BLD-318 **September 27, 2018**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2051**

JASON RAY FLICK, Appellant

v.

SUPERINTENDENT ALBION SCI; ET AL.

(W.D. Pa. Civ. No. 3-15-cv-00080)

Present: RESTREPO, BIBAS and NYGAARD, Circuit Judges

Submitted is Appellant's motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied as he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). The District Court denied Appellant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For substantially the reasons stated by the District Court, Appellant has not shown that reasonable jurists would find its assessment of his claims of trial court error and ineffective assistance of counsel debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant also has not shown that an evidentiary hearing should have been held in District Court. See Campbell v. Vaughn, 209 F.3d 280, 286-87 (3d Cir. 2000) (discussing standard for holding an evidentiary hearing).

By the Court,

s/ Richard L. Nygaard
Circuit Judge

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Dated: October 2, 2018
SLC/cc: Jason Ray Flick

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

JASON RAY FLICK, Petitioner, v. NANCY GIROUX, ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, and DISTRICT ATTORNEY OF SOMERSET COUNTY, Respondents.	Civil Action No. 15 – 80J District Judge Kim R. Gibson Magistrate Judge Lisa Pupo Lenihan

MEMORANDUM ORDER

Before the Court is a Petition for Writ of Habeas Corpus filed by Petitioner Jason Ray Flick ("Petitioner") pursuant to 28 U.S.C. § 2254, challenging his seventeen (17) to thirty-five (35) year judgment of sentence entered on June 3, 2010 by the Somerset County Court of Common Pleas. His Petition was filed on March 25, 2015, and he filed a Supplement to that Petition on June 24, 2015. In accordance with the Magistrate Judge's Act, 28 U.S.C. § 636(b)(1), and Rules 72.C and 72.D of the Local Rules of Court, all pretrial matters were referred to United States Magistrate Judge Lisa Pupo Lenihan.

On February 26, 2018, the Magistrate Judge issued a Report and Recommendation recommending that Petitioner's Petition for Writ of Habeas Corpus and Supplement to that Petition be denied and that a Certificate of Appealability also be denied. (ECF No. 38.) Petitioner was served with the Report and Recommendation and informed that the deadline to file written objections was March 15, 2018. As of today, no objections have been filed.

Therefore, upon careful *de novo* review of the Petition for Writ of Habeas Corpus and its Supplement, and the Magistrate Judge's Report and Recommendation, the following Order is entered.

AND NOW, this 16th day of March, 2018;

IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate Judge (ECF No. 38) is adopted as the Opinion of the Court.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus (ECF No. 1) and Supplement thereto (ECF No. 8) is denied.

IT IS FURTHER ORDERED that a Certificate of Appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court mark this case **CLOSED**.

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Petitioner has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

By the Court:

Kim R. Gibson

Kim R. Gibson
United States District Judge

cc: Jason Ray Flick
JT-4062
SCI Albion
10745 Route 18
Albion, PA 16475

Counsel of record
(Via CM/ECF electronic mail)

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

JASON RAY FLICK,	)	
Petitioner,	)	
	)	
v.	)	**3:15-cv-80**
	)	**District Judge Gibson**
NANCY GIROUX, et al.,	)	**Magistrate Judge Lenihan**
Respondents.	)	

MEMORANDUM ORDER

Presently before this Court is Plaintiff's Motion for Reconsideration [ECF No. 41] of an Order of this Court adopting Magistrate Judge Lenihan's Report and Recommendation. *See* ECF No. 39; ECF No. 38. The Order, dated March 16, 2018, effectively denied Plaintiff's Petition for Writ of Habeas Corpus and the Supplement to that Petition. *See* ECF No. 1; ECF No. 8.

Motions for reconsideration are not explicitly recognized by the Federal Rules of Civil Procedure. *United States v. Compaction Sys. Corp.*, 88 F.Supp.2d 339, 345 (D.N.J. 1999). However, a motion for reconsideration may be treated as a motion to alter or amend judgment under Federal Rule 59(e) or as a motion for relief from judgment under Federal Rule 60(b). *Id. See also Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1352 (3d Cir. 1990) (recognizing that a motion for reconsideration is usually the "functional equivalent" of a motion to alter or amend judgment under Rule 59(e)).

"'Because federal courts have a strong interest in finality of judgments,'" "[m]otions for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure are granted sparingly." *Jacobs v. Bayha*, 2011 WL 1044638, at *2 (W.D. Pa. Mar. 18, 2011) (quoting *Continental Cas. Co. v. Diversified Indus., Inc.*, 884 F.Supp. 937, 943 (E.D. Pa. 1995)). Furthermore, Rule

60(b)(6) provides "extraordinary relief" that is only available in "exceptional circumstances." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 273 (3d Cir. 2002).

The moving party bears a heavy burden to demonstrate that an order should be reconsidered and the Court will only grant such a motion if the moving party shows: (1) an intervening change in the controlling law; (2) the availability of new evidence which was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *Lazardis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010) (quoting *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 678 (3d Cir. 1999)).

Here, despite the arguably untimely nature of Plaintiff's Objections to the Report and Recommendation, the Court has fully reviewed and considered Plaintiff's Objections. *See* ECF No. 41-1. Nevertheless, Plaintiff makes no new arguments beyond those which this Court reviewed and considered *de novo* before adopting the Report and Recommendation, and none of Plaintiff's Objects affect this Court's adoption of the Report and Recommendation.

Reconsideration is not permitted to reargue matters the Court already resolved or relitigate points of disagreement between the court and the moving party. *See In re Avandia Marketing, Sales Practices & Products Liability Litig.*, 2011 WL 4945713, at *1 (E.D. Pa. Oct. 14, 2011); *Kennedy Indus., Inc. v. Aparo*, 2006 WL 1892685, at *1 (E.D. Pa. Jul. 6, 2006) (a litigant who "fails in its first attempt to persuade a court to adopt its position may not use a motion for reconsideration either to attempt a new approach or correct mistakes it made in its previous one."); *Odgen v. Keystone Residence*, 226 F.Supp.2d 588, 606 (M.D. Pa. 2002) ("A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant.").

