NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2026

RICHARD ALLEN RATUSHNY,
Appellant

v.

SUPERINTENDENT HUNTINGDON SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY NORTHAMPTON COUNTY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court Civil No. 5-14-cv-01324)
District Judge: Honorable Cynthia M. Rufe

Submitted Under Third Circuit L.A.R. 34.1(a)
May 25, 2018

BEFORE: MCKEE, SHWARTZ, and NYGAARD, *Circuit Judges*

(Filed June 26, 2018)

OPINION*

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

NYGAARD, *Circuit Judge.*

I.

Before proceeding to the merits of this habeas appeal, we first must determine the scope of the District Court's certificate of appealability (COA).[1] Petitioner Richard Ratushny argues for an expansive reading of the certificate to encompass all of the issues he now raises on appeal. The Commonwealth, on the other hand, argues that the District Court limited its grant to a single issue: the Petitioner's *Brady* claim.[2] We may not consider issues on appeal that are not within the scope of the COA.[3] However, we may, in our discretion, expand the scope of the certificate beyond that announced by the District Court.[4]

The District Court's order denying habeas relief contains a general statement that "the Court issues a certificate of appealability." The Petitioner points to this sentence as evidence that the COA is expansive, encompassing all the claims he raised in the District

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[1] *See* 28 U.S.C. § 2253(c)(2). We exercise jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We will dispense with the usual recitation of the factual background and procedural history of this matter, as both are well-known to the parties and comprehensively set forth in the District Court's memorandum and the U.S. Magistrate Judge's Report and Recommendation. For this same reason, we will also dispense with citations to the record. We need only relate that a Pennsylvania jury convicted the Petitioner of aggravated indecent assault, indecent assault, endangering the welfare of children, corruption of minors, and unlawful contact with a minor, crimes which stemmed from his sexual abuse of his girlfriend's daughters. He was sentenced to six to nineteen years in prison.

17 years

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

[3] 28 U.S.C. § 2253(c)(3); Third Circuit Local Appellate Rule 22.1(b); *Miller v. Dragovich*, 311 F.3d 574, 577 (3d Cir. 2002).

[4] *See* 3d Cir. LAR 22.1(b).

Court. But, the District Court's memorandum opinion explains otherwise. The Petitioner raised these habeas claims in the District Court: an ineffective assistance of counsel claim arising from trial counsel's alleged conflict of interest, an ineffective assistance of counsel claim stemming from trial counsel's failure to uncover a prior criminal conviction of his victim's mother, and a *Brady* violation claim. Ratushny's petition was referred to a U.S. Magistrate Judge, who recommended that relief be denied on all claims.

We read the COA as limited solely to the *Brady* violation. The structure of the District Court's opinion adopting the Magistrate Judge's Report and Recommendation is obvious, using Roman numerals and capital letters to demarcate its discussion and analysis. Relevant here, the District Court's opinion deals with the Petitioner's claims in separate, delineated sections: Part III, section "A." dealt with the Petitioner's ineffectiveness claims while Part III, section "B." dealt with the purported *Brady* violations. In Section A., the District Court specifically held that Ratushny was "not entitled to relief" on the ineffectiveness claims.[5] Compare this with section B, wherein the District Court specifically noted that "although the Court will deny relief, a certificate of appealability will issue." Because the sections of the District Court's opinion are clearly delineated with headings and subheadings, and because its grant of a COA is

[5] The Magistrate Judge's Report and Recommendation rolled both ineffective assistance of counsel claims into one discussion and analysis. The District Court did not identify the ineffectiveness claim focusing on the victim's mother's prior conviction for specific discussion, adopting the Magistrate Judge's recommendation without analysis. No COA was, therefore, given by the District Court on this claim, and despite the District Court's lack of specific discussion of this issue, the Petitioner has not sought one on appeal.

found only in Part III, Section B., it is just as clearly limited to the *Brady* claim. We, therefore, lack jurisdiction to review the ineffective assistance of counsel claim.[6]

II.

We turn now to the claim on which the Petitioner was granted a COA, the alleged *Brady* violation.[7] *Brady* teaches that a state bears an "affirmative duty to disclose [material] evidence favorable to a defendant."[8] "Material" evidence is that in which there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[9] The Supreme Court clarified that "[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that

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[6] While we have the authority to expand the scope of the certificate of appealability sua sponte, we decline to do so here because reasonable jurists could not debate the District Court's conclusion that state court's application of the *Strickland* standard was unreasonable. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); 28 U.S.C. §2254(d)(1). The state court held a post-conviction relief hearing and determined that counsel had not violated the Commonwealth's conflict of interest prescriptions. Further, the state court concluded that Ratushny's interests did not diverge from those of the subject of the conflict of interest, a witness. The Pennsylvania Superior Court affirmed with a comprehensive discussion of this issue, holding that the situation was not likely to be a conflict of interest. Given the wide deference afforded to the state court's determinations, we agree with the District Court that Ratushny should not be accorded relief on this claim and that reasonable jurists would not disagree.

[7] The Petitioner raises the second claim of ineffective assistance of counsel on appeal, but given our holding that the District Court's COA is limited to the *Brady* violation, we lack jurisdiction to review this claim as well and decline to use our discretionary authority to review it.

[8] *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (citing *Brady*, 373 U.S. 83).

[9] *United States v. Bagley*, 473 U.S. 667, 682 (1985).

evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[10]

The Petitioner asserts the Commonwealth violated *Brady* by failing to divulge the fact that the victim's mother—his former girlfriend and a witness for the prosecution—had a fraud conviction on her resume that could have been used for impeachment purposes. The Pennsylvania PCRA court determined that while this evidence fell under *Brady's* purview, there was no violation because there was no support on the record for a finding that the Commonwealth "possessed or controlled that information" and then either intentionally or inadvertently failed to disclose it to the defense. The state court based its conclusion on the fact that public record of the conviction was available to the defense and because there was no evidence that the prosecution had a record of this conviction and withheld it from the defense. We agree with the District Court that the criminal record was suppressed under *Brady*, as we have specifically explained.[11] The state courts reliance on the fact that the criminal records were publicly accessible is of no moment since public availability does not absolve a prosecutor from the responsibility to provide such records to the defense.[12] Nor is the prosecution relieved of its responsibilities under *Brady* where defense counsel fails to ask for such records. A

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[10] *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).
[11] *See Wilson v. Beard,* 589 F.3d 651, 663 (3d Cir. 2009) (citing *United States v. Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991)).
[12] *Id.* at 663-664.

prosecutor's duties are clear under *Brady* and an analysis of whether defense counsel could have or should have discovered the records is "beside the point."[13]

But, the fact *Brady* material was suppressed does not necessarily mean the state court unreasonably applied federal law. To reiterate, the failure to disclose *Brady* evidence only mandates a new trial if such evidence is "material," that is, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[14] Here, the state courts made the determination that the reliability and credibility of the victim's mother were not "critical or essential" to the conviction. Several other witnesses, including another sister of the victim, testified to the fact that she had misrepresented herself on numerous occasions. Furthermore, various friends had testified that the victim confided in them about the abuse. Based on this, the state court determined that the *Brady* material was not favorable enough to overcome other evidence and affect the verdict, and, therefore, "did not undermine the fairness of the proceeding." This conclusion is consistent with our standard for determining whether *Brady* evidence was material. Hence, we agree with the District Court that the state courts did not unreasonably apply federal law in concluding that the *Brady* evidence was not material, especially given the corroborating testimony of the victim and others. The victim's mother was thoroughly cross-examined, during which Petitioner's counsel elicited from her information about her long history of drug use (including her use of illegal drugs with her minor daughter), her difficult

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[13] *Dennis v. Sec'y, Pa. Dept. Corrections*, 834 F.3d 263, 291 (3d Cir. 2016).
[14] *Bagley*, 473 U.S. at 682.

relationship with her daughter, and her belief that she was competing with her daughter for Petitioner's attention and affections. Cross-examination also revealed her two-year delay in reporting the sexual abuse, as well as her prior threats to report the Petitioner to the police, and her repeated threats to report him to the authorities in order to exact some revenge on him for leaving her. Defense counsel's closing argument specifically focused on the victim's mother's lack of credibility and veracity.

Given this, the fact that the victim's mother had been convicted of a fraud offense was not significant. We have stated that "[t]he materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state."[15] The *Brady* evidence that she had been convicted of fraud does nothing to "put the whole case in a different light as to undermine [] confidence in the verdict."[16]

Therefore, this *Brady* evidence was not material, and, for the foregoing reasons, we will affirm.

