial counsel had records showing that this was incorrect, trial counsel did not read the records, believing they were duplicates of other documents. Had trial counsel read the records, he could have called an expert witness at trial to testify that Lazar's symptoms, which the jury heard, were associated with withdrawal.

**C**

Lazar was convicted of second degree murder and sentenced to life imprisonment. His direct appeal was denied. He filed a petition for post-conviction relief alleging, *inter alia*, that trial counsel was ineffective for failing to review the methadone records. The state court granted an evidentiary hearing, at which both Lazar and the Commonwealth called expert witnesses to opine on whether Lazar was suffering from methadone withdrawal when he made his second and third statements to the police. Lazar's expert witness testified that it was very likely that Lazar was experiencing methadone withdrawal when he made his third statement. The Government's expert testified that Lazar's withdrawal systems would have been suppressed by other substances in his body, noted that the hospital treated Lazar with only a low dose of withdrawal medication, and also noted that the hospital discharged him quickly.

Ruling on Lazar's ineffective assistance of counsel claim, the trial court found that defense counsel performed deficiently when he stipulated that Lazar had his last dose of methadone a month before

his arrest. It found, however, that Lazar was not prejudiced under *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The trial court found that "[a]t best, [the jury] would have heard from competing experts that the defendant was experiencing an unknown quantum of withdrawal symptoms during the taking of his statements." Supp. App. 156. The jury would have also considered this testimony in conjunction with the hospital records, which provided that Lazar "was oriented . . . and [that] his insight and judgment were fair." *Id.* (quotation marks omitted). The Superior Court affirmed the trial court's conclusions, and the Pennsylvania Supreme Court declined review.

Lazar then filed this timely habeas corpus petition alleging that trial counsel was ineffective for failing to review the methadone records. The District Court noted that the state court had found deficient performance. Therefore, the question before the Court was whether Lazar was prejudiced. In a thoughtful and well-reasoned opinion, it recognized that a "confession is like no other evidence." App. 6 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). It has "a 'profound impact on the jury' and 'is probably the most probative and damaging evidence that can be admitted against him.'" *Id.* at 11 (quoting *Fulminante*, 499 U.S. at 296). Still the Court found that Lazar could not overcome the standard of review of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1). It granted a certificate of appealability because reasonable jurists could disagree. *See Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017).2

II3

AEDPA limits the ability of a federal court to grant habeas corpus relief to a petitioner based upon a federal constitutional claim that was "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). Under Section 2254(d), habeas relief shall not be granted unless the adjudication "(1) resulted in a decision that was contrary to, or *involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* (emphasis added). Under Section 2254(d)(1), a state court decision involves an unreasonable application "if the court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case." *McKernan v. Superintendent*, 849 F.3d 557, 563 (3d Cir. 2017) (quotation marks and citation omitted).

Lazar's claim was adjudicated on the merits in state court, which "heard and evaluated the evidence and [his] argument[]" that he was prejudiced by trial counsel's failure to review the methadone records. *Johnson v. Williams*, 568 U.S. 289, 302, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013) (emphasis, quotation marks, and citation omitted). Therefore, the question before us is whether the state court's application of the prejudice prong of *Strickland* "involved an unreasonable application of" that precedent. 28 U.S.C. § 2254(d)(1).

Under *Strickland*, prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A 'reasonable probability' is one 'sufficient to undermine confidence in the outcome.'" *Bey v. Superintendent*, 856 F.3d 230, 242 (3d Cir. 2017) (quoting *Strickland*, 466 U.S. at 694).4 We cannot hold that the state court unreasonably applied this standard. While Lazar ably critiques the Superior Court's decision in several ways, each falls short. He points out (1) that the civilian witnesses to whom he confessed were impeached; (2) that the element of robbery for felony murder was proven primary through his third statement; and (3) that the Government referred to his third statement in its closing argument. As to the first two points, the Superior Court considered them. *See* Supp. App. 177 (impeachment noted); *id.* at 166 (additional evidence of robbery noted). As to the third, on this record we are constrained by Section 2254(d)(1) to affirm, as there was no unreasonable application of clearly established federal law.5

III

The judgment of the District Court is affirmed.

**Footnotes**

*

This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

1

Lazar also told the police that there was a sexual encounter with the victim, which was consistent with forensic evidence showing that the victim had recently ejaculated.

2

In its brief, the Commonwealth asked us to vacate the certificate of appealability. At oral argument, the Commonwealth reasonably withdrew this request.

3

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Our review of the District Court's decision is plenary. *Dennis v. Secretary*, 834 F.3d 263, 280 (3d Cir. 2016) (en banc).

4

The Supreme Court has stated that when the *Strickland* analysis is combined with Section 2254(d), the analysis is "doubly" deferential. *Premo v. Moore*, 562 U.S. 115, 122, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011) (citation omitted). However, it is an open question in this Circuit whether this language applies to the prejudice prong. Indeed, we recently granted panel rehearing to remove references to "doubly deferential" review from a *Strickland* prejudice analysis. *Compare Mathias v. Superintendent*, 869 F.3d 175, 189, 191 (3d Cir. 2017) (applying doubly deferential review), *vacated by Mathias v. Superintendent* 876 F.3d 462 (3d Cir. 2017), *with Mathias*, 876 F.3d at 477 n.4 (declining to resolve the issue). In Lazar's case, the District Court found that doubly deferential review does not apply to the prejudice prong of *Strickland*. *See* App. 16 n.3 (citing *Evans v. Secretary*, 703 F.3d 1316, 1334 (11th Cir. 2013) (en banc) (Jordan, J., concurring) (distinguishing prejudice from deficient performance)). We assume *arguendo* that this is correct, as we will nevertheless affirm the denial of the writ.

5

Lazar also argues that the police recovered a machete from another person. This matters little, as this weapon was rusty and the police eliminated the owner as a suspect.

Appendage "B"

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

No. **17-1491**

STEVEN LAZAR,
Appellant

v.

SUPERINTENDENT FAYETTE SCI, ET AL
Appellee

(E. D. Pa. No. 2-14-cv-06907)

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PETITION FOR REHEARING

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Present: AMBRO, RESTREPO and FUENTES, 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 no judge who concurred in the decision having asked for rehearing, the petition for rehearing by the panel is denied.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: August 3, 2018
JK/cc: Jules Epstein, Esq.
John W. Goldsborough, Esq.

Appendage "C"

**STEVEN LAZAR, Petitioner, v. BRIAN V. COLEMAN, Respondent.**
**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**
**2017 U.S. Dist. LEXIS 28564**
**CIVIL ACTION No. 14-6907**
**March 1, 2017, Decided**
**March 1, 2017, Filed**

**Editorial Information: Subsequent History**

Affirmed by Lazar v. Sci, 2018 U.S. App. LEXIS 10311 (3d Cir. Pa., Apr. 24, 2018)

**Editorial Information: Prior History**

Commonwealth v. Lazar, 628 Pa. 638, 104 A.3d 524, 2014 Pa. LEXIS 3165 (Dec. 2, 2014)

**Counsel** For STEVEN LAZAR, Petitioner: JULES EPSTEIN, LEAD ATTORNEY, KAIRYS RUDOVSKY MESSING & FEINBERG LLP, PHILADELPHIA, PA.

For BRIAN V. COLEMAN, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: JOHN W. GOLDSBOROUGH, DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

**Judges:** Gerald Austin McHugh, United States District Judge.

**Opinion**

**Opinion by:** Gerald Austin McHugh

**Opinion**

**MEMORANDUM**

Judicial recognition of a confession's power as evidence dates back centuries: "[A] free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it refers." *King v. Warickshall* (1783) 168 Eng. Rep. 234, 234-35 (KB). Modern courts still recognize that a "confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). In this habeas case, Petitioner Steven Lazar was interrogated by police over a 30-hour period about a homicide, giving two different accounts of the crime. The second account, which was critical to Lazar's ultimate conviction for felony murder, was given while Lazar was in acute methadone withdrawal. At trial, both the jury and court were unaware of this, because, unfortunately, defense counsel stipulated that Lazar had not taken a daily dose of methadone for a month prior to the interrogation. In fact Lazar had taken methadone a mere 24 hours before.

