Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2284

Peter B. Rojas,
Appellant

v.

Superintendent Fayette SCI, et al

(E.D. Pa. No. 5-17-cv-03488)

SUR PETITION FOR REHEARING

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

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

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

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge

Dated: November 19, 2018
Lmr/cc: Peter B. Rojas
Christine F. Murphy

Appendix "B"

ORDER

Rojas' request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would agree, without debate, with the District Court that all of Rojas' claims either lack merit, are procedurally barred, or are non-cognizable on habeas review. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: October 15, 2018
CJG/cc: Peter B. Rojas
Christine F. Murphy, Esq.

A True Copy:

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

ALD-003 October 4, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2284**

PETER B. ROJAS, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, ET AL.

(E.D. Pa. Civ. No. 5:17-cv-03488)

Present: MCKEE, SHWARTZ and BIBAS, Circuit Judges

Submitted are:

1) Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

2) Appellees' response;

3) Appellant's supplement to his request for a certificate of appealability; and

4) Appellant's second supplement to his request for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

(continued)

Appendix "C"

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

PETER B. ROJAS,	:	**CIVIL ACTION**
	:	
Petitioner	:	
	:	
v.	:	**No. 17-3488**
	:	
MARK CAPOZZA, ET AL.,	:	
	:	
Respondents.	:	
	:	

ORDER

AND NOW, this 7th day of May, 2018, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Thomas J. Reuter, it is hereby **ORDERED** that:

1. Petitioner's objections (Doc. Nos. 17 & 19) are **OVERRULED**;[1]

[1] Petitioner's objections press the same arguments raised in his petition. Because I find that the Magistrate Judge applied the appropriate standard of review and thoroughly addressed the pertinent legal issues in his Report and Recommendation, I will not re-address the same issues. See Palmer v. Astrue, No. 09-820, 2010 WL 1254266, at *2 (E.D. Pa. Mar. 31, 2010) ("If . . . objections to a Report merely reiterate arguments previously raised before a magistrate judge, *de novo* review is not required."), aff'd sub nom. Palmer v. Comm'r of Soc. Sec., 410 F. App'x 490 (3d Cir. 2011). In his objections, Petitioner raises one new argument as to his first claim, some additional facts as to his second claim, and adds a seventh claim, which I address in turn below.

In his first claim, Petitioner argues that the state court unreasonably applied Brady and its progeny in concluding that the prosecution's failure to produce three exculpatory videos did not constitute Brady violations. The state court found that Petitioner did not satisfy the three prongs of Brady with respect to the three videos. The Magistrate Judge agreed with the state court that Petitioner cannot satisfy Brady because the first video was not in the prosecution's possession, the second video was not material because it would not show a scene of altercation nor would it show any evidence the jury was not already aware of, and the third video was not material because it did not show Petitioner or the victim. In his objections, Petitioner contends that the

2. The Report and Recommendation (Doc. No. 11) is **APPROVED** and **ADOPTED**;

3. The Petition for a Writ of Habeas Corpus is **DENIED**;

4. Petitioner's Motion for Discovery (Doc. No. 4) is **DENIED**;

5. Petitioner's Motion to Appoint Counsel (Doc. No. 6) is **DENIED**;

4. There is no basis for the issuance of a certificate of appealability; and

5. The Clerk of Court is directed to mark this case **CLOSED**.

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state court judge and Magistrate Judge failed to do a "cumulative" analysis of the effect of the alleged suppression of the three videos. (Obj. at 5.) As the Magistrate Judge noted, the prosecution never obtained the first video and Petitioner has failed to demonstrate how the second and third videos were exculpatory or material. Because the videos were either not suppressed or not material, I find that a cumulative Brady violation has not occurred. See United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991).

In Petitioner's third claim, he contends that the state court unreasonably applied Miranda and its progeny in concluding that trial counsel was not ineffective for failing to properly cross examine a witness or argue a motion to suppress statements made by Petitioner. The state court concluded that Petitioner was not in custody for purposes of Miranda when he made the statements, and thus counsel was not ineffective for failing to more fully cross examine a witness about them or raise a meritless argument to suppress them. The Magistrate Judge found that the state court did not err in its determination and underscored that Petitioner had not overcome the burden of 20 U.S.C. § 2254(e)(1), which states that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." In his objections, Petitioner points to additional facts that he avers indicate he was in custody. (Obj. at 12-15.) Upon review of the record, I agree with the Magistrate Judge that Petitioner has not overcome the presumption because viewed objectively, a reasonable person in Petitioner's circumstances would not have thought he was in custody. The additional facts to which Petitioner points in his objections do not alter this conclusion, and thus Petitioner has failed to overcome § 2254(e)(1)'s presumption.

Finally, Petitioner raises a new claim in his objections, arguing that "the cumulative error doctrine provides relief." (Supp. Obj. at 6.) Because I agree with the Magistrate Judge that no individual constitutional errors were committed in state court, I cannot conclude that the cumulative error doctrine applies here.

Appendix "D"

BY THE COURT:

MITCHELL S. GOLDBERG, J.

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

PETER B. ROJAS : CIVIL ACTION

v. :

MARK CAPOZZA, et al. : NO. 17-3488

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

November 21, 2017

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

I. BACKGROUND

On March 24, 2011, after a trial held in the Court of Common Pleas of Lehigh County, Pennsylvania, a jury found petitioner guilty of one count of robbery and one count of murder in the second degree. (No. CP-39-CR-2191-2009 (C.P. Lehigh)). The Honorable Kelly L. Banach sentenced petitioner to a term of life imprisonment, without the possibility of parole.[1] Commonwealth v. Rojas, No. CP-39-CR-2191-2009 (C.P. Lehigh May 13, 2011).

In her opinion denying petitioner's post-sentence motion, Judge Banach summarized the trial evidence as follows:

> On May 28, 2009, the body of Mark A. Holdren was discovered against a rear door of a home located in the 300 block of North Jute Street, Allentown, Lehigh County, Pennsylvania by an off-duty nurse's aide, Maritza Mercado. Ms. Mercado attempted to render aid but was unsuccessful. At that time, Ms.

[1] Petitioner was also originally sentenced to a concurrent term of no less than ten years to no more than 20 years on the robbery count. However, the trial court vacated that portion of his sentence by Order dated July 8, 2011.