In short, Plaintiff's Motion for Reconsideration, Plaintiff's Objections to the Report and Recommendation, and all attachments to Plaintiff's Motion, *see* ECF No. 41, fail to satisfy any of the three aforementioned requirements to warrant the grant a motion for reconsideration and do not persuade this Court that the extremely thorough and well-crafted Report and Recommendation contained a clear error of law or fact or resulted in a manifest injustice.

ACCORDINGLY, NOW, this 9th day of April, 2018;

IT IS ORDERED that Petitioner's Motion for Reconsideration [ECF No. 41] is **DENIED**.

/s/ Kim R. Gibson
KIM R. GIBSON
United States District Judge

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

JASON RAY FLICK,	)	
	)	Civil Action No. 15 – 80J
Petitioner,	)	
	)	
v.	)	District Judge Kim R. Gibson
	)	Magistrate Judge Lisa Pupo Lenihan
NANCY GIROUX, ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, and DISTRICT ATTORNEY OF SOMERSET COUNTY,	)	
	)	
Respondents.	)	

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REPORT AND RECOMMENDATION

I. RECOMMENDATION

For the following reasons, it is respectfully recommended that the Petition for Writ of Habeas Corpus (ECF No. 1) and the Supplement to that Petition (ECF No. 8) be denied and that a Certificate of Appealability also be denied.

II. REPORT

Pending before the Court is a Petition for Writ of Habeas Corpus filed by Petitioner Jason Ray Flick ("Petitioner") on March 25, 2015, pursuant to 28 U.S.C. § 2254. (ECF No. 1.) Petitioner seeks relief from his judgment of sentence of seventeen (17) to thirty-five (35) years of incarceration entered on June 3, 2010 by the Somerset County Court of Common Pleas following his convictions for one count of aggravated assault, eleven counts of endangering welfare of children, six county of simple assault, six counts of recklessly endangering another person, and

69.

one count of furnishing alcohol to minors. Commonwealth v. Flick, No. CP-56-CR-0000141-2008 (Ct. Com. Pleas Somerset County).[1]

A. Facts of the Crime

The trial court summarized the incidents underlying the charges against Petitioner as follows:

> The charges arose from a series of events which occurred between December 2006 and September 2007 in which the victim was [Petitioner's] son . . ., who was born April 15, 2005. These incidents involved [Petitioner] striking the child to the extent that the child suffered bruises[,] was knocked off his feet by the blows[,] and, on at least one occasion, knocking the wind out of him; allowing his [child] to drink alcoholic beverages by placing beer in the child's "sippy" cup; shooting him numerous times with an "air-soft" gun leaving welts on the child's body; forcing the child to drink hot sauce by grabbing his face and pouring the sauce into his mouth; draping a large snake around the child's shoulders; writing or drawing demeaning and derogatory words and/or pictures on the child's face and body with a permanent marker; leaving the child unattended and unsupervised in his room on several occasions while leaving the home; and causing the child to suffer a fractured left femur and an occipital skull fracture while the child was left in [Petitioner's] care and control.

(Trial Court Memorandum & Order Denying Post-Trial Motion, 9/15/10; ECF No. 30-8, p.2.)

B. Relevant Procedural Background

In December 2007, the Commonwealth charged Petitioner with offenses stemming from twelve incidents. On August 28, 2009, Petitioner filed a motion for a change of venue or venire alleging that prejudicial pretrial publicity "ha[d] so poisoned the minds of prospective jurors in [Somerset C]ounty that a fair and impartial trial would be impossible." (Superior Court Memorandum, 8/30/11; ECF No. 31-5, p.2) (citing Petitioner's Mot. For Change of Venire, 8/28/09; ECF No. 31-2, p.55.) Petitioner contended that the publicity's "[s]pecific references to [his] position, prior criminal record, and . . . the alleged acts" prejudiced him. Id., pp.2-3. He also argued that "[t]he numerous derogatory comments posted along with the articles" provided

[1] The docket sheet for this case is available online at https://ujsportal.pacourts.us/DocketSheets.

"a representative sample of the bias" he faced in Somerset County. Id., p.3. Petitioner supported his motion with five news articles and two Internet blog posts. Id. However, the trial court denied Petitioner's motion "without prejudice subject to the opportunity to attempt to pick a jury." Id., p.4 (citing Order, 11/3/09, at 1.)

Jury selection was held on March 8, 2010. (N.T. Jury Selection, 3/8/10; ECF No. 30-1.) The Commonwealth and Petitioner's counsel conducted a *voir dire* of potential jurors and nineteen (19) of forty-five (45) potential jurors responded that they had seen, heard or read about the case in the media. (N.T. Jury Selection, 3/8/10, pp.14-17, 19-21.) Of those nineteen (19) jurors, seven (7) jurors indicated that it would be "impossible . . . to give [Petitioner] a fair trial based solely on the evidence that [they would] hear in [the] courtroom and the law as the Judge" explained it, and they were all excused for cause. Id., pp.15-21. Only two jurors who had heard about the case and indicated that they could still give Petitioner a fair trial were seated. Id., pp.14-21, 53-56. Petitioner's counsel used two preemptory challenges, waiving six of them. Id., p.55.

The jury trial began on March 24, 2010. (N.T. Trial, 3/26/10; ECF Nos. 30-2 – 30-6.) The trial court asked the Commonwealth to draft a verdict slip for the jury's use during deliberation, which the trial court and Petitioner's counsel reviewed. Before the court gave the proposed verdict slip to the jury, Petitioner's counsel affirmed that he did not "have any corrections or issues with it." (N.T. Trial, 3/26/10, at 216.) The final version of the verdict slip had a heading for each incident: "incident of September 30, 2007," "drinking beer incident," "snake incident," "July 4/5 incident," "'air soft' gun incident," "June 2007 incident," "December 2006/January 2007 incident," and "second December 2006/January 2007 incident." (Post-

Sentence Mot. Pursuant to Pa.R.Crim.P. 720, 6/14/10; ECF No. 30-7, pp.7-9.) The slip had spaces for "guilty" or "not guilty" next to each charge. Id.

