APPENDIX

DLD-057 December 20, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-1994**

DESMOND MARTIN, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI, ET AL.

(E.D. Pa. Civ. No. 2-15-cv-03394)

Present: JORDAN, GREENAWAY, Jr., and NYGAARD, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to deny his habeas petition. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). More specifically, reasonable jurists would not debate the following conclusions of the District Court: Appellant's weight of the evidence and ineffectiveness of PCRA counsel claims are noncognizable, see Young v. Kemp, 760 F.2d 1097, 1105 (11th Cir. 1985), Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Appellant's illegal sentence claim, cumulative error claim, and several ineffective assistance of counsel claims are procedurally defaulted, see Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991), Collins v. Sec'y of Pennsylvania Dep't of Corr., 742 F.3d 528, 541 (3d Cir. 2014); and Appellant's remaining claims are meritless, see Jackson v. Virginia, 443 U.S. 307, 319 (1979), Strickland v. Washington, 466 U.S. 668, 687 (1984), Batson v. Kentucky, 476 U.S. 79, 96 (1986), Brady v. Maryland, 373 U.S. 83, 87 (1963). Additionally, the District Court did not abuse its discretion in denying Appellant's

motions for a stay of the proceedings, discovery, and an evidentiary hearing. See Rhines v. Weber, 544 U.S. 269, 276–77 (2005); Bracy v. Gramley, 520 U.S. 899, 908–09 (1997).

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: January 7, 2019
Tmm/cc: Desmond Martin
Joshua S. Goldwert, Esq.

A True Copy:

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

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18-1994

DESMOND MARTIN,
Appellant

v.

SUPERINTENDENT ROCKVIEW SCI; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

(E.D. Pa. Civ. No. 2-15-cv-03394)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* Judge Nygaard's vote is limited to panel rehearing only

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

Dated: February 5, 2019
Tmm/cc: Desmond Martin
Joshua S. Goldwert, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DESMOND MARTIN, Petitioner,	:	
v.	:	No. 2:15-cv-3394
STEPHEN GLUNT; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	:	

ORDER

AND NOW, this 3rd day of April, 2018, for the reasons set forth in the Opinion issued this date, **IT IS HEREBY ORDERED THAT**:

1. All of Petitioner's objections, ECF No. 23, to the Report and Recommendation are **OVERRULED and DENIED**;
2. The Report and Recommendation, ECF No. 20, is **APPROVED and ADOPTED**;
3. The petition for writ of habeas corpus, ECF No. 1, is **DISMISSED WITH PREJUDICE**;
4. The Motion to Stay, ECF No. 3, is **DENIED**;
5. The Motion for an Evidentiary Hearing, ECF No. 11, is **DENIED**;
6. This case is **CLOSED**; and
7. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

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

DESMOND MARTIN, Petitioner,	:	CIVIL ACTION
v.	:	No. 15-3394
STEPHEN GLUNT, et al. Respondents.	:	

REPORT AND RECOMMENDATION

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

March 16, 2017

Petitioner Desmond Martin, a prisoner at the State Correctional Institution-Rockview in Bellefonte, Pennsylvania, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons described below, I recommend dismissing his petition with prejudice.

FACTUAL AND PROCEDURAL HISTORY

In April 2008, Martin was convicted by a jury of rape, robbery, burglary, theft by unlawful taking, and sexual assault. See Commonwealth v. Martin, CP-51-CR-0009280-2007, Dkt. ("Crim. Dkt.") at 7-8, 14.

The key evidence at trial came from the testimony of Martin's victim, K.W. See N.T. 3/28/2008 at 34-73; 3/31/2008 at 6-96. K.W. testified that on May 27, 2007, she invited Martin, a friend of her nephew's, to board at her house. N.T. 3/31/2008 at 18-19. After less than a week, K.W. told Martin, "you can't stay here." Id. at 21-24. On June 7, 2007, K.W. returned from work with Chinese take-out, spoke with her sister-in-law on the telephone, and fell asleep in front of the television. N.T. 3/28/2008 at 34-37. K.W. awoke to find an armed individual in her bedroom.[1] Id. at 38-39. Although K.W. could not see her assailant's features, she testified she

[1] K.W. testified her assailant told her he had an accomplice in the room, but K.W. never saw

had an "idea of who it was," but did not identify Martin.[2] Id. at 39, 42. The individual bound and raped K.W., drank from a Powerade bottle on K.W.'s bedside table, and then took K.W.'s ATM cards from her pocketbook and coerced K.W. to divulge her PIN number. Id. at 39-54. Several hundred dollars were withdrawn from K.W.'s bank accounts shortly thereafter. Id. at 60-63.

DNA evidence showed "that Desmond Martin [was] included as a major contributor to the DNA mixture detected in the sperm" collected from K.W.'s rape kit. N.T. 4/1/2008 at 137. Martin testified in his own defense and stated that he and K.W. engaged in consensual sexual intercourse on the night of June 7, 2007, but that he left her house before the unknown intruder allegedly appeared. N.T. 4/3/2008 at 26-27.

On July 15, 2008, Martin was sentenced to 20-40 years imprisonment, followed by 10 years of probation. N.T. 7/15/2008 at 15. The Superior Court affirmed on October 20, 2009, and the Pennsylvania Supreme Court denied review on April 27, 2010. Crim. Dkt. at 17. While awaiting the Pennsylvania Supreme Court's decision, Martin filed a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S. § 9541 et seq. ("PCRA"). Id. On December 6, 2011, Martin's PCRA counsel sought permission to withdraw due to Martin's lack of meritorious claims. Id. at 20. The PCRA court dismissed Martin's petition on May 25, 2012 and granted counsel's request to withdraw. Id. at 21. The Superior Court affirmed on September 26, 2014. Id. at 23.

On January 15, 2015, Martin filed a second PCRA petition. Id. at 23. On September 22,

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or heard anyone else in her house. N.T. 3/28/2008 at 49-50.

[2] In her initial police statement, K.W. described her assailant as a "stranger" and an "unknown male" who "had a black . . . ski mask, dark skin, five-ten to six-foot, medium build." N.T. 3/31/2008 at 71-72, 80. During closing arguments, defense counsel asked the jury to believe that K.W. did not identify Martin in a conscious effort to make her "set up [of] the defendant" more believable. N.T. 4/3/2008 at 126.