Given that incorrect stipulation, it is hardly surprising that on collateral review the state courts found Lazar's trial counsel's performance deficient, satisfying the first of two elements of an ineffective-assistance claim under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). But the courts decided that the second element-prejudice-had not been met, and therefore denied relief. The well-reasoned Report and Recommendation of United States Magistrate Judge M. Faith Angell also concludes that federal relief should be denied. I am constrained to agree

with Judge Angell and will adopt that part of her Recommendation. But I base my denial of relief solely on the exceedingly deferential framework imposed on me by 28 U.S.C. § 2254(d). And I write separately to stress my serious concern about the state courts' prejudice analysis and to explain why I will grant a certificate of appealability.

**I. Background**

**A. Facts at Trial**

In January 2007, an elderly man was found in his North Philadelphia home hacked to death. His wallet and keys were missing and his drawers ransacked. The case went unsolved at first, but a few months later, the victim's daughter, while cleaning out the back porch of her father's home, found a bag with several items linked to Lazar: a letter to him from a methadone clinic, a yearbook with his photograph, his social security card, and an access card in his name. When police brought Lazar in for questioning, he told them his friend had taken his bag and given it to another man. Lazar was released.

But over the next several months, Lazar made statements to others that seemed to implicate him in the murder. For example, he told two of his neighbors that he would be going to jail because he had "killed somebody with an axe," and he told one of his friends that "if you are going to kill somebody," the "best weapon to use . . . [is] a hatchet." He made similar statements to two other individuals. All five testified at trial. (As discussed in more detail below, each was impeached to some degree, and none would be considered a pristine witness for the prosecution.) That November, after the friend contacted police about what Lazar had told him, homicide detectives interrogated Lazar over a 30-hour period.

During the interrogation, Lazar gave two statements. First, at 7:20 PM on November 19 (the first day of the interrogation) he said that on the night of the murder, he and a friend ("John") had been doing drugs in an abandoned house near the victim's. John had a hatchet and talked about robbing the victim. After police drove by, the two briefly separated, and Lazar then went into the victim's home to look for John. He found John covered in blood, ransacking the drawers, and the victim dead. But Lazar's second statement, given at 2:45 PM on November 20, told a different story. In this version, he and John had gone to the victim's house to perform oral sex on him-which, after John pulled a hatchet out to threaten the victim, they did. When the victim tried to reciprocate, Lazar hit the victim with his hand, and John hit the victim with the hatchet. John then took the victim's wallet and went through his drawers.

The jury convicted Lazar of second-degree murder, robbery, and possession of an instrument of crime.

**B. Essential Facts of Lazar's *Strickland* Claim**

At trial, Lazar's counsel stipulated that Lazar, a known methadone user, had last taken a daily dose of methadone on October 24, nearly a month before the interrogation. That stipulation was wrong, in a significant way: Lazar had actually last taken methadone at 10:34 AM on November 18, the day before the interrogation began.1 And shortly after giving the second statement, Lazar complained of painful urination and was taken to the hospital, where he reported leg pain, shaking, dizziness, nausea, and diarrhea, and blood tests were positive for multiple anti-withdrawal benzodiazepines, cocaine, and marijuana. Notations in the hospital records, however, painted a slight contrast, describing Lazar's appearance as "neat and appropriate" and "oriented," his demeanor "irritable but cooperative," and his speech "normal in tone, rate, and rhythm." PCRA Hr'g Tr. (Tr.) 12:23-13:5. He was diagnosed with depression and hypertension and discharged that night after being treated with anti-withdrawal drugs.2

**C. State-Court Collateral Review**

On post-conviction review of Lazar's *Strickland* claim, the state trial court agreed with Lazar that his counsel was deficient in making the methadone-dosage-date stipulation, but found there was no prejudice. In addition to considering the evidence before the jury, the court heard competing expert testimony on the effects of methadone withdrawal and observational testimony from the interrogating detectives.

Both experts agreed that an individual suffering from withdrawal could still give a voluntary statement, but they disagreed about how fast withdrawal symptoms (such as nausea, runny eyes and nose, and restlessness) set in: Lazar's expert said it happened within a 24-36 hour window, while the Commonwealth's expert said it took longer, up to 50 hours. The detectives, for their part, testified that Lazar did not appear sick just before he was taken to the hospital. The court, however, gave the most weight to the notations in the hospital records.

The court concluded that if the jury were armed with all of that new evidence and the correct methadone-dosage date, there was still no reasonable probability that the outcome of the trial would have been different. As to Lazar's confession, the court stated: "At best, [the jury] would have heard from competing experts that the defendant was experiencing an unknown quantum of withdrawal symptoms during the taking of his statements." Tr. 15:8-11. Moreover, the court found that even disregarding Lazar's confession, there was "overwhelming evidence of guilt," Tr. 15:20-21-namely, the implicating statements he made to the five individuals who testified at trial.

The Superior Court affirmed, and the Pennsylvania Supreme Court denied Lazar's petition for review.

**II. Standard of Review**

Among its other restrictions on habeas corpus, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) severely limits a federal court's ability to grant habeas relief as to "any claim that was adjudicated on the merits in State court." 28 U.S.C. § 2254(d). When reviewing such a claim, a federal court may not grant relief unless, as relevant here, the state court's decision "involved an unreasonable application of" Supreme Court precedent, *id.* § 2254(d)(1)-in this case, *Strickland* and its progeny.

The Supreme Court has concluded that § 2254(d) "imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (citations omitted). For my purposes, then, the question is not whether the state court decisions were right or wrong. *See White v. Woodall*, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014). Rather, the question is whether they were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Only then can I decline to defer to them.

**III. Discussion**

Because I cannot say that the state courts here-in deciding that, despite Lazar's counsel's deficiencies, there was no prejudice-made an error clear "beyond any possibility for fairminded disagreement," I must deny federal relief. But I remain troubled by that result.

To show *Strickland* prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at

694. Here, unlike the state courts that denied relief, I would have found that such a "reasonable probability" exists-because the tainted evidence is a confession.

Embracing the insight of eighteenth-century British jurists, American courts in an unbroken line of cases have recognized that a voluntary confession has "always ranked high in the scale of incriminating evidence." *Bram v. United States*, 168 U.S. 532, 544, 18 S. Ct. 183, 42 L. Ed. 568 (1897) (quoting *Brown v. Walker*, 161 U.S. 591, 596, 16 S. Ct. 644, 40 L. Ed. 819 (1896)). It is considered "evidence of the most satisfactory character" and "among the most effectual proofs in the law." *Hopt v. Utah*, 110 U.S. 574, 584-85, 4 S. Ct. 202, 28 L. Ed. 262 (1884). Even as other rules of law have changed dramatically over time, that core principle-that a defendant's voluntary confession has a "profound impact on the jury" and "is probably the most probative and damaging evidence that can be admitted against him," *Fulminante*, 499 U.S. at 296-has gone unchanged.

That probative force, of course, applies only to *voluntary* confessions, for the presumption that "one who is innocent will not imperil his safety or prejudice his interests by making an untrue statement" does not lie if he has been "deprive[d] . . . of that freedom of will or self-control essential to make his confession voluntary." *Hopt*, 110 U.S. at 585. For many years, however, voluntariness was the only touchstone, because it was thought that a voluntary yet false confession was "scarcely conceivable." Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1052 (2010) (citation omitted). But since "the experience of the courts, the police, and the medical profession recounts a number of false confessions voluntarily made," *Smith v. United States*, 348 U.S. 147, 153, 75 S. Ct. 194, 99 L. Ed. 192, 1954-2 C.B. 225 (1954), it has become clear that relying solely on voluntariness is not enough: a confession must also be tested for reliability.