Mercado could not find Mr. Holdren's pulse and observed a large pool of blood surrounding him. 9-1-1 was called and Officer Karl Koslowski of the Allentown Police Department responded to the scene.

Officer Koslowski examined the victim as well but could not find a pulse. He observed that Mr. Holdren was pale and stiff. The officer noted a trail of blood from the victim to the street and immediately called for supervisor, detectives, and additional marked units to preserve the crime scene. One of the responding officers was Detective Richard Heffelfinger, a supervisor in the Crime Scene Unit. Utilizing his training and knowledge of evidence collection at the scene, Detective Heffelfinger and his team collected various items of evidence, including blood samples, and made observations regarding a blood trail on Jute and Gordon Streets. The crime scene was videotaped.

An autopsy was performed on the victim and it was determined that the victim died from multiple sharp-force stab and slash wounds, two of which were fatal. The wounds inflicted were consistent with those made by a knife or sharp blade. One stab wound punctured the artery in the right medial thigh and was associated with profuse blood loss and tissue destruction. Another wound was observed in the victim's chest, which struck the left lower lobe of his lung, and had been inflicted with such force that one of the victim's rib bones was partially cut through. Defensive wounds were observed as well.

A folding knife was found in the victim's shorts pockets.

In addition to the evidence collection units, detectives from the Allentown Police Department responded to the scene and attempted to recover additional evidence.

In the morning hours of May 28, 2009, the Defendant contacted a friend of the family, Michael Martin, and asked to speak with him. Mr. Martin met with the Defendant and the Defendant told him that on the previous night, someone had followed him and had "jumped" him. The Defendant claimed that he pulled out a boxcutter and swung at his assailant, but was unsure if he actually connected with him. Mr. Martin lent the Defendant a small amount of money for cigarettes and the two returned to Mr. Martin's home in Easton, Pennsylvania. There, the Defendant contacted another family friend and that family friend instructed the Defendant to contact the police and report the attempted robbery.

The Defendant went to Allentown police headquarters to report the attempted robbery. After police realized that the incident may be connected to Mr. Holdren's homicide, the Defendant was interviewed by Detectives Louis Tallarico and Louis Collins. The interview was tape recorded. In the interview, the Defendant reported that he was hit on the head from behind and pulled out a

razor knife in defense. He told the police that he swung a couple of times, but was not sure if his attacker was injured. Once the attacker fell to the ground, the Defendant left the area. The Defendant showed the detectives some minor injuries on his head that he claimed occurred during the attack.

Eventually, near the conclusion of the interview, the Defendant told detectives that he, in fact, did know the victim from the streets. He further explained that he was taking the victim to a location to buy narcotics, with the expectation that the victim would either give the Defendant money or a portion of the drugs in return. He told the detectives that he never saw the victim with a weapon. He further revealed that he went through the victim's pockets when he was on the ground and took an ACCESS card and a pill bottle. The ACCESS card was eventually discovered in a public trash can nearby, in front of Dominguez Grocery.

The Defendant went home and put his bloody clothing in the washing machine, where it was eventually recovered by the police. The Defendant discarded the slashing instrument, a knife with a razor on one end and a longer blade on the other, wrapped in the t-shirt he was wearing, in a public trash can. This too was eventually found by police.

Rojas, No. CP-39-CR-2191-2009, slip op. at 2-5 (C.P. Lehigh Dec. Sep. 15, 2011) (Banach, J.).

The Superior Court of Pennsylvania affirmed the judgment of sentence on February 13, 2013. Commonwealth v. Rojas, 68 A.3d 362 (Table), No. 2684 EDA 2011 (Pa. Super. Ct. Feb. 13, 2013). On August 14, 2013, the Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal. Commonwealth v. Rojas, 72 A.3d 603 (Pa. 2013) (Table). On April 14, 2014, petitioner filed a pro se petition for state collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq. Counsel was appointed thereafter and a hearing was held on March 20, 2015. The trial court denied petitioner's PCRA petition on August 17, 2015. The denial was then affirmed by the Superior Court of Pennsylvania on April 28, 2017. Commonwealth v. Rojas, 2017 WL 1534919 (Pa. Super. Ct. Apr. 28, 2017). Petitioner did not file a Petition for Allowance of Appeal.

The instant pro se habeas petition was filed on July 28, 2017 ("Pet."; Doc. No. 1).[2]

Petitioner's habeas petition raises the following grounds for relief:

> 1. [Whether] state courts unreasonably applied Brady and its progeny when the prosecution failed to produce various exculpatory surveillance videos.
>
> 2. [Whether] state courts unreasonably determined counsel's failure to timely object to the prosecution's introduction of inflammatory video, requested no curative instruction.
>
> 3. [Whether] state courts unreasonably applied Miranda and its progeny when trial counsel failed to properly cross-examine witness and failed to properly argue motion to suppress.
>
> 4. [Whether] Pennsylvania state courts unreasonably determin[ed] that trial counsel was not ineffective when he failed to prepare to argue motion in limine.
>
> 5. [Whether] Pennsylvania state courts unreasonably determined trial counsel was not ineffective in enlisting an expert toxicologist; where PCRA counsel also did not enlist expert and abandoned claim.
>
> 6. [Whether] Pennsylvania state courts unreasonably determined trial, direct and PCRA counsel were not ineffective in failing to challenge legality of sentence.

(Pet. ¶ 12.) Petitioner subsequently filed a motion for the appointment of counsel (Doc. No. 6) and a motion for discovery (Doc. No. 4). Respondents filed a response to the petition on October 26, 2017. ("Resp."; Doc. No. 10).

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[2] Though the petition was docketed on August 3, 2017, "a pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court." Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). The court presumes that the petition was delivered on the date it was executed by petitioner. See Baker v. United States, 670 F.3d 448, 451 n.2 (3d Cir. 2012).