2015, the PCRA court denied Martin's second PCRA petition, and the Superior Court affirmed on July 1, 2016. Crim Dkt. at 24-25.

On June 16, 2015, Martin timely filed his pro se habeas petition, and on July 9, 2015 he moved to stay his petition pending the outcome of the state court proceedings on his second PCRA petition. See Habeas Petition (doc. 1) at 5-15; 7/10/2015 Letter from Desmond Martin (doc. 3).

DISCUSSION

Before seeking federal habeas relief, a petitioner must exhaust all available state court remedies, "thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Baldwin v. Reese, 541 U.S. 27, 29 (2004) (citations omitted); see also 28 U.S.C. § 2254(b)(1). If the petitioner failed to exhaust his state court remedies on a claim and the state court would now refuse to review the claim based on a state procedural rule that is independent of the federal question and adequate to support the judgment, I may deny the claim as procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 731-32, 735 n. 1 (1991). I also may find a habeas claim procedurally defaulted if the petitioner presented it to the state court, but the state court refused to address it on its merits based on an adequate and independent state procedural ground. Id. at 731-32; Cone v. Bell, 556 U.S. 449, 465 (2009). I may consider a procedurally defaulted claim only if a petitioner demonstrates: (1) a legitimate cause for the default and actual prejudice from the alleged constitutional violation; or (2) a fundamental miscarriage of justice from a failure to review the claim. Coleman, 501 U.S. at 750.

If a claim is not procedurally defaulted and was denied by the state court on its merits, I can grant relief on the claim only if the state court's decision: (1) "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) "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). This is a "difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011). Nonetheless, the Antiterrorism and Effective Death Penalty Act ("AEDPA") does not require "speculating as to what other theories could have supported the state court ruling when reasoning has been provided, or buttressing a state court's scant analysis with arguments not fairly presented." Dennis v. Sec'y, Pennsylvania Dep't of Corr., 834 F.3d 263, 281-82 (3d Cir. 2016).

A state court ruling is "contrary to" clearly established Supreme Court law for the purposes of Section 2254(d)(1) "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000); see also Breakiron v. Horn, 642 F.3d 126, 131 (3d Cir. 2011). A state court decision constitutes an "unreasonable application" of Supreme Court precedent if it identifies the correct governing legal rule from Supreme Court decisions, but "unreasonably applies it to the facts of the particular state prisoner's case." Williams, 519 U.S. at 407-08. The state court's factual findings must be presumed correct unless the petitioner can show otherwise by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340-41 (2003).

1. Weight of the Evidence

Martin challenges the weight of the evidence supporting each conviction. This claim is non-cognizable and must be dismissed. See Tibbs v. Florida, 457 U.S. 31, 37-38 (1982) ("The weight of the evidence refers to a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other") (internal quotations

omitted); Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.").

2. Sufficiency of the Evidence

Martin contends the Commonwealth violated his Fifth and Fourteenth Amendment rights to due process of law when it convicted him of burglary, robbery, and rape based on insufficient evidence. Habeas Pet. at 14; Petitioner's Reply (doc. 17) ("Pet. Reply") at 1. The state courts rejected Martin's insufficiency claims regarding his burglary and robbery convictions. Martin failed to exhaust his insufficiency claim as to his rape conviction.

Martin contends that there was insufficient evidence to sustain his convictions because: (1) K.W.'s testimony was unbelievable; (2) his DNA was recovered from an area of K.W.'s body that suggested he was framed; (3) the cords used to bind K.W. did not carry his fingerprints or DNA; (4) the Commonwealth did not perform DNA testing on the Powerade bottle K.W.'s rapist used; (5) there were no signs of forced entry into K.W.'s home; (6) photographic evidence showed Martin still stored his belongings at K.W.'s house; and (7) video footage provided by the Commonwealth showed "an unknown male" using K.W.'s bank card.[3] Habeas Pet. at 14; Pet. Reply at 1-3.

Burglary and Robbery Convictions

Evidence is constitutionally insufficient only if, "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential

[3] Martin has not established that the video he describes exists.

elements of the crime beyond a reasonable doubt."[4] Parker v. Matthews, 132 S. Ct. 2148, 2152 (2012) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). I must presume the trier of fact resolved any factual conflicts in favor of the prosecution. Jackson, 443 U.S. at 326; see also Cavazos v. Smith, 585 U.S. 1, 6 (2011). I also must accept the jury's credibility determinations. See Thompson v. Keohane, 516 U.S. 99, 109-10 (1995) (under 28 U.S.C. § 2254(d), witness credibility is a factual issue that should first be determined by the state court through a full and fair hearing); Bentley v. Lamas, No. 13-6045 (E.D. Pa. Jan. 16, 2016) (Report and Recommendation) (doc. 56), at 12-13 (discussing the "fundamental tenet of our legal system that vests the fact finder, who observes live testimony, with virtually unreviewable discretion to assess credibility as long as it rests on a valid basis").

A person commits burglary "if he enters a building . . . with intent to commit a crime therein, unless . . . the actor is licensed or privileged to enter." 18 Pa. C.S. § 3502(a). The trial court concluded sufficient evidence supported Martin's burglary conviction, based on photographic evidence of forced entry into K.W.'s house and K.W.'s testimony that: (1) "Appellant was armed with a weapon" when he appeared in her bedroom; (2) "Appellant punched her in the head . . . and raped her" while inside the house; and (3) "Appellant was neither licensed nor privileged" to enter K.W.'s house. Commonwealth v. Martin, 2549 EDA 2008 (C.C.P. Phila. Co. Feb. 6, 2009) ("Trial Court Opinion") at 7-8. The Superior Court affirmed, adopting the trial court's reasoning. Commonwealth v. Martin, 2549 EDA 2008 (Pa. Super. 2009) ("Direct Appeal") at 4.

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[4] Pennsylvania essentially applies the same standard. See Commonwealth v. Hutchinson, 947 A.2d 800, 805-06 (Pa. Super. 2008) (a sufficiency of the evidence claim asks "whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt").