Indeed, in a case like this, where it seems probable that Lazar's confession was voluntary but withdrawal-tainted, that reliability backstop becomes even more important. It is not a new idea that someone whose mental and emotional faculties are impaired could freely give a false confession. Nearly a century ago, Dean Wigmore noted that the usefulness of a confession largely "depends upon the mental and emotional traits of the accused": "We may believe that rationally a false confession is not to be apprehended from the normal person . . . [,] but we have here perhaps a person not to be tested by a normal or rational standard." 3 Wigmore, *Evidence* §§ 820a-b (Chadbourn rev. 1970). The Supreme Court has similarly observed that "under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt," *In re Gault*, 387 U.S. 1, 44-45, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (quoting 3 Wigmore, *Evidence* § 822 (3d ed. 1940)), and that "the physical and psychological environment that yielded the confession can . . . be of substantial relevance to the defendant's guilt or innocence," *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Further, where (as here) the confession was given during a "prolonged and persistent" interrogation, that "count[s] heavily against the confession." *Ashcraft v. Tennessee*, 322 U.S. 143, 161-62, 64 S. Ct. 921, 88 L. Ed. 1192 (1944).

Consider then the state post-conviction courts' decisions in this case. Those courts found no *Strickland* prejudice-that is, no "reasonable probability" that, if the new methadone-withdrawal evidence had been before the jury, "the result of the proceeding would have been different." Given what is now known about false confessions, and the fundamental precept that a confession's "probative weight . . . [is] a matter that is exclusively for the jury to assess," *Crane*, 476 U.S. at 688, that seems like a difficult conclusion to support.

As in every case, only the members of the jury that convicted Lazar could say on what evidence they placed the most weight. And the confession hardly stood alone, as there was also the testimony of the five witnesses to whom Lazar made (seemingly implicating) statements, plus his bag at the scene. But three items stand in counterbalance. First, juries place significant, often dispositive, emphasis on

confessions. As a result, where the evidence tainted by deficient counsel performance is a confession, courts should hesitate-or, to borrow a phrase, "think hard, and then think hard again," *Camreta v. Greene*, 563 U.S. 692, 707 (2011)-before finding there was no prejudice. Second, that general principle has specific application in this case, where the five civilian witnesses all had various credibility problems: one, Lazar's friend, had a theft conviction and had contacted the police about Lazar's statements only after getting into a dispute with Lazar; two others had pending robbery or theft cases against them at the time of trial; and the last two changed their stories on the stand. Thus to the extent courts should ever feel comfortable finding the untainted evidence to be "overwhelming" and sufficient grounds for finding no prejudice, this does not seem like the right case for it. Finally, the Commonwealth's heavy reliance on the confession, throughout trial and specifically in closing argument, speaks volumes about the confession's importance to the case. *Cf. United States v. Brownlee*, 454 F.3d 131, 148 (3d Cir. 2006) ("[I]t is difficult for the Government to argue with effect that the admission of the confession did not contribute to Brownlee's conviction when it submitted just the opposite view to the jury during the trial."). In my view, these factors strongly suggest that the deficient performance of Lazar's trial counsel was prejudicial.

More generally, I believe *Strickland* prejudice is an area where courts should tread with special care. An important distinction needs to be drawn between *Strickland*'s two prongs-counsel's performance and prejudice. When a federal court reviews a claim regarding *counsel's performance* that was decided on the merits in state court, thus triggering deference under § 2254(d), review is said to be "doubly" deferential. *See Harrington*, 562 U.S. at 105 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)). This is because § 2254(d) requires a federal court to give the state court deference, and *Strickland* required the state court to give counsel deference.

But there is an inherent tension between this "layered reasonableness" standard of review and the legal precepts that define *Strickland*'s second prong: *prejudice*. That tension exists because of the test for prejudice: to find no prejudice, a court must find there is *no reasonable probability* that, without counsel's deficiencies, the result of the proceeding would have been different-a proceeding where the prosecution must prove its case beyond a reasonable doubt. In other words, a collateral-review court must conclude there is no "reasonable probability that at least one juror," *Wiggins v. Smith*, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), if given the new information withheld because of counsel's errors, would have reached anything less than a "subjective state of certitude of the facts in issue," *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (citation omitted). The Supreme Court recently reaffirmed this principle in its latest *Strickland* decision, with Chief Justice Roberts identifying the prejudice inquiry as whether there is a "reasonable probability that . . . at least one juror would have harbored a reasonable doubt." *Buck v. Davis*, No. 15-8049, 2017 U.S. LEXIS 1429, 2017 WL 685534, slip op. at 17 (U.S. Feb. 22, 2017).

Taken seriously, this is a high standard to meet. At a conceptual level, it reinforces the principle that a jury cannot convict someone of a crime unless all twelve jurors are persuaded beyond a reasonable doubt. In practical terms, it underscores the importance of a jury deciding a criminal case only after reviewing all relevant evidence. When that evidence relates to a tainted confession, the defendant's inability to put it before the jury "strips [him] of the power to describe to the jury the circumstances that prompted his confession" and "effectively disable[s him] from answering the one question every rational juror needs answered: If [he] is innocent, why did he previously admit his guilt?" *Crane*, 476 U.S. at 689. So I hesitate to conclude that if Lazar's jury had known he was suffering from methadone withdrawal while under interrogation, there is "no reasonable probability that at least one juror" might have had a reasonable doubt.

I recognize that some courts of appeals have applied the double-deference standard to both counsel's performance and prejudice. *See, e.g., Frazier v. Bouchard*, 661 F.3d 519, 534 (11th Cir. 2011); *Foust*

*v. Houk*, 655 F.3d 524, 534 (6th Cir. 2011). The Supreme Court, without explicitly holding so, also seems to assume double deference applies to prejudice. *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 202, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

But applying extreme deference to state-court determinations of prejudice seems to not only be inconsistent with Supreme Court precedent otherwise defining prejudice-it actually undermines its vitality. The test for prejudice as defined by *Wiggins*-is there a "reasonable probability that at least one juror" would have had a reasonable doubt?-has a broad reach, and errs on the side of finding prejudice when a defendant did not receive a fair trial. But the protection conferred by *Wiggins* (and other cases defining prejudice broadly) evaporates once a state court answers that question "no," because of the need to show not just that the state court's conclusion is wrong, but wrong "beyond any possibility of fairminded disagreement." In a disturbing irony, then, a defendant deprived of the right to have the entirety of his case examined through the prism of reasonable doubt is then deprived of collateral relief because he cannot meet a similarly onerous standard.3

**IV. Conclusion**

Because of these profound concerns, although I feel constrained to deny Lazar's habeas petition, I will issue a certificate of appealability.4 An appropriate order follows.

