UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1724

EARL C. HANDFIELD, II,
Appellant

v.

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

(D.C. Civ. No. 2-17-cv-01634)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, SCIRICA*, VANASKIE* *, 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

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*As to panel rehearing only.
** The Honorable Thomas I. Vanaskie, a member of the merits panel that considered this matter, retired from the Court on January 1, 2019. The request for panel rehearing has been submitted to the remaining members of the merits panel and the request for rehearing en banc submitted to all active members of the Court who are not recused.

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/Anthony J. Scirica
Circuit Judge

Dated: January 10, 2019
PDB/cc: Earl C. Handfield, II
Gerald P. Morano, Esq.

August 2, 2018

ALD-278

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-1724**

EARL HANDFIELD, II, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI; ET AL.

(E.D. Pa. Civ. No. 2-17-cv-01634)

Present: MCKEE, VANASKIE, and SCIRICA, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

The application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). Jurists of reason could not debate the District Court's rejection of Appellant's claims concerning use immunity, see Kastigar v. United States, 406 U.S. 441, 460 (1972), his attorney's conflict of interest, see Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980), a violation of Brady v. Maryland, 373 U.S. 83 (1963), see United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991), ineffective assistance of counsel, see Strickland v. Washington, 466 U.S. 668, 687, 694 (1984), and violations of the Confrontation Clause, see Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986); Adamson v. Cathel, 633 F.3d 248, 257-59 & n.8 (3d Cir. 2011). Appellant's remaining claims of trial counsel ineffectiveness are barred due to a procedural default, and he has not shown cause and prejudice or a fundamental miscarriage of justice sufficient to overcome the default. Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Martinez v. Ryan, 566 U.S. 1, 14 (2012) ("To 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."). Finally, to the extent Appellant attempted to raise a freestanding claim of actual innocence in the District Court based on an affidavit of David Johnson, jurists of reason would not debate that he did not meet the "extraordinarily high" threshold of such a potential claim. See Herrera v. Collins, 506 U.S. 390, 417 (1993).

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: October 15, 2018
PDB/cc: Earl C. Handfield, II
Gerald P. Morano, Esq.

A True Copy:

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

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

EARL C. HANDFIELD II,

Petitioner,

v.

MARK GARMAN, et al,

Respondents.

CIVIL ACTION
NO. 17-1634

FILED MAR 14 2018

ORDER

AND NOW, this 14th day of March, 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. Rueter, and the objections filed thereto, it is hereby **ORDERED** as follows:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for writ of habeas corpus is **DENIED**;
3. Petitioner's Motions for Appointment of Counsel (Docket Nos. 2 and 5) are **DENIED**;
4. Petitioner's Request for Leave to Amend (Docket No. 11) is **DENIED**;
5. Petitioner's Supplemental Petition pursuant to Fed. R. Civ. P. 15(c)(2) (Docket No. 12) is **DENIED**;
6. There is no probable cause to issue a certificate of appealability; and

7. The Clerk of Court shall mark this case closed.

BY THE COURT:

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

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

EARL C. HANDFIELD, II	:	CIVIL ACTION
v.	:	
MARK GARMAN, et al.	:	NO. 17-1634

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

October 11, 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 in the State Correctional Institution located in Bellefonte, Pennsylvania. For the reasons stated below, the court recommends that the petition be denied.

I. BACKGROUND

On June 16, 2009, a jury sitting in the Court of Common Pleas of Chester County, Pennsylvania, found petitioner guilty of first-degree murder and possessing instruments of crime ("PIC") in connection with the shooting death of Charles Jennings on October 19, 2005 (No. CP-15-CR-4908-2007 (C.P. Chester)). On that same day, the Honorable Anthony A. Sarcione sentenced petitioner to life imprisonment for the first-degree murder conviction, and a concurrent term of three to thirty-six months' imprisonment for the PIC conviction. Petitioner filed an appeal to the Superior Court of Pennsylvania. In a decision dated December 4, 2011, the Superior Court of Pennsylvania affirmed the judgment of sentence. Commonwealth v. Handfield, 34 A.3d 187 (Pa. Super. Ct. 2011). On October 1, 2012, the Supreme Court of Pennsylvania denied petitioner's petition for review. Commonwealth v. Handfield, 54 A.3d 347 (Pa. 2012) (Table).