A person commits robbery if, in the course of unlawfully taking another's property, he threatens that person with immediate serious bodily injury. 18 Pa. C.S. §§ 3701(a)(1)(ii), 3921(a). The trial court found the evidence was sufficient to support Martin's robbery conviction, based on K.W.'s testimony that: (1) "after Appellant raped her, he located her pocket book, retrieved her ATM card, and then coerced her into telling him the PIN number;" and (2) K.W. divulged her PIN number only after "Appellant" told her there was a .357 Magnum "pointed at the back of her head" and that he "would return" if the number was wrong.[5] Trial Court Opinion at 8-9. The Superior Court affirmed, adopting the trial court's reasoning. Direct Appeal at 4.

The state courts' findings that sufficient evidence supported Martin's burglary and robbery convictions were neither contrary to, nor unreasonable applications of, Parker and Jackson. The jury found K.W. credible and I cannot reweigh that determination. See Thompson, 516 U.S. at 109-10; Bentley, No. 13-6045 (R&R) at 12-13. Moreover, I must view the evidence used to convict Martin in the light most favorable to the prosecution, which requires me to credit K.W.'s testimony. See Parker, 132 S. Ct. at 2152.

Martin contends certain evidence proves his innocence, but the state courts reasonably determined that other trial evidence was sufficient for a reasonable juror to find each element of the burglary and robbery offenses. Although K.W. testified an "unknown male" committed the acts of burglary and robbery in her house, the Commonwealth introduced DNA evidence that established Martin was the "unknown male" described by K.W. Martin has failed to show the

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[5] The trial court also noted Detective James Owens testified that he "recovered ATM receipts for one of the transactions, in the amount and at the time related to him by [K.W.], from a trash receptacle at the ATM machine . . . near the scene of the crimes." Trial Court Opinion at 9. K.W. testified she had never been to the location of that ATM. N.T. 3/28/2008 at 63.

state courts' application of clearly established Supreme Court law was unreasonable.

Rape Conviction

Martin failed to argue in the state courts that the evidence was insufficient to support his rape conviction and no longer has the right to raise that claim in the state courts. See Pa. R.A.P. 903 (allowing one right to appeal to the Superior Court within 30 days of the trial court's final order); 42 Pa. C.S. § 9545(b)(1) (requiring PCRA petition to be filed within one year of final judgment). His claim is procedurally defaulted.[6] See Coleman, 501 U.S. at 735 n. 1.

Even if Martin's claim was not defaulted, it should be dismissed as meritless. See 28 U.S.C. § 2254(b)(2). A person commits rape if he engages in sexual intercourse through threatened or actual compulsion. 18 Pa. C.S. § 3121(a)(1)-(2). Viewed in the light most favorable to the prosecution, a reasonable juror could have determined the evidence established Martin raped K.W. Parker, 132 S. Ct. at 2152. DNA evidence and Martin's testimony established he had sexual intercourse with K.W. on the night in question. N.T. 4/1/2008 at 137; N.T. 4/3/2008 at 26-27. The only contested fact was whether the intercourse was consensual.

K.W. testified that the hours preceding her rape consisted exclusively of leaving work, stopping for Chinese take-out, talking to her sister-in-law on the phone, and falling asleep in front of the television. N.T. 3/28/2008 at 34-37. Martin testified that K.W. actually spent that time eating pizza and watching Pulp Fiction with him, before engaging in consensual sexual intercourse in her front bedroom. N.T. 4/3/2008 at 25-27. The jury accepted K.W.'s testimony, while

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[6] Martin has failed to allege cause for the default or that there would be a fundamental miscarriage of justice if the claim is not reviewed, and I have found none.

rejecting Martin's testimony.[7] I cannot disturb that credibility determination. See Thompson, 516 U.S. at 109-10; Bentley, No. 13-6045 (R&R) at 12-13.

Moreover, the Commonwealth provided corroborating evidence in the form of: (1) photographs of the forced entry into K.W.'s house; (2) photographs of the cords used to bind K.W.; (3) photographs of K.W.'s physical injuries; and (4) testimony from individuals who observed K.W.'s physical and mental state immediately after her rape. Commonwealth Response (doc. 16) at 16-17. The absence of Martin's skin cell or fingerprint evidence on the cords used to bind K.W. does not establish that Martin did not rape K.W. when considered with the other evidence in the light most favorable to the prosecution.

3. Batson Violation

Martin alleges that during jury selection, "the Commonwealth used 3 [peremptory] strikes against [A]frican [A]merican males without race-neutral basis," in violation of Batson v. Kentucky, 476 U.S. 79 (1986).[8] Habeas Pet. at 12.

Four African American males were on the jury panel at Martin's trial. The trial court sat one of those men as a juror, before the Commonwealth used peremptory challenges on the remaining three. N.T. 3/28/2008 Motion Volume I at 72. Martin's counsel lodged a Batson challenge immediately after the Commonwealth's third strike. Id. at 69. The trial court found the Commonwealth established just cause for its first strike, but failed to justify either its second or third strikes. Id. at 71-75. As a remedy, the court seated as a juror the third stricken African American man. Id. at 74-75. The trial court reasoned it did not need to provide further remedy

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[7] Martin's argument on the location of his sperm sample does not affect my conclusion, as the jury could have found K.W. credible regardless of the sample's exact anatomical location.

[8] Batson held that the Equal Protection Clause prohibits the use of peremptory challenges to purposefully exclude potential jurors based on race. Batson, 476 U.S. at 89.

for the second wrongfully stricken juror because (1) that juror "had previously been excused and was lost to jury service;" (2) the final jury seat was filled; and (3) "a sufficient venire to choose the alternate jurors" remained. Trial Court Opinion at 10. The Superior Court affirmed, adopting the trial court's conclusion that seating one wrongfully stricken juror sufficiently remedied both Batson violations. Direct Appeal at 4.

Where a defendant has proven purposeful discrimination in the jury selection process, the trial court must determine the proper remedy. See Batson, 476 U.S. at 99 n. 24 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.") In Pennsylvania, "the remedy for properly sustained Batson objections lies within the sound discretion of the trial court and . . . may involve, among other things, calling additional jurors to the venire, granting additional challenges, seating the challenged jurors; or beginning a new jury selection." Commonwealth v. Hill, 727 A.2d 578, 584 (Pa. Super. 1999).