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[15] *Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013) (citing *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010)).
[16] *Hollman v. Wilson*, 158 F.3d 177, 182 (3d Cir. 1998).

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

RICHARD ALLEN RATUSHNY	:	
Petitioner,	:	
v.	:	**CIVIL ACTION NO. 14-1324**
	:	
TABB BICKELL, *et al.*	:	
Respondents.	:	

ORDER

AND NOW, this 17th day of April 2017, upon careful independent consideration of the *pro se* Petition for Writ of Habeas Corpus, and all related filings, and upon review of the Report and Recommendation of the United States Magistrate Judge Thomas J. Rueter, and the objections thereto, and for the reasons stated in the accompanying memorandum opinion, it is hereby **ORDERED** that:

1. The Clerk is directed to **REMOVE** the case from Civil Suspense;
2. The Objections are **SUSTAINED IN PART AND OVERRULED IN PART;**
3. The Report and Recommendation is **APPROVED** and **ADOPTED IN PART;**
4. The Petition for Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE** and without an evidentiary hearing;
5. The Court **ISSUES** a certificate of appealability; and
6. The Clerk of Court is directed to **CLOSE** the case.

It is so **ORDERED.**

BY THE COURT:

/s/Cynthia M. Rufe

CYNTHIA M. RUFE, J.

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

RICHARD ALLEN RATUSHNY Petitioner,	:	
v.	:	CIVIL ACTION NO. 14-1324
TABB BICKELL, *et al.* Respondents.	:	

MEMORANDUM OPINION

Rufe, J. **April 17, 2017**

Petitioner, who is proceeding *pro se*, seeks relief in this Court pursuant to 28 U.S.C. § 2254, arguing that his state-court conviction was imposed in violation of the United States Constitution. The Petition was referred to Magistrate Judge Thomas J. Rueter, who has issued a Report and Recommendation ("R&R") recommending that the petition be denied. Petitioner has filed objections to the R&R. For the following reasons, the Court will deny the Petition.

I. PROCEDURAL HISTORY

In 2009, Petitioner was convicted of aggravated indecent assault, indecent assault, endangering the welfare of children, corruption of minors, and unlawful contact with a minor after a jury trial in the Court of Common Pleas of Northampton County, Pennsylvania. The crimes related to the sexual abuse of Petitioner's girlfriend's daughters; Petitioner was acquitted as to charges regarding the younger child, and convicted of charges as to the older. After a hearing, the trial court determined that Petitioner was a sexually violent predator, and he was sentenced to six to nineteen years of imprisonment. After his direct appeals were unsuccessful, Petitioner filed a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA").[1]

[1] 42 Pa. Cons. Stat. Ann. §§ 9541, *et seq.*

Petitioner, who was represented by counsel during the PCRA proceedings, asserted among other issues that his trial counsel had been ineffective. The PCRA court held a hearing at which trial counsel testified, and thereafter denied relief. Petitioner raised three issues on appeal to the Superior Court: (1) whether trial counsel had a conflict of interest that prevented him from fully fulfilling his duties to Petitioner; (2) whether the Commonwealth failed to disclose exculpatory evidence in the form of a recent welfare fraud conviction of the victim's mother; and (3) whether trial counsel was ineffective for failing to discover the mother's criminal record.[2] The Superior Court affirmed the denial of relief, and the Supreme Court denied as untimely Petitioner's attempt to file a petition for allowance of appeal. Petitioner then timely filed the Petition in this Court, which raises the same three issues rejected by the Superior Court.

Petitioner has objected to the R&R arguing, as he did in the Petition and the briefing, that the exclusion of evidence denied him a fair trial and that his counsel was ineffective. Upon careful *de novo* review of the record, including the transcript of the PCRA hearing at which trial counsel testified, the Court concludes that Petitioner has not shown an entitlement to relief, and agrees with the R&R that Petitioner has failed to overcome the hurdle of the deference afforded to state courts.[3]

II. LEGAL STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996[4] ("AEDPA"), governs habeas petitions like the one before this Court. Under the AEDPA, "a district court shall entertain an application for writ of habeas corpus [filed on] behalf of a person in custody pursuant to the

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[2] R&R at 2-3 (citing Superior Court opinion).

[3] *See, e.g., Coleman v. Johnson*, 566 U.S. 650, 651 (2012); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

[4] 28 U.S.C. § 2254.

judgment of a State court only on the ground that he is in custody in violation of the Constitution or the laws or treaties of the United States."[5] Where, as here, the habeas petition is referred to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), a district court conducts a *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."[6]

Where the claims presented in a federal habeas petition have been decided on the merits in state court, a district court may not grant relief unless the adjudication of the claim in state court:

> (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.[7]

A state court's decision is "contrary to" clearly established law if the state court applies a rule of law that differs from the governing rule set forth in Supreme Court precedent or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent."[8] A decision is an "unreasonable application of" clearly established law if "the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the

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[5] § 2254(a).

[6] 28 U.S.C. § 636(b)(1)(C).

[7] § 2254(d).

[8] *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

prisoner's case."[9] The "unreasonable application" clause requires more than an incorrect or erroneous state court decision.[10] Rather, the application of clearly established law must be "objectively unreasonable."[11]

III. DISCUSSION

A. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are evaluated pursuant to the two-pronged test established by the Supreme Court in *Strickland v. Washington*.[12] Under *Strickland*, counsel is presumed to have acted reasonably and to have been effective unless a petitioner can demonstrate (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the petitioner.[13] Counsel's performance is only deficient when it is "outside the wide range of professionally competent assistance."[14] Prejudice occurs upon a showing that there is a reasonable possibility that but for counsel's deficient performance the outcome of the underlying proceeding would have been different.[15] For example, "[a]n attorney cannot be ineffective for failing to raise a claim that lacks merit," because in such cases, the attorney's performance is not deficient, and would not have affected the outcome of the proceeding.[16] Similarly, an ineffective assistance of counsel claim is not established upon the showing that an error had an effect on the

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[9] *Id.* at 75 (quoting *Williams*, 529 U.S. at 413).

[10] *Id.*

[11] *Id.*

[12] 466 U.S. 668 (1984).

[13] *Id.* at 687.

[14] *Id.* at 690.

[15] *Lewis v. Horn*, 581 F.3d 92, 106-07 (3d Cir. 2009).

[16] *Singletary v. Blaine*, 89 F. App'x 790, 794 (3d Cir. 2004) (citing *Moore v. Deputy Comm'r of SCI-Huntingdon*, 946 F.2d 236, 245 (3d Cir. 1991)).

proceedings; rather, a defendant must show that there is a reasonable probability that the outcome would have been different in the absence of such errors.[17]

When the state court has squarely addressed the issue of counsel's representation, the district court faces a double layer of deference.[18] "[T]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable, which is different from asking whether defense counsel's performance fell below *Strickland*'s standard."[19] Federal habeas courts must "take a highly deferential look at counsel's performance" under *Strickland*, "through the deferential lens of § 2254(d)."[20] In applying this doubly deferential standard to Petitioner's case, the Court cannot conclude that the state court's application of *Strickland* was unreasonable.

Petitioner argues that counsel was ineffective because he was operating under a conflict of interest by representing a potential defense witness as well as Petitioner. Trial counsel had represented another man who also had been charged with sexual offenses involving the victim in Petitioner's case; the charges were still pending at the time of Petitioner's trial. According to Petitioner, this person was supposed to testify at Petitioner's trial that similar allegations were made against the witness when he rejected the victim's mother's advances, which was also Petitioner's defense. When the trial court pointed out difficulties in calling the witness, given the pending charges, the attorney, without consulting Petitioner, decided not to call the witness.[21] As set forth in the R&R, the PCRA court held a hearing and found no evidence that the attorney violated the conflict of interest provisions of the Pennsylvania Rules of Professional Conduct or

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[17] *Strickland*, 466 U.S. at 694.

[18] *Premo v. Moore*, 562 U.S. 115, 123 (2011).

[19] *Grant v. Lockett*, 709 F.3d 224, 232 (3d Cir. 2013) (citation and internal quotations omitted).

[20] *Id.* (internal quotation omitted).

