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

JAMEEL SIMPSON,

Petitioner,

v.

JAMES ERKERD, et al.,

Respondent.

CIVIL ACTION
NO. 14-4999

APPENDIX

OPINION

Slomsky, J. **August 14, 2017**

I. INTRODUCTION

Before the Court is a Petition for Writ of Habeas Corpus filed by Jameel Simpson pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) Petitioner is a prisoner in state custody. United States Magistrate Judge Linda K. Caracappa issued a Report and Recommendation ("R&R"), recommending that the Petition be denied and that a certificate of appealability not be issued. (Doc. No. 19.) Petitioner has filed numerous objections to the R&R. (Doc. No. 20.) For reasons that follow, the Court will approve and adopt the R&R and will deny the Petition for Writ of Habeas Corpus.[1]

II. BACKGROUND

The trial court summarized the underlying facts of Petitioner's state court conviction as follows:

[1] In regard to this Opinion, the Court has considered the Petition for Writ of Habeas Corpus (Doc. No. 1), the Response in Opposition to the Petition (Doc. No. 17), the Magistrate Judge's Report and Recommendation (Doc. No. 19), Petitioner's Objections to the Report and Recommendation (Doc. No. 20), and the pertinent state court record.

On the night of February 4, 2001, [Petitioner] and three of his friends went together to a private club in West Philadelphia, [the "Wheels of Soul."] The club was run by members of a motorcycle club, and it was licensed to sell alcohol to its members and their guests. Charlie Wilson was the "doorman" serving in a security position on that night and he searched the four [men] before he let them into the club. Mr. Wilson testified that two of the males were arguing with each other as they entered the club.

[Mr. Wilson] warned the two [males] about causing a disturbance in the club as he was completing his search of them. While he was finishing his search of one of the men who was arguing, the other one threw a punch. Mr. Wilson grabbed one of the men and wrestled him to the ground while other club members subdued the man who had tried to punch his friend. The deceased in this case, Jerome Robinson, was one of the other club members who came to Mr. Wilson's aid. After the disturbance quelled, all four . . . men who had come to the club together were put out of the club. Though he was not one of the two who were arguing and scuffling as they entered the club, [Petitioner] did have words with Mr. Wilson on his way out and told him to "check" his pockets to "make sure you got your money."

Later that night[,] in the early hours of February 5, 2003, Mr. Wilson was still in his position as the doorman [] handling security for the club. A female knocked on the door, and [Robinson] opened it and let her in. [Petitioner] was identified at trial as the person who followed [the female] through the club door, and fired one shot with a handgun that struck [Robinson] in the abdomen. That gunshot proved to be fatal, as it severed major arteries that caused [Robinson] to bleed internally. Mr. Wilson found a handgun in the club, and he ran outside after [Petitioner] who had immediately fled after he shot [Robinson]. [Mr. Wilson] saw him running down a small street adjacent to the club, and he yelled at him to stop. [Petitioner] turned around and fired a shot at him, and Mr. Wilson responded by firing his handgun at [Petitioner.] They exchanged two more shots, and Mr. Wilson returned to the club after his handgun "blew up" in his hand.

Shortly after [Robinson] was shot, Officer Robert Wuller was in a marked patrol vehicle a few blocks from the private club when he and his partner arrested Ralph Burnett [for selling narcotics.]. . . Officer Wuller began questioning Burnett, and he observed an injury to his face. . . Officer Wuller suspected that he was one of the four males who had been at [the Wheels of Soul] just before the decedent was shot and killed . . . [Burnett] was transferred to the [homicide division's] custody and questioned[.] [Burnett] gave a written statement to the homicide detectives in which he described in detail what had happened in the club when the four of them were ejected. In that statement, Burnett told the detectives that after they drove away from the club, [Petitioner] told him "he was going to get his hammer." [Burnett] also said in his statement that while [Petitioner] was being put out of the club, he told the members "that he would be back."

> At the conclusion of the homicide investigation, an arrest warrant was issued for [Petitioner]. [On February 6, 2003, when the police were at his residence, [Petitioner] attempted to escape by climbing out of a second floor window and hiding on the roof. The police eventually arrested [Petitioner] on that same date and took him into custody.] [The Commonwealth] charged [Petitioner] with the murder of Jerome Robinson, aggravated assault for shooting at Charlie Wilson, and numerous related offenses.

(Doc. No. 19 at 1-2 (internal citations omitted).)

On April 19, 2006, a jury convicted Petitioner of first-degree murder, aggravated assault, and carrying a firearm without a license. (Id. at 1.) On July 12, 2006, Petitioner was sentenced to a term of life imprisonment. (Id.; Doc. No. 1 at 4.) Petitioner timely appealed his conviction and sentence to the Pennsylvania Superior Court. The Superior Court cited Petitioner's claims as follows:

1. Was it [an] error for the [trial] court to permit the prosecutor to cross-examine [Petitioner's] primary defense witness with respect to her treatment "for any mental illness, disease, or disorder";

2. Was it [an] error for the [trial] court to permit the prosecutor to ask an assigned detective whether he had conducted an investigation "to determine whether or not" an alternative suspect was involved in the instant homicide;

3. Was it [an] error for the [trial] court to permit the prosecutor to ask questions suggesting that a recanting witness had been improperly pressured;

4. Was it [an] error for the [trial] court to overrule [Petitioner's] objections to the Commonwealth's closing statement;

5. Was it [an] error for the [trial] court to permit the jury to view a photo which had been taken by a police officer nearly two years after the incident; and

6. Was it [an] error for the [trial] court to permit the deliberating jury to review the written statements of a recanting witness?

(Doc. No. 19 at 3 (internal citation omitted).) On December 21, 2007, the Pennsylvania Superior Court affirmed the trial court's judgment of sentence. (Id.) On June 4, 2008, the Pennsylvania Supreme Court denied a petition for allowance of appeal. (Id.)

On April 29, 2009, Petitioner filed a timely pro se petition for post-conviction relief in state court, pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. Const. Stat. Ann. § 9541, et seq. (Id.) Counsel was appointed and on July 22, 2010, counsel filed a no merit letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. Ct. 1988), along with a motion to withdraw.[2] (Id.) On September 17, 2010 Terri Himebaugh, Esquire, entered his appearance on behalf of Petitioner and filed a motion for time to investigate potential claims and file an amended PCRA petition. (Id.) On November 10, 2010, counsel filed an amended PCRA petition, along with a supporting memorandum of law. (Id. at 3-4.) On May 4, 2012, the PCRA court dismissed the petition.

Next, Petitioner appealed to the Pennsylvania Superior Court, arguing that the PCRA court had not considered Petitioner's memorandum of law when ruling that Petitioner's issues were insufficiently supported by facts and legal arguments. (Id. at 4.) On February 1, 2013, the Superior Court remanded the case to the PCRA court with instructions to reconsider the petition with the supporting arguments offered in the memorandum of law. (Id. (internal citation omitted).) On October 1, 2013, the PCRA court again dismissed the PCRA petition. (Id.) On October 18, 2013, Petitioner appealed to the Superior Court. (Id.) On June 19, 2014, the Superior Court affirmed the PCRA court's dismissal of the PCRA petition. (Id.)

On August 27, 2014, Petitioner filed the instant federal habeas corpus petition in this Court pursuant to 28 U.S.C. § 2254, raising the following claims:

[2] Pursuant to Commonwealth v. Finley, 550 A.2d 213, 215 (Pa. Super. Ct. 1988), appointed counsel in a post-conviction proceeding may be given leave to withdraw upon the submission of a "no-merit" letter that details the nature and extent of counsel's review of the case, lists each issue the petitioner wished to have reviewed, and explains counsel's assessment that the case lacks merit. In addition, the court must conduct an independent review of the record and must agree with counsel that the petition is meritless before dismissing the petition. Id.

1. Ineffective assistance of trial counsel in that trial counsel had a conflict of interest which should have precluded counsel from representing Petitioner and which prejudicially impacted Petitioner's ability to present a defense;

2. Ineffective assistance of trial counsel for failing to investigate potential alibi witnesses, give timely notice of an alibi defense, call the alibi witnesses at trial and present corroborating evidence;

3. Ineffective assistance of trial counsel for failing to obtain latent fingerprint reports;

4. Petitioner was denied his Fourteenth Amendment right to due process of law and his rights pursuant to Brady v. Maryland in that the prosecution failed to disclose to the defense the existence of a police statement taken from Tyriek Newell, and ineffective assistance of trial and appellate counsel for failing to investigate the existence of said police statement, to obtain it and/or raise and preserve this claim on direct appeal;

5. Ineffective assistance of trial counsel for failing to call several witnesses;

6. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court permitted the prosecutor to question recanting witness [Ralph] Burnett suggesting without any evidentiary basis for doing so, that Burnett had been pressured by others to repudiate his post-arrest accusations;

7. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court overruled petitioner's objections to the Commonwealth's closing statement;

8. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court permitted the prosecution to impeach a defense witness with respect to her mental health history and treatment; and

9. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court permitted the prosecutor and detective to impermissibly bolster the prestige of the police witness.

(Doc. No. 19 at 5; see also Doc. No. 1.)

On February 28, 2017, the Magistrate Judge issued a R&R in which she recommended denying the Petition for Writ of Habeas Corpus. (Doc. No. 19.) Petitioner filed Objections to the Magistrate Judge's R&R. (Doc. No. 20.) For the reasons that follow, the Court finds that the

Objections are without merit and will adopt the R&R (Doc. No. 19) and will deny the Petition (Doc. No. 1).

III. STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1)(B) and the local rules of this Court, a district judge is permitted to designate a magistrate judge to make proposed findings and recommendations on petitions for post-conviction relief. Any party may file objections in response to the magistrate judge's report and recommendation. Id. at § 636(b)(1)(C). Whether or not an objection is made, a district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The [district] judge may also receive further evidence or recommit the matter to the magistrate judge with further instructions." Id. "[I]t must be assumed that the normal practice of the district judge is to give some reasoned consideration to the magistrate's report before adopting it as the decision of the court." Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir.1987). See also 28 U.S.C. § 636(b).

In the Eastern District of Pennsylvania, Local Rule 72.1.IV(b) governs a petitioner's objections to a magistrate judge's report and recommendation. Under that rule, a petitioner must "specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections[.]" Savior v. Superintendent of Huntingdon SCI, No. 11–5639, 2012 WL 4206566, at *1 (E.D. Pa. Sept. 20, 2012). Upon review, "[a district judge] shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). De novo review is non-deferential and generally permits the district court to conduct an "independent review" of the entire matter. Salve Regina College v. Russell, 499 U.S. 225, 238 (1991). "Although [the] review is de novo, [a district judge] [is] permitted, by statute, to rely upon the magistrate judge's proposed findings and recommendations to the extent [the judge], in the

exercise of sound discretion, deem[s] proper." Owens v. Beard, 829 F. Supp. 736, 738 (M.D. Pa. 1993) (citing United States v. Raddatz, 447 U.S. 667, 676 (1980)).

IV. ANALYSIS

Petitioner's first, second, third, fourth, and sixth claims were properly exhausted in the state court and therefore his objections to the R&R on these claims will be addressed on the merits. However, Petitioner's fifth, seventh, eighth, and ninth claims were properly dismissed by the Magistrate Judge as procedurally defaulted.

A. Petitioner's First Objection That the Magistrate Judge Erred in Denying His Ineffective Assistance of Counsel Claim Based on a Conflict of Interest Is Without Merit

Petitioner's first objection relates to the Magistrate Judge's finding that Petitioner had failed to establish a meritorious ineffective assistance of counsel claim. (Doc. No. 20 at 2-6.) Petitioner argues that his trial counsel, Nino Tinari, Esquire,[3] had a conflict of interest that should have precluded him from representing Petitioner, and that Nino Tinari's representation prejudicially impacted Petitioner's ability to present a defense. (Id.) As will be discussed below, this objection is without merit.