On March 26, 2010, the jury convicted Petitioner of the crimes as charged. On June 2, 2010, the court imposed an aggregate sentence of seventeen (17) to thirty-five (35) years' imprisonment and an aggregate fine. Commonwealth v. Flick, No. CP-56-CR-0000141-2008 (Ct. Com. Pleas Somerset County).

Petitioner filed a timely post-sentence motion for a new trial and arrest of judgment. (Post-Sentence Mot. Pursuant to Pa.R.Crim.P. 720, 6/14/10; ECF No. 30-7.) He alleged that the trial court erred in denying his motion for change of venue, appointing a former district attorney as his counsel, and giving the jury a prejudicial verdict slip. Id. On August 2, 2010, the trial court held a hearing regarding the motion and denied the motion on September 15, 2010. (Trial Court Memorandum, 9/15/10; ECF No. 30-8.) Petitioner filed a timely notice of appeal (Notice of Appeal, 10/13/10; ECF No. 31-2, p.54) and a Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal raising two issues: (1) Whether the court erred in not allowing his case to be tried outside of Somerset County; and (2) Whether the court erred in submitting a verdict slip which contained editorialization thereby creating a prejudice in the minds of the jurors to convict him (Brief for Appellant, 1/26/11; ECF No. 31-3, pp.1-15). On appeal, the Superior Court of Pennsylvania affirmed Petitioner's judgment of sentence. (Superior Court Memorandum, 8/30/11; ECF No. 31-5.)

Petitioner next filed a petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA") on April 5, 2013. (Motion for Post Conviction Collateral Relief; ECF No. 32-1.) On May 29, 2013, the PCRA court held a preliminary review of the petition, during which Petitioner's PCRA counsel and the Commonwealth provided argument on whether an

evidentiary hearing was necessary. (Superior Court Memorandum, 6/20/14; ECF No. 33-2, p.2); (N.T., 5/29/13; ECF No. 33-4, pp.17-55.) Following that argument, the court ordered counsel to brief the issue of timeliness and the issues that Petitioner raised in his petition. Id. The PCRA court also ordered the Commonwealth to respond to counsel's brief. Id. Following the briefing, on August 16, 2013, the PCRA court found that the PCRA petition was timely, but that an evidentiary hearing was unnecessary. (Memorandum & Order, 8/16/13; ECF No. 33-3, pp.21-26.) Consequently, the court issued a notice of its intent to dismiss the petition pursuant to Pa.R.Crim.P. 907. (Order, 8/16/13; ECF No. 33-3, p.26.) Petitioner's PCRA counsel filed a response to the Rule 907 notice on September 13, 2013, raising an issue that had not been raised in the PCRA petition or during oral argument. (ECF No. 33-4, pp.15-16.) On September 24, 2013, the PCRA court dismissed the PCRA petition. (Order, 9/24/13; ECF No. 32-3.)

Petitioner filed a notice of appeal on October 25, 2013. (Superior Court Memorandum, 6/20/14; ECF No. 33-2, p.3.) The PCRA court ordered, and Petitioner timely filed, a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Id. In lieu of a Rule 1925(a) opinion, the PCRA court relied upon its August 16, 2013 memorandum and order in finding that the petition was without merit. Id.

On appeal, Petitioner argued that the PCRA court erred in denying his petition because his counsel was ineffective during the pre-trial phase and at trial. Id., p.4. Specifically, he argued that his appointed counsel was ineffective for waiving his preliminary hearing without a basis to do so and for not filing a *habeas corpus* motion to test whether the Commonwealth could present a *prima facie* case. Id., p.5. He also argued that his counsel was ineffective for failing to call certain witnesses at trial. Id, p.6. The Superior Court of Pennsylvania affirmed the

PCRA court's denial of relief in a Memorandum dated June 20, 2014. (Superior Court Memorandum, 6/20/14; ECF No. 33-2.)

Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on July 21, 2014. (Appeal from Memorandum Entered on 6/20/14; ECF No. 33-3, pp.1-9.) It was denied on January 21, 2015. (Order, 1/21/15; ECF No. 33-5). He initiated the instant habeas corpus proceeding on March 25, 2015 (ECF No. 1), and filed a Supplement to his Petition on June 24, 2015 (ECF No. 8). Respondents filed a Motion to Dismiss the Petition (ECF No. 29) that was converted into an Answer by the Court in an Order dated November 16, 2015, (ECF No. 34). The Petition is now ripe for review.

C. Standard of Review

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal habeas court may overturn a state court's resolution of the merits of a constitutional issue only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court of the United States, in Williams v. Taylor, 529 U.S. 362 (2000), discussed the analysis required by § 2254(d)(1):

> [Under the "contrary to" clause], a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by 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. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 1498. The Third Circuit Court of Appeals, consistent with the Williams v. Taylor interpretation, set forth in Matteo v. Superintendent, SCI-Albion, 171 F.3d 877 (3d Cir. 1999), *cert. denied* 528 U.S. 824 (1999), a two-tier approach to reviewing § 2254(d)(1) issues:

> First, the federal habeas court must determine whether the state court decision was "contrary to" Supreme Court precedent that governs the petitioner's claim. Relief is appropriate only if the petitioner shows that "Supreme Court precedent requires an outcome contrary to that reached by the relevant state court." O'Brien [v. Dubois], 145 F.3d [16], 24-25 [1st Cir. 1998)]. In the absence of such a showing, the federal habeas court must ask whether the state court decision represents an "unreasonable application" of Supreme Court precedent; that is, whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified. If so, then the petition should be granted.