/s/ Gerald Austin McHugh

United States District Judge

**ORDER**

This 1st day of March, 2017, upon careful and independent review of the petition for a writ of habeas corpus and consideration of the thorough and well-reasoned Report and Recommendation filed by U.S. Magistrate Judge M. Faith Angell, for the reasons expressed in my accompanying Memorandum it is hereby **ORDERED** that:

1. The petition for a writ of habeas corpus is **DENIED**.

2. A certificate of appealability under 28 U.S.C. § 2253(c)(2) is **ISSUED** as to whether, under 28 U.S.C. § 2254(d)(1), the state courts in this case unreasonably applied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

/s/ Gerald Austin McHugh

United States District Judge

**Footnotes**

1

Methadone is categorized as an "essential" medicine by the World Health Organization. Though one might assume that withdrawal from a medication used to treat addiction is less traumatic than withdrawal from an abused substance itself, that assumption is problematic. Highly respected addiction specialists first questioned it over 25 years ago. *See generally* Michael Gossop & John Strang, *A Comparison of the Withdrawal Responses of Heroin and Methadone Addicts During Detoxification*, 158 Brit. J. Psychiatry 697 (1991). And a recent empirical study surveying 215 inmates reflected that 70 percent would rather endure unsupported withdrawal from heroin as compared to methadone, and that the trauma of methadone withdrawal following arrest was so severe as to discourage future participation in methadone treatment. *See generally* Jeannia J. Fu et al., *Forced*

*Withdrawal from Methadone Maintenance Therapy in Criminal Justice Settings: A Critical Treatment Barrier in the United States*, 44 J. Substance Abuse Treatment 502 (2013).
2

The jury heard the evidence relating to Lazar's hospital visit, *see* Trial Tr. (May 10, 2010) 180:19-183:21, but without the context of Lazar being in acute withdrawal.
3

I would adopt the position advanced by Judge Jordan of the Eleventh Circuit in his concurring opinion in *Evans v. Secretary, Department of Corrections*, 703 F.3d 1316, 1333-36 (11th Cir. 2013) (en banc), and not apply "double deference" to the issue of prejudice.
4

"A certificate of appealability may issue . . . if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(a) (district judge may issue one). "That standard is met when 'reasonable jurists could debate whether . . . the petition should have been resolved in a different manner.'" *Welch v. United States*, 136 S. Ct. 1257, 1263, 194 L. Ed. 2d 387 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). For reasons already given I find that standard met here, and so will grant a certificate of appealability on the issue whether the state courts in this case unreasonably applied *Strickland* prejudice.

Appendage "D"

**STEVEN LAZAR, Petitioner v. BRIAN V. COLEMAN, et al., Respondents**
**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**
**2016 U.S. Dist. LEXIS 137389**
**NO. 14-6907**
**September 29, 2016, Decided**
**September 29, 2016, Filed**

**Editorial Information: Prior History**

Commonwealth v. Lazar, 32 A.3d 820, 2011 Pa. Super. LEXIS 3790 (Pa. Super. Ct., 2011)

**Counsel** For STEVEN LAZAR, Petitioner: LEAD ATTORNEY, JULES EPSTEIN, KAIRYS RUDOVSKY MESSING & FEINBERG LLP, PHILADELPHIA, PA.

For BRIAN V. COLEMAN, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: JOHN W. GOLDSBOROUGH, DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

**Judges:** M. FAITH ANGELL, UNITED STATES MAGISTRATE JUDGE.

**Opinion**

**Opinion by:** M. FAITH ANGELL

**Opinion**

**REPORT AND RECOMMENDATION**

M. FAITH ANGELL

UNITED STATES MAGISTRATE JUDGE

Presently before this court is a petition for writ of habeas corpus filed, pursuant to 28 U.S.C. § 2254, by a state prisoner. Petitioner Steven Lazar is currently incarcerated at State Correctional Institution ("SCI") Fayette in La Belle, Pennsylvania, where he is serving a life sentence without parole for second degree murder, robbery, conspiracy to commit robbery, and possessing an instrument of crime. For the reasons that follow, it is recommended that Mr. Lazar's habeas petition be denied and dismissed without an evidentiary hearing.

**BACKGROUND**1

On May 11, 2010, following a jury trial in the Philadelphia County Court of Common Pleas, petitioner was convicted of second degree murder, robbery, conspiracy to commit robbery, and possessing an instrument of crime. CP-51-CR-0002056-2008; Habeas Petition (paper no. 1), at 1.2 The Honorable Rose Marie DeFino-Nastasi imposed the mandatory sentence of life imprisonment for murder, with concurrent sentences of five to ten years' imprisonment for the robbery charge, and five to ten years for the conspiracy charge. The facts underlying Mr. Lazar's offenses were described by the Superior Court of Pennsylvania below as follows:

> [Dario Gutierrez's] decomposing body was discovered in his Philadelphia home by his daughter, Evelyn Gutierrez, on January 9, 2007. The medical examiner placed the time of death sometime

between January 6 and 8, 2007. Death resulted from a head injury caused by a dozen blows to the decedent's face and skull inflicted by a weapon such as a hatchet or an axe. There was no forced entry, but the victim's wallet and keys were missing and his upstairs drawers had been ransacked.

Approximately three months after the murder, Ms. Gutierrez returned to clean out her father's home and discovered a small travel bag on a chair on the rear porch, under an awning. Ms. Gutierrez telephoned police, who retrieved the bag and later searched it. The bag contained clothing, a plastic gun, correspondence from a methadone clinic addressed to [petitioner], and a school yearbook containing [petitioner's] photograph and two wallets. The wallets contained a social security card and an access card in [petitioner's] name. Police located and transported [petitioner] to the Homicide Unit for questioning on July 3, 2007.

[Petitioner] admitted to Detective David Baker that the bag belonged to him, but advised the detective that he did not know why the bag was located on the decedent's porch. He maintained that a friend had taken the bag and given it to an older man who lived three doors away from the place where he and the friend were ingesting drugs. After taking [petitioner's] statement, the police returned the bag to him and permitted him to leave.

Thereafter, [petitioner] made statements to five people, including Russel Angely, implicating himself in the murder. After a dispute with [petitioner] in November 2007, Mr. Angely called police and reported [petitioner's] statements. Mr. Angely testified at trial that [petitioner] admitted to him that he was involved in a murder and that a hatchet was the "best weapon to use" to kill someone. [Petitioner] made similar comments to Sarn Wilson and Mark Kedra. June Blase and John Barry, [petitioner's] downstairs neighbors, testified that [petitioner] told them on November 17, 2007, that he would be going to jail because he killed somebody with an axe. N.T. Trial (Jury), 5/6/10, at 85.

Police arrested [petitioner] on November 19, 2007, at 8:00 a.m. on an outstanding bench warrant from a neighboring county and transported him to the Homicide Unit for questioning. Over a thirty-hour period, [petitioner] gave two statements to police. In the first statement, signed at 7:20 p.m. on November 19, 2007, [petitioner] implicated John, a Puerto Rican man with whom he was doing drugs in an abandoned house located near the decedent's home, in the murder. He recounted that John had talked about robbing the decedent, that he had a hatchet in his pants, and that the two separated when police drove by. When [petitioner] went to the decedent's home to look for John, the door was open, the decedent was on the floor, and John, covered in blood, was ransacking drawers.

While [petitioner] remained in custody, police unsuccessfully attempted to locate the abandoned house or corroborate the details of [petitioner's] story. [Petitioner] remained in the interview room overnight and questioning resumed around noon the next day. At 2:45 p.m. on November 20, 2007, [petitioner] gave a second statement in which he recounted that he went with John to the decedent's house to have oral sex with the decedent. John took a hatchet with him to scare the decedent. After they performed oral sex on the decedent, the decedent tried to perform oral sex on [petitioner]. [Petitioner] struck him with his hand, knocked him backwards, and John struck the decedent with the hatchet. John took the victim's wallet and ransacked the drawers.*Commonwealth v. Lazar*, 2191 EDA 2013 (Pa. Super. 2014), at 1-4.

Before his trial in the Court of Common Pleas, Mr. Lazar moved to suppress the statements he made in police custody on November 19-20, 2007. After a hearing, the trial court denied the motion, and petitioner was ultimately convicted and sentenced. Through new counsel, petitioner filed a direct appeal to the Superior Court. Petitioner argued that the trial court erred in denying his motion to suppress the statements because they were given involuntarily; petitioner argued that he was subject

to coercion from law enforcement and his overnight detention in the interrogation room was excessive. Commonwealth's Response, Exhibit A (paper no. 8-1). On August 2, 2011, the Superior Court affirmed petitioner's judgment of sentence. *Commonwealth v. Lazar*, 32 A.3d 820 (Pa.Super. 2011) (unpublished memorandum).