[21] Petition ¶ 12.

that the interests of Petitioner and the other man diverged.[22] The Pennsylvania Superior Court affirmed with a detailed discussion, finding that the situation was not likely to lead to a conflict of interest because the interests of Petitioner and the witness "did not diverge with respect to a factual or legal issue or course of action" as the attorney was able to proffer the information received from the witness, and the witness did not object to testifying.[23] Although it is somewhat troubling that counsel below was representing both the defendant on trial and a potential witness, the Court is bound to give "wide deference to the state court's conclusions," and under that standard, Petitioner is not entitled to relief.[24]

B. The *Brady* Claim

"[T]he 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, irrespective of the good faith or bad faith of the prosecution."[25] To establish a *Brady* claim, the evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching," it "must have been suppressed by the State, either willfully or inadvertently," and it "must have been material such that prejudice resulted from its suppression."[26]

Petitioner argues that the Commonwealth violated *Brady* by failing to disclose that the victim's mother, a prosecution witness, had been convicted of fraud in obtaining food stamps and other assistance—evidence of a *crimen falsi* that could have been used as impeachment

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[22] *Commonwealth v. Ratushny*, No. 327 EDA 2013, 2014 WL 11022433, *4 (Pa. Super. Ct. Jan. 28, 2014) (non-precedential).

[23] R&R at 10-12 (quoting *Commonwealth v. Ratushny*, No. 327 EDA 2013, slip op. at 4-9 (Pa. Super. Ct. Jan. 28, 2014)).

[24] *Collins v. Sec'y of Pa. Dep't of Corr.*, 742 F.3d 528, 546-47 (3d Cir. 2014) (quoting *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013); *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

[25] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[26] *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 284-85 (3d Cir. 2016) (en banc).

evidence.[27] The Pennsylvania courts held that although the evidence was *Brady* material, in that it was favorable to the defense, there was no evidence that "the Commonwealth possessed or controlled that information and failed to disclose it either intentionally or inadvertently," both because the record of the conviction was available to the defense, and because there was no evidence that the prosecution had the records or withheld the fact of the conviction.[28]

The withholding of evidence that calls into question the credibility of a prosecution witness violates *Brady*.[29] This includes criminal records.[30] Moreover, "the fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel."[31] Although it appears that defense counsel did not specifically request the criminal records of prosecution witnesses, this does not relieve the prosecutor's burden. The Third Circuit recently clarified that "the concept of 'due diligence' plays no role in the *Brady* analysis,"[32] because "[a]dding due diligence, whether framed as an affirmative requirement of defense counsel or as an exception from the prosecutor's duty, to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny."[33] Therefore, even if defense counsel did not request the records, the prosecution had a duty to obtain and produce the *crimen falsi* conviction impeachment evidence of Petitioner's girlfriend. The Court therefore sustains the objections to

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[27] PCRA hearing transcript May 30, 2012 at 23.

[28] *Ratushny*, 2014 WL 11022433, at * 7 (footnote omitted).

[29] *Wearry v. Cain*, 136 S. Ct. 1002, 1005 (2016).

[30] *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991).

[31] *Wilson v. Beard*, 589 F.3d 651, 663-64 (3d Cir. 2009) (internal citation omitted).

[32] *Dennis*, 834 F.3d at 291.

[33] *Id.* at 293.

the conclusion of the R&R (which was issued without benefit of the en banc decision in *Dennis*) that "[n]o *Brady* violation occurred because no evidence was suppressed."[34]

However, Petitioner still must establish that the state courts unreasonably applied federal law in concluding that Petitioner did not show that he was prejudiced by the non-disclosure. In this regard, "the proper inquiry remains whether use of the [evidence] by defense counsel at trial would have resulted in a different outcome at trial."[35] At the PCRA hearing, defense counsel testified that he could have used the conviction to impeach the witness, and that he would have asked for a jury instruction based on the prior conviction for a *crimen falsi* statement.[36] The PCRA court denied relief, because it "did not find [the victim's] mother's reliability to be critical or essential to the conviction," as the older daughter herself testified as to the abuse, and several friends testified that she had confided in them.[37] The Superior Court therefore concluded that the evidence was insufficiently favorable to merit relief.[38]

After careful review of the record, the Court cannot hold that the state courts unreasonably applied federal law in concluding that the excluded evidence was not sufficiently material, particularly in light of the testimony of the victim herself. However, upon consideration of the decision in *Dennis*, because Petitioner's defense largely focused upon undermining the credibility and motives of those who testified, "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues

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[34] R&R at 22.

[35] *Dennis*, 834 F.3d at 301-02.

[36] PCRA hearing transcript May 30, 2012 at 24-25. There apparently was another Commonwealth witness with a *crimen falsi* conviction, but that has not been part of these proceedings. *Id.* at 25-27.

[37] *Ratushny*, 2014 WL 11022433, at *7.

[38] *Id.*

presented were adequate to deserve encouragement to proceed further."[39] Therefore, although the Court will deny relief, a certificate of appealability will issue.

IV. CONCLUSION

For the reasons set forth above, Petitioner's objections will be sustained in part and overruled in part, and the Petition will be denied without a hearing. The Court will issue a certificate of appealability. An order will be issued.

[39] *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

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

RICHARD RATUSHNY	:	CIVIL ACTION
v.	:	
TABB BICKEL, et al.	:	NO. 14-1324

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

August 31, 2015

Presently before the court is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is incarcerated in the State Correctional Institution located in Huntingdon, Pennsylvania. For the reasons that follow, the court recommends that the petition be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

On March 3, 2009, a jury sitting in the Court of Common Pleas of Northampton County, Pennsylvania convicted petitioner of aggravated indecent assault, indecent assault, endangering the welfare of children, corruption of minors, and unlawful contact with a minor. Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 1 (Pa. Super. Ct. Jan. 28, 2014).[1]

The appellate court summarized the events underlying petitioner's convictions as follows:

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[1] Prior charges had been filed against petitioner relating to the same alleged criminal acts at issue herein. After a hearing on January 25, 2008, the state court permitted the Commonwealth to withdraw and refile the charges against petitioner. Commonwealth v. Ratushny, No. CP-48-CR-1847-2008, slip op. at 6-7 (C.P. Northampton June 20, 2013).

> The charges involved two sisters, although the jury acquitted [petitioner] of all charges related to the younger sister. The older sister, T.H., testified that over a period of two to three years, from age twelve to fifteen, she was subjected to abuse by [petitioner], [the] Mother's live-in boyfriend. [The] Mother reported his conduct to authorities when she learned that he had touched her younger daughter inappropriately. At trial, T.H. recounted the incidents, at least one of which was corroborated by [petitioner] in statements he made to Children and Youth Services ("CYS") investigators. Several friends of the victim also testified that she confided in them about the sexual contact with [petitioner].

Id. at 1-2. On September 11, 2009, the court conducted a sexually violent predator ("SVP") hearing, at which petitioner was determined to be a SVP. On September 18, 2009, the court sentenced petitioner to an aggregate term of imprisonment of six to nineteen years. Id. at 1.

Following the denial of post sentence motions, petitioner filed an appeal to the Superior Court of Pennsylvania alleging that the determination that he was a SVP was against the weight of the evidence and that his sentence was excessive. The appellate court affirmed the judgment of sentence on April 6, 2011. Commonwealth v. Ratushny, 17 A.3d 1269 (Pa. Super. Ct. 2011). Petitioner did not seek review in the Supreme Court of Pennsylvania.

On April 9, 2012, petitioner filed a timely petition for post conviction relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq. An evidentiary hearing was held on May 30, 2012, at which petitioner was represented by counsel. The claims at issue included claims of trial counsel ineffectiveness. Petitioner's trial counsel, Erv McLain, appeared and testified at the PCRA evidentiary hearing. (N.T., 5/30/12, at 5-29.) The PCRA court denied the petition and issued a decision dated June 20, 2013. Petitioner filed an appeal raising three issues:

1. Did trial counsel have a conflict of interest which prevented him from fully fulfilling his duties to his client?

2. Did the defendant's right to disclosure of exculpatory evidence by the [C]ommonwealth was [sic] violated when the Commonwealth failed to disclose evidence that the victim's mother had recently been convicted of welfare fraud?