Id. at 891. The phrase "clearly established Federal law," as the term is used in Section 2254(d)(1) is restricted "to the holdings, as opposed to the dicta of [the United States Supreme Court] decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 365. Under the "unreasonable application" clause,

> a federal habeas court may not grant relief simply because that 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. If a petitioner is able to satisfy the requirements of § 2254(d)(1), then the state court decision is not entitled to deference under AEDPA and the federal habeas court proceeds to a *de novo* evaluation of the constitutional claim on the merits. *See* Tucker v. Superintendent Graterford SCI, 677 F. App'x 768, 776 (3d Cir. 2017) (citing Panetti v. Quarterman, 551 U.S. 930, 953 (2007) ("When . . . the requirement set forth in § 2254(d)(1) is satisfied[,] [a] federal court must then resolve the claim without the deference AEDPA otherwise requires."). Indeed, the Third Circuit recently explained that,

> [w]hile a determination that a state court's analysis is contrary to or an unreasonable application of clearly established federal law is necessary to grant habeas relief, it is not alone sufficient. That is because, despite applying an improper analysis, the state court still may have reached the correct result, and a federal court can only grant the Great Writ if it is "firmly convinced that a federal constitutional right has been violated," Williams, 529 U.S. at 389, 120 S.Ct. 1495. *See also* Horn v. Banks, 536 U.S. 266, 272, 122 S.Ct. 2147, 153 L.Ed.2d 301

> (2002) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review . . . none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard"). Thus, when a federal court reviewing a habeas petition concludes that the state court analyzed the petitioner's claim in a manner that contravenes clearly established federal law, it then must proceed to review the merits of the claim de novo to evaluate if a constitutional violation occurred. *See* Lafler v. Cooper, 566 U.S. 156, 174, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

Vickers v. Superintendent Graterford SCI, 858 F.3d 841, 848-89 (3d Cir. 2017) (internal footnote omitted).

The AEDPA further provides for relief if an adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under § 2254(d)(2), a state court decision is based on an "unreasonable determination of the facts" if the state court's factual findings are "objectively unreasonable in light of the evidence presented in the state-court proceeding," which requires review of whether there was sufficient evidence to support the state court's factual findings. *See* Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Within this overarching standard, of course, a petitioner may attack specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision. Here, § 2254(e)(1) comes into play, instructing that the state court's determination must be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence. Lambert v. Blackwell, 387 F.3d 210, 235 (3d Cir. 2004).

D. Discussion

Petitioner raises the following claims in his Petition: (1) the denial of his right to a fair trial before an impartial jury; (2) ineffective assistance of counsel for failing to file an interlocutory appeal of the trial court's order denying his motion for change of venue; (3)

ineffective assistance of counsel for failing to properly prepare for trial; (4) ineffective assistance of counsel for failing to object to language obtained in the verdict slip at trial; and (5) ineffective assistance of post-conviction counsel for failing to properly argue claims in his PCRA petition.

1. **Procedurally defaulted claims**

Each of Petitioner's ineffective assistance of counsel claims (claims 2, 3, & 4) are unexhausted for Petitioner's failure to raise them in the state courts, and they are procedurally defaulted at this point in time because Petitioner would be without a state corrective process if he were to go back and try to present them to the state court.[2] For example, the claims would be deemed waived under the PCRA, 42 Pa. C.S.A. § 9544(b), and/or barred by the one-year statute of limitations under the PCRA, 42 Pa. C.S.A. § 9545(b).

Under the procedural default doctrine, a federal court may be precluded from reviewing claims in certain situations. *See* Gray v. Netherland, 518 U.S. 152, 162 (1996) (The procedural default doctrine prohibits federal habeas courts from reviewing a state court decision involving a

[2] The provisions of the federal habeas corpus statute at 28 U.S.C. § 2254(b) require a state prisoner to exhaust available state court remedies before seeking federal habeas corpus relief. This "exhaustion" requirement is "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002), quoting Coleman, 501 U.S. at 731. *See also* O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999). In order to exhaust a claim, a petitioner must "fairly present" it to each level of the state courts. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000), citing 28 U.S.C. § 2254(b); O'Sullivan, 526 U.S. at 848. In Pennsylvania, this requirement means that a petitioner in a non-capital case must have presented every federal constitutional claim raised in his habeas petition to the Common Pleas Court and then the Superior Court either on direct or PCRA appeal. *See* Lambert v. Blackwell, 387 F.3d 210, 233-34 (3d Cir. 2004). The petitioner must demonstrate that he raised the claim in the proper state forums through the proper vehicle, not just that he raised a federal constitutional claim before a state court at some point. O'Sullivan, 526 U.S. at 845 (a petitioner must have presented a claim through the "established" means of presenting a claim in state court at the time); Ellison v. Rogers, 484 F.3d 658, 660-62 (3d Cir. 2007) (the petitioner's claims of ineffective assistance were not exhausted properly even though he had raised those claims on direct review, because state law required that ineffective assistance claims be raised in state post-conviction review, and the petitioner had not sought such review).

federal question if the state court decision is based on a rule of state law that is independent of the federal question and adequate to support the judgment); Coleman v. Thompson, 501 U.S. 730, 732 (1991) (If a petitioner has failed to properly exhaust a claim – for example, he failed to comply with a state procedural rule, and as a result the state court declined to adjudicate the claim on the merits, the claim is defaulted in federal habeas corpus under the procedural default doctrine.).

As the United States Court of Appeals for the Third Circuit explained in Rolan v. Coleman, 680 F.3d 317 (3d Cir. 2012):

> Procedural default occurs when a claim has not been fairly presented to the state courts (i.e., is unexhausted) and there are no additional state remedies available to pursue, *see* Wenger v. Frank, 266 F.3d 218, 223-24 (3d Cir. 2001); or when an issue is properly asserted in the state system but not addressed on the merits because of an independent and adequate state procedural rule, *see* McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

Rolan, 680 F.3d at 317.

A petitioner whose constitutional claims have not been addressed on the merits due to procedural default can overcome the default, thereby allowing federal court review, if he or she can demonstrate either: (1) "cause" for the default and "actual prejudice" as a result of the alleged violation of federal law;[3] or (2) failure to consider the claims will result in a "fundamental miscarriage of justice."[4] Coleman, 501 U.S. at 750.

Petitioner appears to acknowledge that his ineffective assistance of counsel claims are procedurally defaulted because he argues that the default should be excused for two reasons: (1)

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[3] The United States Supreme Court has defined "cause" as "some objective factor external to the defense." Murray v. Carrier, 477 U.S. 478, 488 (1986).