Martin has failed to prove the trial court's decision to seat one of the two improperly stricken jurors was contrary to, or an unreasonable application of, Batson. Batson, 476 U.S. at 99 n. 24; Hill, 727 A.2d at 584. Given the trial court's broad discretion to remedy a Batson violation, the state court's decision merits deference.

4. Prosecutorial Misconduct

Martin alleges the prosecution violated his right to due process when it failed to disclose: (1) videotapes and still photographs from the date of K.W.'s rape; and (2) DNA profiles for saliva samples taken from the Powerade bottle in K.W.'s bedroom. Habeas Pet. at 10; Pet. Reply at 3. Martin argues that evidence, "if . . . introduced[,] would have changed the outcome of the entire case." Habeas Pet. at 10.

"The 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." Brady v. Maryland, 373 U.S. 83, 87 (1963). The prosecution, however, must have had constructive possession of the favorable evidence, i.e., the prosecution knew or should have known of the evidence. United States v. Risha, 445 F.3d 298, 303 (3d Cir. 2006).

Photographic Evidence

Martin's contention that the Commonwealth failed to disclose videotapes and photographs is based on statements made by the police during their interview of him. See Habeas Pet., Ex. E. ("So if your pictures was on the pole camera at 1:14 PM[9] what would that mean?"); ("So if I had film of you using the ATM machine that would mean that all you have said was not true is that correct?"). Martin contends those statements referenced "two different camera footages" and that the Commonwealth (1) did not properly disclose footage from the referenced pole camera; and (2) failed to produce evidence allegedly recorded by the ATM where K.W.'s bank card was used. Pet. Reply at 7.

Martin raised his claim of "prosecutorial misconduct for withholding the aforesaid videotape" in his initial PCRA petition, but the PCRA court failed to address it.[10] Commonwealth Response, Ex. D at 2; Commonwealth v. Martin, 2220 EDA 2012 (C.C.P. Phila.

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[9] The police were dispatched to K.W.'s house at 1:16 a.m. on June 8, 2007. It would appear the police meant to ask Martin about footage from 1:14 a.m., not 1:14 p.m., because the time is consistent with the early morning events on June 8, 2007.

[10] Martin also alleged his trial counsel was ineffective for failing to find and use the videotape and pictures recorded by the ATM. Commonwealth Response, Ex. D at 2. The PCRA court and Superior Court held that claim lacked merit. See discussion infra at 17-19.

Co. Oct. 31, 2012) ("PCRA Opinion") at 10; Commonwealth v. Martin, 2220 EDA 2012 (Pa. Super. 2014) ("PCRA Appeal") at 9. I must review the claim de novo. Rompilla v. Beard, 545 U.S. 374, 390 (2005) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

During discovery, the Commonwealth sent a letter to Martin's trial counsel stating it was providing "4 DVDs from the police pole camera at Chew and Chelten Sts." Commonwealth Response, Ex. M. Martin seems to contend that the Commonwealth recently fabricated this letter because he claims he never received those DVDs. Pet. Reply at 7. He says "he never heard or seen anything at trial regarding any videotape." Brief in Support of Petitioner's Motion (doc. 6) ("Habeas Memo.") at 2. Yet Martin was asked during redirect-examination about police questions regarding "surveillance videos of an ATM machine," N.T. 4/3/2008 at 105, and his own discovery files contained references to the pole camera. Pet. Reply at 2, Ex. A-E. His claim that the Commonwealth suppressed evidence from the pole camera is meritless. Moreover, he cannot establish the contested film footage was favorable to his defense. See Dennis, 834 F.3d at 285 (internal quotations omitted).

Martin similarly fails to prove the Commonwealth suppressed video and picture evidence allegedly obtained from the ATM where K.W.'s bank card was used. Even if I accept Martin's argument that the police referenced "two different camera footages," it is not unconstitutional for investigating officers to misrepresent the existence of certain pieces of incriminating evidence in an attempt to obtain a confession.[11] Cf. United States v. Velasquez, 885 F.2d 1076, 1088-89 (3d Cir. 1989) (police provided a suspect with false information that was "designed to make the

[11] Such tactics, however, may render a guilty plea invalid, if the totality of the circumstances show the resulting confession was not the product of voluntary and unconstrained choice. Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973). Because Martin did not plead guilty, that protection is not at issue.

suspect think that the evidence against him was stronger than it actually was," and the suspect responded by waiving his right to remain silent and confessing. That police tactic did not render the suspect's waiver and confession involuntary because it did not overcome the suspect's will or capacity for self-control). Mere mention of ATM video by police does not establish it exists, and Martin has not otherwise proven its existence. Nor has he shown that the alleged ATM video and pictures would be exculpatory.

Martin has failed to establish a Brady violation regarding the pole camera DVDs or the alleged ATM video, and his claim should be dismissed. Dennis, 834 F.3d at 285.

DNA Evidence from the Powerade Bottle

Martin's second claim of prosecutorial misconduct is that "saliva was collected from [a Powerade bottle K.W. testified her assailant drank from] but the results were never revealed." Pet. Reply at 3. Martin defaulted this claim by not raising it in the state courts and he is now barred from doing so.[12] See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1); Coleman, 501 U.S. at 735 n. 1.

Regardless, it is meritless. See 28 U.S.C. § 2254(b)(2). K.W. testified that she kept a bottle of Powerade by her bed and that her assailant drank from that bottle immediately after the rape. N.T. 3/28/2008 at 47. Police collected two swabs from the lid of that bottle, which they sent to the Philadelphia Police Department for forensic analysis. See N.T. 4/1/2008 at 86-89; Pet. Reply, Ex. D. Police requested that the criminalistics laboratory "perform DNA analysis/testing" on the swabs and "compare to any evidence relative to [the] investigation." Pet. Reply, Ex. D.

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[12] Martin has failed to allege cause for the default or that there would be a fundamental miscarriage of justice if the claim is not reviewed, and I have found none.

The laboratory dried and saved the samples "for possible DNA analysis . . . if needed."[13] N.T. 4/1/2008 at 92-93.

No test results were disclosed, and there is no evidence that tests were performed.