3. Was counsel ineffective for failing to discover the criminal record of the victim's mother?

Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 3 (Pa. Super. Ct. Jan. 28, 2014) (quoting Appellant's Br. at 3). On January 28, 2014, the Superior Court of Pennsylvania affirmed the denial of the PCRA petition. Id. On February 28, 2014, petitioner attempted to file a petition for allowance of appeal in the Supreme Court of Pennsylvania. The petition was filed one day late and the court returned the petition as untimely filed. Commonwealth v. Ratushny, 123 MT 2014 (Pa. 2014). On March 3, 2014, petitioner filed a petition for leave to file a petition for allowance of appeal nunc pro tunc. On November 25, 2014, the Supreme Court of Pennsylvania denied this request. Commonwealth v. Ratushny, 104 A.3d 3 (Pa. 2014).[2]

The instant petition for a writ of habeas corpus was executed on February 11, 2014 and was filed on March 4, 2014 (Doc. No. 1). Petitioner asserts three grounds for relief:

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[2] As noted in the text of this Report and Recommendation, on March 3, 2014, petitioner filed a petition for allowance of appeal nunc pro tunc in the Supreme Court of Pennsylvania. The next day, on March 4, 2014, petitioner filed the instant habeas petition in federal court. As part of his habeas petition, petitioner filed a motion for stay of the habeas petition ("Motion for Stay"). In a Report and Recommendation dated July 30, 2014 (Doc. No. 12), the undersigned recommended that the Motion for Stay be granted and that the habeas petition be stayed and held in abeyance until the resolution of the pending related state court proceedings. By order dated August 22, 2014, the Honorable Cynthia M. Rufe approved and adopted the Report and Recommendation and stayed the instant habeas petition in accordance therewith (Doc. No. 13). By order dated April 20, 2015, upon notification from petitioner that the underlying state court proceedings had concluded, see Document Nos. 14 and 15, Judge Rufe lifted the stay previously imposed, and referred the case to the undersigned for further consideration (Doc. No. 17).

1. Trial counsel had a conflict of interest that prevented him from fully fulfilling his duties to . . . me thus rendering ineffective assistance of counsel under the Fourteenth Amendment.

2. My federal constitutional right to disclosure of exculpatory evidence by the Commonwealth was violated when the Commonwealth failed to disclose its witness' crimen falsi record.

3. Counsel rendered ineffective assistance of counsel under the Fourteenth Amendment when he failed to discover the crimen falsi conviction of a major witness against me.

(Petition ¶ 12.) Petitioner also filed the following: (1) Traverse (Doc. No. 9); (2) "Correction of Error in Relation to a Traverse to Answer to 28 U.S.C. § 2254 Habeas Corpus Petition" (Doc. No. 10); and (3) Request for Appointment of Counsel (Doc. No. 16).

Respondents filed a response to the habeas petition on April 8, 2014, arguing that the petition should be denied because petitioner's claims are meritless ("Resp.," Doc. No. 5). For the reasons set forth below, the habeas petition should be denied.

II. DISCUSSION

A. Habeas Corpus Standards

Petitioner's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The provisions of the AEDPA relevant to the instant matter provide as follows:

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

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2). The Supreme Court recently emphasized that the "AEDPA's standard is intentionally difficult to meet." Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (quotation omitted).

The Supreme Court has instructed that the "contrary to" and "unreasonable application" clauses in Section 2254(d)(1) should be viewed independently. Williams v. Taylor, 529 U.S. 362, 404-05 (2000). With respect to Section 2254(d)(1), a federal habeas petitioner is entitled to relief under the "contrary to" clause only if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Id. at 413. The Court in Williams was careful to note that most cases will not fit into this category, which is limited to direct and unequivocal contradiction of Supreme Court authority. Id. at 406-08.

Under the "unreasonable application" clause, "[a] state court decision will be an 'unreasonable application' if (1) 'the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular . . . case;' or (2) '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.'" Appel v. Horn, 250 F.3d 203, 209 (3d Cir. 2001) (quoting Williams, 529 U.S. at 407). A federal habeas court may not issue the writ simply because that court concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Williams, 529 U.S. at 411. Relief is appropriate only where the state court decision

also is objectively unreasonable. Id. See also Waddington v. Sarausad, 555 U.S. 179, 190 (2009) (same). The Third Circuit Court of Appeals recently described this "highly deferential standard" as follows: "[W]e will not surmise whether the state court reached the best or even the correct result in [a] case; rather, we will determine only whether the state court's application of [federal law] was unreasonable." Collins v. Sec'y of Pa. Dep't of Corrs., 742 F.3d 528, 544 (3d Cir.) (quotation omitted), cert. denied, 135 S. Ct. 454 (2014).

With respect to 28 U.S.C. § 2254(d)(2), which dictates that federal habeas relief may be granted when the state court adjudication was based on an unreasonable determination of the facts in light of the evidence presented, the petitioner must demonstrate that a reasonable fact-finder could not have reached the same conclusions given the evidence. If a reasonable basis existed for the factual findings reached in the state courts, then habeas relief is not warranted. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); Campbell v. Vaughn, 209 F.3d 280, 290-91 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001). Additionally, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). See Rountree v. Balicki, 640 F.3d 530, 538 (3d Cir.) ("State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by clear and convincing evidence.") (quotation omitted), cert. denied, 132 S. Ct. 533 (2011).

A federal habeas court may not consider a petitioner's claims of state law violations, but must limit its review to issues of federal law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (not the province of the federal court to re-examine a state court's determinations on state law questions); Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court

may not issue the writ on the basis of a perceived error of state law."); Engle v. Isaac, 456 U.S. 107, 120 n.19 (1982) ("If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable."); Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997) ("[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.").

B. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court set forth a two prong test that a petitioner must satisfy before a court will find that counsel did not provide the effective assistance of counsel guaranteed by the Sixth Amendment. Under this test, a petitioner must show: (1) that counsel's performance was deficient; and (2) counsel's deficient performance caused the petitioner prejudice. Id. at 687-96. See also Harrington v. Richter, 562 U.S. 83 (2011) (same); Premo v. Moore, 562 U.S. 115 (2011) (same). The United States Supreme Court observed that "[s]urmounting Strickland's high bar is never an easy task." Harrington, 562 U.S. at 105 (quotation omitted). See also Collins, 742 F.3d at 544 (discussing Strickland); Ross v. District Attorney of the County of Allegheny, 672 F.3d 198, 209-10 (3d Cir. 2012) (same).

To show deficient performance, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. In evaluating counsel's performance, a reviewing court should be "highly deferential" and must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Moreover, there

is 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. (citation omitted). The Court cautioned that the appropriate "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Premo, 562 U.S. at 122 (quoting Strickland, 466 U.S. at 690).

The United States Supreme Court explained the prejudice requirement for an ineffective assistance of counsel claim as follows:

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Harrington, 562 U.S. at 104 (citations omitted). See also Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011) (The prejudice requirement of Strickland requires a "'substantial,' not 'conceivable,' likelihood of a different result."). It follows that "'counsel cannot be deemed ineffective for failing to raise a meritless claim.'" Ross, 672 F.3d at 211 n.9 (quoting Werts v. Vaughn, 228 F.3d 178, 202 (3d Cir. 2000)).

Where, as in the instant case, the state court already has rejected an ineffective assistance of counsel claim, a federal court must defer to the state court's decision pursuant to 28 U.S.C. § 2254(e)(1). The Supreme Court stated:

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both 'highly deferential,' id. at 689; Lindh v. Murphy, 521 U.S. 320, 333 n.7 . . . (1997), and when the two apply in tandem, review is 'doubly' so. Knowles, 556 U.S. at ___, 129 S. Ct., at 1420. The Strickland standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at ___, [129 S. Ct., at 1420]. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Premo, 562 U.S. at 122-23 (quotation omitted). See also Woods v. Donald, 135 S. Ct. at 1376 (2015) (when considering claims of ineffective assistance of counsel, AEDPA review must be "'doubly deferential' in order to afford 'both the state court and the defense attorney the benefit of the doubt'") (quoting Burt v. Titlow, 134 S. Ct. 10, 13 (2013)).

C. Petitioner's Claims

Claim 1. Ineffective Assistance of Trial Counsel – Conflict of Interest

In his first habeas claim, petitioner contends that he was denied the effective assistance of counsel guaranteed him by the United States Constitution and, in support of this claim, avers as follows:

> Counsel represented a witness in my case who was charged with sexually assaulting the same victim I was charged with assaulting. He was supposed to testify for me at my trial that the victim's mother only went to the police when he rejected her romantic advances. That was my defense too. Without consulting me, and when warned by the trial court that he might have a conflict of interest if he called that witness to testify, he told the court he would not call the witness, and he was not called. His testimony would have verified my defense that the victim's mother brought charges like these to realtime [sic] against men who spurned her advances.