ENTERED
OCT 11 2017
CLERK OF COURT

On September 9, 2013, petitioner filed a pro se petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq. The PCRA court appointed counsel, who filed an amended PCRA petition on August 7, 2014. On July 28, 2015, the PCRA court denied the amended PCRA petition, finding that none of the issues raised therein had merit. Commonwealth v. Handfield, No. CP-15-CR-4908-2007 (C.P. Chester July 28, 2015). Petitioner filed an appeal with the Superior Court of Pennsylvania. The PCRA court issued a written decision dated October 21, 2015, addressing petitioner's appeal from the court's denial of the PCRA petition. On July 20, 2016, the appellate court affirmed the denial of the PCRA petition. Commonwealth v. Handfield, 2016 WL 5266564 (Pa. Super. Ct. July 20, 2016). Petitioner filed a petition for reargument on August 1, 2016, which was denied on September 29, 2016. Petitioner's request for review in the Supreme Court of Pennsylvania was denied on March 28, 2017. Commonwealth v. Handfield, 2017 WL 1160841 (Pa. Mar. 28, 2017).

Petitioner executed the instant habeas petition on April 6, 2017, and filed it in this court on April 10, 2017, see Doc. No. 1, with an accompanying memorandum of law ("Pet'r's Mem. of Law"). Petitioner raises nine issues:

1. State court unreasonably applied "derivative use immunity" law and unreasonably determined facts: 5th Amendment violation

2. Trial counsel was ineffective for not using impeaching and exculpatory evidence in D. Johnson's first statement to investigators

3. State court unreasonably applied law governing conflict of interest and unreasonably determined the facts

4. State court . . . unreasonably applied Brady law and unreasonably determined the facts

5. State court unreasonably applied Strickland v. Washington where trial counsel failed to investigate exculpatory witness, Willie Suber, and unreasonably determined the facts presented

6. State court unreasonably applied law governing the Confrontation Clause/ inadmissible evidence standard when it permitted hearsay from A. Shabazz, and unreasonably determined the facts presented

7. Trial counsel was ineffective where he used A. Shabazz as a witness whom [sic] introduced prejudicial testimony

8. State court unreasonably applied law governing Confrontation Clause regarding petitioner's right to confront D. Johnson on his forgery case

9. Trial counsel was ineffective for failing to object to [the] trial court's erroneous jury instruction that relieved [the] Commonwealth of its burden of proof regarding defense witnesses, Tyrone Hill, Josh McMillan, and Rhalik Gore

(Petition ¶ 12.) Respondents filed a 141-page response on July 11, 2017, urging that the claims are meritless and/or procedurally defaulted, and the petition for a writ of habeas corpus should be denied ("Resp.," Doc. No. 9). Petitioner filed a reply on August 2, 2017 ("Pet'r's Reply," Doc. No. 10).

II. DISCUSSION

A. Habeas Corpus Standards

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

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

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

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

incorrectly." Williams, 529 U.S. at 411. Relief is appropriate only where the state court decision also is objectively unreasonable. Id. 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. See 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 Rice v. Collins, 546 U.S. 333, 338-39 (2006) (citations omitted) ("State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption 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

The Commonwealth asserts that some of petitioner's habeas claims are unexhausted and procedurally defaulted. It is well established that a prisoner must present all of his claims to a state's intermediate court, as well as to its supreme court, before a district court may entertain a federal petition for habeas corpus. 28 U.S.C. § 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).[1] "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). Petitioner must show that "the claim brought in federal court [is] the substantial equivalent of that

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

presented to the state courts. Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts." Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. 1989) (citations omitted), cert. denied, 493 U.S. 1036 (1990). See also Morales v. Vaughn, 619 F.App'x 127, 130 (3d Cir. 2015) (same) (not precedential).

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, 9 (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, see Wenger v. Frank, 266 F.3d 218, 223-24 (3d Cir. 2001); or, when an issue is properly asserted in the state system but not addressed on the merits because of an independent and adequate state procedural rule, see McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

Rolan, 680 F.3d at 317. 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 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]

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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 [is] consistent with other decisions." Boyd v. Waymart, 579 F.3d 330, 368 (3d Cir. 2009) (citation omitted). Petitioner can demonstrate cause for 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. Caswell, 953 F.2d at 862. The cause must be "something that cannot fairly be attributed to [the

Procedural default may be overcome by application of the Supreme Court's holding in Martinez, in which the Court 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. Martinez, 566 U.S. at 8. The Supreme Court held that in states like Pennsylvania, where state law requires that 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." 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 '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, codified at 28 U.S.C. § 2254(i), that the ineffectiveness of counsel during a PCRA proceeding does not provide a basis for release from custody.