The Commonwealth disclosed to Martin that it had collected DNA samples from the Powerade bottle and had sent those samples to the criminalistics laboratory. See Pet. Reply, Ex. D. Martin, however, has provided no evidence that the Commonwealth completed the DNA analysis, and the trial testimony suggested no testing occurred. See N.T. 4/1/2008 at 130 (the identification laboratory "received several items of evidence in this case to perform DNA analysis on. [It] received a vulva swab from a rape kit; the blood of [K.W.]; the saliva of [R.T.]; the saliva of Desmond Martin, and several swabs off of electrical cords.").

Moreover, DNA recovered from K.W.'s rape kit linked Martin to her assault. Martin, therefore, has failed to show that the Commonwealth suppressed evidence in violation of Brady. See Paddy v. Beard, No. 03-5312, 2008 WL 8971156, at *20 (E.D. Pa. Oct. 28, 2008) ("the prosecution is not required to use any particular investigatory tool, including quantitative testing, to secure exculpatory evidence. . . . Additionally, while the [results of the un-performed test] might have been inculpatory, the opposite is not necessarily true.") (citing Arizona v. Youngblood, 488 U.S. 51, 58-59 (1988)); Sullivan v. Wynder, No. 05-1411, 2006 WL 3839886, at *10 (W.D. Pa. Dec. 28, 2006), (rejecting claim that failure to conduct DNA testing violated Brady) vacated and reapproved and readopted, 2007 WL 201026 (W.D. Pa. Jan. 22, 2007). His claim should be dismissed as meritless.

5. Illegal Sentence

[13] The criminalistics laboratory that received the swabs does not perform DNA testing. N.T. 4/1/2008 at 97. Rather, the Philadelphia Police Department's DNA identification laboratory is charged with performing any such analysis. Id. at 129-130.

Martin alleges his sentence violates the Eighth and Fourteenth Amendments.[14] Habeas Pet. at 8; Pet. Reply at 12-13.

Martin raised this claim in his second PCRA petition, which the state courts found was untimely. Crim. Dkt at 25. Because that decision was based on adequate and independent state grounds, it is procedurally defaulted.[15] See Peterson v. Brennan, 196 F. App'x 135, 142 (3d Cir. 2006) ("the PCRA statute of limitations is an adequate and independent state ground to deny habeas relief"); see also Lark v. Sec'y, Pennsylvania Dep't of Corr., 645 F.3d 596, 613 (3d Cir. 2011) (the PCRA timing deadlines became firmly established and strictly enforced after November 23, 1998); Fahy v. Horn, 516 F.3d 169, 189 (3d Cir. 2008) (same).

Regardless, it is meritless. The trial court sentenced Martin to 20-40 years imprisonment, which "was in the aggravated range of the Sentencing Guidelines" because his actions "exacerbate[d] the cruelty" of his crime. Trial Court Opinion at 12.; N.T. at 7/15/2008 at 5, 14-16. Although Martin alleges other similar cases have resulted in lower sentences, Pet. Reply at 13, he fails to show his sentence constituted cruel and unusual punishment. See James v. Folino, No. 07-2162, 2015 WL 5063782, at *7 (E.D. Pa. Aug. 25, 2015) (finding it exceedingly rare for a court to hold a particular sentence unconstitutionally disproportionate, and even rarer for such a finding to occur in the context of a violent felony because "[t]he Eighth Amendment does

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[14] To the extent Martin challenges the trial court's decision to impose an aggravated sentence, Habeas Pet. at 8, that implicates state sentencing law and is not cognizable here. See Estelle v. McGuire, 502 U.S. 62, 67 (1991). Regarding Martin's claim that his sentence "was based on an 'arbitrary distinction' . . . [which] violates the due process clause," Pet. Reply at 13, he fails to explain that distinction and how it deprived him of due process. It should be dismissed. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991), cert. denied, 502 U.S. 902 (1991) (denying habeas relief on the basis of "vague and conclusory allegations").

[15] Martin has failed to allege cause for the default or that there would be a fundamental miscarriage of justice if the claim is not reviewed, and I have found none.

not require strict proportionality between crime and sentence in non-capital cases. Rather, it 'forbids only extreme sentences that are grossly disproportionate to the crime.'") (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

6. Ineffective Assistance of Trial Counsel

Martin alleges six ineffectiveness claims against trial counsel for her failure to: (1) investigate the alleged ATM footage; (2) call an alibi witness; (3) object to his aggravated sentence; (4) object to the Commonwealth's closing argument; (5) file any post-trial motions regarding the Commonwealth's closing argument; and (6) present a proper defense. Habeas Memo. at 14-19.

Clearly established federal law governing ineffectiveness claims is set forth in the two-part test of Strickland v. Washington, 466 U.S. 668 (1984); see also Premo v. Moore, 562 U.S. 115, 121 (2011). Martin must show (1) counsel's performance was deficient, i.e., counsel was not functioning as counsel guaranteed by the Sixth Amendment, and (2) the deficient performance prejudiced him, meaning that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 694. Pennsylvania applies the same test. See Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000); Commonwealth v. Sneed, 899 A.2d 1067, 1075-76 (Pa. 2006).

Counsel's ineffectiveness is measured objectively, considering all the circumstances. See Strickland, 466 U.S. at 687-88. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688. In evaluating counsel's performance, I must be "highly deferential" and "indulge a strong presumption" that counsel's challenged actions might be considered sound strategy. Id. at 689. Counsel actions are presumed to reflect a sound strategy unless the petitioner shows "no sound strategy . . . could have

supported" them. Thomas v. Varner, 428 F.3d 491, 500 (3d Cir. 2005). Thus, a strategic choice "made after thorough investigation of law and facts relevant to plausible options [is] virtually unchallengeable." Strickland, 466 U.S. at 690-91. The relevant inquiry is not whether Martin's counsel was prudent, appropriate, or perfect. Burger v. Kemp, 483 U.S. 776, 794 (1987). Rather, the focus is simply to ensure the proceedings resulting in Martin's conviction and sentence were fair. See Strickland, 466 U.S. at 684-85.

Review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas." Yarborough v. Gentry, 540 U.S. 1, 6 (2003). The authority of federal courts to review state court actions is limited. If the state court addressed counsel's effectiveness, and applied the correct legal standard, a petitioner must show the state court's decision was objectively unreasonable. Woodford v. Visciotti, 537 U.S. 19, 25 (2002). "[I]t is not enough to convince a federal habeas court that, in its independent judgment," the state court erred in applying Strickland. Bell v. Cone, 535 U.S. 685, 699 (2002). Martin, therefore, "must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in [federal court in] the first instance[.]" Id. at 698-99.