The Sixth Amendment of the United States Constitution recognizes the right of every criminal defendant to effective assistance of counsel. U.S. Const. amend. VI. To evaluate an ineffective assistance of counsel claim in violation of the Sixth Amendment, the court must apply a two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under this test, trial counsel is presumed to have acted effectively unless a petitioner can show that: (1) counsel's "representation fell below an objective standard of reasonableness[;]" and (2) counsel's deficient performance prejudiced the petitioner. Id. To

[3] In this section only, Nino Tinari, Esquire, will be referred to by his full name in order to distinguish him from his son, Eugene Tinari. Throughout the rest of this Opinion, he will be referred to as trial counsel.

establish prejudice, a petitioner must show that there is a "reasonable probability that, but for [counsel's] unprofessional errors, the result of the proceeding would have been different." Id. at 687-88, 694. "Judicial scrutiny of counsel's performance must be highly deferential . . . [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Id. at 689.

Petitioner contends that his trial counsel, Nino Tinari, Esquire, was ineffective because counsel had a conflict of interest that should have prevented him from representing Petitioner. Petitioner alleges that Nino Tinari failed to call two witnesses, Kenneth Newell and Nate Hunter,[4] due to Nino Tinari's alleged prior representation of these two witnesses. (Doc. No. 19 at 8.) In his Objections to the R&R, Petitioner makes four substantially similar objections regarding Nino Tinari and Kenneth Newell's relationship and how it related to his defense. (Doc. No. 20 at 2-6.)

First, Petitioner contends that his trial counsel, Nino Tinari, was ineffective under Strickland because the PCRA court never held an evidentiary hearing to verify the credibility of the representations made by Nino Tinari. (Id. at 3.) The PCRA court and the Magistrate Judge have reviewed Petitioner's claim that Nino Tinari represented Kenneth Newell on unrelated charges which, Petitioner alleges, prejudiced Petitioner because he wanted Kenneth Newell to be called as a witness. (Doc. No. 19 at 11.)

Nino Tinari, Esquire, stated on the record that he never represented Newell. (Id.) Nino Tinari explained under oath that it was his son, Eugene Tinari, Esquire, who represented Newell

[4] Petitioner does not object to the Magistrate Judge's finding on this claim in regard to Nate Hunter. The Magistrate Judge found that Petitioner failed to prove that there was any conflict of interest regarding Nate Hunter and that Petitioner failed to demonstrate that his counsel's performance fell below an "objective standard of reasonableness." (Doc. No. 19 at 14 (internal citation omitted).) Because Petitioner did not object to the Magistrate Judge's finding on Hunter, this Court will not address the part of his Petition related to him.

in unrelated matters. (Id. at 10.) The Commonwealth informed the PCRA Court that, while the docket entry listed Nino Tinari as representing Kenneth Newell at a hearing, the entry of appearance on the docket actually listed Eugene Tinari as counsel of record. (Id.) Further, Eugene Tinari stated on the record that he had appeared on Newell's behalf, not his father Nino Tinari. (Id.)

Second, Petitioner argues that the Magistrate Judge ignored evidence of record establishing that Nino Tinari actually represented Kenneth Newell. (Doc. No. 20 at 4.) The only proof Petitioner offered that trial counsel represented Newell is in Petitioner's Motion to Dismiss filed in state court. In that Motion, Petitioner claimed that he asked Nino Tinari after his conviction why he did not call Kenneth Newell as a defense witness. (State Ct. R., Pet'r's Motion to Dismiss at 7.) Nino Tinari supposedly responded that although he and his son represented Newell on unrelated matters, Newell "would have hurt [Petitioner] if he took the stand." (Id.)

Here, Petitioner's claim is refuted by the record. As noted above, the record shows that the Commonwealth raised the conflict issue before Petitioner's first trial citing Nino Tinari's possible representation of Kenneth Newell. (Doc. No. 19 at 10.) The PCRA court found that it was Nino Tinari's son, Eugene Tinari, who had represented Kenneth Newell on a previous matter. (Id.) In this regard, Petitioner has failed to demonstrate that there is any evidence of record which establishes that Nino Tinari had previously represented Kenneth Newell. Therefore, the Magistrate Judge did not ignore the evidence, and this objection is without merit.

Third, Petitioner argues that trial counsel was ineffective under Strickland because it is illogical to believe that Nino Tinari did not discuss the case with his son, Eugene Tinari. (Doc. No. 20 at 4.) Petitioner notes that Eugene Tinari originally represented Petitioner at his

preliminary hearing in this case. (Doc. No. 20 at 4-5.) However, there is nothing in the record to indicate that after Nino Tinari became attorney of record in the trial court in Petitioner's case that Nino Tinari and Eugene Tinari discussed Petitioner's case.

Trial counsel, Nino Tinari, cannot be found deficient for a conflict of interest that did not exist. Moreover, Petitioner offers no proof that indicates Nino Tinari and Eugene Tinari collaborated on his case or any other related case. Therefore, Petitioner has failed to demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Strickland, 466 U.S. at 668.

Fourth, Petitioner objects to the Magistrate Judge's determination that Nino Tinari made a strategic decision not to call Kenneth Newell to the stand. (Doc. No. 20 at 3.) Petitioner argues that this determination was not based upon any evidence of record. (Id.) As discussed below, the Magistrate Judge took Charles Wilson's testimony into consideration when making this decision. (Doc. No. 19 at 11-12.) Further, the record shows that Kenneth Newell provided a statement to police that Petitioner was angry about being thrown out of the club and vowed to return "to take care of the old head who threw him out." (Id. (internal citation omitted).) The Magistrate Judge's determination that Nino Tinari made a strategic decision not to call Kenneth Newell to the witness stand was based on sufficient evidence of record.

In a case raising an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 691. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. A defendant asserting ineffective assistance of counsel must identify the acts or omissions that are

alleged not to be based on reasoned professional judgment. Strickland, 466 U.S. at 690. Then, a reviewing court must determine whether all the circumstances identified as acts or omissions were outside "the wide range of professionally competent assistance." Id.

Here, Nino Tinari introduced Kenneth Newell as an alternative suspect in Petitioner's trial through other evidentiary means. The Magistrate Judge noted:

> [T]hrough cross-examination of Charlie Wilson, the defense obtained testimony that Kenneth had been in the club shortly before the shooting and was wearing dark clothing, just like the person that Wilson pursued immediately after the shooting. Defense counsel also questioned the assigned detective, suggesting that police had failed to adequately investigate Kenneth as a suspect in the homicide. Additionally, defense counsel presented Petitioner's ex-girlfriend, Kaneisha Houston, who offered an elaborate tale about Kenneth's supposed involvement, including an alleged confession immediately after the shooting and a dramatic flight through the woods afterward, as well as purported threats she had received from him.

(Doc. No. 19 at 12 (internal citation omitted.)

Moreover, in further regard to Kenneth Newell, Petitioner contends that counsel was ineffective under Strickland because he was prejudiced by counsel's conflict of interest. (Doc. No. 20 at 5-6.) Petitioner contends that he was prejudiced because his counsel did not call Kenneth Newell as a witness at trial, notwithstanding the fact that counsel did introduce other evidence showing that Newell was an alternative suspect. (Id.) Having already presented evidence that implicates Kenneth Newell as a suspect, Nino Tinari's decision not to call Kenneth Newell as a witness cannot be said to have fallen below an objective standard of reasonableness. Furthermore, to argue there is a reasonable probability that the omission of Newell's testimony altered the outcome of the case is based on pure speculation.

The Court cannot find that the PCRA court's and the Magistrate Judge's decision that Nino Tinari's acts were not outside "the wide range of professionally competent assistance" was

an unreasonable application of Strickland. Therefore, the objections raised on this ground are without merit.

B. Petitioner's Second Objection That the Magistrate Judge Erred in Denying His Ineffective Assistance of Councel Claim Based on a Failure to Investigate a Potential Alibi Witness Is Without Merit

Petitioner's second objection is that trial counsel failed to investigate a potential alibi witness, Saffiyah Warren.[5] (Doc. No. 20 at 6-10.) Petitioner objects to the Magistrate Judge's findings that (1) Warren had no "personal knowledge regarding Petitioner's actual whereabouts at the time of the shooting and could only testify that she 'had a phone conversation with petitioner that evening'"; (2) in order to establish an alibi, the alibi witness must have personal knowledge of where Petitioner was; (3) the cell phone records would not prove that Petitioner was at Tyriek Newell's mother's house; and (4) even if this evidence had been presented it would not exculpate Petitioner because it did not directly contradict the other evidence. (Id.) Petitioner's objection is without merit.

Under Pennsylvania law "[t]o prevail on a claim that trial counsel rendered ineffective assistance by failing to call a witness, the defendant must show that (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or should have known of the witness' existence; (4) the witness was prepared to cooperate and would have testified on the defendant's behalf; and (5) that the absence of the witness' testimony prejudiced the defendant." Commonwealth v. Brown, 767 A.2d 576, 582 (Pa. Super. Ct. 2001).

[5] Petitioner does not object to the Magistrate Judge's finding relating to Tyriek Newell as a potential alibi witness. The Magistrate Judge found that Petitioner failed to show that Tyriek Newell was available to testify at Petitioner's trial and that Petitioner failed to meet his burden of showing any likelihood that the verdict would have been different if trial counsel had called Tyriek Newell to testify. (Doc. No. 19 at 16.) Because Petitioner did not object to the Magistrate Judge's finding, this Court will not address the part of his Petition related to Tyriek Newell.

"[Petitioner] has the burden of showing that the trial counsel had no reasonable basis for failing to call a particular witness." Commonwealth v. Small, 980 A.2d 549, 560 (Pa. 2009).

In order to show ineffective assistance of counsel, a petitioner must show that the witness was available to testify, Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991), cert. denied, 502 U.S. 902 (1991), and that there is "a reasonable likelihood that . . . information [not presented] would have dictated a different trial strategy or led to a different result at trial." Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990). "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless . . . counsel's failure to pursue those investigations may not later be challenged as unreasonable." Strickland, 466 U.S. at 691. If counsel determines that particular investigations are unnecessary, counsel has a duty to base that decision on reasonable grounds. Id. at 690-91. When a court is assessing a "particular decision not to investigate," the court must look at counsel's decision directly for "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

Petitioner contends that he informed trial counsel that he was at Tyriek Newell's mother's house and was on a landline telephone talking to his girlfriend, Saffiyah Warren, at the time of the shooting. (Doc. No. 17 at 14.) However, Warren had no personal knowledge concerning Petitioner's actual whereabouts at the time of the shooting. Warren only would have testified that she was on the phone with Petitioner that evening. Because Warren could not testify to Petitioner's actual physical whereabouts, trial counsel had no reason to believe calling Warren to the stand would have exonerated Petitioner. Petitioner has offered no evidence to show that the failure to investigate the phone records to show that Petitioner was talking to his girlfriend at the time of the shooting was unreasonable.

Because Warren's testimony would not exonerate Petitioner, he has failed to show that the absence of her testimony prejudiced him. Moreover, trial counsel had a reasonable basis for not calling Warren. Therefore, this objection is without merit.