On June 20, 2012, Mr. Lazar filed a timely *pro se* petition for collateral relief pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa.CS. § 9541, *et. seq.* Petitioner was appointed counsel, and the PCRA court held an evidentiary hearing on May 30, 2013. A decision was held in abeyance. On July 15, 2013, the PCRA court held another hearing at which the Honorable Rose Marie DeFino-Nastasi ruled that trial counsel's performance was deficient because he had failed to ascertain from petitioner's subpoenaed medical records that petitioner had been going through methadone withdrawal during his interrogation on November 19-20, 2007. Nonetheless, the PCRA court found there was no reasonable probability that the outcome of the suppression hearing or the trial would have been different had that information, along with expert testimony on the effects of methadone withdrawal, been presented below. N.T. PCRA Hearing, 7/15/13, at 15.3 Accordingly, the PCRA court denied relief.

Mr. Lazar then filed a timely notice of appeal to the Superior Court. He raised two claims: (1) the PCRA court erred in denying relief under either a Sixth Amendment ineffectiveness analysis or a Fourteenth Amendment Due Process analysis where petitioner's conviction was based primarily on a two-day custodial interrogation, and the jury was told petitioner was not a recent methadone user when ecords and expert testimony now show that he had received methadone up to the day before his arrest and he was suffering through methadone withdrawal during his interrogation; and (2) petitioner was deprived of the effective assistance of counsel and a fair trial when trial counsel failed to investigate and produce evidence regarding his methadone use which contradicted police averments that petitioner was not in discomfort during interrogation and his confession was knowing and voluntary. *Lazar*, 2191 EDA 2013 at 4-5. On July 23, 2014, the Superior Court issued an opinion affirming the PCRA court's judgment and dismissing the appeal. Mr. Lazar sought *allocatur* from the Pennsylvania Supreme Court, but this was denied on December 2, 2014. Habeas Petition, at 18.

On December 5, 2014, Mr. Lazar, still represented by PCRA counsel, filed the instant habeas petition. He raises a single claim for habeas relief, arguing that he was denied effective assistance of counsel when trial counsel failed to show that Mr. Lazar was in methadone withdrawal during his custodial interrogation on November 19-20, 2007. Habeas Petition, at 5. In support, petitioner argues that he was convicted "primarily on a confession" and the jury had been told that "he was off methadone for a month and fine throughout his custodial interrogation" when, in fact, "petitioner had methadone one day before his arrest and was in the throes of methadone withdrawal during interrogation." *Ibid.*

On March 9, 2015, the Commonwealth of Pennsylvania filed a response to Mr. Lazar's habeas petition, arguing that petitioner is not entitled to relief because his claim was reasonably and correctly adjudicated as meritless by the state courts; petitioner could not prove he was prejudiced by trial counsel's performance. Commonwealth's Response (paper no. 8), at 1. On March 12, 2015, petitioner filed a counseled Answer (paper no. 9) to the Commonwealth's Response. On May 26, 2015, with leave of Court, the Commonwealth filed a Sur-Reply (paper no. 12) to petitioner's Answer. On June 2, 2015, petitioner filed a counseled Answer to the Sur-Reply (paper no. 13). Having read the briefs, the Court ordered counsel to appear for oral argument on October 29, 2015.

**DISCUSSION**

**A. imeliness**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24,

1996, significantly amended the laws governing habeas corpus petitions. One of the amended provisions, 28 U.S.C. § 2244(d), imposes a one-year statute of limitations on state prisoners who seek federal habeas relief. A habeas petition must be filed within one year from the date on which the petitioner's judgment of conviction becomes final. *See* 28 U.S.C. § 2244(d)(1).4

In the instant case, Mr. Lazar's conviction became final on September 1, 2011, which is the last ate on which he could have filed a petition for *allocatur* with the Pennsylvania Supreme Court on direct appeal. Pa.R.A.P. 1113 ("A petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days after the entry of the order of the Superior Court . . . sought to be reviewed."). Accordingly, absent any tolling, petitioner's habeas statute of limitations would have begun on September 1, 2011, and would have expired one year later.

The amended habeas statute includes a tolling provision for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Mr. Lazar filed a timely PCRA petition on June 20, 2012. As of that date, two-hundred ninety-three (293) days of Mr. Lazar's one-year statute of limitations had expired. The remainder of Mr. Lazar's statute of limitations period was tolled during the time that his PCRA petition was pending: from June 20, 2012, through December 2, 2014, when the Pennsylvania Supreme Court denied *allocatur* review. On December 2, 2014, Mr. Lazar's statutory period began to run again. The instant habeas petition was filed just three (3) days later, on December 5, 2014, before the remaining statute of limitations period expired.5 The Commonwealth does not dispute, and I independently find, that Mr. Lazar's habeas petition is timely under § 2244(d)(1).

**B. Exhaustion and Procedural Default**

The exhaustion rule, codified in 28 U.S.C. § 2254,6 provides that a habeas petitioner must have "exhausted the remedies available in the courts of the State" for all constitutional claims before a federal court shall have habeas corpus jurisdiction. *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004). There are rare circumstances that circumvent this requirement, none of which apply to the case at hand. To exhaust all remedies for a claim under 28 U.S.C. § 2254, the habeas petitioner must give the state courts a full and fair opportunity to resolve all federal constitutional claims. *See Stevens v. Delaware Corr. Ctr.*, 295 F.3d 361, 369 (3d Cir. 2002); *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). An unexhausted habeas claim becomes procedurally defaulted when the petitioner has no additional state remedies available to pursue the issue. *See Wenger v. Frank*, 266 F.3d 218, 223-224 (3d Cir. 2001), *cert. denied*, 535 U.S. 957, 122 S. Ct. 1364, 152 L. Ed. 2d 358 (2002) (when a claim has not been fairly presented to the state 6 courts, but further state court review is clearly foreclosed under state law, the claim is procedurally defaulted and may be entertained in a federal habeas petition only if there is a basis for excusing the default).

In order for Mr. Lazar to have given the state courts a full and fair opportunity to resolve his habeas claim, he must have presented both the factual and legal substance in the state courts through the highest tribunal, the Pennsylvania Superior Court.7 The exhaustion requirement is rooted in considerations of comity; the statute is designed to protect the role of the state court in enforcement of federal law and to prevent disruption of the state judicial proceedings. *See Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Castille*, 489 U.S. at 349 (1989). The burden is on the habeas petitioner to establish that he has fairly presented his federal constitutional claims to all levels of the state judicial system. *See Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002) (*quoting Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231 (3d Cir. 1992), *cert. petition dismissed*, 506 U.S. 1089, 113 S. Ct. 1071, 122 L. Ed. 2d 498 (1993)) ("[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts . . . and the same

method of legal analysis must be available in the state court as will be employed in the federal court").

The Commonwealth does not dispute, and I independently find, that petitioner's claim of ineffective assistance of trial counsel was considered and rejected by the PCRA court and the Pennsylvania Superior Court on collateral appeal. Therefore, this claim meets the habeas exhaustion requirements.

**C. Merits Analysis of Petitioner's Claims**

Having concluded that Mr. Lazar's claim is timely and has been properly exhausted in the state court system, I will address the merits of his claim below.

**1. Habeas Standards of Review**

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is set forth in 28 U.S.C. § 2254, as amended by AEDPA. *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 739, 178 L. Ed. 2d 649 (2011).

The role of habeas courts is limited. Section 2254(d) bars relitigation of any claim "adjudicated on the merits" in state court unless one of the listed exceptions is present, i.e., the state court decision was "contrary to, or involved an unreasonable application of," United States Supreme Court precedent. A state court decision is "contrary to" established precedent if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a different result from [Supreme Court] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

A state court decision involves an "unreasonable application" of established precedent when the "state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable. *Ibid.*

When a habeas petitioner asserts ineffective assistance of counsel, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. [ . . . ] A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Id.* at 105 (internal citations omitted).