II. DISCUSSION

A. Habeas Corpus Standards

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

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

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

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

Under the "unreasonable application" clause, "[a] state court decision will be an

'unreasonable application' if (1) 'the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular . . . case;' or (2) 'the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" Appel v. Horn, 250 F.3d 203, 209 (3d Cir. 2001) (quoting Williams, 529 U.S. at 407). A federal habeas court may not issue the writ simply because that court concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Williams, 529 U.S. at 411. Relief is appropriate only where the state court decision also is objectively unreasonable. Id. The Third Circuit Court of Appeals described this "highly deferential standard" as follows: "[W]e will not surmise whether the state court reached the best or even the correct result in [a] case; rather, we will determine only whether the state court's application of [federal law] was unreasonable." Collins v. Sec'y of Pa. Dep't of Corrs., 742 F.3d 528, 544 (3d Cir.) (second and third alteration in original) (quotation omitted), cert. denied, 135 S. Ct. 454 (2014). See also White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (same).

With respect to 28 U.S.C. § 2254(d)(2), which dictates that federal habeas relief may be granted when the state court adjudication was based on an unreasonable determination of the facts in light of the evidence presented, the petitioner must demonstrate that a reasonable fact-finder could not have reached the same conclusions given the evidence. If a reasonable basis existed for the factual findings reached in the state courts, then habeas relief is not warranted. Burt v. Titlow, 134 S. Ct. 10, 15 (2013); Campbell v. Vaughn, 209 F.3d 280, 290-91 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001). Additionally, "a determination of a factual

issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). See also Rountree v. Balicki, 640 F.3d 530, 538 (3d Cir.) ("State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by clear and convincing evidence.") (quotation omitted), cert. denied, 565 U.S. 992 (2011); Simmons v. Beard, 590 F.3d 223, 231 (3d Cir. 2009) ("Under the § 2254 standard, a district court is bound to presume that the state court's factual findings are correct, with the burden on the petitioner to rebut those findings by clear and convincing evidence.").

A federal habeas court may not consider a petitioner's claims of state law violations, but must limit its review to issues of federal law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (not the province of the federal court to re-examine a state court's determinations on state law questions); Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); Engle v. Isaac, 456 U.S. 107, 120 n.19 (1982) ("If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable."); Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997) ("[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.").

B. Exhaustion and Procedural Default

Respondent asserts that some of petitioner's claims are procedurally defaulted. It is well established that a prisoner must present all of his claims to a state's intermediate court before a district court may entertain a federal petition for habeas corpus.[3] 28 U.S.C. §

[3] On May 9, 2000, the Pennsylvania Supreme Court issued Order No. 218 that declared that federal habeas petitioners no longer have to appeal to the state supreme court to satisfy the exhaustion requirement. The Third Circuit has recognized the validity of this Order.

2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 845, 847 (1999); Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir.), cert. denied, 568 U.S. 1036 (2012). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir.), cert. denied, 504 U.S. 944 (1992). To satisfy the exhaustion requirement, a petitioner must demonstrate that the claim raised in the federal petition was "fairly presented" to the state courts. Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)). See also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (same).

However, when the petitioner cannot obtain state court review of his claims because of noncompliance with state procedural rules, the doctrine of procedural default generally bars federal habeas corpus review. Martinez v. Ryan, 566 U.S. 1 (2012); Coleman v. Thompson, 501 U.S. 722, 729-32 (1991). The Third Circuit Court of Appeals explained:

> 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 . . . ; 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[.]

Rolan, 680 F.3d at 317 (citations omitted). See also Bey v. Sup't Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017) (same). Upon a finding of procedural default, review of a federal habeas petition is barred unless the habeas petitioner can show "(1) the procedural rule was not independent and adequate; (2) cause for his failure to comply with state procedural rules and

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See Lambert v. Blackwell, 387 F.3d 210, 233-34 (3d Cir. 2004), cert. denied, 544 U.S. 1063 (2005).

prejudice resulting therefrom; or (3) that a fundamental miscarriage of justice will occur if not considered." Peterkin v. Horn, 176 F. Supp. 2d 342, 353 (E.D. Pa. 2001) (citations omitted).[2]

Procedural default may be overcome by application of the Supreme Court's holding in Martinez, in which the recognized a narrow exception to its prior holding in Coleman, 501 U.S. at 729-32, that attorney errors in a post-conviction proceeding do not establish cause to excuse a procedural default. Id. at 8. The Supreme Court held that in states like Pennsylvania, where state law requires ineffective assistance of trial counsel claims be raised in an initial-review collateral proceeding, a petitioner may establish "cause" sufficient to overcome a procedural default if "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington, 466 U.S. 668 . . . (1984)." Id. at 14. The Court continued that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id. As the Third Circuit Court of Appeals recently explained, "whether a claim is

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[2] "A state [procedural] rule provides an adequate and independent basis for precluding federal review if (1) the rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) their refusal was consistent with other decisions." Boyd v. Waymart, 579 F.3d 330, 368 (3d Cir. 2009) (quotation omitted). Petitioner can demonstrate cause for purposes of procedural default if he can show that some objective factor external to the defense impeded or prevented his ability to comply with the state procedural rules. See Caswell, 953 F.2d at 862. The cause must be "something that cannot fairly be attributed to [the petitioner]." Coleman, 501 U.S. at 753. To show prejudice, petitioner must present evidence that this factor did more than merely create a possibility of prejudice; it must have "worked to [petitioner's] actual and substantial disadvantage." Murray v. Carrier, 477 U.S. 478, 494 (1986) (emphasis in original) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). The third exception to procedural default is concerned only with "actual" innocence and petitioner must show that in light of new evidence it is more likely than not that no reasonable juror would have convicted him absent the claimed error. Schlup v. Delo, 513 U.S. 298, 327-28 (1995).

'substantial' is a 'threshold inquiry' that 'does not require full consideration of the factual or legal bases adduced in support of the claims.'" Bey, 856 F.3d at 238 (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)). The Supreme Court left standing, however, the long-established principle that there is no right to counsel in a post-conviction proceeding. See 28 U.S.C. § 2254(i); Moore v. DiGuglielmo, 489 F. App'x 618, 627 n.5 (3d Cir.) (not precedential), cert. denied, 568 U.S. 1016 (2012); United States v. Colon, 2016 WL 687183, at *4 (E.D. Pa. Feb. 18, 2016) (same).