C. Petitioner's Third Objection That the Magistrate Judge Erred in Denying His Ineffective Assistance of Counsel Claim Based on a Failure to Obtain Latent Fingerprints Is Without Merit

Petitioner's third objection is that trial counsel failed to obtain potentially exonerating forensic latent fingerprint reports. (Doc. No. 20 at 10-12.) Petitioner notes that Charles Wilson[6] testified that immediately after the shooting, Petitioner jumped into the passenger side of Nate Hunter's vehicle which drove away from the crime scene. (Doc. No. 19 at 16-17.) Petitioner claims that latent fingerprints were taken from that vehicle and that trial counsel failed to obtain a forensic analysis of those prints. (Id.) Petitioner alleges that if counsel had obtained the fingerprint analysis report, it would have established that none of the fingerprints were his prints. (Id.) Petitioner objects to the Magistrate Judge's finding that "the lack of fingerprint evidence would not have proven that petitioner was not in the getaway vehicle" and that Petitioner was unable to establish prejudice. (Id.) This objection is without merit.

As previously noted, to establish an ineffective assistance of counsel claim under Strickland, a petitioner must show that: (1) his counsel's performance fell below an "objective standard of reasonableness" and (2) this deficient performance prejudiced the petitioner's defense. Strickland, 466 U.S. at 687-88, 694. To establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. Further, Pennsylvania courts have held that "the absence of . . . fingerprints is not exculpatory per se and might be explained for any one of

[6] Charles Wilson was the "doorman" serving in a security position on the night of the murder. (Doc. No. 19 at 1-2 (internal citations omitted).)

many reasons consistent with his guilt." Commonwealth v. Wright, 388 A.2d 1084, 1086 (Pa. Super. Ct. 1978). A petitioner must show more than the fact that fingerprint evidence was not produced. See id. He must show that this failure to produce the fingerprint evidence prejudiced his defense. See Strickland, 466 U.S. at 687-88, 694.

Here, Petitioner offered no evidence that the verdict would have been different with the introduction of fingerprint evidence lifted from the getaway vehicle. Instead, Petitioner states in his objection that "[w]hile the lack of fingerprints may not have, by itself established the reasonable probability that the jury would have found reasonable doubt," the lack of fingerprints on the door would have impacted the jury's determination of the credibility of Charles Wilson's and Clarence Cannady's testimony. (Doc. No. 20 at 10-11.) Cannady was a member of the Wheels of Soul Motorcycle Club and was present at the time of the murder. He testified that he was running behind Wilson when they attempted to apprehend Petitioner and saw Petitioner's face when he turned around for a moment. (Id. at 16.) Wilson testified that immediately after the shooting, Petitioner was running and jumped into the passenger side of Nate Hunter's vehicle as it pulled away from the crime scene. (Doc. No. 19 at 16-17.) Put simply, Petitioner's defense was not prejudiced because he failed to establish that the fingerprints would have changed the verdict. Therefore, Petitioner failed to prove that counsel was ineffective and his third objection is without merit.

D. Petitioner's Fourth Objection That the Magistrate Judge Erred in Denying His Brady Claim Based on the Failure to Disclose a Police Statement Is Without Merit

Petitioner's fourth claim in his Petition is that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), by withholding a statement made by Tyriek Newell, and that trial and appellate counsel were ineffective for failing to raise this claim. (Doc. No. 20 at 12.) Petitioner alleges that all witness statements were turned over to counsel, except for a statement

Tyriek Newell made to police about events occurring on the night of the murder. (Doc. No. 19 at 18.) The Magistrate Judge found that there was no Brady violation. (Id. at 20.)

In Brady, the United States Supreme Court held "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady, 373 U.S. at 87. To establish a Brady violation, a petitioner must demonstrate: (i) evidence was suppressed by the state, either willfully or inadvertently; (ii) the evidence is favorable to the accused, either because it is exculpatory or impeaching; and (iii) the evidence was material to the outcome of the case. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Evidence is Brady material when it places the "whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995). Further, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," then the evidence must have been disclosed. Strickler, 527 U.S. at 280 (citation omitted). In order for evidence to be material, it is not necessary that the evidence be established by a preponderance that its disclosure would have resulted in an acquittal. Kyles, 514 U.S. at 434. Rather, in making a determination of materiality, the assessment of the omitted evidence's impact must take account of the cumulative effect of the suppressed evidence in light of all the other evidence, not merely the value of the suppressed evidence standing alone. Id. at 436-37.

In this case, a Brady violation did not occur. First, the Magistrate Judge explained that Tyriek Newell's statement failed to meet the first requirement to establish a Brady violation—that is, a petitioner must show that evidence was suppressed by the state, either willfully or inadvertently. (Doc. No. 19 at 19-20.) Specifically, the Magistrate Judge concluded that Petitioner failed to offer any proof that trial counsel was not provided with a copy of Tyriek

Newell's statement, thus he could not prove that the Commonwealth suppressed the evidence. (Id.) Petitioner objects to the Magistrate Judge's finding as follows:

> Petitioner objects to the Magistrate Judge's finding that there was no "offer of proof that trial counsel was not provided with a copy of Tyriek Newell's statement."[7] Petitioner argues that "(1) there was no cover letter from the Commonwealth enclosing the statement, as is their custom, pattern, and practice of providing when passing discovery to defense counsel; (2) there is no indication on the Police Activity Sheet, which purports to list all the civilian interviews that Tyriek Newell gave a statement; and (3) Lead Detective Cummings testified that he had no idea that Tyriek Newell had even been in the club that night which in effect, denies having seen and/or taken his statement."

(Doc. No. 20 at 12-13.)

These objections, however, do not demonstrate that Newell's statement was suppressed or that trial counsel was not provided with a copy of the statement. The absence of a cover letter enclosing Newell's statement does not mean that the statement was not turned over to the defense.

Second, Tyriek Newell's statement fails to meet the second requirement to establish a Brady violation—that is, the evidence is favorable to the accused, either because it is exculpatory or impeaching. Strickler, 527 U.S. at 281-82. The Magistrate Judge found that Tyriek Newell's statement did not exonerate Petitioner nor did the statement support Petitioner's argument that Petitioner spent the evening with Tyriek Newell at Newell's mother's house. (Doc. No. 19 at 20.) Tyriek Newell's statement is summarized as follows:

> In his statement, Tyriek notes, on two occasions, that [petitioner] was angry over being kicked out of the club. Tyriek further stated that, after he, [petitioner] and their two friends, "Doe" and "Mar," had been kicked out of the club, the four men went to 62nd and Vine Streets. Tyriek further stated that, while at 62nd and Vine Streets, Doe was arrested, and that following the arrest "I left and went home." Notably, Tyriek did not state that he went straight home from the club to his mother's house or that [petitioner] came with him. As such, contrary to

[7] Petitioner did not have any objections relating to the ineffective assistance of counsel claims regarding the alleged Brady violation.

> [petitioner's] assertions, Tyriek's statement does not corroborate [petitioner's] alibi theory. . . .

(Id. at 19 (internal citations omitted).) Petitioner argues that he was at Tyriek Newell's mother's house with Tyriek during the shooting. Tyriek's statement, however, does not mention that Petitioner was with him at any time during the shooting. Tyriek's statement merely states Tyriek's whereabouts on the night of the shooting. Because Tyriek's statement does not corroborate Petitioner's theory about being at Tyriek's mother's house during the shooting, the statement is not favorable to his defense.

Third, Tyriek Newell's statement fails to meet the third requirement to establish a Brady violation—that is, the evidence was material to the outcome of the case. Strickler, 527 U.S. at 281-82. The Magistrate Judge found that Tyriek's statement did not exonerate Petitioner nor did the statement support Petitioner's argument that he spent the evening with Tyriek Newell at Newell's house. (Doc. No. 19 at 20.) If Tyriek's statement was introduced at trial, it would not have changed the outcome of the case because, as mentioned above, Tyriek's statement does not corroborate Petitioner's alibi nor does it mention Petitioner's whereabouts at the time of the shooting. Thus, Petitioner also fails to meet the third prong of the Brady test.

Accordingly, Petitioner's fourth objection to the Magistrate's finding that the Commonwealth's failure to turn over a police statement did not violate Brady v. Maryland is without merit.

E. Petitioner's Sixth Objection That the Magistrate Judge Erred in Denying His Claim Based on Allowing the Prosecution to Question a Recanting Witness Is Without Merit

Petitioner's sixth objection is that he was denied his rights under the Sixth and Fourteenth Amendments when the trial court permitted the prosecutor to question Ralph Burnett, a recanting witness, about the identity of the individual he had lunch with on the day he recanted his

statement to police. Petitioner objects to the Magistrate Judge's finding that the prosecutor's questioning of this witness did not violate Petitioner's constitutional rights. (Doc. No. 20 at 17.) Petitioner argues that the purpose of the prosecutor's line of questioning was to suggest that Burnett had been pressured by individuals to recant his testimony. (Doc. No. 19 at 20 (internal citation omitted).)

Federal Rule of Evidence 607 provides that: "any party, including the party that called the witness, may attack the witness's credibility." Fed. R. Evid. 607. This includes questioning the witness about his or her potential bias. United States v. Werme, 939 F.2d 108, 114 (3d Cir. 1991). When cross-examining a witness, "[p]roof of bias is almost always relevant because the jury, as the finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45, 52 (1984). "Evidence is relevant if it has any tendency to make the existence of any fact that is at consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401(a).

Here, the Magistrate Judge found that the prosecution attempted to elicit Burnett's potential bias. (Doc. No. 19 at 22-23.) A review of the testimony reflects that the Magistrate Judge was correct in finding that the prosecutor was trying to establish that Burnett and Petitioner were friends and that Burnett had a relationship with Petitioner's family by questioning Burnett about having lunch with Petitioner's family on the day of his testimony. (Id. at 21 (internal citation omitted).) The prosecutor was trying to show Burnett's bias and propensity to change his story to Petitioner's benefit. Petitioner failed to prove that the prosecutor's questioning was intended to show that Burnett had been influenced by the defense to recant his statement.

Since the Petitioner failed to show that the prosecutor's questions to Burnett were anything other than an attempt to show bias and evidence showing bias is generally permitted, the Petitioner failed to prove that his right to a fair trial was violated. Therefore, Petitioner's sixth objection is without merit.

F. Petitioner's Fifth, Seventh, and Eighth Objections Will Be Dismissed as Procedurally Defaulted

Petitioner's fifth, seventh, and eighth objections were not properly exhausted in state court and will be dismissed.[8] Petitioner makes the following objections: (i) Petitioner's fifth objection is that counsel failed to call Kina Hampton as a witness at trial; (ii) Petitioner's seventh objection is that the trial court overruled Petitioner's objections to the Commonwealth's closing argument to the jury; and (iii) Petitioner's eighth objection is that the trial court improperly permitted the prosecution to impeach Petitioner's primary defense witness by questioning the witness' mental health history. Because these objections were not properly exhausted in state court, they will be dismissed as procedurally defaulted. The Magistrate Judge summarized the relevant law as follows:

> Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999). A petitioner is not deemed to have exhausted the remedies available to him if he has a right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c) (1994); Castille v. Peoples, 489 U.S. 346, 350, 109 S. Ct. 1056, 1059, *reh'g denied*, 490 U.S. 1076, 109 S. Ct. 2091 (1989). In other words, a petitioner must invoke "one complete round of the state's established appellate review process" in order to exhaust his remedies. O'Sullivan, 526 U.S. at 845. A habeas petitioner retains the burden of showing that all of the claims alleged have been "fairly presented" to the state courts, which burden demands, in turn, that the claims brought in federal court be the "substantial equivalent" of those presented to the state courts.

[8] Petitioner's ninth claim in his habeas petition was that the trial court erred in permitting the prosecutor and detective to impermissibly bolster the prestige of a police witness. (Doc. No. 20 at 21.) In his objections, Petitioner concedes that his ninth claim is procedurally defaulted. For this reason, the Court will not address the ninth claim of Petitioner.