[4] To show a fundamental miscarriage of justice, a petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 321 (1995) (quoting Murray, 477 U.S. at 496).

because his PCRA counsel was ineffective in failing to raise the claims in his PCRA petition;[5] and (2) because he is actually innocent of the crimes of which he was convicted.

First, there is no question that the instant case is not the type of extraordinary case in which Petitioner can overcome the default of his claims by way of the miscarriage of justice exception – *i.e.*, that he is actually innocent. The Supreme Court has applied the fundamental miscarriage of justice exception "to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" McQuiggin v. Perkins, 133 S. Ct. 1924, 1933 (2013) (alteration in original) (quoting Schlup, 513 S. Ct. at 329). Put differently, the exception is only available when a petition 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 nonharmless constitutional error." Id. at 1936 (quoting Schlup,513 U.S. at 316).

Petitioner has failed to present any evidence of his innocence, much less "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial . . . ." McQuiggin, 133 S. Ct. at 1936. He has not presented "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" that was not presented at trial. Schlup, 513 U.S. at 324. Put simply, his conclusive allegation of innocence, without anything to support it, does not establish a miscarriage of justice, nor does his claim that he would not have been convicted but for the denial of his constitutional right to be tried before an impartial jury. In Schlup, the Supreme Court emphasized that "[w]ithout any new evidence of innocence, even

[5] This is actually Petitioner's fifth claim in his habeas petition. However, a standalone claim of collateral counsel's ineffectiveness is statutorily barred by 28 U.S.C. § 2254(i), and therefore, precluded from review. It is therefore assumed that Petitioner meant the arguments he makes in this claim to support his position against procedural default.

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." 513 U.S. at 316. Thus, Petitioner's allegation of innocence does not rise to the level of a miscarriage of justice and therefore does not warrant review of his procedurally defaulted claims.

Petitioner next relies on PCRA counsel's ineffectiveness to serve as cause and prejudice for his procedurally defaulted ineffective assistance of trial counsel claims. In support of his position, he relies on Martinez v. Ryan, 132 S. Ct. 1309 (2012), wherein the United States Supreme Court changed the landscape of the procedural default doctrine. Martinez held that even though there may not be a federal constitutional right to counsel in postconviction proceedings, such as the PCRA proceeding in Pennsylvania, ineffective assistance of post-conviction counsel in post-conviction proceedings, which causes the waiver of an ineffective assistance of trial counsel claim, may serve as "cause" to excuse the procedural default of that claim in the federal habeas proceedings. 132 S. Ct. at 1315. However, to overcome the default, the prisoner must demonstrate that the underlying ineffective assistance of counsel claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id. at 1318-19 (citing Miller-El v. Cockrell, 537 U.S. 322 (2003)). Because Petitioner's underlying ineffective assistance of trial counsel claims are not "substantial," their default should not be excused.

Petitioner's first procedurally defaulted ineffective assistance of counsel claim is that counsel was ineffective for failing to file an interlocutory appeal after the trial court denied his order for a change of venue. Under Pennsylvania law, a trial court's order denying a defendant's motion for change of venue cannot be reviewed as an interlocutory appeal unless the trial court certifies it as an interlocutory appeal by permission. Commonwealth v.Mitchell, 72 A.3d 715

(Pa. Super. Ct. 2013). The Superior Court of Pennsylvania has stated that "any harm resulting from an erroneous denial of a change in venue can be rectified after final judgment is entered in the case." Mitchell, 72 A.3d at 719.

Following trial, counsel argued in post-sentence motions that the trial court erred in denying Petitioner's motion for change of venue or venire. The argument was addressed at length by the trial court and by the Superior Court on appeal, who held that the trial court did not abuse its discretion in denying Petitioner's motion. In light of the fact that trial counsel could not have filed an interlocutory appeal of the trial court's order denying his motion for change of venue, and the fact that the argument was thoroughly addressed by the state courts, it is clear that this ineffective assistance of counsel claim is not substantial.

Petitioner's second procedurally defaulted claim is that trial counsel was ineffective for failing to properly prepare for trial. (ECF No. 2, p.13.) In support of this claim, Petitioner argues that he informed trial counsel of several witnesses who were available and willing to testify on his behalf at trial. These witnesses included Rebecca Shaffer, Joseph Halle, Missy Halle, Brad Shaffer, Lisa Shaffer and Shane Johnson. (ECF No. 2, p.14.) He argues that these witnesses would have impeached the credibility of the Commonwealth's witnesses and established that the Commonwealth witnesses had a corrupt motive to testify against him. He also states that he provided trial counsel with the name of his employer, Jeremy Sigmud, who would have testified that Petitioner was actually employed and was not "an unemployed person who sat around all day drinking beer," as he was portrayed by the Commonwealth. (ECF No. 2, pp.14-15.)

In addition, Petitioner informed trial counsel in a letter that he was actually innocent of the crimes charged and requested trial counsel contact an accident reconstruction expert to

establish that the injuries suffered by his son the victim K.S. were the result of falling down the stairs. (ECF No. 2, p.15.) Petitioner claims that this would have impeached the Commonwealth's medical expert, but instead of looking into the possibility of hiring an accident reconstruction expert, counsel allegedly wrote back and told Petitioner not to bother him again, that Petitioner was wasting his time, and that he would make the decisions in the case. Id.

Petitioner also argues that he provided trial counsel with the names of character witnesses who would have testified that Petitioner was a good father and gainfully employed. These witnesses included Shane Johnson, Brad Shaffer, Lisa Shaffer, Ernie Kabina, Mike Owens, Monica Owens, Regina Baily, Donnie Blair, Barbara Blair and Megan Jacobs. Id. He further argues that trial counsel was ill prepared to properly cross-examine Rogi Spangler, Amber Lynn Clark, Sharon Baron, Jennifer Jacobs, Dawn Wilkins, and Richard Powell. Id., pp.16-17. He claims that trial counsel did not conduct a pretrial investigation into these witnesses' propensity to tell the truth, nor did he request a criminal background check on each one or properly review these witnesses' prior statements. Id., p.17. He claims this resulted in ineffective cross-examination by failing to impeach each witness with prior inconsistent statements and their corrupt motive to testify against him. Id. Finally, in addition to the aforementioned arguments, Petitioner, in his Supplemental Petition, criticizes virtually every aspect of trial counsel's performance as relating to the testimony of the Commonwealth's expert witness Dr. Monique Higginbotham. (ECF No. 8.)