C. Standard for Ineffective Assistance of Counsel Claims

Petitioner asserts several claims of ineffective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court set forth a two-prong test that a petitioner must satisfy before a court will find that counsel did not provide the effective assistance guaranteed by the Sixth Amendment. Under this test, a petitioner must show: (1) that counsel's performance was deficient; and (2) counsel's deficient performance caused the petitioner prejudice. Id. at 687-96. See also Harrington v. Richter, 562 U.S. 86 (2011) (same); Premo v. Moore, 562 U.S. 115 (2011) (same). The United States Supreme Court observed that "[s]urmounting Strickland's high bar is never an easy task." Harrington, 562 U.S. at 105 (quotation omitted). See also Collins, 742 F.3d at 544 (discussing Strickland).

To show deficient performance, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. In evaluating counsel's performance, a reviewing court should be "highly deferential" and must make "every effort . . . to eliminate the

distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (citation omitted). The Court cautioned that the appropriate "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Premo, 562 U.S. at 122 (quoting Strickland, 466 U.S. at 690).

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

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

Harrington, 562 U.S. at 104 (citations omitted). See also Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (holding that the prejudice requirement of Strickland "requires a 'substantial,' not just 'conceivable,' likelihood of a different result" (citation omitted)). It follows that "'counsel cannot be deemed ineffective for failing to raise a meritless claim.'" Ross v. Dist. Attorney of the Cnty. of Allegheny, 672 F.3d 198, 211 n.9 (3d Cir. 2012) (quoting Werts v. Vaughn, 228 F.3d 178, 202 (3d Cir. 2000)).

Where, as in the instant case, the state court already has rejected an ineffective

assistance of counsel claim, a federal court must defer to the state court's decision pursuant to 28 U.S.C. § 2254(e)(1). As the Supreme Court stated,

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

Harrington, 562 U.S. at 105 (citations omitted). See also Woods v. Donald, 135 S. Ct. at 1376 (when considering claims of ineffective assistance of counsel, AEDPA review must be "'doubly deferential' in order to afford 'both the state court and the defense attorney the benefit of the doubt'") (quoting Burt v. Titlow, 134 S. Ct. 10, 13 (2013)).

D. Petitioner's Claims

Claim No. 1 [Whether] state courts unreasonably applied Brady and its progeny when the prosecution failed to produce various exculpatory surveillance videos.

Petitioner argues that the state courts erred in denying his Brady claims brought due to the failure of the Commonwealth "to produce various exculpatory surveillance videos." (Pet. ¶ 12.) In his habeas petition, petitioner stated the following in support of this claim:

> Petitioner's 14th Amendment rights were violated when the prosecution failed to comply with discovery request[s] and withheld exculpatory evidence (video footages). Petitioner's due process rights under the U.S. Constitution were plainly violated when the withholding of the evidence prevented petitioner from demonstrating his innocence, precluding petitioner from corroborating to the jury, with tangible evidence his account of the day of the incident. Withholding of evidence gave credence to the Commonwealth's witness[']s testimony.

Id. Petitioner raised this claim during his direct appeal, arguing that "exculpatory evidence existed on city cameras and a camera outside a grocery store. According to [petitioner], the videos would corroborate his claims that the victim approached him. He adds that the tapes should have been preserved and disclosed."[4] Rojas, No. 2684 EDA 2011, slip op. at 14-17. Respondent counters that petitioner's first claim for relief is meritless and should be denied. (Resp. at 6-8.)

The Superior Court considered petitioner's Brady claims and concluded that they were meritless. With regard to the grocery store video, the court noted that petitioner "cannot establish that the Commonwealth ever possessed the footage." Rojas, No. 2684 EDA 2011, slip op. at 16-17. Concerning the two city surveillance videos, one at Second and Gordon streets and one at Sixth and Turner streets, the court "fail[ed] to see how the video evidence was exculpatory" given that the video evidence was not of the crime scene, and "[t]he fact that the victim may have first approached [petitioner] on the video in no way advances the position that the victim attacked [petitioner]." Id. at 17.

While a prosecutor's affirmative duty to disclose evidence favorable to a defendant can be traced to early twentieth century prohibitions against misrepresentation, it is predominantly associated with the Supreme Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). "Brady obligations attach to all exculpatory evidence in the government's actual or

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[4] The court notes that petitioner appears to have raised additional Brady claims in his PCRA petition with respect to two other surveillance videos, at Fourth and Turner streets and at Fourth and Chew streets. However, these claims were not included in petitioner's PCRA appeal. As a result, they are unexhausted and, since the time to raise them in a new PCRA filing has now passed, they are now procedurally defaulted and thus not cognizable on review. See 28 U.S.C. § 2254(b)(1)(A).

constructive possession."[5] Maynard v. Gov't of the Virgin Islands, 392 F. App'x 105, 113 (3d Cir. 2010) (not precedential). The Supreme Court has explained that "[t]here are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Other courts have stated the three prongs thusly: "To establish a Brady violation, it must be shown that (1) evidence was suppressed; (2) the evidence was favorable to the defense; and (3) the evidence was material to guilt or punishment." Simmons v. Beard, 590 F.3d 223, 233 (3d Cir. 2009) (quotation omitted).

Not every failure to disclose favorable evidence gives rise to a constitutional violation. Kyles v. Whitley, 514 U.S. 419, 436-37 (1995). A Brady violation does not occur unless there is a reasonable probability that the suppressed evidence would have produced a different verdict, i.e., the suppressed evidence was "material." Strickler, 527 U.S. at 281. A reasonable probability is shown when the government's suppression undermines confidence in the outcome of the trial. Kyles, 514 U.S. at 434.

This court agrees with the state court that petitioner cannot satisfy the three prongs of Brady with respect to these three surveillance videos. Trial testimony revealed that the police were never able to obtain the grocery store video, because

> the employees and the store owner did not know how to download the videotape surveillance from their system. So, they had to make an appointment with ADT,

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[5] Exculpatory evidence has been described as that which "goes to the heart of the defendant's guilt or innocence as well as that which might well alter the jury's judgment of the credibility of a crucial prosecution witness." United States v. Starusko, 729 F.2d 256, 260 (3d Cir. 1984) (citing Giglio v. United States, 405 U.S. 150, 154 (1972)).

the security system, to have it downloaded at a later time. And, unfortunately, the way the system was set up, it was eventually purged so we weren't able to get it.