(Petition ¶ 12.) Respondents urge that this claim be denied as meritless.

The PCRA court rejected this claim in a detailed decision. See Commonwealth v. Ratushny, No. CP-48-CR-1847-2008, slip op. at 20-36 (C.P. Northampton June 20, 2013). The Superior Court of Pennsylvania affirmed on appeal and stated as follows:

> Appellant first alleges that his trial counsel, Erv McLain, Esquire, provided ineffective assistance due to a conflict of interest. Specifically, he maintains that trial counsel's representation of both him and Jeffrey Hitcho, a defendant who was also charged with sexual offenses involving T.H., prevented him from divulging favorable information he learned from the latter. Additionally, he also claims that due to that attorney-client relationship, counsel could not use compulsory process to force Hitcho to testify on Appellant's behalf. The Commonwealth counters that trial counsel's representation of Hitcho did not present an actual conflict, nor did it adversely affect Appellant's counsel's performance, as Hitcho was willing to testify voluntarily.
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> At the January 9, 2008 hearing on the defense motion to suppress Appellant's statements, counsel alerted the court to a rape shield issue involving Jeffrey Hitcho. While counsel stated he no longer represented Hitcho, he advised the court that Hitcho was charged with sexual crimes involving T.H. that allegedly occurred after those involving Appellant. The trial court postponed the impending trial to permit the defense to make a formal proffer and to hold a hearing on the issue. The charges were subsequently withdrawn, without prejudice to the Commonwealth to re-file, which did occur.
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> The admissibility of Hitcho's testimony arose again at the February 27, 2009 hearing on Appellant's omnibus pretrial motion on the re-filed charges. The Commonwealth objected to its admission under the Rape Shield Law, 18 Pa.C.S. §3104(b). Defense counsel represented to the court that he intended to introduce evidence to demonstrate that Hitcho, like Appellant, was accused of sexual abuse by T.H. after he spurned advances by the minor's mother. N.T., 2/27/09, at 15. The inference to be drawn from such evidence was that the victim's mother retaliated by fabricating the charges. Preliminarily, the court questioned whether the evidence was probative when the charges against Hitcho were still pending and the accusation had not been proven false. Furthermore, it rejected the notion that Appellant's jury should have to make a determination whether the allegation against Hitcho was false in order to render the evidence admissible as to Appellant. When the court asked defense counsel whether both defendants were going to be tried together, counsel responded in the negative and withdrew the motion. Id. at 16.

At the PCRA hearing, Appellant offered the criminal docket from Hitcho's case indicating that trial counsel McLain entered his appearance on Hitcho's behalf on September 27, 2007. Def.'s Exhibit 2. Attorney McLain stated that, during the course of representing Hitcho, he became aware that the charges against Hitcho involved the same victim, under similar circumstances, and close in time to Appellant's incident. N.T. PCRA Hearing, 5/30/12, at 11. He also testified that Appellant and Hitcho discussed the matter directly, and that when he made the proffer to the court, Hitcho had already agreed to testify. Id. at 11, 12. When asked what Hitcho told him, counsel declined to provide that information. Instead, he referred PCRA counsel to the transcript of his earlier exchange with the judge during which he articulated the proffered testimony. Id. at 13. Attorney McLain subsequently explained that his proffer of the testimony Hitcho would provide was based on his discussion with Hitcho at that time. Id. at 15. He was reluctant to repeat it because he had not spoken to Hitcho about testifying at the PCRA hearing and confidentiality issues remained. Id. However, Attorney McLain was "totally confident" that he did not breach confidentiality when he discussed the matter with the court earlier. Id. at 16. Appellant's counsel asked the court to compel counsel to answer, but the court declined, reasoning that the issue of confidential communications could be avoided "if we use that transcript." Id. at 14. Counsel readily acknowledged that he did not have any discussions with Appellant regarding a potential conflict of interest with Hitcho. Id. at 18.

The PCRA court correctly recognized that a petitioner's claim of counsel's conflict of interest can support a finding of ineffectiveness if he demonstrates an actual conflict of interest that adversely affected his counsel's performance. Commonwealth v. Padden, 783 A.2d 299, 209-10 (Pa.Super. 2001). An actual conflict of interest is "evidenced whenever during the course of representation, the interests of appellant – and the interests of another client towards whom counsel bears obligation – diverge with respect to a material factual or legal issue or to a course of action." Id. at 310 (quoting In re Interest of Saladin, 518 A.2d 1261 (Pa.Super. 1986)).

The PCRA court found no evidence that Attorney McLain violated Pa.R.Prof.Conduct 1.7, which governs conflict of interest, or that his representation was impaired by an actual conflict of interest. Specifically, the PCRA court found no evidence that the interests of Appellant and Hitcho ever diverged. The court disagreed that counsel's refusal to reiterate at the PCRA hearing what Hitcho told him years earlier was any indication that counsel withheld favorable information from Appellant, and characterized this argument as an attempt by Appellant to manufacture a conflict where none existed. The court credited trial counsel's testimony that Appellant learned of the incident involving the victim's mother directly from Hitcho, and that when counsel placed the proffer on the record at the February 2009 hearing, he had not breached confidentiality. Finally, the court

> found no support for Appellant's position that counsel's relationship with Hitcho precluded the use of compulsory process to obtain Hitcho's testimony, and further, held that this argument was of no consequence in light of Hitcho's willingness to testify voluntarily.
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> We agree with the PCRA court that the factual situation herein was not likely to create a conflict of interest, such as those situations where counsel represents co-defendants or a co-defendant and a complaining witness. See Saladin, supra. Furthermore, the record supports the PCRA court's conclusion that the interests of Appellant and Hitcho did not diverge with respect to a factual or legal issue or course of action, and that Attorney McLain was not limited or impeded in his representation of Appellant by his responsibilities to Hitcho. No relief is due on this basis.

Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 4-9 (Pa. Super. Ct. Jan. 28, 2014) (footnotes omitted).

During pretrial proceedings and the trial, the issue of Mr. Hitcho and his testimony was discussed by counsel and the court. At the January 25, 2008 hearing, trial counsel raised a potential Rape Shield Law issue concerning Mr. Hitcho. Commonwealth v. Ratushny, No. CP-48-CR-1847-2008, slip op. at 21 (C.P. Northampton June 20, 2013). With consent of the court, the charges were withdrawn and re-filed against petitioner. After the charges were re-filed, outstanding pretrial motions were considered at a hearing on February 27, 2009. Id. at 8. At this hearing, petitioner raised, inter alia, two issues in an attempt to bypass the Rape Shield Law, and the possible testimony of Mr. Hitcho. Id. See also N.T., 2/27/09, at 14. Trial counsel withdrew the motion regarding Mr. Hitcho. Id. at 14-16. At a conference on March 9, 2009, the trial court noted that "counsel agreed that neither of them would introduce any evidence regarding the fact that [the victim] has made allegations of sexual misconduct against another defendant, . . . Hitcho, and that Hitcho was currently pending trial on those allegations." Commonwealth v. Ratushny, No. CP-48-CR-1847-2008, slip op. at 9 (C.P. Northampton June 20, 2013) (quoting

Commonwealth v. Ratushny, CP-48-CR-1847-2008, slip op. at 1-18 (C.P. Northampton Apr. 5, 2010)).[3]

In order to establish a violation of the Sixth Amendment on the grounds that counsel had a conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." United States v. Cuyler, 446 U.S. 335, 349 (1980) (footnote omitted). The "possibility of conflict is insufficient to impugn a criminal conviction." Id. at 350. The Third Circuit Court of Appeals explained when an "actual conflict of interest" exists:

> An actual conflict of interest "is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action." Sullivan v. Cuyler, 723 F.2d [1077,] 1086 [(3d Cir. 1983)]. To reach the level of constitutional ineffectiveness the conflict "must cause some lapse in representation contrary to the defendant's interests but such lapse need not rise to the level of actual prejudice." [United States v. Gambino, 788 F.2d, 938, 951 (3d Cir. 1986).] A lapse in representation adversely affecting the defendant's interests can be demonstrated not only by what the attorney does, but by what he refrains from doing. Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978).