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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) (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).

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 (citing 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) (The prejudice requirement of Strickland requires a "'substantial,' not just 'conceivable,' likelihood of a different result."). 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). 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 88-89 (citations omitted). See also Woods, 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 Titlow, 134 S. Ct. at 13).

D. Petitioner's Claims

Claim No. 1 State court unreasonably applied "derivative use immunity" law and unreasonably determined facts: 5th Amendment violation

In support of this claim, petitioner states as follows:

> The state court unreasonably applied [clearly] established federal law in Kastigar v. U.S. where [the] Commonwealth failed to meet its burden of proving it did not make derivative use of Handfield's immunized testimony, under Section 2254(d)(1) and unreasonably determined the facts presented where [the] Commonwealth failed to use clear and convincing evidence derived [from] legitimate and wholly independent sources to indict, under Section 2254(d)(2).

(Pet'r's Mem. of Law at 21.) Petitioner asserts that because he "was prosecuted for the crime which he was compelled to testify about, the Commonwealth had the burden of proving, by clear and convincing evidence, that the subsequent prosecution was wholly independent of his immunised [sic] testimony." Id. at 21-22 (citing Kastigar v. United States, 406 U.S. 441 (1972); Commonwealth v. Swinehart, 541 Pa. 500 (1995)). Respondents summarized petitioner's argument as follows:

> Petitioner alleges that he was compelled to testify before [a] grand jury as a witness with Derivative [U]se Immunity[,] then he maintains that he was indicted for the same crime he was ordered to testify about before the grand jury. Further, Petitioner alleges that the Commonwealth failed to demonstrate that it did not use his immunized testimony as a lead to target petitioner in the investigation. Petitioner concludes that the Commonwealth failed to prove that it obtained an independent source which led to his arrest and his conviction.

(Resp. at 28.)

In the instant matter, petitioner's convictions arose out of the shooting murder of Charles "Corey" Jennings on October 19, 2005. During the investigation into the victim's death, the Commonwealth subpoenaed petitioner on October 26, 2006, to testify before the grand jury. Petitioner invoked his Fifth Amendment privilege and refused to testify. On November 16, 2006, the Commonwealth obtained an order compelling petitioner to appear before the grand jury under a grant of immunity. On that same day, while testifying before the grand jury about the death of Mr. Jennings, petitioner implicated himself in the murder. Commonwealth v. Handfield, 34 A.3d 187, 188-89 (Pa. Super. Ct. Dec. 14, 2011). Petitioner was arrested approximately one year later on November 24, 2007, for the murder of Mr. Jennings. Petitioner's counsel filed a motion seeking to dismiss the prosecution under Kastigar. The trial court held numerous evidentiary hearings on the motion to dismiss and, on December 5, 2008, the trial court denied petitioner's motion to dismiss. Commonwealth v. Handfield, 34 A.3d at 201. The Superior Court of Pennsylvania affirmed the trial court's decision to deny the motion to dismiss, and recounted in detail the evidence presented at the hearings. Id. at 189-202. The Superior Court of Pennsylvania concluded as follows:

> [W]e agree with the trial court that the Commonwealth proved, by clear and convincing evidence, the prosecution of Appellant arose wholly from independent sources. That is, the Commonwealth proved during the hearing on Appellant's motion to dismiss that the evidence it proposed to use was derived from a legitimate source wholly independent of Appellant's compelled, immunized grand jury testimony. For instance, the record reveals that, prior to Appellant offering his immunized grand jury testimony on November 16, 2006, the investigating task force had information Appellant was criminally involved in the homicide. Specifically, Detective Quinn testified that, in August of 2006, a witness told the police Appellant had Mr. Jennings[] killed, and Detective Vito made a notation from the task force meeting acknowledging Appellant may have contracted Mr.