The Pennsylvania courts have adopted the *Strickland* standard to evaluate claims of ineffective assistance of counsel under Pennsylvania law. *See Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975-977 (Pa. 1987); *see also Werts v. Vaughn*, 228 F.3d 178, 202-203 (3d Cir. 2000) (concluding that Pennsylvania standard for judging ineffectiveness claims is identical to the *Strickland* standard). Therefore, the Pennsylvania Superior Court's resolution of a claim of ineffective assistance

of counsel is presumed to apply clearly established federal law and is due the deference that 28 U.S.C. § 2254(d) requires. The issue for habeas review is whether the Pennsylvania Superior Court unreasonably applied the *Strickland* test, which creates a doubly deferential review. *See Richter*, at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)).

**2. Mr. Lazar is Not Entitled to Habeas Relief on His Claim That He Was Prejudiced by Trial Counsel's Performance**

At trial, petitioner was represented by David Conroy, Esq. In his pre-trial motion to suppress Mr. Lazar's respective statements to police on November 19 and 20, 2007, counsel argued the statements were involuntary because: (1) petitioner's statement to police on the afternoon of November 20 was taken after petitioner had remained in custody in the Homicide Unit interview room since 7:20 p.m. the previous night because police were investigating the details he provided in his November 19 statement; (2) several hours after delivering his November 20 statement, petitioner complained of pain during urination and was taken by police to the hospital; and (3) petitioner was addicted to methadone.8 Commonwealth's Response, at 9. The court found both statements had been made voluntarily and ruled them admissible. N.T. Trial, 5/4/10 (motion to suppress volume), at 18-37, 39-45.

It was stipulated at trial that petitioner had received methadone doses daily at the time of the murder (between January 6-9, 2007) and at the time of his initial police statement in July 2007; it was also stipulated that petitioner last received a daily dose of methadone on October 24, 2007, nearly four weeks before police arrested petitioner on November 19. N.T. Trial, 5/10/10, at 179-180. As discussed below, this was inaccurate and petitioner's last daily dose of methadone was, in fact, taken at 10:34 a.m. on November 18, 2007. N.T. PCRA Hearing, 7/15/13, at 5.

On December 13, 2007, Mr. Conroy sent letters to the Goldman Clinic (the methadone clinic where petitioner received treatment) and the hospital at Girard Medical Center (located adjacent to the Goldman Clinic at the intersection of N. 8th Street and W. Girard Avenue in Philadelphia) requesting petitioner's medication records. Commonwealth's Response, at 15. In January 2008, these entities responded by providing hundreds of pages of records, including a print-out showing dates on which petitioner had received methadone treatment. *Ibid.* Counsel's review of these initial records showed petitioner last visited the clinic on October 24, 2007. N.T. PCRA Hearing, 5/30/13, at 152-153. Petitioner, however, told Mr. Conroy that he had visited the Goldman Clinic and received his last treatment as recently as the day before his November 19 arrest. On collateral appeal, the Superior Court described Mr. Conroy's efforts to obtain evidence supporting his client's allegations as follows:

> Trial counsel testified [at the PCRA evidentiary hearing] that he requested [petitioner's] methadone treatment records from the Goldman Clinic and received records that included a printout of [petitioner's] methadone treatments. Counsel also made multiple phone calls to the facility to ascertain if the records were complete, and twice sent a paralegal to look for them. Finally, in anticipation of trial, counsel subpoenaed the records custodian and the records. Upon receiving five hundred pages of records, counsel noted that the dosage sheet on the top was identical to those he had previously received, and he did not closely examine the subpoenaed records. [Petitioner] demonstrated that the subpoenaed medical records that counsel had in his possession confirmed that [petitioner] received his last dosage of methadone on November 18, 2007 at 10:48 a.m., which was the day before his arrest. The medical record would have supplied the factual foundation for expert medical testimony that [petitioner] was experiencing withdrawal from methadone when he provided [statements to police on November 19 and 20], and that the statements were not voluntary. [Petitioner] presented the expert testimony of George E. Woody, M.D., to that effect.*Lazar*, 2191 EDA 2013 at 7-8.

The Goldman Clinic and the hospital, although adjacent to one another, had two different computer systems which did not fully communicate with each other. Commonwealth's Response, at 25. It is apparent that Mr. Conroy did receive an incomplete version of his client's medication records in January 2008 after his initial request. Petitioner's current habeas counsel, Jules Epstein, Esq., who represented petitioner during PCRA proceedings as well, reviewed the subpoenaed medication records (provided to Mr. Conroy just before trial) and identified the appropriate pages showing petitioner's last visit to the clinic to actually be November 18.9

With this evidence identified, Mr. Epstein called George Edward Woody, M.D., an expert on the treatment of addiction, to testify on petitioner's behalf at the PCRA evidentiary hearing. The Superior Court described Dr. Woody's testimony as follows:

> Dr. Woody opined that since [petitioner] did not receive his usual methadone dose on November 19, "it is highly likely that by the morning of the 20th, he would have been in opioid withdrawal and appeared restless, and anxious, and depressed." N.T. Hearing, Vol. I, 5/30/13, at 23-4. He added that one using methadone would start to withdraw twenty-four to thirty-six hours after the last dose, and "typically the person will complain of feeling sick." *Id.* at 19-20. The person may feel uncomfortable, and have a runny nose and eyes, vomiting and diarrhea. The physician pointed to the Hahnemann emergency room records from the night of November 20, 2007, where [petitioner] reported "one-day history of shaking, some [leg] pain, and dizziness, and nausea, and diarrhea," symptoms consistent with opiate withdrawal. He was treated with Clonidine and Compazine, drugs traditionally used to treat opiate withdrawal. Dr. Woody conceded that symptoms present gradually and a note in the medical records to the effect that the patient's insight was fair, his appearance neat and appropriate, that he was cooperative, and his speech normal in rate and rhythm, did not undermine his conclusion that [petitioner] was in withdrawal. Dr. Woody concluded that [petitioner's] state of mind at the time he gave the statement would have been "desperate or mindless," *id.* at 57, although he admitted upon cross-examination that he had not read [petitioner's] statement. *Id.* at 59. He reviewed the testimony of the police officers who conducted the interrogation and conceded that it was possible that they did not witness any indications that [petitioner] was in withdrawal, *id.* at 60, and that several of the drugs [petitioner] was taking may have suppressed withdrawal symptoms.*Lazar*, 2191 EDA 2013 at 8-9.

The Commonwealth called its own expert, John O'Brien, M.D., to testify at the PCRA evidentiary hearing. Dr. O'Brien agreed that it was likely petitioner began suffering some symptoms of methadone withdrawal on November 20, 2007. The Superior Court described Dr. O'Brien's testimony as follows:

> [Dr. O'Brien] agreed with Dr. Woody that some of the other prescription medications that [petitioner] was taking would alleviate symptoms of opiate withdrawal, and that the hospital admission occurred hours after [petitioner] executed his second statement to police. The expert found [petitioner's] answers to be very detailed and not indicative of impulsive responses. He saw no verbal expression of physical discomfort, and noted that the dose of medication prescribed at the hospital was lower than usually prescribed for treatment of opiate withdrawal symptoms. The fact that [petitioner] was discharged within three hours of his presentation at the emergency room suggested the symptoms were not substantial. *Id.* at 96. Notably, Dr. O'Brien testified that methadone withdrawal does not cause hallucination, inability to distinguish truth from falsehood, formation of false memory, or involuntary speaking. *Id.*e at 101-02. Thus, he opined that [petitioner's] statement was knowing, voluntary and intelligent. Nothing in the materials he reviewed suggested otherwise. *Id.* at 108.*Lazar*, 2191 EDA 2013 at 9-10.