United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1989). The court further explained that to establish a violation of the Sixth Amendment right to counsel, the defendant must

> [f]irst . . . demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

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[3] The state court record did not contain a transcript for proceedings on March 9, 2010. It is unknown whether proceedings on that day were recorded or transcribed.

Id. (quoting United States v. Fahey, 769 F.2d 829, 836 (1st Cit. 1985)). The court noted that "[o]verall, conflicts problems are more likely to arise in cases involving joint representation in a single proceeding rather than multiple representation in which the attorney represents different clients in different matters." Id.

This matter falls into the second category – trial counsel represented different clients in different matters concerning actions that occurred at different times, albeit involving the same victim. Because petitioner did not object to trial counsel's representation on the grounds of a conflict of interest at his trial, even though this matter was discussed at pretrial proceedings, petitioner must establish an actual conflict of interest. As the Third Circuit Court of Appeals stated, an actual conflict of interest "is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action." Sullivan v. Cuyler, 723 F.2d at 1086.

Here, the state court found no evidence that the interests of petitioner and Hitcho ever diverged. The court credited trial counsel's testimony that petitioner learned of the incident involving the victim's mother directly from Hitcho. In his PCRA petition, petitioner argued that a conflict existed because trial counsel could not use Hitcho as a witness at petitioner's trial because Hitcho's testimony might jeopardize Hitcho's plea negotiations. The PCRA court found no evidence that trial counsel's representation of petitioner was impeded because, if counsel called Mr. Hitcho as a witness in petitioner's trial, counsel would "incur the ire" of the prosecution and potentially negatively impact Hitcho's plea negotiations. Commonwealth v. Ratushny, No. C.P.-48-CR-1847-2008, slip op. at 33 (C.P. Northampton June 20, 2013). The appellate court found no support for petitioner's position that counsel's relationship with Hitcho precluded the use of

compulsory process to obtain Hitcho's testimony, and further, held that this argument was of no consequence in light of Hitcho's willingness to testify voluntarily. Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 4-9 (Pa. Super. Ct. Jan. 28, 2014). In this habeas claim alleging ineffective assistance of counsel because of a conflict of interest, petitioner fails to establish that an actual conflict of interest existed. Petitioner fails to show that his interests and those of Mr. Hitcho, diverged with respect to a material factual or legal issue or to a course of action.[4]

The state court's adjudication of petitioner's claim of ineffective assistance of counsel based upon a conflict of interest did not result in a decision that was contrary to, or an unreasonable application of, clearly established federal law, or in a decision that was based on an

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[4] In his Traverse, petitioner argues that the prosecutor and trial counsel perpetrated a "verbal act of fraud" against the trial court by misrepresenting when they each knew about Mr. Hitcho and the allegations of sexual assault against him. (Traverse at 3-4.) Petitioner contests trial counsel's testimony during which counsel testified regarding when his representation of Mr. Hitcho began and ended. The Superior Court of Pennsylvania on PCRA appeal recognized this discrepancy as follows:

> [Petitioner] stated that trial counsel continued to represent Hitcho until he pled guilty to reduced charges on April 13, 2009. Appellant's brief at 12, citing Exhibits D-1 and D-2. Trial counsel represented to the court on January 9, 2008, that he was no longer representing Hitcho. N.T., 1/9/08, at 50. Since the exhibits upon which [petitioner] relies are not part of the record forwarded to the Court, we cannot reconcile this discrepancy.

Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 6 n.2 (Pa. Super. Ct. Jan. 28, 2014). The discrepancy regarding the dates on which trial counsel represented Mr. Hitcho does not impact whether trial counsel was ineffective due to an actual conflict of interest. Trial counsel's representation of Mr. Hitcho did not prevent Mr. Hitcho from testifying at petitioner's trial; Mr. Hitcho volunteered to do so. In a conference with the trial court before the trial began, a decision by both counsel was made not to present the testimony of Mr. Hitcho. The basis for this decision is not in the record. However, there is no support for petitioner's position that trial counsel's representation of Mr. Hitcho prevented the testimony.

unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1) and (2). Petitioner's first habeas claim should be denied.[5]

Claim 2. **Brady Violation**

Claim 3. **Ineffective Assistance of Trial Counsel – Failure to Discover Conviction of Victim's Mother**

In his second habeas claim, petitioner contends that the Commonwealth violated the mandates of Brady v. Maryland, 373 U.S. 83 (1963) when it failed to disclose evidence favorable to petitioner.[6] Petitioner states as follows in support of this claim:

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[5] The PCRA court and the appellate court on PCRA review, both noted that petitioner did not allege in his PCRA petition that trial counsel was ineffective for failing to call Mr. Hitcho to testify at petitioner's trial. Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 7 n.3 (Pa. Super. Ct. Jan. 28, 2014) ("Appellant has not alleged that trial counsel was ineffective for withdrawing the [defense] motion [to suppress] or failing to call Hitcho to testify at trial."); Commonwealth v. Ratushny, No. C.P.-48-CR-1847-2008, slip op. at 36 n. 50 (C.P. Northampton June 20, 2013). Petitioner also does not raise this claim in the federal habeas petition. See Petition ¶ 12. Petitioner's attempt to belatedly assert this claim in a document titled "Correction of Error in Relation to a Traverse to Answer" (Doc. No. 10) must fail. This claim has not been presented to the state courts and the time to do so has passed. See 42 Pa. Cons. Stat. Ann. § 9545 (one year statute of limitations for PCRA petition).

[6] While a prosecutor's affirmative duty to disclose evidence favorable to a defendant can be traced to early twentieth century prohibitions against misrepresentation, it is predominantly associated with the Supreme Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). The Supreme Court in Kyles v. Whitley, 514 U.S. 419 (1995) provides a concise summary of the evolution of the current Brady law. The Supreme Court stated the Brady rule as follows: AThere are three components to a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.@Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Other courts have stated the three prongs thusly: "To establish a Brady violation, it must be shown that (1) evidence was suppressed; (2) the evidence was favorable to the defense; and (3) the evidence was material to guilt or punishment." Simmons v. Beard, 590 F.3d 223, 233 (3d Cir. 2009) (quotation omitted). Not every failure to disclose favorable evidence gives rise to a constitutional violation. Kyles, 514 U.S. at 436-37. A Brady violation does not occur unless there is a reasonable probability that the suppressed evidence would have produced a different verdict, i.e., the suppressed evidence was "material." Strickler, 527 U.S. at 281. A reasonable probability is shown when the

> The mother of the victim was one of the main witnesses against me. I alleged that the charges against me arose [from] her wanting to retaliate against me because I did not want to be romantically involved with her any longer. The prosecutor's office that prosecuted me had a few years earlier convicted the witness of a crimen falsi, welfare fraud. Because this was not disclosed I could not bring this fact to the jury's attention, as I had a right under Pennsylvania law. This evidence was material to my innocence.

(Petition ¶ 12.)

In his third habeas claim, petitioner maintains that trial counsel was ineffective for failing to discover this prior conviction of the victim's mother and use that conviction to impeach her as a witness. In addition to the argument quoted above with respect to his second claim, petitioner stated the following in support of the third claim: "Counsel should have discovered this and used it to impeach her, as these records were readily available in the Northampton County Clerk of Courts office and on the docket website maintained by the Administrative Office of Pennsylvania Courts." Id. Respondents urge that both of these claims be denied as meritless. (Resp. at 11-14.)

The PCRA court rejected these claims and the appellate court affirmed stating as follows:

> Next, Appellant claims he is entitled to a new trial because the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose evidence favorable to him, namely, evidence of a Commonwealth witness's false statement conviction that could have been used to impeach her trial testimony.
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government's suppression undermines confidence in the outcome of the trial. Kyles, 514 U.S. at 434. Impeachment evidence, such as that at issue herein, falls squarely within the Brady rule. United States v. Scott, 2015 WL 1639576, at *10 (3d Cir. Apr. 14, 2015) (citing Giglio v. United States, 405 U.S. 150, 154 (1972)).

Appellant cites the Third Circuit Court of Appeals' decision in Wilson v. Beard, 589 F.3d 651 (3d Cir. 2009), for the proposition that under Brady, the prosecution bears the burden of disclosing the criminal record of its witnesses regardless of whether an explicit request was made by the defense. He implies that Wilson imposes a duty upon the prosecution to obtain and disclose that information to the defense. According to Appellant, the Commonwealth's failure to disclose that its witness, T.H.'s mother, had a crimen falsi conviction for making a false statement, without more, violated Brady as she was an important component of the Commonwealth's case and evidence tending to impeach her testimony was critical to the defense. Appellant alleges further that the conviction was admissible under Pa.R.E. 609 for that purpose, and defense counsel admittedly would have used it had he been aware of the crimen falsi conviction. Finally, Appellant contends that such evidence would likely have changed the outcome given the jury's acquittal of Appellant on assault charges involving the victim's younger sister.