While this claim is still procedurally defaulted, Petitioner actually did raise a similar claim of trial counsel ineffectiveness, but the claim was not raised in his PCRA petition, rather it was raised for the first time in response to the PCRA court's 901's Notice. (Letter to Judge Cascio from Attorney Jerome J. Kaharick; ECF No. 33-4, pp.15-16.) Although it was not

properly raised on appeal from the denial of PCRA relief,[6] the Superior Court briefly addressed it and noted that Petitioner did not allege that the two witnesses he named were available or willing to cooperate, or that counsel even knew of the witnesses. Petitioner further failed to offer any summary of what the testimony would have been so as to demonstrate that he would have been prejudiced by the failure to call the two witnesses. Therefore, the Superior Court found that his claim was undeveloped and that Petitioner could not satisfy his burden. (Superior Court Memorandum, 6/20/14; ECF No. 33-2, pp.6-8.)

For the omission of a witness by trial counsel to constitute ineffective assistance, Pennsylvania law requires that a petitioner establish 1) that the witness existed, 2) that the witness was available to testify at trial, 3) that counsel was informed or should have known of the existence of the witness, 4) that the witness was prepared to cooperate and testify for the petitioner at trial, and 5) that the absence of the testimony prejudiced the petitioner so as to deny him a fair trial. Commonwealth v. Pursell, 724 A.2d 293, 258 (Pa. 1999) (citing Commonwealth v. Crawley, 663 A.2d 676, 679 (Pa. 1995)). This state standard comports with federal law. *See* Williams v. Taylor, 529 U.S. 362, 394-95 (2000). *See also*, U.S. ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) ("[w]hen a habeas corpus petitioner alleges as a ground for relief the failure of counsel to exercise normal competence in presenting specific trial evidence it is reasonable, we think, to put on petitioner the burden of showing that the missing evidence would be helpful.")

[6] *See* Commonwealth v. Rykard, 55 A.3d 1177, 1192 (Pa Super. 2012) (explaining appellant could not raise claim of trial counsel's ineffectiveness for first time in response to Rule 907 notice; to aver properly new non-PCRA counsel ineffectiveness claim, petitioner must seek leave to amend his petition).

Petitioner's proffer to the Court as to what witnesses counsel was ineffective for failing to call does not meet the aforementioned burden to prove ineffectiveness. While he does identify numerous witnesses counsel failed to call, and he also identifies briefly as to what their testimony would be, he offers nothing more than his self-serving statement that the witnesses would be prepared to cooperate and testify in his favor at trial, nor has he demonstrated how he was denied a fair trial without these witnesses testifying. He identifies some of the witnesses as character witnesses who would testify as to his good reputation as a father, and some of the witnesses he claims would rebut the Commonwealth's argument that Petitioner was not employed or rebut Commonwealth witnesses who allegedly had a corrupt motive for testifying against him. However, none of these witnesses Petitioner identifies would have testified as to witnessing any of the events or incidents that lead to the crimes for which Petitioner was charged. Therefore, he cannot prove that the absence of their testimony prejudiced him so much so as to deny him a fair trial, and the Court finds that this claim, too, is not substantial.

In reviewing the claim that Petitioner presents in his Supplemental Petition, which is included as part of Petitioner's second claim (in which he argues that his trial counsel was ineffective pre-trial and at trial), Petitioner raises numerous issues about trial counsel's performance as it relates to his examination of Dr. Monique Higginbotham, and his failure to obtain an expert witness of his own in the form of an accident reconstructionist to rebut Dr. Higginbotham's testimony about how the victim was injured. However, Petitioner's 19-page Supplement is really nothing more than an attack on trial counsel in that he should have objected to virtually everything testified to by Dr. Higginbotham. It is also filled with arguments reflecting his misunderstanding of the Pennsylvania Rules of Evidence. In short, this is not a substantial ineffectiveness claim to merit overcoming its procedural default.

Finally, Petitioner's third procedurally defaulted claim is that counsel was ineffective for failing to object to language in the verdict slip. This claim is similar to the first one in that trial counsel did object to the language in the verdict slip, but in post-sentence motions. He argued that the verdict slip submitted to the jury was improper because it contained information that would lead a jury to convict him by their mere reading of it.

In denying the allegation of error related to the verdict slip submitted to the jury, the trial court noted that

> [b]ecause this case involved a total of twelve discrete incidents of alleged criminal behavior and eight of the incidents included more than one criminal charge, we directed the Assistant District Attorney to draft a proposed verdict slip to help the jury in its deliberations and to submit it to the court and defense counsel for review and discussion. Following those discussions, held off the record, we prepared a final draft of the verdict slip for submission to the jury. Each separate incident was described in a term or terms designed to help the jury identify that incident separate from the others. Although not objected to during the trial, Defendant now argues that each incident should have been described as "alleged" and that failure to include that modifier somehow resulted in an impermissible directive to the jury to return guilty verdicts on each. While review could be denied because of the failure to object at trial, we chose to proceed, particularly because Defendant is now represented by new counsel.

(Trial Court Memorandum, 9/16/2010; ECF No. 30-8, pp.7-8.)