(N.T. 3/21/2011, at 165.) Petitioner has not disputed this sequence of events. There can be no Brady violation for failing to produce the grocery store video because the video was never in the actual or constructive possession of the state. See Maynard, 392 F. App'x at 113.

This court likewise agrees with the Superior Court that petitioner has not established how the two city surveillance videos were exculpatory or material. In his direct appeal, petitioner claimed the first video, from Second and Gordon Streets, "would show [petitioner] injured and bloody." This court fails to see how this evidence "goes to the heart of defendant's guilt or innocence," as petitioner does not claim that it would show the scene of any altercation between himself and the victim. Even if the court were to find this footage to be exculpatory, it is not material because there is no reasonable probability that footage "show[ing] petitioner injured and bloody" would have produced a different verdict. Strickler, 527 U.S. at 281. Ample evidence was presented at trial that petitioner had sustained injuries in the altercation from which the jury could have concluded that petitioner was acting in self-defense; photographs were presented to the jury that showed petitioner's alleged injuries, see N.T. 3/23/2011, at 12-15, and multiple officers testified that petitioner reported having been injured during the incident. See N.T. 3/22/2011, at 211(Officer Berger testified that petitioner reported the victim "came up behind him and hit him in the head or struck him in the head"); N.T. 3/23/2011, at 19 (Officer Millan recalls seeing blood as well as lumps on petitioner's head); at 91 (Officer Tallarico recalls seeing "maybe a dime sized spot of dried blood" on the top of petitioner's head, and petitioner reported that he had received the injury in the struggle). Thus, this court finds no Brady violation with regard to the Second and Gordon surveillance video.

Petitioner alleged that the second video, from Sixth and Turner streets, would show "[petitioner] being approached by [the victim]." Even if the video did show petitioner initially being approached by the victim, the court fails to see how this would tend to establish that the victim was the aggressor. Furthermore, Detective Tallarico testified that he reviewed the video from Sixth and Turner streets, and did not see either petitioner or the victim on the video around the time of the incident. See N.T. 3/23/2011, at 96-97. The Superior Court credited this testimony, see Rojas, No. 2684 EDA 2011, slip op. at 15, and this court is "bound to presume that the state court's factual findings are correct."[6] Simmons, 590 F.3d at 231 (citing 28 U.S.C. § 2254(d)). Petitioner has not overcome this presumption here. Thus, petitioner has not met his burden of establishing that the video would have been exculpatory, or that it was material.

For the foregoing reasons, petitioner has not established a Brady violation with respect to these three surveillance videos and his first claim must be denied.

Claim No. 2 [Whether] state courts unreasonably determin[e]d counsel's failure to timely object to the prosecution's introduction of inflammatory video; requested no curative instruction.

Petitioner argues that his trial counsel was ineffective for failing to object to video footage that was shown during the trial, which depicted "the scene of the homicide, including blood trails and pooling of blood, and the victim's body", see Rojas, No. CP-39-CR-2191-2009, slip op. at 10 (C.P. Lehigh Aug. 17, 2015), and for failing to request a curative instruction. In support of this claim, petitioner provides the following:

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[6] Though the officer's testimony was credited on appeal, "§ 2254 draws no distinction between state trial and appellate court factual determinations." Rolan v. Vaughn, 445 F.3d 671, 679 (3d Cir. 2006) (citation omitted).

> Petitioner's 6th Amendment rights were violated when trial counsel failed to object to inflammatory video introduced by the prosecution that caused spectator to scream and run out of the courtroom. Where trial counsel did not review[] video to request redaction of possible inflammatory footage[] nor did he request cautionary instruction to the jury. Therefore leaving the jury to cast a verdict based on emotional determinations rather than asking the court to advise them not to allow emotions [to] affect their decisions.

(Pet. ¶ 12.) Petitioner presented this argument to the state courts in his PCRA petition and appeal. See Rojas, No. CP-39-CR-2191-2009, slip op. at 7-12 (C.P. Lehigh Aug. 17, 2015); Rojas, 2017 WL 1534919, at *3. The PCRA and appellate courts found that counsel did not render ineffective assistance because the video was not unduly prejudicial, as the Superior Court had determined in petitioner's direct appeal.

In his direct appeal, petitioner argued that the trial court improperly admitted the crime scene video because it was unduly inflammatory and prejudicial. In resolving the issue, the Superior Court stated that the video was "consonant with the severity of a homicide crime scene," and found that its admission "does not rise to the level of inflammatory and overwhelmingly prejudicial evidence that would inflame the minds of the jury."[7] Rojas, No. 2684 EDA 2011, slip op at 13.

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[7] Petitioner claims that the video "caused [a] spectator to scream and run out of the courtroom." (Pet. ¶ 12.) The trial court, in evaluating petitioner's PCRA petition, "reviewed the notes of testimony and . . . listened to the audio recording of the actual trial." Rojas, No. CP-39-CR-2191-2009, at 11 (C.P. Lehigh Aug. 17, 2015). The court found that "the reaction to the viewing of the videotape by the spectator was not shrieking, sobbing, or crying out," but rather "two or three muffled sobs." Id. Further, the court expressed that it "d[id] not recall any spectator making a 'scene' in the courtroom or inappropriately exiting the courtroom during trial." Id. Thus, the court found "no indication that there was any disruption during the videotape, nor during the course of the trial." Id. This court must defer to the state court's factual findings on this matter. See 28 U.S.C. § 2254(d).

The PCRA court and appellate court analyzed the crime scene video under Pennsylvania law regarding the admissibility of crime scene photographs, and found no error in the Superior Court's prior determination.[8] As "[c]ounsel cannot be deemed ineffective for failing to raise a meritless claim," the Superior Court found that counsel was not ineffective for failing to object to the video. See Rojas, 2017 WL 1534919, at *3 (citing Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014)).