. . .

The PCRA court found that, while the victim's mother's criminal conviction for false statements was impeachment evidence favorable to the accused, thus satisfying the second element of the Brady analysis, Appellant failed to demonstrate that the Commonwealth intentionally or inadvertently suppressed this evidence. There was no evidence adduced that the Commonwealth was aware of the conviction, and no indication that the Commonwealth misled the defense. Moreover, the court concluded that the conviction was not suppressed by the Commonwealth because it was a matter of public record. See Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002).

Preliminarily, we question whether Brady was implicated herein when the defense could have discovered the evidence in question with due diligence. See Commonwealth v. Haskins, 60 A.3d 538, 547 (Pa.Super. 2012) ("No Brady violation occurs when the defendant knew, or with reasonable diligence, could have discovered the evidence in question. Similarly, no violation occurs when the evidence was available to the defense from a non-governmental source."). The criminal convictions of T.H.'s mother were a matter of public record and accessible to the defense.

Furthermore, we agree that the record contains no evidence that the Commonwealth was aware of or suppressed this impeachment evidence, the first element of a Brady violation. In this regard, Wilson, supra, offers no support for Appellant's contention that Brady imposes a blanket obligation upon the prosecution in every case to acquire and turn over the criminal records of its witnesses. In Wilson, the court cited Brady as requiring "the disclosure by the prosecution not only of information actually known to the prosecutor, but of all

information in the possession of the prosecutor's office, the police, and others acting on behalf of the prosecution." Wilson, supra, at 659. The failure to do so upon request violates due process where the evidence is material to guilt or punishment. Id.

The facts in Wilson bear no similarity to the facts herein. In that case, the defense filed pre-trial motions specifically asking the Commonwealth to disclose crimen falsi convictions of its witnesses. The prosecutor's file contained the rap sheet of a pivotal Commonwealth witness, but the Commonwealth failed to disclose this information in response to the defense request. When the court asked the prosecution for the witnesses' criminal histories at the charging conference, the prosecutor was not forthcoming. At the close of trial, the prosecutor affirmatively misrepresented that the witness had no record. On those facts, the court found that the Commonwealth violated Brady by failing to disclose evidence favorable to the defendant that was in its possession pursuant to a specific request by the defense, and affirmed the grant of habeas relief based on the Brady violation.

We agree with Appellant and the PCRA court that the witness's prior crimen falsi conviction was evidence favorable to the accused, and that under Pennsylvania decisions applying Brady, a prosecutor has an obligation upon request to disclose all exculpatory information material to the guilt or punishment of an accused within its possession, including evidence of an impeachment nature. Commonwealth v. Chmiel, 30 A.3d 1111, 1129 (Pa. 2011); Commonwealth v. Lesko, 15 A.3d 345, 370 (Pa. 2011). However, the record supports the PCRA court's conclusion that Appellant did not prove that the Commonwealth possessed or controlled that information and failed to disclose it either intentionally or inadvertently. In fact, the Commonwealth's attorney represented that she routinely copies her entire file and supplies it to the defense, and that she did so herein. Thus, one can reasonably infer that the Commonwealth did not have such information in its possession.

Additionally, we find ample support for the PCRA court's conclusion that this evidence was not material. The law is well settled that, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." See Commonwealth v. Chambers, 807 A.2d 872, 887 (Pa. 2002). "[M]aterial evidence" must be so favorable to the accused "that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Commonwealth v. Santiago, 591 A.2d at 1117 (quoting United States v. Bagley, 473 U.S. 667, 676 (1985)[)]. "A Brady violation is established by showing that the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict; and "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense."

Commonwealth v. Weiss, 986 A.2d 808, 815 (Pa. 2009). A defendant is not entitled to a new trial where the prosecution fails to disclose evidence impacting a witness's credibility unless he demonstrates "that the reliability of the . . . witness may well be determinative of his guilt or innocence." Id.

In Commonwealth v. Ferguson, 866 A.2d 403, 407 (Pa.Super. 2004), this Court found that alleged Brady impeachment evidence failed to discredit the testimony of two eyewitnesses that established beyond a reasonable doubt that the defendant participated in a brutal assault in broad daylight. No new trial was warranted as the impeachment evidence was "not sufficiently favorable, and its suppression was not sufficiently prejudicial, to satisfy the constitutional threshold of materiality." Id. at 408.

As in Ferguson, supra, the PCRA court herein found that the crimen falsi conviction impeachment evidence was not sufficiently favorable, nor its non-disclosure sufficiently prejudicial, to satisfy the constitutional threshold of materiality. Contrary to Appellant's contention, the PCRA court did not find T.H.'s mother's reliability to be critical or essential to the conviction. T.H. testified that she and Appellant engaged in a sexual relationship over a two to three year period. Appellant admitted to CYS investigators that on one occasion, he petted the minor, and digitally penetrated her vagina, and rubbed his penis against her. N.T. Trial Vol. I, 3/10/09, at 54. T.H.'s testimony and Appellant's admissions to CYS were legally sufficient to prove the offenses beyond a reasonable doubt. The PCRA court found that impeachment evidence was not sufficiently favorable to overcome this evidence and affect the verdict, and that its absence did not undermine the fairness of the proceeding. We agree. The record supports the PCRA court's finding that Appellant failed to demonstrate that the Commonwealth intentionally or inadvertently suppressed the information regarding T.H.'s mother's crimen falsi conviction, and that the information was material to Appellant's defense. Thus, no Brady violation occurred and no relief is due.

The PCRA court's finding that this impeachment evidence did not affect the outcome of the case also proves fatal to Appellant's claim that trial counsel was ineffective due to his failure to ascertain whether the Commonwealth witnesses, specifically T.H.'s mother, had criminal records. We agree with the PCRA court that this claim has arguable merit and that counsel's failure to seek out this information lacked an objective reasonable basis. Defense counsel acknowledged that if he had known of the conviction, he would have used it to impeach T.H.'s mother and as the basis for a charge to the jury pursuant to Pa.S.S.J.I. 4.08D (Criminal), regarding impeachment of a witness by prior conviction.

However, Appellant failed to establish actual prejudice from counsel's failure to act. In light of T.H.'s testimony, as well as Appellant's incriminating

> admissions to CYS, the record simply fails to evidence a reasonable probability that had counsel used the crimen falsi conviction to impeach T.H.'s mother, the result would have been different. The PCRA court noted that, even without evidence of the criminal conviction, trial counsel effectively cross-examined T.H.'s mother about her extensive history of drug abuse, including her use of cocaine with T.H. The jury heard testimony that she knew about Appellant's sexual abuse of T.H. long before she reported it, and that she threatened Appellant with exposure. According to the PCRA court, counsel's impeachment of this witness was so complete that evidence of her conviction for making a false statement would have been cumulative. PCRA Court Opinion, 6/20/13, at 43.

Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 9-18 (Pa. Super. Ct. Jan. 28, 2014) (footnotes omitted and emphasis in original).

As summarized above, supra 16 n.6, "[t]here are three components to a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.@Strickler, 527 U.S. at 281-82. The defendant must demonstrate that there is a reasonable probability that the result of the trial would have been different if the evidence had been disclosed. Id. at 289. A reasonable probability is shown when the government's suppression undermines confidence in the outcome of the trial. Kyles, 514 U.S. at 434. The state courts, employing a standard indistinguishable from Brady, concluded that petitioner failed to prove the second and third elements of a Brady violation. This court agrees.

The second prong of Brady requires proof that the governmental entity either willfully or inadvertently suppressed evidence required to be disclosed. However, it is equally well-settled that "[a] Brady violation does not occur where information was readily available to the defendant through the exercise of due diligence." Paddy v. Beard, 2012 WL 5881847, at *12 (E.D. Pa. Nov. 20, 2012) (Shapiro, J.) (citing United States v. Perdomo, 929 F.2d 967, 973 (3d Cir.