> Santana v. Fenton, 685 F.2d 71, 73-74 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115, 103 S. Ct. 750 (1983). "If [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claim procedurally barred . . . there is procedural default for the purpose of federal habeas . . . ." Coleman v. Thompson, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, *reh'g denied*, 501 U.S. 1277, 112 S. Ct. 27 (1991); McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). The procedural default barrier also precludes federal courts from reviewing a state petitioner's federal claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgment. Coleman, 501 U.S. at 729; see also Nolan v. Wynder, 363 Fed. Appx. 868, 871 (3d Cir. 2010); Taylor v. Horn, 504 F.3d 416, 427-28 (3d Cir. 2007). "To qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" Walker v. Martin, 131 S. Ct. 1120, 1127-28 (2011) (quoting Beard v. Kindler, 558 U.S. 53, 130 S. Ct. 612 (2009))

(Doc. No. 19 at 23-24.) Because Petitioner's fifth, seventh, and eighth objections were not properly exhausted in state court, these claims will be denied.

i. Petitioner's Fifth Objection That the Magistrate Judge Erred in Denying His Ineffective Assistance of Counsel Claim Based on a Failure to Call Witnesses at Trial Is Procedurally Defaulted

Petitioner's fifth objection is that counsel failed to call Kina Hampton as a witness at trial. Petitioner argues that Hampton's testimony would have rebutted another eyewitnesses' testimony.[9] (Doc. No. 20 at 15-17.)

In the R&R, the Magistrate Judge found this claim procedurally defaulted:

> Petitioner's failure to raise this claim in the Concise Statement of Matters Complained of on Appeal in the Superior Court constitutes waiver under the law of the state. See Pa. R. A. P. 1925 (issue must be raised in Statement of Matters Complained of on Appeal or be waived). Waiver of a claim for failure to comply with the requirements of Pa. R. A. P. 1925(b) and identify all issues to be reviewed on appeal has been found to be an adequate and independent ground sufficient to invoke the procedural default doctrine. See Edwards v. Wenerowicz, No. 11-3227, 2012 U.S. Dist. LEXIS 21908, 2012 WL 568849, at *4 (E.D. Pa.

[9] Petitioner does not object to the Magistrate Judge's finding on the fifth claim in his Petition relating to Anthony Rosselli. The Magistrate Judge found that the court is precluded from federal review of this claim because the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgment. (Doc. No. 19 at 24-25.) Because Petitioner did not object to the Magistrate Judge's finding, this Court will not address the part of his Petition related to Anthony Rosselli.

> Jan. 31, 2012) ("The Third Circuit has specifically recognized that a failure to comply with Rule 1925(b) and identify all issues to be reviewed on appeal resulting in waiver at the state court level constitutes procedural default on independent and adequate state grounds.") (citing Buck v. Colleran, 115 F.App'x 526, 528 (3d Cir. 2004)). As such, we find that this court is precluded from federal review of petitioner's fifth claim of this habeas petition since the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgment. See Coleman, 501 U.S. at 729.

(Doc. No. 19 at 24-25.)

Petitioner argues that finding this claim procedurally defaulted and refusing to review it on the merits would result in a fundamental miscarriage of justice due to new reliable evidence establishing actual innocence. (Doc. No. 20 at 15.) Courts have applied the "fundamental miscarriage of justice exception" to overcome various state procedural defaults.

> Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Schlup v. Delo, 513 U.S. 298, 316 (1995). The fundamental miscarriage of justice exception is narrow. Coleman v. Greene, 845 F.3d 73, 76 (3d Cir. 2017). "[A] petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup, 513 U.S. 298 at 327.

Here, Petitioner asserts that he is innocent of the instant crime. (Doc. No. 20 at 16.) He has presented "new evidence and witnesses that . . . were not presented to the jury" through Hampton's testimony. (Id.) Petitioner argues that his counsel was ineffective for failing to call Kina Hampton because Hampton gave a statement to police explaining that the only person she saw running up the street on the night of the incident was Charles Wilson. (Id.) This statement

contradicts trial testimony by another eyewitness, Clarence Cannady, that he was behind Wilson and saw Petitioner's face when he turned around. (Id.) Petitioner asserts that Hampton's testimony is new evidence that would have helped establish Petitioner's innocence. (Id.)

Hampton's testimony if presented at trial would have been insufficient to show that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. Although Hampton provided a statement to trial counsel that the only person she saw running up the street was Wilson, there are multiple eyewitness accounts that Petitioner was at the scene of the crime and that he shot Robinson. (Doc. No. 19 at 15 (internal citation omitted).) Hampton's statement is not enough to meet the standard in the narrow range of cases where the miscarriage of justice exception applies. Therefore, this claim is procedurally defaulted because it was not raised at the state court level.

ii. Petitioner's Seventh Objection That the Magistrate Judge Erred in Denying His Claim Based on the Fact That the Court Overruled Petitioner's Objections to the Commonwealth's Closing Statement Is Procedurally Defaulted

Petitioner's seventh objection is that the trial court overruled Petitioner's objections to the Commonwealth's closing argument to the jury. (Doc. No. 20 at 18.) Petitioner alleges that three separate statements violated Petitioner's right to a fair trial when the prosecutor:

1. "dramatically used paper cups to mimic a 'shell game' while simultaneously arguing to the jury that defense counsel was attempting to obscure the truth";

2. insinuated that "unnamed courtroom spectators . . . had 'gotten to' Ralph Burnett and had somehow improperly influenced his testimony"; and

3. rhetorically asked "when you get to Kaneisha Houston, who's sitting with Kaneisha down at the end of the hall, who's pulling the strings."

(Doc. No. 19 at 25 (citing Doc. No. 1 at 33-34).) Petitioner first objects to the Magistrate Judge's finding that Petitioner's counsel on direct appeal waived the first and third arguments made in relation to this claim because they were not sufficiently developed and because

Petitioner failed to cite to any pertinent authority, making the first and third arguments procedurally defaulted. (Doc. No. 20 at 18.)

"While a person convicted of a crime is guaranteed the right to direct appeal under Article V, Section 9 of the Pennsylvania Constitution, where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived." Commonwealth v. Johnson, 604 Pa. 176, 191 (Pa. 2009); See also Kirnon v. Klopotski, 620 F. Supp. 2d 674, 683-84 (E.D. Pa. 2008); Pa. R. App. P. 2119(a) (each point of an argument must be "followed by such discussion and citation of authorities as are deemed pertinent"). It is not a court's responsibility to frame the appellant's arguments. Johnson, 604 Pa. at 191.

Here, Petitioner asserts that the argument contained in his brief filed in the Superior Court cites both federal and state law that stands for the proposition that a prosecutor may not intentionally mislead a jury with improper suggests and insinuations. (Doc. No. 20 at 19.) However, if the case law cited does not "develop the claim in any . . . meaningful fashion," the claims are waived. Pa. R. App. P. 2119(a). The first argument relating to the claim that the prosecution mimicked a "shell game" was not fully developed. (Doc. No. 19 at 25-26.) The third argument relating to Kaneisha Houston cited no pertinent authority and Petitioner provided only three sentences of argument. (Id.) Therefore, the first and third arguments of this claim are procedurally defaulted for failure to comply with Pennsylvania Rule of Appellate Procedure 2119.

Petitioner further objects to the Magistrate Judge's finding relating to the second argument. (Doc. No. 20 at 19.) Petitioner contends that the Magistrate Judge misunderstood the argument that Petitioner was attempting to make. (Id. at 19.) Petitioner asserts that the

prosecutor misled the jury by making statements that were unsupported by any good faith evidence. (Id. at 19-20.) A review of Petitioner's memorandum of law shows that Petitioner did not cite to any testimony or state court decision to support this argument. (See Doc. No. 1.) Further, a review of the state court record shows that Petitioner failed to raise this claim before the state courts. Therefore, Petitioner is barred from raising this claim and Petitioner's second argument also is procedurally defaulted.

For the reasons stated above, Petitioner's seventh objection will be dismissed as procedurally defaulted.

iii. Petitioner's Eighth Objection That the Magistrate Judge Erred in Denying His Claim Based on the Fact That the Court Permitted the Prosecution to Impeach Petitioner's Primary Defense Witness Is Procedurally Defaulted

Petitioner's eighth objection is that the trial court improperly permitted the prosecution to impeach Petitioner's primary defense witness by questioning the witness' mental health history and treatment. (Doc. No. 20 at 20.) Petitioner objects to the Magistrate Judge's finding that this claim was waived and procedurally defaulted in state court because trial counsel did not renew his objection. (Id.)

"In order to preserve an issue for review, a party must make a timely and specific objection." Commonwealth v. Brown, 701 A.2d 252, 254 (Pa. Super. Ct. 1997). Further, Pennsylvania law provides "[a]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." 42 Pa. Const. Stat. Ann. § 9544(b).

Here, Petitioner objected to the prosecutor's line of questioning when the prosecutor asked Kaneisha Houston "[if she had] ever been treated for any mental illness, disease or disorder[.]" (Doc. No. 19 at 27 (internal citation omitted).) The trial court sustained this objection and called counsel to sidebar. (Id.) The prosecution then continued questioning

Houston without further objections from defense counsel or Petitioner. (Id.) In the absence of a timely and proper objection in the state court habeas petition, the Petitioner's argument concerning the prosecutor's follow-up questioning is waived. Therefore, this objection will be dismissed as procedurally defaulted.

V. CONCLUSION

For the foregoing reasons, the Court will adopt Magistrate Judge Caracappa's Report and Recommendation (Doc. No. 19) and will deny the Petition for Writ of Habeas Corpus (Doc. No. 1). An appropriate Order follows.

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

JAMEEL SIMPSON, Petitioner,	:	CIVIL ACTION
v.	:	
JAMES ERKERD, et al. Respondents.	:	NO. 14-4999

APPENDIX

ORDER

AND NOW, this 14th day of August 2017, upon consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1), the Response to the Petition (Doc. No. 17), the pertinent state court record, the Report and Recommendation of United States Chief Magistrate Judge Linda K. Caracappa (Doc. No. 19), Petitioner's Objections to the Report and Recommendation (Doc. No. 20), and in accordance with the Opinion issued this day, it is **ORDERED** that:

1. The Report and Recommendation (Doc. No. 19) is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus (Doc. No. 1) is **DENIED WITH PREJUDICE**;
3. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not demonstrated that reasonable jurists would debate the correctness of the procedural grounds for this ruling. 28 U.S.C. § 2253; Slack v. McDaniel, 529 U.S. 473, 484 (2000); and
4. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

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

APPENDIX

JAMEEL SIMPSON, Petitioner,	:	CIVIL ACTION
v.	:	
JAMES ERKERD, et al. Respondents,	:	NO. 14-4999

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE

Now pending before this court is a Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated in the State Correctional Institution Huntingdon, in Huntingdon, Pennsylvania. For the reasons which follow, it is recommended that the petition be denied and dismissed.

I. PROCEDURAL HISTORY

After a jury trial before the Honorable Peter F. Rogers in the Court of Common Pleas of Philadelphia, petitioner was convicted on April 19, 2006 of first-degree murder, aggravated assault, and carrying a firearm without a license. See Habeas Pet. 8/27/14; see also CP-51-CR-0404321-2003. On July 12, 2006, plaintiff was sentenced to a term of life imprisonment. Id.

The Trial Court summarized the facts of the case as follows:

> On the night of February 4, 2003, [petitioner] and three of his friends went together to a private club in West Philadelphia, [the "Wheels of Soul."] The club was run by members of a motorcycle club, and it was licensed to sell alcohol to its members and their guests. Charlie Wilson was the "doorman" serving in a security position on that night and he searched the four [men] before he let them into the club. Mr. Wilson testified that two of the males were arguing with each other as they entered the club.
>
> [Mr. Wilson] warned the two [males] about causing a disturbance in the club

as he was completing his search of them. While he was finishing his search of one of the men who was arguing, the other one threw a punch. Mr. Wilson grabbed one of the men and wrestled him to the ground while other club members subdued the man who had tried to punch his friend. The deceased in this case, Jerome Robinson, was one of the other club members who came to Mr. Wilson's aid. After the disturbance quelled, all four . .. men who had come to the club together were put out of the club. Though he was not one of the two who were arguing and scuffling as they entered the club, [petitioner] did have words with Mr. Wilson on his way out and told him to "check" his pockets to "make sure you got your money."