The Commonwealth also presented the testimony of the police officers, Detective John McDermott and Detective Kenneth Rossiter, who interrogated petitioner on November 19 and 20, 2007. Each

professed familiarity with the signs of opiate withdrawal. Consistent with their suppression motion and trial testimony, they described petitioner as appearing physically fine, aware, and cooperative during his interviews. N.T. PCRA Hearing, 5/30/13, at 178, 186. They testified that petitioner did not complain of being sick or state he was experiencing withdrawal. Detective McDermott testified that, after taking petitioner's statement on November 20, he accompanied petitioner to the bathroom where petitioner complained of painful urination; this prompted Detective McDermott to arrange for transportation to the hospital. *Id.* at 179. At the hospital, petitioner was administered drugs traditionally used to treat opiate withdrawal at 1:30 a.m. on November 21, 2007. *Id.* at 122-126. Petitioner was then discharged twenty minutes after receiving the medication. *Id.* at 126.

As discussed above, the PCRA court ultimately found that trial counsel, Mr. Conroy, had fallen below an objective standard of reasonableness by failing to obtain and present petitioner's full methadone treatment records. Nonetheless, the court found petitioner failed to establish prejudice, i.e., there was no reasonable probability that, had counsel performed adequately, the result of the suppression hearing or the trial would have been different. See N.T. PCRA Hearing, 7/15/13, at 3-20. This was affirmed by the Superior Court, which noted the PCRA court found that petitioner's statements were not confessions but merely placed petitioner at the scene of the murder. *Lazar*, 2191 EDA 2013, at 12 n.5. The Superior Court provided the following support for its decision:

> [Petitioner] claims that the confession was "the crux of the Commonwealth's case[,]" and the only evidence that established the commission of the felony underlying his second-degree murder conviction. Furthermore, [petitioner] maintains that absent the statements, the evidence of guilt was not overwhelming. [Petitioner] attacks the reliability of the testimony of Mr. Angely, who had a *crimen falsi* conviction, a pending drug case, and a motive for lying. Similarly, Mr. Wilson, Mr. Kedra, Ms. Blase and Mr. Barry, were not "slam dunk" witnesses for the Commonwealth. Furthermore, [petitioner] alleges that the discovery of his bag on the rear porch of the murder scene months after the murder did not link him to the crime.
>
> The PCRA court preliminarily noted that a person could be experiencing opiate withdrawal and still give a voluntary statement. It viewed withdrawal as "but one circumstance to consider in the totality-of-the-circumstances test" for determining whether a statement is voluntary. [Petitioner's] expert acknowledged that metabolism affected the speed of onset of withdrawal symptoms, and both experts agreed that [petitioner's] admitted concurrent use of other substances could affect the timing of withdrawal. Most telling, according to the PCRA court, were the records of the hospital. As Dr. O'Brien observed, the medical records contained no report of objectively manifested symptoms of withdrawal such as vomiting or frequent urination. Furthermore, hospital personnel prescribed low doses of sedatives and released [petitioner] within three hours, which suggested that withdrawal symptoms were not substantial. The court placed great weight on notations in the records that [petitioner's] appearance was "neat and appropriate" and that he was "irritable but cooperative;" his speech was "normal in tone, rate, and rhythm;" he was "oriented," "and his insight and judgment were fair." The court concluded that the only new fact was that [petitioner] had received his last dosage of methadone twenty-four hours before he gave his first statement to police, and expert testimony that withdrawal could commence twenty-four to thirty-six hours after the last dosage. This would not have changed the result of the earlier suppression motion [the trial court was aware that petitioner had informed hospital personnel he was on methadone]. The court also concluded that defense counsel's cross-examination was effective in informing the jury of the length of detention, the conditions, [petitioner's] psychiatric status, and the physical complaints that prompted the hospital visit. Despite the fact that the jury was not told that [petitioner] was on methadone maintenance, that it did not hear expert testimony regarding withdrawal, and that [petitioner] reported that the symptoms were present for one day, the PCRA court found no reasonable probability "that the outcome of this trial would have been different had

the jury received this information." The court characterized [petitioner's] statements to his friends of involvement in the murder, five of whom testified at trial, as "overwhelming evidence of guilt," and that the experts' testimony regarding subjective and objective symptoms of withdrawal, as well as the medical records, militated against a finding that police officers lied. Since we find ample support for the PCRA court's conclusions, this claim fails.*Lazar*, 2191 EDA 2013, at 13-15 (internal citations and footnotes omitted).

Petitioner now challenges the state courts' findings and, to prove prejudice, he attacks the sufficiency of the other evidence used to support his conviction. Petitioner argues that he is entitled to *de novo* review from this Court because the state courts unreasonably applied the *Strickland* analysis by failing to weigh the entire record. Petitioner's Answer (paper no. 9), at 16-17. A court must "evaluate the totality of the available . . . evidence" in determining prejudice. *Williams v. Taylor*, 529 U.S. 362, 397-398, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In particular, petitioner argues the state courts failed to discuss the impeachment of the witnesses who testified against petitioner at trial and failed to discuss the fact that petitioner's November 20 statement was the only evidence presented that supported a conviction for robbery (an essential element of felony murder). Petitioner's Answer, at 17. Under non-deferential, *de novo* review, petitioner argues there was not overwhelming evidence to support his conviction, which thereby demonstrates prejudice and entitles him to a new trial.

A federal court on habeas review is bound by the state court's credibility determinations after a live hearing. The federal habeas statute provides "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by [the federal habeas court]." *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983). A federal habeas court must also afford the presumption of correctness to implicit findings discernible from the record and the state court result, even where the state court provided no explicit factual findings on a certain issue. See *Culombe v. Connecticut*, 367 U.S. 568, 603, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961) ("all testimonial conflict is settled by the judgment of the state courts"); see also *Campbell v. Vaughn*, 209 F.3d 280, 290 (3d Cir. 2000) (a federal court is bound by the state court's implicit resolution of a credibility dispute).

That the state courts did not explicitly analyze the impeachment of prosecution witnesses at trial does not show that those courts unreasonably failed to consider or evaluate the totality of available evidence. As shown in the block-quote above, the Superior Court on collateral appeal did acknowledge petitioner's argument that trial counsel undermined the credibility of each witness to whom petitioner confessed his involvement in murdering the decedent. This impeachment evidence was, however, considered and discredited by the jury at trial. Indeed, petitioner confessed on separate occasions to four independent witnesses - a fifth recanted - involving the same crime with the same details while taking his daily doses of methadone. N.T. Trial, 5/4/10, at 99-152; N.T. Trial, 5/5/10, at 5-9, 10-78; N.T. Trial, 5/6/10, 81-96, 210-220. Each of these confessions was made after police first interrogated petitioner in July 2007 upon discovery of petitioner's bag at the decedent's house.

Petitioner challenges the significance of the testimony of witness John Barry, who testified that petitioner stated police "might be looking for me for hitting somebody with an axe." Petitioner's Answer, at 24, citing N.T. Trial, 5/6/10, at 215. Although not an inherently inculpatory statement, this statement is meaningful because police had intentionally chosen not to disclose the murder weapon to petitioner during his July 2007 questioning. N.T. Trial, 5/6/10, at 121-122. Petitioner also questions the motives and credibility of his roommate, Russell Angely, who testified against petitioner at trial. Mr. Angely, petitioner notes, had a *crimen falsi* conviction, a pending drug case, and a motive for lying (he was angry at petitioner over a dispute involving their dwelling). Petitioner's Answer, at 23-24. Petitioner similarly questions the credibility of witness Sarn Wilson, who had a pending robbery case and was a friend of Mr. Angely. *Id.* at 24. Mr. Wilson, though, testified that he received no offer in exchange for

his testimony against petitioner. N.T. Trial, 5/5/10, at 11. Finally, petitioner challenges the credibility of witness June Blase because she had a pending theft case against her. Petitioner's Answer, at 24. Ms. Blase, however, also explicitly testified that she had received no offer in exchange for her testimony. N.T. Trial, 5/6/10, at 82.