1991)). Petitioner admits in his habeas petition that the information regarding T.H.'s mother's conviction was "readily available [to trial counsel] in the Northampton County Clerk of Courts office and on the docket website maintained by the Administrative Office of Pennsylvania Courts[.]" (Petition ¶ 12.) No Brady violation occurred because no evidence was suppressed. See United States v. Georgiou, 777 F.3d 125, 140 (3d Cir. 2015) ("The [prosecution witness's] Minutes [from his arraignment and guilty plea] and Bail Report were not suppressed under . . . Brady because they were accessible to Appellant."); United States v. Pelullo, 399 F.3d 197, 213 (3d Cir. 2005) ("Brady does not compel the government to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.") (quotations omitted); Perdomo, 929 F.2d at 973 ("Brady does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence;" "[e]vidence is not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of exculpatory evidence."); Marinelli v. Beard, 2012 WL 5928367, at *41 (M.D. Pa. Nov. 26, 2012) ("It is well-settled that the government does not violate Brady by failing to disclose exculpatory or impeaching evidence that is available to the defense from other sources in the exercise of due diligence.") (citing cases); Shank v. Mitchell, 2009 WL 3210350, at *9 (S.D. Ohio Sept. 30, 2009) ("[T]he state has no duty to disclose, and Brady is not violated by the failure to disclose, information or records that are readily available to the defense through the exercise of due diligence.") (citing cases).[7]

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[7] The appellate court stated that "[t]he PCRA court noted that while the defense made two discovery requests, it was unclear whether it specifically requested prior convictions of Commonwealth witnesses since Appellant's discovery requests were not filed of record and no evidence of their contents was adduced." Id. at 14 n.4. Courts have held, however, that the government entity has a duty under Brady "to disclose all exculpatory evidence to the defense

Additionally, petitioner failed to prove the third prong of Brady, that prejudice occurred as a result of the non-disclosure. Strickler, 527 U.S. at 281-82. Petitioner must demonstrate that there is a reasonable probability that the result of the trial would have been different if the evidence had been disclosed. Id. at 289. A reasonable probability is shown when the government's suppression undermines confidence in the outcome of the trial. Kyles, 514 U.S. at 434. This court agrees with the state courts that petitioner was unable to establish a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). As stated by the appellate court, contrary to petitioner's assertions, "the PCRA court did not find T.H.'s mother's reliability to be critical or essential to the conviction." Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 16 (Pa. Super. Ct. Jan. 28, 2014). The reliability of the victim's mother was not determinative of petitioner's guilt or innocence. The evidence at trial was substantial. T.H., the victim, testified that she and petitioner engaged in a sexual relationship for a two to three year period. (N.T., 3/10/09, at 26-51.) Trial counsel engaged T.H. in a vigorous cross-examination. Id. at 63-110. T.H. testified that she and her mother did cocaine together. Id. at 100. T.H. stated that her mother knew she was having sex with petitioner for about two years "and still let him stay in the house." Id. at 103. T.H. testified that her mother was "very jealous of me, never wanted me around [petitioner.]" Id. at 104. Moreover, trial counsel cross-examined T.H.'s mother about her extensive history of drug abuse, including her use of cocaine with T.H.. Id. at 169-70, 208. The

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before trial, even if the defendant did not specifically request the evidence." Paddy v. Beard, 2012 WL 5881847, at *11 (E.D. Pa. Nov. 20, 2012). See also United States v. Munchak, 2014 WL 3557176, at *13 (M.D. Pa. July 17, 2014) ("[U]nder Brady, the Government has an affirmative duty to disclose such evidence even where there has not been a request for it by the defendant.").

jury heard the mother testify that she knew of petitioner's sexual abuse of T.H. long before she reported it, and that she had threatened petitioner with exposure. Id. at 182, 205. See also Id. at 48 (T.H. testified that her mother would threatened to expose petitioner's sexual contact with T.H. "if they got into a fight"). T.H.'s mother testified that she felt she was in competition with her daughter and that she was jealous of her daughter. Id. at 173, 199. Friends of the victim testified that T.H. told them that she and petitioner had a sexual relationship. Id. at 213, 225. In addition, the appellate court stated as follows with respect to the evidence adduced at trial:

> The PCRA court also noted that much of T.H.'s mother's testimony was corroborated by other witnesses. T.H.'s account of how her mother tricked her into admitting that she was having sex with Appellant was consistent with her mother's version of the event. N.T. Trial Vol. I, 3/10/09, at 179-180. Appellant's admissions to CYS investigators mirrored the mother's testimony regarding what he had told her.

Commonwealth v. Ratushny, No. 327 EDA 2013, slip op. at 17 n.5 (Pa. Super. Ct. Jan 28, 2014).

CYS investigators testified that on one occasion petitioner admitted that he petted the minor, digitally penetrated her vagina and rubbed his penis against her. (N.T., 3/11/09, at 54-55, 147-48.) On direct examination at his trial, petitioner denied making these statements. (N.T., 3/12/09, at 165-66.) In light of all the evidence presented at trial, this court finds that petitioner failed to prove a reasonable probability that the result of the trial would have been different if the evidence of T.H.'s mother's conviction for a false statement had been disclosed.

In his third habeas claim, petitioner contends that trial counsel was ineffective for failing to discover and use T.H.'s mother's prior conviction as impeachment evidence at trial. The PCRA court rejected this claim and the Superior Court of Pennsylvania affirmed finding that trial counsel was not ineffective because petitioner failed to establish a reasonable probability that,

absent counsel's deficient performance, the outcome of the trial would have been different. Harrington, 562 U.S. at 104. See also Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011) (The prejudice requirement of Strickland requires a "'substantial,' not 'conceivable,' likelihood of a different result."). For the reasons set forth above, the reliability of the victim's mother's testimony was not determinative of petitioner's guilt or innocence. Trial counsel subjected the victim's mother to a vigorous cross-examination during which the mother admitted that she did drugs with her minor daughter, knew about the abuse for a significant period of time before alerting police, used the abuse to threaten petitioner when she and petitioner would fight, and admitted to being jealous of her minor's daughter and her relationships with men. Petitioner fails to meet the second prong of the Stickland test.

The state court's adjudication of petitioner's second and third habeas claims did not result in a decision that was contrary to, or an unreasonable application of, clearly established federal law, or in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1) and (2). Petitioner's second and third habeas claims should be denied.

D. Request for Appointment of Counsel

Petitioner also requests the court appoint counsel to represent him in this habeas litigation. (Doc. No. 16.) There is no constitutional right to counsel in a federal habeas corpus proceeding. See Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991), cert. denied, 503 U.S. 988 (1992). Appointment of counsel in a habeas proceeding is mandatory only if the district court determines that an evidentiary hearing is required, and the petitioner qualifies to have counsel appointed under 18 U.S.C. § 3006A. See Rule 8(c) of the Rules Governing Section 2254.

Otherwise, a court may exercise its discretion in appointing counsel to represent a habeas petitioner, who is "financially eligible" under the statute, if the court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2); Reese, 946 F.2d at 263-64.

Under these guidelines, counsel may be appointed where a pro se prisoner in a habeas action has made a colorable claim, but lacks the means to adequately investigate, prepare, or present the claim. Id. District courts have discretion to appoint counsel in habeas cases where the interests of justice so require. 18 U.S.C. § 3006A; United States ex rel. Manning v. Brierley, 392 F.2d 197, 198 (3d Cir.), cert. denied, 393 U.S. 882 (1968). Factors to consider include whether the claims raised are frivolous, the complexity of the factual and legal issues, and if appointment of counsel will benefit the petitioner and the court. See, e.g., Reese, 946 F.2d at 263-64.

Here, petitioner's claims clearly lack merit. No evidentiary hearing is warranted. Counsel will provide no benefit to petitioner or the court, and the interests of justice do not require appointment of counsel. Petitioner's request for appointment of counsel should be denied.

III. CONCLUSION

For all of the above reasons, the court makes the following:

RECOMMENDATION

AND NOW, this 31st day of August, 2015, the court respectfully recommends that the petition for a writ of habeas corpus be **DENIED**, petitioner's Request for Appointment of Counsel (Doc. No. 16) should be **DENIED**, and no certificate of appealability be issued.[8]

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[8] The COA should be denied because petitioner has not shown that reasonable jurists could debate whether his petition should be resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. See Miller-El v.

The parties may file objections to the Report and Recommendation. See Loc. R. Civ. P. 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

Cockrell, 537 U.S. 322, 336 (2003).