Later that night[,] in the early hours of February 5, 2003, Mr.Wilson was still in his position as the doorman [] handling security for the club. A female knocked on the door, and [Robinson] opened it and let her in. [Petitioner] was identified at trial as the person who followed [the female] through the club door, and fired one shot with a handgun that struck [Robinson] in the abdomen. That gunshot proved to be fatal, as it severed major arteries that caused [Robinson] to bleed internally.

Mr. Wilson found a handgun in the club, and he ran outside after [petitioner] who had immediately fled after he shot [Robinson]. [Mr. Wilson] saw him running down a small street adjacent to the club, and he yelled at him to stop. [Petitioner] turned around and fired a shot at him, and Mr. Wilson responded by firing his handgun at [petitioner.] They exchanged two more shots, and Mr. Wilson returned to the club after his handgun "blew up" in his hand.

Shortly after [Robinson] was shot, Officer Robert Wuller was in a marked patrol vehicle a few blocks from the private club when he and his partner arrested Ralph Burnett [for selling narcotics.]. . . Officer Wuller began questioning Burnett, and he observed an injury to his face...Officer Wuller suspected that he was one of the four males who had been at [the Wheels of Soul] just before the decedent was shot and killed ... [Burnett] was transferred to the [homicide division's] custody and questioned[.] [Burnett] gave a written statement to the homicide detectives in which he described in detail what had happened in the club when the four of them were ejected. In that statement, Burnett told the detectives that after they drove away from the club, [petitioner] told him "he was going to get his hammer." [Burnett] also said in his statement that while [petitioner] was being put out of the club, he told the members "that he would be back."

At the conclusion of the homicide investigation, an arrest warrant was issued for [petitioner]. [On February 6, 2003, when the police were at his residence, [petitioner] attempted to escape by climbing out of a second floor window and hiding on the roof. The police eventually arrested [petitioner] on that same date and took him into custody.] [The Commonwealth] charged [petitioner] with the murder of Jerome Robinson, aggravated assault for shooting at Charlie Wilson, and numerous related offenses.

Commonwealth v. Simpson, 2215 EDA 2006, (Pa. Super. 2007), at 2-4, citing, Trial Court Opinion, 2/20/07, at 2-4.

Petitioner filed a timely direct appeal. The Superior Court cited petitioner's claims as follows:

1. Was it error for the [trial] court to permit the prosecutor to cross-examine [petitioner's] primary defense witness with respect to her treatment "for any mental illness, disease or disorder";
2. Was it error for the [trial] court to permit the prosecutor to ask an assigned detective whether he had conducted an investigation "to determine whether or not" an alternative suspect "was involved" in the instant homicide;
3. Was it error for the [trial] court to permit the prosecutor to ask questions suggesting that a recanting witness had been improperly pressured;
4. Was it error for the [trial] court to overrule [petitioner's] objections to the Commonwealth's closing statement;
5. Was it error for the [trial] court to permit the jury to view a photo which had been taken by a police officer nearly two years after the incident; and
6. Was it error for the [trial] court to permit the deliberating jury to review the written statements of a recanting witness?

Commonwealth v. Simpson, 2215 EDA 2006 (Pa. Super. 2007), at 6-7. On December 21, 2007, the Pennsylvania Superior Court affirmed the trial court's judgment of sentence. Id. The Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal on June 4, 2008. See CP-51-CR-0404321-2003, at 29.

On April 29, 2009, petitioner filed a timely *pro se* petition for post-conviction relief, pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541, *et seq*. Id. Counsel was appointed and on July 22, 2010, counsel filed a no merit letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), along with a motion to withdraw.[1] Id. On September 17, 2010, present counsel, Terri Himebaugh, Esq., entered the case and filed a motion for time to investigate potential claims and file amended PCRA petition. Id. On November 10, 2010, counsel filed an amended PCRA petition, along with a supporting

[1] Pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), appointed counsel in a post-conviction proceeding may be given leave to withdraw upon the submission of a "no-merit" letter that details the nature and extent of counsel's review of the case, lists each issue the petitioner wished to have reviewed, and explains counsel's assessment that the case lacks merit. The court must also conduct an independent review of the record and must agree with counsel that the petition is meritless before dismissing the petition.

memorandum of law. Id. at 29-30. On May 4, 2012, the PCRA court dismissed the petition. Petitioner appealed to the Pennsylvania Superior Court, arguing that the PCRA court had not considered petitioner's memorandum of law when ruling that petitioner's issues were insufficiently supported by facts and legal arguments. On February 1, 2013, the Superior Court remanded to the PCRA court with instructions to reconsider the petition with the supporting arguments offered in the memorandum of law. Commonwealth v. Simpson, 1468 EDA 2012 (Pa. Super. 2013). On October 1, 2013, the PCRA court again dismissed the PCRA petition.

On October 18, 2013, petitioner appealed to the Superior Court. See CP-51-CR-0404321-2003, at 33. On appeal to the Superior Court, petitioner raised to following claims:

1. Was petitioner denied his rights under Article 1 Section 9 of the Constitution of the Commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States of America to effective assistance of counsel in that trial counsel had a conflict of interest which should have precluded him from representing petitioner, and which prejudicially impacted petitioner's ability to present a defense?
2. Was petitioner denied his rights under Article 1 Section 9 of the Constitution of the Commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States of America to effective assistance of counsel in that trial counsel failed to investigate potential alibi witnesses, to give notice of an alibi defense, to call alibi witnesses and to present corroborating evidence?
3. Was petitioner denied his rights under Article 1 Section 9 of the Constitution of the Commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States of America to effective assistance of counsel in that trial counsel failed to obtain a potentially exonerating forensic latent print report?
4. Was petitioner denied his Fourteenth Amendment to the Constitution of the United States of America right to due process of law and his rights pursuant to Brady v. Maryland[2] in that the prosecution failed to disclose to the defense the existence of a police statement taken of Tyriek Newell; and was petitioner denied his rights under Article 1 Section 9 of the Constitution of the Commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States of America to effective assistance of counsel in that trial and appellate counsel failed to investigate the existence of said police statement, to obtain it and/or to raise and preserve this claim on direct appeal?
5. Was petitioner denied his rights under the Sixth and Fourteenth Amendments

[2] See Brady v. Maryland, 373 U.S. 83 (1963).

to the Constitution of the United States of America in that his PCRA petition was improperly dismissed without a hearing?

6. Was petitioner denied his rights under Article 1 Section 9 of the Constitution of the Commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States of America to effective assistance of counsel in that trial counsel failed to call several witnesses whose testimony would have rebutted eye witness testimony?

See Commonwealth v. Simpson, 2939 EDA 2013 (Pa. Super. 2014), at 1-2. The Superior Court affirmed the PCRA court's dismissal of the PCRA petition on June 19, 2014. Id.

On August 27, 2014, petitioner filed the instant federal habeas corpus petition with this court pursuant to 28 U.S.C. §2254, raising the following claims:

1. Ineffective assistance of trial counsel in that trial counsel had a conflict of interest which should have precluded counsel from representing petitioner and which prejudicially impacted petitioner's ability to present a defense;
2. Ineffective assistance of trial counsel for failing to investigate potential alibi witnesses, give timely notice of an alibi defense, call the alibi witnesses at trial and present corroborating evidence;
3. Ineffective assistance of trial counsel for failing to obtain latent fingerprint reports;
4. Petitioner was denied his Fourteenth Amendment right to due process of law and his rights pursuant to Brady v. Maryland in that the prosecution failed to disclose to the defense the existence of a police statement taken from Tyriek Newell, and ineffective assistance of trial and appellate counsel for failing to investigate the existence of said police statement, to obtain it and/or raise and preserve this claim on direct appeal;
5. Ineffective assistance of trial counsel for failing to call several witnesses;
6. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court permitted the prosecutor to question recanting witness Burnett suggesting without any evidentiary basis for doing so, that Burnett had been pressured by others to repudiate his post-arrest accusations;
7. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court overruled petitioner's objections to the Commonwealth's closing statement;
8. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court permitted the prosecution to impeach a defense witness with respect to her mental health history and treatment; and
9. Petitioner was denied his rights under the Sixth and Fourteenth Amendments when the trial court permitted the prosecutor and detective to impermissibly bolster the prestige of the police witness.

See Habeas Pet. Memo. Of Law, at 8-40. Respondents argue that petitioner's claims are either meritless or procedurally defaulted. See Resp. to Habeas Pet. 1/27/17. After detailed review of the state court records, we find that petitioner is not entitled to relief and petitioner's petition for habeas corpus should be denied.

II. STANDARDS OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for Writ of Habeas Corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court of the United States, in Williams v. Taylor, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 1518-19 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded state court legal decisions, and more clearly defined the two-part analysis set forth in the statute. Under the first part of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly established

federal law, as determined by the Supreme Court of the United States." Williams, 529 U.S. at 404. Justice O'Connor, writing for the majority of the Court on this issue, explained that a state court decision may be contrary to Supreme Court precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours [the Supreme Court's]." Id. at 405. However, this "contrary to" clause does not encompass the "run-of-the-mill" state court decisions "applying the correct legal rule from [Supreme Court] cases to the facts of the prisoner's case." Id. at 406.

To reach such "run-of-the-mill" cases, the Court turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). Id. at 407-08. The Court found that a state court decision can involve an unreasonable application of Supreme Court precedent in one of two ways: (1) "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407. However, the Supreme Court specified that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. The Supreme Court has more recently pronounced: "The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that

determination was unreasonable – a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 573, 127 S. Ct. 1933, 1939 (2007).

III. DISSCUSION OF THE MERITS

Petitioner's first, second, third, fourth, and sixth claims were properly exhausted in the state courts and will now be addressed on the merits

Claim One

Petitioner's first claim is that trial counsel, Nino Tinari, Esquire, was ineffective because counsel had a conflict of interest that should have prevented Attorney Tinari from representing petitioner. Petitioner alleges that Attorney Tinari failed to call two witnesses, Kenneth Newell and Nate Hunter, due to Attorney Tinari's prior representation of these two witnesses. See Habeas Pet., 08/27/14 at 8-16.

The state court reviewed this claim on collateral appeal and found it meritless.

When reviewing claims of ineffective assistance of counsel, this court must view the totality of the evidence before the trial court and determine whether the petitioner has shown that the decision reached is reasonably likely to have been different, absent the alleged ineffectiveness of counsel. Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984). The Sixth Amendment to the United States Constitution recognizes the right of every criminal defendant to effective assistance of counsel. U.S. Const., amend.VI. The Supreme Court has set forth a two-prong test - both parts of which must be satisfied - by which claims alleging counsel's ineffectiveness are adjudged. Id. at 668. First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. The Supreme Court has explained that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

> reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 76 S. Ct. 158, 163-64 (1955)).

A convicted defendant asserting ineffective assistance must therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Id. at 690. Then the reviewing court must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. Under Pennsylvania law, counsel is not ineffective for failing to raise baseless or frivolous issues. Commonwealth v. Wilson, 393 A.2d 1141, 1143 (Pa. 1978).

Second, the petitioner must demonstrate that his counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. A reviewing court need not determine whether counsel's performance was deficient before considering whether the petitioner suffered any prejudice as a result of the alleged deficiency. If it is easier to dispose of an ineffectiveness claim for lack of the requisite prejudice, that course should be followed. Id. at 697.