The PCRA court and the Superior Court, each of which determined there was no *Strickland* prejudice in part because of the foregoing witness testimony, were well aware of trial counsel's impeachment efforts and the jury's consideration of such efforts. This constitutes an implicit finding, to which deference is owed. The state courts were also well aware that a witness with a criminal past, or otherwise limited credibility, may nevertheless be telling the truth, particularly when that witness's statement to police is corroborated by similar or identical accounts of other witnesses.

The Court notes that *Strickland* prejudice must be assessed not only in light of the evidence that counsel failed to present (because of his deficient performance) and that the prosecution did present, but also in light of the evidence the prosecution would have presented in response to whatever counsel should have presented had he performed adequately. *See Wong v. Belmontes*, 558 U.S. 15, 20, 26, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009) (*per curiam*) (stating that a court must "consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path" - i.e., "must consider all the evidence - the good and the bad - when evaluating prejudice.") (*citing Strickland*, 466 U.S. at 695-696). The state courts, in considering the testimony of the Commonwealth's expert, Dr. O'Brien, at the PCRA evidentiary hearing, did just that. The state courts reasonably concluded that, had the jury heard the competing expert testimony in light of the full methadone records, there was no reasonable probability the jury's verdict would have differed.

A review of the record also demonstrates that petitioner's November 20 statement was not the only or even the most important evidence of a robbery, which established the felony underlying petitioner's felony murder conviction. The decedent's wallet and house keys were missing from the scene of the crime, and the dresser drawers in his home had been opened and ransacked. Furthermore, while petitioner's November 20 statement was the only instance in which he admitted committing a robbery to the police, his November 19 statement established that he and his co-conspirator had agreed to go to the decedent's house for the purpose of committing a robbery. Commonwealth's Sur-Reply, at 23 n.12. According to petitioner's own expert, petitioner's failure to receive his methadone does on November 19 would indicate he was likely to be experiencing withdrawal symptoms on the morning of November 20. N.T. PCRA Hearing, 5/30/13, at 23-24. This does not implicate the voluntariness or reliability of petitioner's November 19 statement.

The Court notes that petitioner's November 20 statement differed in several ways from his November 19 statement. Among the changes, petitioner stated he entered the house with his co-conspirator, rather than separately, and he stated that he struck the decedent. Petitioner also stated for the first time on November 20 that he and his co-conspirator had gone to the decedent's house to perform oral sex. There was no reason for petitioner or for law enforcement to fabricate this aspect of petitioner's 16 story, and forensic analysis of the decedent's clothes ultimately showed semen that corroborated this version of events. Commonwealth's Response, at 27, n.10. Petitioner has not shown that the state courts unreasonably applied the *Strickland* analysis by failing to weigh the entire record, and we do not consider this matter under *de novo* review. As such, we consider whether "fair-minded jurists could disagree that the state court's decision conflicts with [U.S. Supreme Court] precedents." *Richter*, 562 U.S. at 102. When assessing whether a state court's application of federal law is unreasonable, "the range of reasonable judgment can depend in part on the nature of the relevant rule" that the state court must apply. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). "[B]ecause the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 556 U.S. at

123.

This Court cannot find that the state courts below acted unreasonably. It is apparent from the record that the state courts carefully considered the evidence and provided thorough justifications for their finding that, although petitioner's trial counsel performed deficiently, petitioner was not prejudiced by that performance. The state courts discussed in detail the testimony of the Commonwealth's expert, Dr. O'Brien, and petitioner's expert, Dr. Woody, who admitted that even petitioner's November 20 statement could have been voluntary. The state courts discussed in detail the objective emergency room records from Hahnemann Hospital on the night of November 20, which showed that petitioner's withdrawal symptoms were not substantial. The state courts discussed how trial counsel's cross-examination effectively informed the jury of the length and conditions of petitioner's detention, his psychiatric status, and the physical complaints that prompted his hospital visit. Finally, the state courts reasonably considered and evaluated the other evidence aside from petitioner's November 2007 statements to police: his travel bag found at the scene of the crime; his July 2007 statement to police; and his substantially similar admissions to four separate individuals on separate occasions implicating his involvement in murdering the decedent with an axe or a hatchet together with a Puerto Rican co-conspirator named John.

**D. Conclusion**

For the foregoing reasons and based on my review of the record, I find that petitioner is not entitled to habeas relief on his ineffective assistance of counsel claim. The state courts' finding that petitioner was not prejudiced by trial counsel's performance was neither contrary to, nor did it involve an unreasonable application of, United States Supreme Court precedent. Under AEDPA, this finding ends federal review. *Richter*, 562 U.S. at 101. I also find that petitioner has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and that reasonable jurists could not debate the issue. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Therefore, I make the following recommendation.

RECOMMENDATION

Consistent with the above discussion, it is recommended that petitioner's habeas petition, filed under 28 U.S.C. § 2254, be DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING. It is further recommended that a finding be made that there is no probable cause to issue a certificate of appealability.

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

BY THE COURT:

/s/ M. Faith AngelL

M. FAITH ANGELL

UNITED STATES MAGISTRATE JUDGE

**Footnotes**

1

In preparing this Report and Recommendation, I have reviewed the following documents: Mr. Lazar's petition for writ of habeas corpus (paper no. 1); the Commonwealth's Response with attached exhibits

(paper no. 8); Mr. Lazar's Answer to the Response (paper no. 9); the Commonwealth's Sur-Reply (paper no. 12); Mr. Lazar's Answer to the Sur-Reply (paper no. 13); and the State Court records.
2

The page numbers cited in this Report and Recommendation refer to the numbers assigned by our Clerk's Office and are found at the top of each page.
3

Transcripts of Notes of Testimony from the State Court proceedings in this matter are found in the State Court records that were provided by the Clerk of the Quarter Sessions Court of Philadelphia County to the Clerk of this Court.
4

While the date on which the petitioner's conviction becomes final is typically the start date for the limitations period, the statute permits the limitations period to run from three other points in time, depending on which occurs latest. In addition to the date on which the petitioner's conviction becomes final, the start date can also run from: (1) "the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action"; (2) "the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; or (3) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1). There is nothing in the record or papers before me to suggest that the start date for the statute of limitations period should be permitted to run from a point later in time than the date on which Mr. Lazar's conviction became final.
5

Time periods have been calculated using the on-line calendar available at .
6

The exhaustion requirements of 28 U.S.C. § 2254 provide:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that:
>
> (A) the applicant has exhausted the remedies available in the courts of the State: or
>
> (B)(i) there is an absence of available State corrective process, or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
7

Seeking *allocatur* by the Pennsylvania Supreme Court is not part of the standard appeals process. *See* Pennsylvania Supreme Court *Order No. 218* (May 2000); *see also Mattis v. Vaughn*, 128 F.Supp.2d 249, 261 (E.D.Pa. 2001); *Lambert v. Blackwell*, 387 F.3d 210, 233-234 (3d Cir. 2004).

8

The primary issues addressed at the suppression hearing included the circumstances of petitioner's overnight stay in the interview room (the number of breaks he was given, whether food and water were provided, etc.) and petitioner's physical appearance and behavior (whether he was coherent or in any distress, whether he appeared tired or under the influence of drugs, etc.). See N.T. Suppression Hearing, 5/3/10.

9

In its Sur-Reply, the Commonwealth suggests that it remains uncertain whether Mr. Epstein identified the appropriate pages from the subpoenaed records available to Mr. Conroy or whether Mr. Epstein instead retrieved a more complete version of the medication records himself or from petitioner at some point after trial. Commonwealth's Sur-Reply (paper no. 12), at 8-9 n.5. Nonetheless, as the Commonwealth rightly acknowledges, the Superior Court below found that the subpoenaed records did confirm, if reviewed properly, that petitioner received his last dosage of methadone on November 18; this Court shall not disturb those findings. See *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (holding that review under the federal habeas law is limited to the record that was before the state court which ruled on the claim on the merits).