Failure to Investigate the ATM Video

Martin alleges "trial counsel was ineffective for failing to find, produce and use ATM video at trial as a part of defense." Habeas Pet. at 20. This claim assumes the existence of video footage that was not included in the four DVDs provided during discovery.

The PCRA court held Martin "fail[ed] to plead or to demonstrate that such a video exists or, moreover, that he is prejudiced by trial counsel's omission. Error was not committed." PCRA Opinion at 10. The Superior Court affirmed, concluding: "[Martin] fail[ed] to adequately develop his argument – he [did] no more than declare that, had trial counsel used the ATM video,

the outcome of the proceedings would have been different. . . . As opined by the PCRA court, there is no evidence that such a video exists." PCRA Appeal at 10.

The state courts' decisions were neither contradictory to, nor unreasonable applications of, Strickland. Martin has failed to show the existence of the video and pictures from the ATM where K.W.'s bank card was used. See discussion supra at 11-13. Counsel could not be ineffective for not using that video, and Martin cannot establish prejudice.

Failure to Call An Alibi Witness

Martin claims trial counsel was ineffective because she failed to call La'shaunna Crockett as an alibi witness. Habeas Pet. at 20. Crockett was Martin's girlfriend and the mother of his child. She did not attend trial because, according to Martin, she was "pretty upset" with him. N.T. 4/3/2008 at 97.

The PCRA court denied this claim as meritless and the Superior Court affirmed. PCRA Opinion at 9; PCRA Appeal at 8-9. The state courts held Martin failed to establish either the content of Crockett's proffered testimony or the prejudicial effect of counsel's failure to call Crockett as a witness. PCRA Appeal at 8-9.

Under Strickland, Martin must establish prejudice by showing what Crockett's testimony would have been, that it could have been elicited, and that it would have produced a different trial result if presented.[16] Moore v. DiGuglielmo, 489 F. App'x 618, 625 (3d Cir. 2014); see also Corley v. United States, Nos. 8-422, 12-2213, 2013 WL 3272411, at *7 (M.D. Pa. June 27, 2013)

[16] Under Pennsylvania law, a petitioner asserting an ineffective assistance of counsel claim based on failure to call a witness must establish: (1) the witness' "existence;" (2) his "availability;" (3) "counsel's actual awareness, or duty to know" of him; (4) his "willingness and ability" to testify; and (5) the "necessity" of his testimony "to avoid prejudice." Commonwealth v. Gibson, 951 A.2d 1110, 1133-34 (Pa. 2008).

(citing Patel v. United States, 19 F.3d 1231, 1237 (7th Cir. 1994)); accord United States v. Edwards, No. 96-591, 2000 WL 57270, at *5 (E.D. Pa. May 8, 2000). Such post-conviction claims are highly suspect because the decision to call a witness is a "strategic trial decision that Strickland protects from second-guessing." Henderson v. DiGuglielmo, 138 F. App'x 463, 469 (3d Cir. 2005).

Martin contends that Crockett would have testified consistently with her police interview, where she stated she picked Martin up from K.W.'s house "late, um between 11:00 and 12:00 . . . I don't remember exactly." Habeas Memo., Ex. J. He has not, however, provided an affidavit from Crockett and, moreover, that timing would have placed Martin at K.W.'s house on the night of her rape, roughly 75 minutes before the police were dispatched. See N.T. 3/31/2008 at 120-21 (police were dispatched at 1:16 a.m.). The state courts' holdings that Martin failed to show prejudice from counsel's decision not to call Crockett were neither contrary to, nor unreasonable applications of, Strickland. § 2254(d); Moore, 589 F. App'x at 626.

Even if there is a possibility that Crockett would have testified consistently with her police statement, and that the jury would have found her credible, "that does not mean that there is a reasonable probability that a jury would do so." Brown v. Wenerowicz, 663 F.3d 619, 633-34 (3d Cir. 2011). To justify habeas relief, "[s]peculation is not enough." Id. Rather, "[t]he Superior Court's determination must necessarily be unreasonable." Id. Martin cannot satisfy this strict standard and this claim should be dismissed as meritless.

Failure to Object to Aggravated Sentence

Martin alleges trial counsel was ineffective for failing to object to "the aggravated sentence during sentencing." Habeas Pet. at 8. Because Martin did not raise this claim in state court and

he is precluded from raising it there now, the claim is procedurally defaulted.[17] See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1); Coleman, 501 U.S. at 735 n. 1.

Regardless, it is meritless. See 28 U.S.C. § 2254(b)(2). Martin was convicted of three first-degree felonies. Crim. Dkt. at 7-8. Although his sentence of 20-40 years imprisonment followed by 10 years of probation exceeded the state sentencing guidelines, it was below the statutory maximum of 60 years. 18 Pa. C.S. § 1103 (penalty for a first-degree felony not to exceed 20 years).

Martin contends the trial court "did not place sufficient reasons for deviating from [the] sentencing guidelines" and failed to consider mitigating factors, such as his "lack of violent history and [the] sexual assessment board's view that [he] was not a sexual[ly] violent predator." Habeas Pet. at 8. In Pennsylvania, a sentencing court must consider a defendant's pre-sentence report, the guidelines recommendation, the need to protect the public, the gravity of the offense, and the rehabilitative needs of the defendant, and is required to explain any reasons for departing from the guidelines. Commonwealth v. Walls, 926 A.2d 957, 967 (Pa. 2007). The sentencing judge calculated the sentencing guidelines and heard argument pertaining to Martin's mitigating factors. N.T. 7/15/2008 at 4-6. The judge then imposed a sentence outside the guidelines range explaining:

> Rape in and of itself is a cruel and demeaning crime, [Martin] took it a step beyond. . . [Martin] did everything [he] did to degrade [K.W.] and put her beyond fear . . . and she was a person who befriended [Martin], who took [him] in when [he] didn't have any place else to go, so that just really exacerbates the cruelty.

Id. at 15-16.

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[17] Martin has failed to allege cause for the default or that there would be a fundamental miscarriage of justice if the claim is not reviewed, and I have found none.