Kenneth Newell

The PCRA court reviewed petitioner's claim and explained that Kenneth Newell was the brother of petitioner's friend Tyriek Newell and was in the club when the shooting occurred. Commonwealth v. Simpson, 2939 EDA 2013, 1/16/14, at 4. Petitioner argues that Nino Tinari provided representation Kenneth Newell on unrelated charges, which prejudiced

petitioner because petitioner wanted Kenneth Newell to be called as a witness. Petitioner further argues that Nino Tinari had planned for Kenneth Newell to be granted immunity so that Nino Tinari could tell petitioner that Mr. Newell was not able to be called to the stand.

The PCRA court explained that Nino Tinari did not represent Mr. Newell. Rather it was Nino Tinari's son, Eugene Tinari, Esquire, who represented Mr. Newell in other criminal matters. The PCRA court noted that Eugene Tinari represented Mr. Newell and Eugene Tianri practices in a separate office with a separate address than Nino Tinari. Thus, Nino Tinari had no conflict of interest in regard to Mr. Newell.

Petitioner admits that Nino Tinari's law practice is physically separate from Eugene Tinari's. However, petitioner alleges that Nino Tinari and Eugene Tinari were material law partners. Petitioner alleges that just because their offices were separate, does not mean that the father and son did not work on cases together, refer or pass cases to each other or discuss common cases. See Habeas Pet., at 9, fn. 6. The court is not persuaded by this argument. Petitioner offers no proof that Nino Tinari and Eugene Tinari collaborated on this or any other case. Petitioner notes that Eugene Tinari originally represented petitioner at his preliminary hearing, but there is nothing in the record to indicate that after Nino Tinari became attorney of record that Nino Tinari and Eugene Tinari discussed the case.

Petitioner's original September 2004 trial on the instant matter resulted in a mistrial. Petitioner was then retried and convicted in the instant matter in April 2006. At a preliminary hearing, before the start of petitioner's first trial, the court addressed the issue of a potential conflict of interest in regards to Attorney Tinari and Kenneth Newell. The Commonwealth presented to the court the fact that a Quarter Sessions File docket entry reflected that Nino Tinari appeared on behalf of Kenneth Newell and filed a parole petition on Mr.

Newell's behalf in an unrelated matter before Judge McInerney. N.T. 3/30/04, at 7. Nino Tinari stated on the record that he never represented Mr. Newell. Nino Tinari explained that, "this is an absolute error, Your Honor. Eugene Tinari appeared before Judge McInerney. Eugene filed the petition, I had nothing to do with it, I wasn't there in the courtroom. I had no idea from the docket. I don't represent Kenneth Newell, [Gene] did..." Id. at 11. Nino Tinari further stated on the record that himself and Eugene Tinari do not practice law in the same office. Id. at 13-14. After a recess, the Commonwealth informed the court that, while the docket entry listed Nino Tinari as representing Kenneth Newell at a hearing, the entry of appearance on the docket actually listed Eugene Tinari as counsel of record. Further, Eugene Tinari informed the Commonwealth that it was he who appeared on Mr. Newell's behalf not Nino Tinari. Id. at 26-27. Petitioner has offered no proof that any of the representations made to the state court by Nino Tinari or the Commonwealth were false. The record appears to be clear that Nino Tinari never represented Mr. Newell, thus there would be no conflict of interest.

Petitioner has failed to demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Strickland, 466 U.S. at 668. Counsel cannot be found deficient for a conflict of interest that did not exist.

Petitioner argues that petitioner wanted to call Kenneth Newell to testify because he wanted to present Mr. Newell as the prime alternative suspect. The PCRA court addressed Nino Tinari's performance and found that petitioner was unable to prove that Attorney Tinari's legal strategy was not reasonable. The PCRA court explained the following:

> Counsel made a sound strategic decision not to call Kenneth (a Commonwealth witness) to the stand since Kenneth provided a statement to police that [petitioner] was angry about being thrown from the club and vowed to return "to take care of the old head who threw him out." The defense decided to advance the legal theory that Kenneth was an alternate suspect, as he was in the club the time of the shooting, and was wearing similar clothing as [petitioner] that night. The plan did

> not work, but it was a reasonable strategic decision to help [petitioner] with his case, for which he cannot be deemed ineffective.

Simpson, 2939 EDA 2013, at 5.

The Commonwealth's response to the instant petition explained how Attorney Tinari introduced Kenneth Newell as an alternative suspect. The Commonwealth noted: "through cross-examination of Charlie Wilson, the defense obtained testimony that Kenneth had been in the club shortly before the shooting and was wearing dark clothing, just like the person that Wilson pursued immediately after the shooting. Defense counsel also questioned the assigned detective, suggesting that police had failed to adequately investigate Kenneth as a suspect in the homicide. Additionally, defense counsel presented petitioner's ex-girlfriend, Kaneisha Houston, who offered an elaborate tale about Kenneth's supposed involvement, including an alleged confession immediately after the shooting and a dramatic flight through the woods afterward, as well as purported threats she had received from him." See Resp. to Habeas Pet., 1/27/17 at 16-17, citing N.T. 4/13/06, 78-79, 111; 4/18/06, 79-88, 112, 119, 145, 168-173.

We find that the state court's decision was a reasonable application of Strickland. Attorney Tinari introduced Kenneth Newell as an alternative suspect through other methods. Mr. Newell had given police a statement that petitioner was angry and going "to take care of the old head who threw him out." A convicted defendant asserting ineffective assistance must therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. Then the reviewing court must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. The court cannot find that the PCRA court's decision that Attorney Tinari's acts were not outside "the wide range of professionally competent assistance" was an unreasonable application of Strickland. It is recommended petitioner's first

claim be denied as to this issue.

Nate Hunter

The PCRA court reviewed this claim as to Nate Hunter and explained that Mr. Hunter was one of the three men with petitioner when they were all ejected from the club. Simpson, 2939 EDA 2013, at 5. Nate Hunter also signed a written statement to police in which he stated that he heard petitioner threaten to return to the club. Resp. to Habeas Pet., 1/27/17 at 17.

The PCRA court found petitioner's claim that Attorney Tinari had a conflict of interest because he had represented Nate Hunter meritless. The PCRA explained that Attorney Tinari had entered his appearance on Mr. Hunter's behalf on an unrelated drug offense, but never actually met with Mr. Hunter and withdrew his representation of Mr. Hunter prior to the start of petitioner's trial. Further, petitioner waived any potential conflict of interest before the start of trial.

At the March 30, 2004 pre-trial hearing, before petitioner's first trial, Attorney Tinari stated on the record "I have no idea of Nate Hunter, Your Honor. I have no idea who he is, I haven't interviewed him, I haven't spoken with him, and I have no idea what his case is about..." N.T. 3/30/04, at 12. The docket sheet revealed that an entry of appearance for Attorney Tinari had been docketed in Mr. Hunter's case. Attorney Tinari informed the court that perhaps someone from Attorney Tinari's office had interviewed Mr. Hunter and filed the entry of appearance. Id. at 26. At the time of the entry of appearance no court proceedings or appearance had taken place on Mr. Hunter's case. Id. at 31-32. The court ordered Attorney Tinari to have no further contact with Mr. Hunter and to withdraw from Mr. Hunter's case. At the start of petitioner's first trial on September 21, 2004, Attorney Tinari stated on the record that he had no

contact with Mr. Hunter and was withdrawing as counsel from Mr. Hunter's case. N.T., 9/21/04 at 9-12. Additionally, the court conducted a full colloquy of petitioner concerning Attorney Tinari's entry of appearance on behalf of Mr. Hunter and petitioner waived any conflict. Id. at 13-17. Petitioner stated that he understood that Attorney Tinari had previously been listed as attorney of record for Nate Hunter and that Attorney Tinari was ordered to withdraw from that case and have no contact with Mr. Hunter. Id. Petitioner testified that he still wanted Attorney Tinari to represent him. Id.

We find that the state court's decision was a reasonable application of Strickland. Petitioner has failed to prove that there was any conflict in regards to Nate Hunter. Furthermore, any potential conflict was waived after colloquy on the record by petitioner. Petitioner has failed to demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Strickland, 466 U.S. at 668. It is recommended that petitioner's first claim as to this issue be denied.

Claim Two

Petitioner's second claim is that trial counsel was ineffective for failing to investigate potential alibi witnesses, Saffiyah Warren and Tyriek Newell, and to notice an alibi defense. Habeas Pet. Memo. of Law, 8/27/14 at 16-22. Petitioner argues that he informed trial counsel that at the time of the shooting petitioner was at Tyriek Newell's mother's house with Tyriek and was on the household landline telephone talking to his girlfriend Saffiyah Warren. Petitioner alleges that both of these individuals could have testified in petitioner's defense that he was with them when the shooting occurred. Id.

The Superior Court reviewed this claim on collateral appeal and found it was meritless. The Superior Court explained that under Pennsylvania law "[t]o prevail on a claim

that trial counsel rendered ineffective assistance by failing to call a witness, the defendant must show that (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or should have known of the witness' existence; (4) the witness was prepared to cooperate and would have testified on defendant's behalf; and (5) that the absence of the witness' testimony prejudiced the defendant. Commonwealth v. Brown, 767 A .2d 576, 582 (Pa.Super.2001). [Petitioner] has the burden of showing that trial counsel had no reasonable basis for failing to call a particular witness. Commonwealth v. Small, 980 A.2d 549, 560 (Pa .2009). Simpson, 2939 EDA 2013, 6/9/14, at 3.

The Superior Court explained that while petitioner did provide an affidavit from Ms. Warren that she had been on the phone with petitioner the night of the shooting and that she was available to testify at petitioner's trial, Ms. Warren had no personal knowledge regarding petitioner's actual whereabouts at the time of the shooting. Ms. Warren would only have been able to testify that she had a phone conversation with petitioner that evening. The Superior Court further reasoned "[e]ven assuming that Warren's cell phone records were obtained and reflected that a telephone call took place between her cell phone and the land-line at Tyriek's mother's house on the night of the shooting, such records would not prove that [petitioner] was at Tyriek's mother's house. Thus, even if the jury believed Warren's proposed testimony, it would not exculpate [petitioner], because none of Warren's testimony could contradict any of the other evidence against [petitioner]." Id. at 4. The Superior Court found as follows:

> In the face of other significant evidence, including multiple eyewitness accounts that [petitioner] was at the scene of the crime and that he shot Robinson, we cannot say that Warren's uncorroborated testimony would have resulted in a different verdict. Because of the tenuous significance of Warren's proffered testimony in light of the other testimony presented at trial, the PCRA court properly decided that [petitioner's] claim of ineffective assistance of counsel with regard to Warren and her phone records had no arguable merit.

Id. The Superior Court ruled that petitioner failed to show that had trial counsel called Ms. Warren to testify at trial that the verdict would have been different.

In regards to Tyriek Newell as a potential witness the Superior Court explained that petitioner failed to provide the court with an affidavit from Mr. Newell or phone records from Mr. Newell's house. Petitioner failed to prove that Mr. Newell was available and willing to testify at petitioner's trial. Id. at 5. The Superior Court concluded that petitioner failed to meet his burden of showing any likelihood that the verdict would have been different if trial counsel had called Mr. Newell to testify at trial.

The state court ruling was "neither contrary to nor an unreasonable application of federal law." In order to show ineffective assistance of counsel, petitioner must show that the witness was available to testify, Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902 (1991), and that "a reasonable likelihood that ... information [not presented] would have dictated a different trial strategy or led to a different result at trial." Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990). Petitioner failed to show that Tyriek Newell was available to testify at petitioner's trial. Additionally, even if Saffiyah Warren testified that she was on the phone with petitioner, that testimony would not have proven that petitioner was at Tyriek Newell's house at the time of the shooting; thus, petitioner cannot prove that Ms. Warren's testimony would have led to a different result at trial. It is recommended that petitioner's second claim be dismissed.