The admission or exclusion of evidence is within the sound discretion of the trial court. Scales v. United States, 367 U.S. 203, 256 (1961). Generally, "[d]iscretionary rulings regarding the admissibility of evidence are . . . best left to the province of the trial judge." Yohn v. Love, 76 F.3d 508, 525 (3d Cir. 1996). Even if this court were to find that the admission of the video to be in error, "[i]t is a well-established principle that evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." Bisaccia v. Attorney Gen. of N.J., 623 F.2d 307, 312 (3d Cir. 1980) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1975)). A claim under this standard "would arise if the probative value of the evidence, although relevant, was greatly outweighed by the prejudice to the accused from its admission." Albrecht v. Horn, 485 F.3d 103, 122 n.6 (3d Cir. 2007) (citing Bisaccia, 623 F.2d at 313). To constitute a denial of fundamental fairness, the evidence admitted or not admitted "must be material in the sense of a crucial, critical, highly significant

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[8] To the extent that petitioner is challenging the state court's evidentiary ruling under state law, such a claim would not be cognizable on review. See Estelle, 502 U.S. at 67-68 ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

factor." Johnson v. Wainwright, 719 F.2d 1125, 1127 (11th Cir. 1983), cert. denied, 466 U.S. 975 (1984). See also Snell v. Lockhart, 14 F.3d 1289, 1299 (8th Cir.) (finding that a state court's evidentiary ruling denies due process where it is "so 'gross,' . . . 'conspicuously prejudicial,' . . . , or otherwise of such magnitude that it fatally infected the trial and failed to afford petitioner the fundamental fairness which is the essence of due process . . . ." (citations omitted)), cert. denied, 513 U.S. 960 (1994).

After careful examination of the record, this court does not find the admission of the crime scene video, as described by the state courts, to have deprived petitioner of fundamental fairness in his trial under the standard outlined above. Thus, this court cannot disturb the trial court's ruling that the crime scene video was admissible. Any objection by trial counsel either on state law grounds or on the basis of federal due process would have been without merit. Because trial counsel cannot be ineffective for failing to raise a meritless claim, petitioner's second claim must be denied.[9]

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[9] Moreover, petitioner has not shown that the decision not to object to the video or request a curative instruction was not sound trial strategy. Under Strickland, to establish ineffective assistance of counsel, a petitioner has to "overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 689 (citation omitted). At the PCRA hearing, petitioner's trial attorney testified that he did not act to suppress the video "because what the video showed to [him] was that the victim was able to walk, to walk away from the fight scene, and got some distance and attempted to get help," which he stated was relevant "to get first degree [murder] off the table," because it showed that petitioner's specific intent may not have been to kill the victim. (N.T. 3/20/15, at 10-11.) He stated that "[w]e chose to let the jury see . . . the distance, let them see that he walked away from the scene, and we didn't think that a stipulation [that the victim walked away] would have as much effect on the jury." Id. at 13. Trial counsel explained that he did not request a curative instruction because:

> I didn't want to draw attention to that. I didn't think it was that big of a deal. I thought it would have been worse drawing attention to it and having the judge instruct the jury about, you know, saying the video is horrible and putting that in

Claim No. 3 [Whether] the trial court unreasonably applied Miranda and its progeny when trial counsel failed to properly cross-examine witness and failed to properly argue motion to suppress.

Petitioner argues that trial counsel failed to properly cross-examine Officer Berger at a pretrial hearing and failed to file a motion to suppress his pre-Miranda statements to police. In support of this claim, petitioner states:

> Petitioner's 5th and 14th Amendment of the U.S. Constitution[] due process was violated when trial counsel did not properly cross-examine[] Commonwealth witness at pre-trial hearing to elicit further information that petitioner's rights to Miranda warnings were violated. Petitioner was interrogated first then subsequently Mirandized and interrogated again, however, trial counsel did not raise issue on his motion to suppress nor did counsel attempt[] to pursue suppression of the illegal[ly] obtained confession.

(Pet. ¶ 12.) The Pennsylvania Superior Court rejected petitioner's claim on this issue. It found that petitioner "was not in custody for the purposes of Miranda," and looked to the trial court's recitation of the circumstances under which he made his pre-Miranda statement:

> Upon review of the totality of the circumstances surrounding [petitioner's] interaction with Officer Berger, we do not believe that the officer was required to issue Miranda warnings. [Petitioner], of his own accord, appeared at the police station to report that he was the victim of a robbery. Officer Berger initially dealt with [petitioner] as a victim and allowed [petitioner] to tell him his version of the events in question. When Officer Berger eventually came to suspect that [petitioner] knew more about the homicide on Jute Street, he confirmed the information he had been given and contacted detectives to further the homicide investigation.

Rojas, 2017 WL 1534919, at *4.

The state court's analysis is neither contrary to nor an unreasonable application of federal law, nor was it an unreasonable determination of the facts in light of the evidence

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> their heads . . . . I thought that was the best course of action at the time.
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> Id. at 17.

presented. As the state court properly explained, a suspect is entitled to Miranda warnings prior to a custodial interrogation, id. at *4; Miranda warnings are not required for the admission of a defendant's statements made voluntarily of his own accord. See Miranda, 384 U.S. at 478 ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.").

The United States Supreme Court has defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom in any significant way." Id. at 444. When determining whether an individual is in custody, the ultimate inquiry is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (quotations omitted). In situations where there is no formal arrest, "custody" means whether a person had the freedom "to come and go as he pleased." United States v. Mesa, 638 F.2d 582, 587 (3d Cir. 1980); see also United States v. Leese, 176 F.3d 740, 743 (3d Cir. 1999) (using the objective test of whether the government has in some meaningful way imposed restraint on a person's freedom of action). A court must, therefore, employ a fact-intensive analysis and objectively examine all circumstances surrounding the interrogation. Stansbury v. California, 511 U.S. 318, 322 (1994). Notably, the relevant test does not consider the subjective intent of the officers, but rather "how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442 (1984). See also United States v. Long Tong Kiam, 432 F.3d 524, 528 (3d Cir. 2006) ("As the Supreme

Court has emphasized repeatedly, the inquiry in Miranda cases is not into the officer's subjective intent, suspicion, or views." (citations omitted)).

In this case, the court finds no error in the state courts' determination that petitioner was not subject to custodial interrogation. At a pretrial hearing, Officer Berger, the officer who initially spoke with petitioner, testified that he was working the complaint desk on the day in question when petitioner "came into the complaint desk to report a robbery from early that morning." (N.T. 10/27/09, at 36-37.) Petitioner reported "that he was a victim of a robbery," and the officer began to "gather all the information that [he] could" through "normal conversation." Id. at 37, 40. Based on the location of the alleged robbery, the officer began to suspect that petitioner was involved in the homicide but "continued with the robbery investigation." Id. at 39-40. The officer was speaking to petitioner in "the outside lobby area of the complaint window," which is open to the public and not in a secured area. Id. at 37-38. The officer testified that petitioner "absolutely" could have left the lobby area at any time. Id. at 41.