After reviewing Pennsylvania Rule of Criminal Procedure 646, effective February 1, 2010, which superseded Pennsylvania case law that held it was reversible error to submit written instructions to the jury for use while deliberating, *see* Commonwealth v. Oleynik, 568 A.2d 1238 (1990), and recognizing the distinction between instructions and neutral notations on a verdict slip, *see* Commonwealth v. Kelly, 399 A.2d 1061 (1979), the trial court found that "the written notations on [Petitioner's] verdict slip [were] not instructions, but rather short, condensed factual identifiers for each incident." (ECF No. 30-8, p.9.) In Pennsylvania, neutral notations on a verdict slip are evaluated under an abuse of discretion standard, Kelly, 399 A.3d at 1061-62, and

the trial court found that the notations on Petitioner's verdict slip did not require reversal because "even if not ideal or completely neutral . . . 1) there was a clear need for the notations because of the volume of charges, both parties were consulted regarding this need and, defense counsel failed to object to the slip's use and 2) there was a discussion regarding the drafting of the slip and its short, condensed language without any further description of the factual circumstances was impartial, despite the absence of the word 'alleged.'" (ECF No. 30-8, p.9.) It further found that the verdict slip in Petitioner's case "provided an opportunity for the jury to decide whether the specific incidents occurred by checking the appropriate box for 'guilty' or 'not guilty.' As a result, it did not presuppose guilty, despite the absence of the word 'alleged.'" Id.

Once again, the Court finds that this claim is not a "substantial" claim of ineffective assistance of counsel because trial counsel's failure to object to the verdict slip at trial did not prevent the trial court from reviewing Petitioner's claim regarding the verdict slip. Indeed, the trial court even pointed out that the claim could be denied on trial counsel's failure to object at trial, but chose to review it because Petitioner was represented by new counsel. Thus, Petitioner was not harmed by trial counsel's failure to object to the verdict slip at trial.

2. Denial of the right to a fair trial before an impartial jury

Petitioner's first claim is the only claim in his Petition that is not procedurally defaulted. Therefore, it will be reviewed pursuant to AEDPA's extremely deferential standard of review set forth in the Standard of Review section, *supra*.

Petitioner claims that the trial court's denial of his pretrial motion for a change of venue denied him the right to be tried before an impartial jury, and that the trial court's ruling was an unreasonable application of clearly established Federal law.

On August 28, 2009, counsel for Petitioner filed pretrial motions, which included a Motion for Change of Venue. (Pre-trial motions; ECF No. 31-2, pp.55-61.) In it he requested a change of venue or venire under Pennsylvania Rule of Criminal Procedure 584, arguing that a fair and impartial jury could not be selected from Somerset County because of prejudicial publicity; specifically, news clippings and news transcripts containing derogatory comments about him, including specific references to his position, prior criminal record and references to the alleged acts. The motion was supported with five news articles and two Internet blog posts. (Pretrial Motions; ECF No. 31-2, pp.62-104.) Counsel claimed that it would be impossible to select a fair and impartial jury given the biased publicity towards Petitioner and the crimes with which he was charged. (Pretrial Motions; ECF No. 31-2, p.55.) The trial court denied the motion without prejudice subject to the opportunity to attempt to pick a jury.

In post-sentence motions (ECF No. 30-7), Petitioner challenged the trial court's ruling solely based on the pervasive pretrial publicity and its impact on the potential jury pool. (Memorandum, 9/16/10; ECF No. 30-8, p.4.) As to the jury *voir dire*, the trial court stated the following:

> .... [19]/45[7] (40%) of prospective jurors questioned indicated that they had read, seen or heard about the incident. Of them, only 7 (15.6% of the entire jury pool) reported that they could not give a fair trial to [Petitioner] and all were removed for cause. Out of the 45 prospective jurors, 12 had children under the age of 5. Six indicated they were unable to give a fair trial and all were removed. The only prospective jurors who were chosen and objected to by defense counsel but allowed to remain on the jury were: 1) a juror with a grandchild under the age of 5; 2) a juror with a grandchild under the age of 5 who also knew law enforcement officers; and 3) a juror who indicated she had seen a story in the newspaper but would show no bias. No other prospective juror who heard, read or saw facts

[7] The trial court stated that 18 prospective jurors "indicated that they had read, seen or heard about the incident," but the Superior Court noted that it was 19 jurors who indicated that they had heard about Petitioner's case through the media. (Memorandum, 8/30/11; ECF No. 31-5, p.4)

> about the case was chosen. In addition to this, Defense counsel chose not to exercise all of his peremptory challenges, thereby expressing a satisfaction with the jury selected . . . . Based on these numbers and the defense counsel's nonuse of peremptory challenges, this procedure appears to be in line with the well-settled case law. Accordingly, we find no error.

(ECF No. 30-8, p.7.) The trial court also examined each piece of pre-trial publicity proffered and concluded that there was no presumption of actual prejudice and, even if presumption would apply, Petitioner had "not met his burden of establishing that the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, or, alternatively, that there was an insufficient cooling off period." (ECF No. 30-8, p.6.)

On appeal, the Superior Court found that the trial court did not abuse its discretion in denying Petitioner's motion for a change of venue or venire. (ECF No. 31-5, p.11.) In support of its decision, the Court cited the articles Petitioner claimed were prejudicial and noted that they were published approximately two years and two months before jury selection. Only one article was published eight months prior to jury selection, but it did not contain references to Petitioner's criminal history, just the factual allegations. The Court found that the length of time between the publishing of the articles and the jury selection comported with Pennsylvania law, *see* Commonwealth v. McCullum, 602 A.2d 313, 318 (Pa. 1992), and was a sufficient amount of time to "dissipate publicity when most of the publicity occurred during one month." (ECF No. 31-5, p.10.) The Court also referenced trial counsel's waiver of six peremptory challenges and concluded that indicated a "fair and impartial trial" could be obtained in Somerset County. (ECF No. 31-5, p.11.)

The Supreme Court of the United States has held that the due process clause of the Fourteenth Amendment guarantees a criminal defendant the right to "a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); *see also* Irvin v.

Dowd, 366 U.S. 717, 722 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Murphy v. Florida, 421 U.S. 794 (1975); Patton v. Yount, 467 U.S. 1025 (1984). When prejudicial pretrial publicity or an inflamed community atmosphere preclude seating an impartial jury, due process requires the trial court to grant a defendant's motion for change of venue, Rideau, 373 U.S. at 726, or a continuance, Sheppard, 384 U.S. at 362-63. Ultimately, the question is whether a defendant's "trial was not fundamentally fair." Two standards guide analysis of this question. They are the "presumed prejudice" standard and the "actual prejudice" standard.