Because Martin's sentencing judge considered the guidelines range for Martin's sentence and explained that her upward departure was based on the gravity of Martin's offense, trial counsel was not ineffective for failing to contemporaneously challenge the court's sentence.[18] United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) (counsel cannot be ineffective for failing to raise a meritless claim).

Failure to Object to Prosecutorial Misconduct

Martin also claims counsel was ineffective for failing to object when the prosecution described him as having been "caught lying," but described K.W.'s testimony as "something that ha[d] a ring of truth to it." Habeas Memo. at 15. Martin failed to raise this issue in his PCRA petition and he is now barred from doing so. See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1). Martin, however, argues PCRA counsel's ineffectiveness caused his failure to raise this claim. Habeas Memo. at 16. Even if Martin could prove such a claim,[19] he fails to show prejudice.

A prosecutor's improper comments will not violate due process, and warrant a new trial, unless there is a strong likelihood that the jury's decision was influenced by the comments. Darden v. Wainwright, 477 U.S. 168, 182 (1986). It "is not enough that the prosecutor['s] remarks were undesirable or even universally condemned;" rather, the prosecutor's comments must "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 181. The prosecutor's comments, therefore, must be examined in the context of the entire trial. Id. at 179.

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[18] Moreover, trial counsel filed a Petition for Reconsideration of Sentence and requested a hearing on July 23, 2008. 7/23/2008 Petition for Reconsideration of Sentence. The sentencing judge denied the request on July 24, 2008. 7/24/2008 Order for Hearing.

[19] The ineffectiveness or absence of initial collateral review counsel may constitute cause sufficient to excuse procedural default. Martinez v. Ryan, 566 U.S. 1, 18 (2012).

"Vouching is a type of prosecutorial misconduct" in which the prosecutor personally bolsters the credibility of a government witness. United States v. Walker, 155 F.3d 180, 184 (3d Cir.1998) (citing Lawn v. United States, 355 U.S. 339, 359 n. 15 (1958)). To establish vouching, a claimant must show: (1) the prosecution assured the jury that a government witness was credible; and (2) this assurance was based on information other than the evidence before the jury. Lam v. Kelchner, 304 F.3d 256, 271 (3d Cir. 2002); see also Buel v. Vaughn, 166 F.3d 163, 176 (3d Cir. 1999) (in analyzing whether a prosecutor offered an unconstitutional "expression of personal opinion about the credibility of witnesses," a judge must consider "whether the [prosecutor's] comments suggested that the prosecutor had knowledge of evidence other than that which was presented to the jury") (internal citations omitted). Because the prosecutor made no such assurance, he did not violate the constitution and Martin cannot be prejudiced by counsel's failure to object.

The prosecutor argued the jury should believe K.W. and not Martin. The prosecutor described K.W.'s testimony that she had prayed to her mother during her rape as "something that ha[d] what they call a ring of truth to it. Didn't just make that one up. . . . [T]hat's some pretty detailed language. She didn't just come in here and say I was raped. She explained to you exactly what happened." N.T. 4/3/2008 at 156. Conversely, when discussing Martin's testimony, the Commonwealth advocated: "I think it's important that you notice when he got caught in lies when he was testifying, how he reacted. Because it allows you to understand why he had the guts ten days after he committed this crime to go to the special victims unit. This man thinks he can come in here . . . and get over on everybody." Id. at 161.

That argument is rationally based on the evidence, and reasonable inferences therefrom. It does not suggest the prosecutor had inside knowledge pertaining to the witnesses. See United

States v. Jackson, No. 14-3712, 2017 WL 727144, at *8 (3d Cir. Feb. 24, 2017) ("the role of the prosecutor [is] to argue in summation what inferences to draw from the evidence") (internal quotations omitted). The Commonwealth's closing argument did not violate due process, and Martin has not shown prejudice from trial counsel's failure to object. His claim lacks merit and may be dismissed. See 28 U.S.C. § 2254(b)(2).

Failure to File Post-Trial Motion Regarding Commonwealth's Closing Argument

Martin alleges Gina Capuano, who served as both trial and appellate counsel, "fail[ed] to appeal prosecutorial misconduct after [preserving] it during trial." Habeas Memo. at 16. The claim is procedurally defaulted because Martin acknowledges he did not raise this issue in his first PCRA petition, id., and he is barred from asserting it now. See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1); Coleman, 501 U.S. at 735 n. 1. Martin argues, however, that I should excuse his procedural default because PCRA counsel's ineffectiveness caused his failure to raise this claim in his initial PCRA petition. Habeas Memo. at 16. Even if PCRA counsel was somehow ineffective,[20] I may not excuse Martin's procedural default because he fails to show prejudice. Martin's underlying ineffectiveness claim lacks merit.

Strickland does not require counsel to raise "every 'colorable' claim suggested by a client." Jones v. Barnes, 463 U.S. 745, 754 (1983). Rather, effective counsel "winnow[s] out weaker arguments on appeal and focus[es] on one central issue if possible, or at most on a few key issues." Id. at 751-52. "For judges to second-guess reasonable professional judgments . . . would disserve the very goal of vigorous and effective advocacy[.]" Id. at 754.

Martin fails to show Ms. Capuano violated Jones, and I will not second-guess her decision

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[20] The ineffectiveness or absence of initial collateral review counsel may constitute cause sufficient to excuse procedural default. Martinez v. Ryan, 566 U.S. 1, 18 (2012).

to omit a baseless claim of prosecutorial misconduct from the five grounds she raised on appeal. In closing argument, the prosecutor challenged Martin's alleged alibi by commenting: "I'll let you decide what happened . . . . Obviously, you didn't hear from Ms. Crockett." N.T. 4/3/2008 at 165. Trial counsel objected that the prosecutor "flat out put the burden on [Martin] to call in a witness" and moved for "mistrial or any alternative cautionary instruction . . . ." Id. at 169. The court sustained the objection and instructed the jury to disregard the prosecutor's statement, but denied trial counsel's motion for a mistrial or curative instruction. Id. at 164, 170. In her final charge, the trial judge instructed the jury that "[a] person accused of a crime is not required to present evidence or to prove anything in his own defense." Id. at 174.