Claim Three

Petitioner's third claim is that trial counsel was ineffective for failing to obtain potentially exonerating forensic latent fingerprint reports. See Habeas Pet. Memo. of Law, 8/27/14 at 22-23. Petitioner notes that Charles Wilson testified that, immediately after the

shooting, petitioner jumped into the passenger side of Nate Hunter's 1988 burgundy celebrity wagon and it pulled away from the crime scene. Petitioner claims that latent fingerprints were taken from that vehicle. Petitioner claims that trial counsel failed to obtain a forensic analysis of those prints. Petitioner alleges that had counsel obtained the fingerprint analysis report, it would have established that none of the fingerprints were petitioners. Id.

The PCRA Court reviewed this claim on collateral appeal and found it meritless. The PCRA Court found as follows:

> [Petitioner] has not, at any time presented any fingerprint report to confirm his assertion. See, Scott, supra. In addition, the absence of [petitioner's] fingerprints in the car would not prove I that [he] was not in the car. Whether fingerprints were found in the car or not, that evidence alone would not have affected the verdict in the case, nor would [it] have proved or disproved that [petitioner] was the shooter. That is why [it] is well settled in the law that a defendant's fingerprint is not exculpatory evidence per se and may be explained for a number of reasons. Commonwealth v. Wright, 388 A.2d 1084 (Pa. Super. 1978). In addition, [it] cannot be forgotten that this was not a crime based on circumstantial evidence with no eyewitness; rather, multiple eyewitnesses clearly identified [petitioner] as the shooter.

Simpson, 2939 EDA 2013, at 10.

The lack of fingerprint evidence would not have proven that petitioner was not in the getaway vehicle. Thus, the PCRA court found that petitioner failed to prove that he was prejudiced by trial counsel not obtaining a forensic report on the fingerprints. Petitioner must demonstrate that his counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. Based on the facts of this case petitioner has failed to show that trial counsel's failure to obtain and identify latent fingerprints from the getaway vehicle prejudiced petitioner. Thus, petitioner has failed to prove that counsel was ineffective. As such, we must

recommend petitioner's third claim be denied.

Claim Four

Petitioner's fourth claim is that the Commonwealth violated Brady v. Maryland[3] by withholding a statement made by Tyriek Newell, and that trial and appellate counsel were ineffective for failing to raise this claim. See Habeas Pet. Memo. of Law, 8/27/14, at 23-26. Petitioner alleges that all witness statements were turned over to counsel, except for a statement made by Tyriek Newell. Petitioner claims that defense counsel in the instant habeas matter received a letter from Mr. Newell in 2010, stating that Mr. Newell had made a statement to police.

In Brady, the Supreme Court held "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady, 373 U.S. at 87. To establish a Brady violation, a petitioner must demonstrate: (i) evidence was suppressed by the state, either willfully or inadvertently; (ii) the evidence is favorable to the accused, either because it is exculpatory or impeaching; and (iii) the evidence was material to the outcome of the case. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The materiality standard is satisfied when the evidence places the "whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995). Further, this standard is satisfied "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler, 527 U.S. at 280 (citation omitted). In order for evidence to be material, it is not necessary that the evidence establish by a preponderance that disclosure of the evidence would have resulted in an acquittal. Kyles, 514 U.S. at 434. Moreover, in making a determination of materiality, the assessment of the omitted evidence's impact must take account of the cumulative

[3] 373 U.S. 83 (1963).

effect of the suppressed evidence in light of the other evidence, not merely the probative value of the suppressed evidence standing alone. Id. at 436-37.

The Superior Court reviewed this claim and found it meritless. Simpson, 2939 EDA 2013 at 5-6. The Superior Court explained that petitioner's allegations did not meet the standards of Brady. First, petitioner failed to offer any proof that trial counsel was not provided with a copy of Tyriek Newell's statement. Thus, petitioner could not prove that the Commonwealth suppressed the evidence. Additionally, the Superior Court found that a review of the statement revealed that Mr. Newell's statement was not exculpatory in nature. Petitioner argues that he was at Tyriek Newell's mother's house with Mr. Newell during the shooting. However, the Superior Court found as follows:

> In his statement, Tyriek notes, on two occasions, that [petitioner] was angry over being kicked out of the club. See Tyriek Statement, at 2, 4 (unnumbered). Tyriek further stated that, after he, [petitioner] and their two friends, "Doe" and "Mar," had been kicked out of the club, the four men went to 62nd and Vine Streets. Id. at 3 (unnumbered). Tyriek further stated that, while at 62nd and Vine Streets, Doe was arrested, and that following the arrest "I left and went home." Id. Notably, Tyriek did not state that he went straight from the club to his mother's house or that [petitioner] came home with him. As such, contrary to [petitioner's] assertions, Tyriek's statement does not corroborate [petitioner's] alibi theory...

Simpson, 2939 EDA 2013, at 6. The Superior Court found that petitioner's Brady claim was meritless because petitioner failed to prove that Tyriek Newell's statement was suppressed by the Commonwealth and the statement was not exculpatory for petitioner. Id. Further, the Superior Court found that since petitioner could not prove that he was prejudiced by the non-disclosure of Mr. Newell's statement, petitioner cannot establish ineffective assistance of counsel in failing to discover the existence of the statement. Id.

We find the Pennsylvania Superior Court's determination was not contrary to or an unreasonable application of Supreme Court precedent. Schriro, 550 U.S.at 573. With regard

to the first prong of the Brady test, petitioner has failed to provide any evidence that trial counsel was not aware of the statement made by Tyriek Newell to the police. Moreover, the Superior Court was accurate in its summary of Tyriek Newell's statement and the conclusion that said statement did not exonerate petitioner nor did the statement support petitioner's argument that petitioner spent the evening with Tyriek Newell at Mr. Newell's house. Thus, petitioner also fails to meet the third prong of the Brady test. As such, we find the instant claim does not rise to the level of a Brady violation. Because the underlying Brady claim is meritless, counsel cannot be deemed ineffective for failing to obtain the statement, and we recommend petitioner's instant allegation be dismissed.

Claim Six

Petitioner's sixth claim is that the trial court violated petitioner's right to a fair trial when the trial court permitted the prosecutor to question Ralph Burnett, a recanting witness, about the identity of the individual Mr. Burnett had lunch with on the day he recanted his statement to police. Plaintiff argues that the purpose of the prosecutor's line of questioning was to suggest that Mr. Burnett had been pressured by individuals in the courtroom to recant his testimony. See Habeas Pet. Memo of Law, 8/27/14, at 29-32.

Petitioner raised this claim on direct appeal and the Superior Court found the claim meritless. Simpson, 2215 EDA 2006, at 14-17.

As explained by the Superior Court, Mr. Burnett had provided the police with a signed written statement detailing incriminating statements that petitioner had made. Mr. Burnett was called as a witness for the prosecution, and recanted his previous written statement. Mr. Burnett claimed that he had been under the influence of drugs at the time he made the statement.

During Mr. Burnett's testimony at trial, the prosecutor questioned Mr. Burnett concerning his relationship with petitioner's family:

Mr. Cameron [the prosecutor]

Q. Now, in addition to knowing the defendant did you know his family?

A. No.

Q. Well, when we broke for lunch today who did you leave outside this courtroom with?

Mr.Tinari [defense counsel]: Objection.

The Court: Overruled.

The Witness: With a friend.

By Mr. Cameron [the prosecutor]:

Q. Who's the friends?

A. Just one friend.

Q. Who's that?

A. He's sitting in the back.

Q. What's your relationship with him; who is he?

A. He watched me grow up a little bit.

The Court: What? He's what?

The Witness: I said he watched me grow up. He's like a friend.

By Mr. Cameron:

Q. What's his name?

A. Rashawn.

Q. The other people that were there, do you know any of the other people, the ladies and children back there?

A. I know one of them.

Q. Who's that?

A. Just the girl.

Q. Do you know their relationship with the defendant?

A. No.

See Simpson, 2215 EDA 2006, at 15-16, citing N.T. at 158-159; see also Habeas Pet. Mem. Of Law, 8/17/14, at 30, citing N.T. 4/13/06, at 158-159.

Petitioner alleges that the above line of questioning was intended to imply to the jury that the Commonwealth had information that the defense had been impermissibly trying to 'influence' Mr. Burnett's testimony. See Habeas Pet. Memo. of Law, 8/27/14, at 30.

The Superior Court reviewed the above line of questioning and found petitioner's argument had no merit. The Superior Court explained that the prosecutor did not make any statements insinuating threats or intimidation on part of the defense. The Superior Court noted that the prosecutor had established that petitioner and Mr. Burnett were friends and the above line of questioning was intended to further explore the relationship between petitioner, petitioner's family, and Mr. Burnett. The Superior Court found that, "[a]lthough the prosecutor's questioning was ultimately unsuccessful, because Burnett denied any relationship with [petitioner's] family or the courtroom spectators, it was still proper as a party may impeach its own witness on grounds of bias." Simpson, 2215 EDA 2006, at 15-18.

A review of the record affirms the Superior Court's finding that petitioner's claim was meritless. Petitioner fails to show any question that supports petitioner's accusation that the line of questioning was intended to show that Mr. Burnett had been influenced by the defense to recant his statement. The prosecution attempted to prove a potential bias on behalf of Mr. Burnet

by trying to establish Mr. Burnett has a relationship with petitioner and his family. Thus, it is recommended that petitioner's sixth habeas claim be denied as meritless.

IV. PROCEDURAL DEFAULT: CLAIMS FIVE, SEVEN, EIGHT, NINE

Respondents argue that federal review of claims five, seven, eight and nine are barred based on the doctrine of procedural default. See Resp. to Habeas Pet. 1/27/17 at 27-27. Respondents contend that because the state courts did not address the merits of these claims, petitioner may only obtain federal review if he demonstrates cause for the default and resulting prejudice, or that failure to review the claims would result in a fundamental miscarriage of justice due to new reliable evidence establishing actual innocence. Id. at 27-37. The undersigned finds that petitioner's claims five, seven, eight and nine are procedurally defaulted and will discuss them as such below.

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999). A petitioner is not deemed to have exhausted the remedies available to him if he has a right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c) (1994); Castille v. Peoples, 489 U.S. 346, 350, 109 S. Ct. 1056, 1059, *reh'g denied*, 490 U.S. 1076, 109 S. Ct. 2091 (1989). In other words, a petition must invoke "one complete round of the state's established appellate review process" in order to exhaust his remedies. O'Sullivan, 526 U.S. at 845. A habeas petitioner retains the burden of showing that all of the claims alleged have been "fairly presented" to the state courts, which burden demands, in turn, that the claims brought in federal court be the "substantial equivalent" of those presented to the state courts. Santana v. Fenton, 685 F.2d 71, 73-74 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115, 103 S. Ct. 750 (1983). "If [a] petitioner failed to exhaust state remedies and the court to

which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claim procedurally barred . . . there is procedural default for the purpose of federal habeas. . . ." Coleman v. Thompson, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, *reh'g denied*, 501 U.S. 1277, 112 S. Ct. 27 (1991); McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). The procedural default barrier also precludes federal courts from reviewing a state petitioner's federal claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgment. Coleman, 501 U.S. at 729; see also Nolan v. Wynder, 363 Fed. Appx. 868, 871 (3d Cir. 2010); Taylor v. Horn, 504 F.3d 416, 427-28 (3d Cir. 2007). "To qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" Walker v. Martin, 131 S. Ct. 1120, 1127-28 (2011) (*quoting* Beard v. Kindler, 558 U.S. 53, 130 S. Ct. 612 (2009)).