"Where media or other community reaction to a crime or a defendant engenders an atmosphere so hostile and pervasive as to preclude a rational trial process, a court reviewing for constitutional error will presume prejudice to the defendant without reference to an examination of the attitudes of those who served as the defendant's jurors." Rock v. Zimmerman, 959 F.2d 1237, 1252 (3d Cir. 1992), *overruled on other grounds* Brecht v. Abrahamson, 507 U.S. 619 (1993); *see also* Sheppard, 384 U.S. at 333; Rideau, 373 U.S. at 723. Such cases, however, are "exceedingly rare." Rock, 959 F.2d at 123; Flamer v. Delaware, 68 F.3d 736, 754 (3d Cir. 1995). In fact, for a court to presume prejudice, "the community and media reaction . . . must have been so hostile and so pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury." Id. at 1252.

In refusing to presume prejudice in Petitioner's case, the Superior Court relied on the more than two years of "cooling-off period" between the time most of the articles at issue were published from December 14 through December 22, 2007 and the selection of the jury, and also relied on the eight month "cooling-off period" between the time the last article was published and the jury selection. (ECF No. 31-5, p.10.) The United States Supreme Court has explained

that, even when pretrial publicity is extensive and severe, a lapse in time between the publicity and the trial can dissipate any prejudice that may have resulted. In Murphy, for instance, the Court held that extensive media coverage of the defendant's prior crimes did not amount to prejudice, particularly since the publicity had stopped seven months before jury selection. Murphy, 421 U.S. at 802. In Patton, the Court found no prejudice when, although there was extensive and prejudicial media coverage, "the community sentiment had softened" between the time of the coverage and the trial. 467 U.S. at 1034. "That time soothes and erases is a perfectly natural phenomenon, familiar to all," the Patton Court explained. Id.

> The relevant question is not whether the community remembered the case, but whether the jurors at [the defendant's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant. It is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have long passed . . .. *[I]t is clear that the passage of time . . . can be a highly relevant fact. In the circumstances of this case, we hold that it clearly rebuts any presumption of partiality or prejudice that existed at the time of the initial trial.*

Id. at 1035 (emphasis added) (internal citation omitted); *see also* Flamer, 68 F.3d at 755 (refusing to presume prejudice when there was a lapse of eight months between the publication of the last newspaper story on which the defendant relied and the start of jury selection); Pruett v. Norris, 153 F.3d 579, 586 (8th Cir. 1998) (recognizing benefits of cooling-off period of eleven months).

The publicity upon which Petitioner relied in his case is far from the kind that would have created a "trial atmosphere . . . utterly corrupted by press coverage," Murphy, 421 U.S. at 799, that the United States Supreme Court has required before attaching a presumption of prejudice. As such, Petitioner has failed to show that his is one of those "exceedingly rare" cases, Rock, 959 F.2d at 1252, where "the community and media reaction . . . [was] so hostile and so

pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury." Id.

The *voir dire* here also provides ample support for the Superior Court's conclusion that the "cooling-off period" had an effect in Petitioner's case. Of the 45 prospective jurors, only 19 had obtained knowledge of the case through pretrial publicity and 7 of them (or 16% of the jury pool) were removed for cause because they indicated that they could not fairly try Petitioner's case because of this prior knowledge. Only 2 of the remaining 12 prospective jurors who had indicated that they had heard, seen or read anything about the case were selected as jurors. Petitioner has not directed this Court to any evidence that such a figure evinces "a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displaced no animus of their own." Murphy, 421 U.S. at 803.

The second standard utilized by the Supreme Court in pretrial publicity cases is "actual prejudice." To find the existence of actual prejudice, Petitioner must satisfy two basic prerequisites. First, he must show that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Irvin, 366 U.S. at 727. Second, he must show that these jurors could not have laid aside these preformed opinions and "render[ed] a verdict based on the evidence presented in court." Id. at 723. As the Supreme Court has explained:

> It is not required . . . that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his*

> *impression or opinion and render a verdict based on the evidence presented in court.*

Id. at 722-23 (emphasis added).

In determining whether actual prejudice existed, the Superior Court in this case appropriately looked to the totality of the circumstances, including the *voir dire* of those potential jurors ultimately empaneled. Murphy, 421 U.S. at 799-801. The two that had indicated previously hearing about the case in the media also indicated that their knowledge of the case would not affect their ability to be fair and impartial. Also, defense counsel chose not to exercise all of his peremptory challenges, waiving six of them, thereby expressing a satisfaction with the jury selected. The Supreme Court has reiterated: "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." Uttecht v. Brown, 551 U.S. 1, 9 (2007).

In conclusion, the state court's decision, which evaluated Petitioner's claim under the appropriate legal principles, was not "contrary to" clearly established Federal law. 28 U.S.C. § 2254(d)(1). And, its decision was not an "unreasonable application of" that law, nor did it result "in a decision that was contrary to, or involved an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." Id. § 2254(d)(1), (2). As a result, Petitioner should be denied habeas relief on this claim.

E. Certificate of Appealability

A court should issue a Certificate of Appealability where a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner meets this burden by showing that "reasonable jurists would find the district court's

assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, this Court should not issue a Certificate of Appealability.

III. CONCLUSION

For the aforementioned reasons, it is respectfully recommended that the Petition for Writ of Habeas Corpus (ECF No. 1) and the Supplement to that Petition (ECF No.8) be denied and that a Certificate of Appealability also be denied.

In accordance with the applicable provisions of the Magistrate Judges Act, 28 U.S.C. §636(b)(1)(B)&(C), and Rule 72.D.2 of the Local Rules of Court, Petitioner shall have fourteen (14) days from the date of the service of this report and recommendation to file written objections thereto. Plaintiff's failure to file timely objections will constitute a waiver of his appellate rights.

Dated: February 26, 2018.

Lisa Pupo Lenihan
United States Magistrate Judge

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