A jury is presumed to follow such limiting instruction. See Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987) (citing Richardson v. Marsh, 481 U.S. 200, 208 (1987)). Therefore, the Commonwealth did not violate Martin's constitutionally protected rights, and trial counsel cannot be deemed ineffective for failing to appeal the issue.

Failure to Prepare a Proper Defense

Martin challenges trial counsel's decision to present a "defense centered around the 'consensual' aspects of the Petitioner[']s and the Complainant[']s relationship rather than focusing on the physical evidence that all points to the fact that the petitioner was framed." Habeas Memo. at 14. This claim is procedurally defaulted because Martin did not raise it in state court, and he is barred from bringing it now.[21] See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1); Coleman, 501 U.S. at 735 n. 1.

Regardless, the claim is meritless. See 28 U.S.C. § 2254(b)(2). Counsel's actions are

[21] Martin has failed to allege cause for the default or that there would be a fundamental miscarriage of justice if the claim is not reviewed, and I have found none.

presumed to reflect a sound strategy unless the petitioner shows "no sound strategy . . . could have supported" them. Thomas, 428 F.3d at 500. Martin has made no such showing. It was sound strategy for trial counsel to try and explain the presence of Martin's DNA in K.W.'s rape kit through testimony on the allegedly consensual sexual encounter, rather than through argument that Martin was framed despite no supporting evidence.

7. Ineffective Assistance of Appellate PCRA Counsel

Martin next alleges his PCRA appellate counsel was ineffective for failing to file documentary support related to his ineffectiveness claims concerning the alleged ATM video and non-use of Crockett as an alibi witness. Habeas Memo. at 17. This claim is procedurally defaulted because Martin acknowledges he did not raise this issue in the state courts, id., and he is barred from bringing it now.[22] See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1); Coleman, 501 U.S. at 735 n. 1. Moreover, it is non-cognizable. 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

8. Cumulative Error

Martin alleges his claims, when viewed collectively, show his trial was infected with unfairness so as to deprive him of due process. Pet. Reply at 14. This claim is procedurally defaulted because Martin did not raise this claim in state court, and he is barred from bringing it now. See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1); Collins v. Sec'y, Pennsylvania Dep't of Corr., 742 F.3d 528, 543 (3d Cir. 2014).

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[22] Martin has failed to allege cause for the default or that there would be a fundamental miscarriage of justice if the claim is not reviewed, and I have found none.

"Individual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008) (internal quotation marks omitted) (citations omitted). In order for a petitioner to make such a showing, he must "establish actual prejudice." Id. As explained here, Martin cannot make the requisite showing. Sufficient evidence supports Martin's convictions, his counsel provided effective assistance, and his trial was not infected with constitutional error.

9. Request for Stay

On January 15, 2015, Martin filed a second PCRA petition alleging newly discovered evidence, which he amended on June 26, 2015 and supplemented on July 7, 2015. Crim. Dkt. at 23. On July 9, 2015, Martin filed a Motion to Stay (doc. 3) his habeas petition as he pursued collateral relief in the state courts. I ordered Martin to "provide additional information to support his Motion," 7/13/2015 Order (doc. 4), but did not receive any responsive filing. On September 22, 2015, the PCRA court dismissed Martin's petition as untimely and the Superior Court affirmed on July 1, 2016. Id. at 24-25. That dismissal concluded Martin's pending state court proceedings. His request should be denied as moot.

10. Request for an Evidentiary Hearing

On September 29, 2015, Martin filed a Motion for an Evidentiary Hearing (doc. 11), which I denied without prejudice on February 8, 2016. See Order That Petitioner's Motion For Evidentiary Hearing is Denied Without Prejudice (doc. 18). I now recommend denying that motion with prejudice.

Section 2254 restricts the availability of an evidentiary hearing when the petitioner "has failed to develop the factual basis of a claim in [s]tate court proceedings." See Thomas, 428 F.3d

at 498 (quoting § 2254(e)(2)). Failing to develop a claim requires "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams, 529 U.S. at 432.

Even if the petitioner is not barred from obtaining an evidentiary hearing by § 2254(e)(2), I have discretion to grant a hearing. See Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000). I must focus on "whether the hearing would be meaningful, in that a hearing would have the potential to advance the petitioner's claim." Id. A petitioner bears the burden of showing the hearing would be meaningful, by "forecast[ing] . . . evidence beyond that already contained in the record" that would help his cause, "'or otherwise . . . explain[ing] how his claim would be advanced by an evidentiary hearing.'" Id. (quoting Cardwell v. Greene, 152 F.3d 331, 338 (4th Cir. 1998)).

Martin has failed to show an evidentiary hearing would meaningfully advance his claims.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, on March 16, 2017, it is respectfully recommended that:

1. The Petition for Writ of Habeas Corpus be DENIED with prejudice.
2. The Motion to Stay be DENIED with prejudice.
3. The Motion for an Evidentiary Hearing be DENIED with prejudice.
4. It is further recommended that there is no probable cause to issue a certificate of appealability.[23] Martin may file objections to this Report and Recommendation within 14 days after being served with a copy. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/Timothy R. Rice
TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

23 Because jurists of reason would not debate my recommended disposition of the petitioner's claims, a certificate of appealability also should not be granted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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

DESMOND MARTIN, Petitioner,	:	CIVIL ACTION
v.	:	No. 15-3394
STEPHEN GLUNT, et al. Respondents.	:	

ORDER

JOSEPH F. LEESON, JR., J.

AND NOW, this day of , 2017, upon careful and independent consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Timothy R. Rice, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

2. The Petition for a Writ of Habeas Corpus (doc. 1) is DENIED with prejudice;

3. The Motion to Stay (doc. 3) is DENIED as moot;

4. The Motion for an Evidentiary Hearing (doc. 11) is DENIED with prejudice;

5. There is no probable cause to issue a certificate of appealability; and

4. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

_____

JOSEPH F. LEESON, JR., J.

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

3/17/2017

RE: Martin v. Glunt, et al
CA No. 15-3394

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Timothy R. Rice, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge**.

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

KATE BARKMAN
Clerk of Court

By:s/ Tashia C. Reynolds_____
Tashia C. Reynolds, Deputy Clerk

cc: Desmond Martin, Pro Se
Joshua Scott Goldwert, Esquire

Courtroom Deputy to Judge Joseph F. Leeson, Jr.

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(11/07)