Thus, the state courts found that petitioner appeared at the police station of his own accord to report being the victim of a robbery, and was not subject to custodial interrogation. The questions of fact underlying this ultimate conclusion are governed by the statutory presumption of the correctness of state court factual findings in 20 U.S.C. § 2254(e)(1), which provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Petitioner has not overcome this presumption. Considering these facts from an objective standpoint, this court agrees that a reasonable person in petitioner's shoes would have would not have understood himself as being in the officer's custody while reporting being the victim of a crime. Though the officer asked questions of petitioner and may have suspected petitioner was involved in the homicide, the inquiry does not consider the officer's subjective intent or suspicion. Long Tong Kiam, 432 F.3d at 528. Thus, this court is satisfied that no Miranda violation occurred. Because counsel cannot be ineffective for failing to raise a meritless claim, the state courts correctly determined that no ineffective assistance of counsel was rendered. Petitioner's third claim must be denied.

Claim No. 4 [Whether] Pennsylvania state courts unreasonably determin[e]d that trial counsel was not ineffective when he failed to prepare to argue motion in limine.

Petitioner argues that his trial counsel was ineffective in failing to prepare for and argue a motion in limine regarding the victim's ACCESS and Rescue Mission records. In support thereof, he states the following:

> Petitioner's 6th Amendment Rights of the U.S. Constitution [were] violated when counsel did not prepare to effectively argue that decedent's Access and Rescue Mission records were admissible. Experienced and prepared counsel would have found multiple laws that would have helped him have the motion in limine granted, however, he opted for an argument that could not win grounded on decedent's funds. Failure to have this evidence admitted at trial prevented evidence that demonstrates petitioner's claim of self-defense.

(Pet. ¶ 12.) Petitioner raised this claim in his PCRA petition, arguing that the records contained evidence of the victim's "recent history of psychiatric troubles," which petitioner argues is relevant to his self-defense claim. The Superior Court found these arguments "unavailing," stating "[a]t best, [petitioner] has established that [the victim] filled out a questionnaire

indicating he was addicted to heroin. Rojas, 2017 WL 1534919, at *5. At the hearing, counsel also indicated the questionnaire may have stated that [the victim] suffered from suicidal ideation and depression." Id. The court found the information to be irrelevant to petitioner's self-defense claim, as it "would not establish that [the victim] was more likely to have attacked [petitioner]." Id.

As discussed supra, "[d]iscretionary rulings regarding the admissibility of evidence are still best left to the province of the trial judge." Yohn, 76 F.3d at 525. This court finds no error in the Superior Court's affirmation of the trial judge's evidentiary ruling. Trial counsel, therefore, is not ineffective for failing to raise a meritless claim. Petitioner has failed to establish that the state courts' adjudications of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or 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. Petitioner's fourth habeas claim should be denied.

Claim No. 5 [Whether] Pennsylvania state courts unreasonably determined trial counsel was not ineffective in enlisting an expert toxicologist; where PCRA counsel also did not enlist expert and abandoned claim.

Petitioner's next claim is that counsel was ineffective for failing to enlist an expert toxicology witness. In support of his argument, petitioner states:

> Petitioner's 6th Amendment rights of the U.S. Constitution w[ere] violated when trial counsel did not enlist an expert toxicologist or consult with one in order to introduce evidence of decedent's cocaine and meth[a]done use at the time of [the] incident as well as decedent's mental health and his failure to take his psychotropic medications. As trial counsel attempted to no avail to introduce this evidence through a pathologist (not qualified) instead of consulting with the appropriate expert. PCRA counsel did not seek an opinion to raise claim.

(Pet. ¶ 12.)

The PCRA court denied this claim, finding that petitioner "failed to meet the standard to establish ineffective assistance" in failing to call a witness under Pennsylvania's five-part test. Rojas, 2017 WL 1534919, at *5. The test requires petitioner to establish:

> (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Sneed, 45 A.3d 1096, 1109 (Pa. 2012) (citations omitted). The PCRA court found that petitioner "ha[d] not provided the name of the toxicologist he would have called or any evidence that the toxicologist would have testified on his behalf at trial," nor had he "detailed any medical or scientific testimony beyond a bald assertion that a toxicologist 'could have proven' that cocaine would have made [the victim] aggressive." Rojas, 2017 WL 1534919, at *5.

This court agrees with the state courts that petitioner has not established ineffective assistance of counsel. Though the state court did not apply the test set forth in Strickland, the Third Circuit has found that "the Pennsylvania test is not contrary to the test set forth in Strickland. The five requirements set forth by the Pennsylvania Supreme Court would necessarily need to be shown to prevail under Strickland on a claim of this nature." Moore, 489 F. App'x at 626. Thus, petitioner cannot establish that the decision of the state courts was contrary to or an unreasonable application of federal law. See 28 U.S.C. § 2254(d)(1). Nor was the determination an unreasonable application of the facts in light of the evidence presented; petitioner has neither identified a witness who could have testified on his behalf at any stage of

these proceedings, nor whether the witness would have given the opinion that petition advances. As a result, petitioner cannot establish the criteria for ineffective assistance of counsel for failure to call a witness.

To the extent petitioner alleges PCRA counsel (as opposed to trial counsel) was ineffective for failing to pursue an expert toxicologist or by failing to seek an opinion from such an expert, this claim is not cognizable in a federal habeas corpus proceeding. See 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 [§ 2254]."). In addition, such a claim would be procedurally defaulted. On PCRA appeal, the Superior Court of Pennsylvania concluded that petitioner was not entitled to relief on claims that PCRA counsel was ineffective, as the claim was presented for the first time on appeal, rather than presented to the PCRA court as required by Pennsylvania law. Rojas, 2017 WL 1534919, at *6. For all of these reasons, petitioner's fifth claim must be denied.