Claim Five

Petitioner's fifth claim is that trial counsel was ineffective for failing to call Philadelphia Police Officer Anthony Rosselli and Kina Hampton as witnesses at trial.

The Superior Court found this claim waived on collateral review. Simpson, 2939 EDA 2013, at fn. 5. The Superior Court found petitioner's instant fifth claim was waived because petitioner failed to raise said claim in the Concise Statement of Matters Complained of on Appeal as required by Pa.R.A.P.1925(b). Petitioner's failure to raise this claim in the Concise Statement of Matters Complained of on Appeal in the Superior Court constitutes waiver under the law of the state. See Pa.R.A.P.1925 (issue must be raised in Statement of Matters Complained of on Appeal or be waived). Waiver of a claim for failure to comply with the requirements of Pa. R.A.P.1925(b) and identify all issues to be reviewed on appeal has been found to be an adequate and independent ground sufficient to invoke the procedural default

doctrine. See Edwards v. Wenerowicz, No. 11–3227, 2012 U.S. Dist. LEXIS 21908, 2012 WL 568849, at *4 (E.D.Pa. Jan.31, 2012) ("The Third Circuit has specifically recognized that a failure to comply with Rule 1925(b) and identify all issues to be reviewed on appeal resulting in waiver at the state court level constitutes procedural default on independent and adequate state grounds.") (citing Buck v. Colleran, 115 F. App'x 526, 528 (3d Cir.2004)). As such, we find that this court is precluded from federal review of petitioner's fifth claim of this habeas petition since the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgment. See Coleman, 501 U.S. at 729.

Claim Seven

Petitioner's seventh claim is that the trial court erred when the court overruled petitioner's objections to the Commonwealth's closing statements. Petitioner alleges that three separate statements violated petitioner's right to a fair trial: (1) that the prosecutor "dramatically used paper cups to mimic a 'shell game' while simultaneously arguing to the jury that defense counsel was attempting to obscure the truth"; (2) that the prosecutor insinuated that "unnamed courtroom spectators...had 'gotten to' Ralph Burnett and had somehow improperly influenced his testimony"; and (3) that the prosecutor rhetorically asked "when you get to Kaneisha Houston, who's sitting with Kaneisha down at the end of the hall, who's pulling the strings." See Habeas Pet. Memo. of Law, 8/27/14, at 33-34.

The Superior Court found petitioner's first and third arguments were waived. Simpson, 2215 EDA 2006, at 19-20. In regards to petitioner's first claim that the prosecutor mimicked a "shell game", the Superior Court found that petitioner failed to develop said claim, resulting in the claim being waived. Id. The Superior Court noted that petitioner failed to cite to any case law in support of his argument. As to the Kaneisha Houston statement, the Superior

Court explained that petitioner provided only three sentences of argument in support of his claim and failed to cite to any pertinent authority. The Superior Court found that argument waived due to its lack of development. Simpson, 2215 EDA 2006, at 19-20, citing Commonwealth v. Bobin, 916 A.2d 1164, 1168 (Pa. Super. 2007) (concluding that claim is waived where argument supporting it is "markedly insufficient, amounting to less than one half page and containing no analysis or case citation.").

Although the state court does not mention the relevant rule by name, the Superior Court dismissed the claims as waived pursuant to Pa.R.App.P. 2119, finding that petitioner's issues were not properly developed with citation to authority and or legal discussion. Rule 2119 provides that where an appellant's argument "fails to provide any discussion of a claim with citation to relevant authority or fails to develop the claim in any other meaningful fashion capable of review, that claim is waived." Pa. R.App.P. 2119(a). The state procedural rule under which the state courts found petitioner's claims to be waived is an independent and adequate rule for purposes of procedural default. Courts within the Third Circuit have held that Pa. R.App. P. 2119 is an independent and adequate state procedural rule for the purposes of procedural default. *See* Kirnon v. Klopotski, 620 F.Supp.2d 674, 683-84 (E.D.Pa.2008); Boggs v. DiGuglielmo, 2006 WL 56 536025, at *3 (E.D.Pa. 2006); Sims v. Tennis, 2006 WL 3484291, at *2 (E.D.Pa. 2006). This court finds that petitioner's, first and third arguments set out in claim seven are procedurally defaulted for failure to comply with Pennsylvania Rule of Appellate Procedure 2119, and should be dismissed as such.

As to petitioner's second argument that the prosecutor insinuated that "unnamed courtroom spectators...had 'gotten to' Ralph Burnett and had somehow improperly influenced his testimony", respondents argue that petitioner failed to raise this claim before any state court.

Further, respondents argue that petitioner fails to cite to any notes of testimony showing that the prosecutor made such statements during closing arguments. See Resp. to Habeas Pet., 1/27/17, at 33. A review of petitioner's memorandum of law shows that petitioner does not cite to any notes of testimony or state court decision in support of this argument. A review of the record shows that petitioner failed to raise this claim before any state court. Petitioner is now time barred from raising said claim, thus petitioner's claim is procedurally defaulted. It is recommended that petitioner's seventh claim as to the Mr. Burnett argument be dismissed as procedurally defaulted.

Claim Eight

Petitioner's eighth claim is that the trial court erred in permitting the prosecution to question Keneisha Houston, a defense witness, concerning her mental health history and treatment. See Habeas Pet. Memo. of Law, 8/27/14 at 35.

The Superior Court reviewed this claim and found it waived because petitioner did not adequately object to the line of questioning at trial, resulting in waiver of the claim. Simpson, 2215 EDA 2006, at 8-10.

The Superior Court cited to the following line of questioning by the prosecution:

> Q: Did you have anything to drink at all that night?
> A: No.
> Q: Did you have anything to smoke?
> A: No.
> Q: Didn't use any drugs or anything like that?
> A: No.
> Q: By the way, have you ever been treated for any mental illness, disease or disorder?
> DEFENSE COUNSEL: Objection.
> THE COURT: Sustained. Counsel, let me see you at sidebar. [Sidebar conference off the record.]
> Q: Ma'am, I'm going to be more direct. Am I correct – are you all right, I notice you're crying.
> A: Yes.

Q: Am I correct at the last time before the last proceedings, am I correct that you were temporarily committed to a mental facility for stress?
A: Yes.
Q: In fact, you had to be picked up on a bench warrant to be brought to court at the last proceeding, correct?
A: Yes.

Simpson, 2215 EDA 2006, at 8-9.

The Superior Court explained that petitioner was arguing that Ms. Houston's mental health background was inadmissible because it was not used to challenge her perception or recollection on the night in question, but instead, was used to discredit her testimony on the basis of "her status as a prior recipient of mental health service." Id. at 9, citing Brief for Appellant at 23. The Superior Court went on to find that claim waived, explained that the trial court sustained petitioner's original objection. In finding the claim waived the Superior Court reasoned:

> [Petitioner] accepted the trial court's ruling on its face and did not request any further relief as to this question, i.e., a curative instruction or mistrial; hence, he is precluded from asserting an entitlement to such relief for the first time on appeal or from contending that the trial court otherwise abused its discretion in sustaining his objection. See Commonwealth v. Brewington, 740 A.2d 247,251 (Pa. Super. 1999} (finding issue waived where the trial court sustained defense counsel's objection and counsel failed to seek a curative instruction or move for a mistrial); Commonwealth v. Birdseye, 637 A.2d 1039, 1043 (Pa. Super. 1994) (finding that defense counsel's acceptance of trial court's ruling at trial constitutes waiver of issue on appeal). Moreover, [petitioner] failed to object to the prosecutor's follow-up questioning, which asked Houston whether she was "temporarily committed to a mental facility for stress." "In order to preserve an issue for review, a party must make a timely and specific objection." Commonwealth v. Brown, 701 A.2d 252, 254 (Pa. Super. 1997). In the absence of a timely and proper objection, we conclude that [petitioner's] argument concerning the prosecutor's follow-up questioning is also waived.

Simpson, 2215 EDA 2006, at 9-10.

Pennsylvania law provides "[a]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post

conviction proceeding." 42 Pa.C.S. § 9544(b). This court has recognized 42 Pa. C.S.A. § 9544(b) an independent and adequate state procedural rule. See e.g., Robinson v. Coleman, No. 10-265, 2011 WL 5447845, at *3-4 (E.D. Pa. Nov. 4, 2011); Flagg v. Wynder, No. 07-2175, 2008 WL 861498, at *9-10 (E.D. Pa. Mar. 27, 2008). Thus, petitioner claim eight should be dismissed as procedurally defaulted.

Claim Nine

Petitioner's ninth and final claim is that petitioner's due process rights were violated when the trial court permitted the Commonwealth to improperly bolster the credibility of police witnesses by asking Detective John Cummings, on redirect examination, whether he had conducted any investigation into Kenneth Newell. Petitioner argues this line of questioning allowed the jury to imply that Kenneth Newell had been investigated and was "cleared" as a suspect. See Habeas Pet. Memo. of Law, 8/27/14 at 39-41. Petitioner's trial counsel objected to the line of questioning but the trial court overruled the objection. See N.T., 4/18/2006, at 30-31.

Respondents argue that petitioner's ninth claim is procedurally defaulted because petitioner failed to raise the claim as a federal law claim in state court. Thus, petitioner failed to put the state court on notice that he was raising a federal constitutional claim. See Resp. to Habeas Pet. 1/27/17, at 35-37.

"Fairly presenting" a federal claim to the state courts requires the petitioner to present both the factual and legal substance of the claim in such a manner that the state court is on notice that the federal claim is being asserted. See McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). Citations to the Constitution or to federal case law can provide adequate notice of the federal character of the claim. Evans v. Court of Common Pleas, 959 F.2d 1227, 1232 (3d Cir. 1992). A petitioner may also alert the state courts through "reliance on state cases

employing [federal] constitutional analysis in like fact situations," or "assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution." Id.

A review of the trial court and Superior Court opinions on direct appeal reveal that petitioner was raising a claim of trial court error in making an improper evidentiary ruling. The trial court and Superior Court opinions address state evidentiary rules in deciding petitioner's claim was meritless. Thus, petitioner failed to put the state court on notice that a federal claim was being asserted. See McCandless, 172 F.3d at 261. It is recommended that petitioner's final claim, claim nine, be dismissed as procedurally defaulted.[4]

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 28th day of February, 2017, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED. Further, there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/S LINDA K. CARACAPPA
LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE

[4] Petitioner offers no arguments to excuse his default of the above discussed procedurally defaulted claims.

ALD-068 **December 7, 2017**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2939

[redacted]

APPENDIX

JAMEEL SIMPSON, Appellant

vs.

JAMES ERKERD, ET AL.

(E.D. PA. Civ. No. 2-14-cv-04999)

Present: MCKEE, VANASKIE and SCIRICA, Circuit Judges

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

in the above captioned case.

Respectfully,

Clerk

MMW/LLB/slc

ORDER

The foregoing request for a certificate of appealability is denied. For substantially the reasons given by the District Court and the Magistrate Judge, appellant has not made a substantial showing of the denial of a constitutional right nor shown that reasonable jurists would find the correctness of the procedural aspects of the District Court's determination, including that discovery is unwarranted, debatable. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/ Theodore McKee
Circuit Judge

Dated: August 1, 2018
tmm/cc: Jennifer O. Andress, Esq.
Jameel Simpson

[redacted]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2939

APPENDIX

JAMEEL SIMPSON,

Appellant

v.

JAMES ERKERD; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

(D.C. Civil No. 2-14-cv-04999)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS and SCIRICA[1] 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.

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[1] Judge Scirica's vote is limited to panel rehearing only.

BY THE COURT,

s/ Theodore McKee
Circuit Judge

Dated: September 4, 2018
SLC/cc: Jameel Simpson
Jennifer O. Andress