Claim No. 6 [Whether] Pennsylvania state courts unreasonably determined trial, direct [appeal] and PCRA counsel were not ineffective in failing to challenge legality of sentence.

In his sixth claim, petitioner asserts that his trial, direct appeal, and PCRA counsel were ineffective for "fail[ing] to challenge the legality of petitioner's sentence and properly raise issue on appeal." (Pet. ¶ 12.) He further asserts that the Superior Court unreasonably determined that he was not entitled to raise the issue for the first time on appeal. Id. Respondent counters that the claim is procedurally defaulted. (Resp. at 17.)

On PCRA appeal, the Pennsylvania Superior Court concluded that this claim was waived. The appellate court noted that petitioner did not raise the issue in his PCRA petition or

in his 1925(b) statement, and accordingly determined that the claim was waived and no relief was due. Rojas, 2017 WL 1534919, at *6.

Case law has held that Pennsylvania procedural waiver rules are adequate and independent state rules for the purposes of procedural default. Troutman v. Overmyer, 2015 WL 1808640, at *12 (E.D. Pa. Apr. 21, 2015) (collecting cases) (approving and adopting Report and Recommendation dated Feb. 11, 2015). This claim is unexhausted and, since the time to raise it in a new PCRA petition has passed, the claim now is procedurally defaulted. Petitioner has not demonstrated cause and prejudice or a miscarriage of justice excusing this default. Petitioner's sixth claim must be denied.

E. Motion for Discovery

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Rather, discovery in a habeas case proceeds according to Rule 6(a) of the Rules Governing § 2254 Cases. That provision states: "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." A habeas petitioner is not entitled to discovery as a matter of due course; but "only upon a showing of 'good cause' and even then, the scope of discovery is subject to the district court's sound discretion." Williams v. Beard, 637 F.3d 195, 209 (3d Cir. 2011), cert. denied, 567 U.S. 952 (2012). A habeas petitioner may satisfy the "good cause" requirement by setting forth specific factual allegations which, if fully developed, would entitle him to habeas relief. Id. The burden rests on the petitioner to demonstrate that the requested information is pertinent and that there is

good cause for its production. Id. The grant or denial of a request for discovery is within the discretion of the district court. Id.

Petitioner seeks additional discovery in the form of DNA testing a knife that was found in the victim's pocket and a lighter that was recovered near the scene of the altercation. (Doc. 4, at 1.) Petitioner contends that this evidence will "prove that [petitioner] acted in self-defense" and "show that [petitioner] had sustained multiple lacerations to his head from the decedent during the decedent's attempt to rob the defendant," therefore establishing that petitioner was actually innocent of the murder charge. Id.

Petitioner has not set forth specific factual allegations which, if fully developed, would entitle him to habeas relief. The state court in the PCRA proceeding denied this identical request for DNA testing in its Order dated December 3, 2013. See Rojas, No. CP-39-CR-2191-2009 (C.P. Lehigh Dec. 12, 2013) (denying petitioner's motion for post-conviction DNA testing) (Banach, J.). The court found that petitioner was unable to establish that there is a reasonable possibility that the testing would produce exculpatory evidence to establish petitioner's "actual innocence" of the offense for which he was convicted. Id. Specifically, the court noted that at trial, evidence was presented that petitioner had a cut to his head and that he reported to police that the victim had assaulted him. Id. at n.3. The petitioner, however, told police that he did not see the victim with a weapon and that he did not receive any stab wounds. Id. The PCRA court further found that "the victim's folding knife was found in the victim's pocket, folded." Id. Based on these facts, the PCRA court concluded that "potential evidence of [petitioner's] blood being discovered on a particular item (in this case,

the victim's knife and a lighter found at the crime scene) would not exonerate [petitioner] or establish that [petitioner] acted in self-defense." Id.

This court agrees with the state court that petitioner has not demonstrated that DNA testing of the knife and lighter would result in a finding that petitioner is entitled to habeas corpus relief. Petitioner's argument that the requested discovery will exonerate him amounts to pure speculation. "[I]t is not enough for a petitioner to speculate that the discovery he seeks might yield information that would support one of his claims, or that it would give support to a new claim." Lopez v. Beard, 2017 WL 1293389, at *2 (E.D. Pa. Mar. 3, 2017). See also Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991) ("[B]ald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or to require an evidentiary hearing." (citations omitted)); Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir. 1994) ("[H]abeas corpus is not a general form of relief for those who seek to explore their case in search of its existence." (citation omitted)). Here, petitioner's allegations supporting his request for discovery do not satisfy the "good cause" standard of Rule 6(a) of the Rules Governing § 2254 Cases, which requires "setting forth specific factual allegations which, if fully developed, would entitle him or her to the writ." Han Tak Lee v. Glunt, 667 F.3d 397, 404 (3d Cir. 2012). Thus, petitioner's motion for discovery must be denied.

F. Motion for Appointment of Counsel

Petitioner also has filed a Motion for Appointment of Counsel (Doc. No. 6). There is no constitutional right to counsel in a federal habeas corpus proceeding. See Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991), cert. denied, 503 U.S. 988 (1992). Appointment of counsel in a habeas proceeding is mandatory only if the district court determines that an

evidentiary hearing is required, and the petitioner qualifies to have counsel appointed under 18 U.S.C. § 3006A. See Rule 8(c) of the Rules Governing § 2254. Otherwise, a court may exercise its discretion in appointing counsel to represent a habeas petitioner, who is "financially eligible" under the statute, if the court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2); Reese, 946 F.2d at 263-64.

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

Here, the record was sufficient for this court to determine that petitioner's claims have no merit. Counsel will provide no benefit to petitioner or the court, and the interests of justice do not require appointment of counsel. Petitioner's motion for appointment of counsel should be denied.

III. CONCLUSION

Accordingly, the court makes the following:

RECOMMENDATION

AND NOW, this 21st day of November, 2017, the court respectfully recommends that petitioner's claims be **DENIED**. It is further recommended that petitioner's Motion for

Discovery (Doc. No. 4) and Motion for Appointment of Counsel (Doc. No. 6) be **DENIED**.

Finally, it is recommended that no certificate of appealability ("COA") be granted.[10]

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

BY THE COURT:

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

[10] The COA should be denied because petitioner has not shown that reasonable jurists could debate whether his petition should be resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).