[David] Johnson to kill Mr. Jennings in retaliation for the theft of a gold chain. On September 15, 2006, Ms. Beckett told the police her son had "heard on the streets" that Appellant "may have had something to do with the death of Mr. Jennings." N.T. 3/12/08 at 153. However, the police also had information from four individuals that Mr. Johnson was bragging about having committed the crime, and in October of 2006, Mr. [Wendell] Fields told the police Appellant had told him that Mr. Johnson shot Mr. Jennings in his presence. Thus, although the Commonwealth suspected Appellant was somehow involved in the murder of Mr. Jennings, they believed, largely based on Mr. Fields' statement, that Appellant was a witness and Mr. Johnson was the shooter. Therefore, the Commonwealth compelled Appellant's testimony before the investigating grand jury.

Subsequent to Appellant appearing before the grand jury, in what the police characterized as an ongoing murder investigation, on approximately February 8, 2007, Ms. [Ataya] Shabazz telephoned the police indicating Mr. Johnson wanted to provide them with information. Therefore, in February of 2007, Detective Dykes met with Mr. Johnson, who indicated he would not make a full statement without consulting with his attorney; however, he stated the death of Mr. Jennings was "all over a stupid chain." N.T. 3/12/08 at 156. Detective Dykes met with Mr. Johnson later that month, and Mr. Johnson, for the first time, provided a full, detailed account of what transpired on the night Mr. Jennings was murdered. Specifically, he recounted that Appellant shot Mr. Jennings, who attempted to flee. Mr. Johnson told the police he was coming forward because, while he was in prison on unrelated charges, a corrections officer told him that he was being blamed for the shooting.

Mr. Johnson's detailed February, 2007 statement led to Ms. Shabazz wearing a body wire, and in February and March of 2007, the police recorded conversations she had with Ms. [Adrienne] Beckett. In April of 2007, the police confronted Ms. Beckett with statements she had made to Ms. Shabazz, and Ms. Beckett then made a full statement indicating that, a few hours after the murder, Appellant told her he "did what [he] had to do," N.T. 3/12/08 at 167, and she recounted how she and Appellant drove to Maryland, which ultimately led to Appellant dumping items in a plastic bag into a dumpster behind a strip mall.

On April 7, 2007, Detective Dykes watched a video of Mr. Jennings' funeral and he observed as Mr. [Duron] Peoples placed Appellant's gold chain in the coffin. Mr. Jennings' coffin was exhumed so that the gold chain could be removed.

In October of 2007, Mr. Allen told the detective that, while he was in prison, Mr. Fields told him Appellant shot Mr. Jennings and he was attempting to place the blame on Mr. Johnson. Following Mr. Allen making his statement, Mr. Buchanan told the police that, after the homicide, Mr. Fields told him Appellant had killed

> Mr. Jennings. Thus, based on this investigation, the police concluded Appellant, and not Mr. Johnson, was the person who had shot Mr. Jennings, and therefore, the police charged Appellant with the murder in November of 2007.
>
> Based on the aforementioned, we conclude the trial court did not err in finding the Commonwealth met its burden of proving, by clear and convincing evidence, that the evidence upon which Appellant's subsequent prosecution was brought arose wholly from legitimate, independent sources.

Id. at 204-05. The appellate court further concluded that the Commonwealth took appropriate cautionary steps to insulate those individuals who were aware of petitioner's immunized testimony before the grand jury. The court explained as follows:

> First, we find the Commonwealth took successful cautionary measures to insulate those members of the district attorney's office and law enforcement officers who were aware of Appellant's immunized grand jury testimony from those who were not so aware. That is, there is no question DA Carroll, Deputy DA Kelly, Deputy DA Yen, ADA Hobart, and Detective Campbell never revealed to other prosecutors or law enforcement officers what had transpired before the grand jury on November 16, 2006. Additionally, out of an abundance of caution, these people were removed from and did not participate in the subsequent investigation of Mr. Jennings' murder. Law enforcement officers, who continued with the ongoing investigation, and the newly appointed prosecutor, were not informed of what had transpired before the grand jury and, in fact, no reason was offered as to why communication with certain individuals about Mr. Jennings['] murder was being prohibited.
>
> In any event, to the extent Appellant correctly argues prosecutors and officers logically assumed Appellant had made inculpatory statements to the grand jury under the grant of immunity, this does not lead to the conclusion that the Commonwealth improperly used Appellant's compelled testimony as an "investigatory lead" or used any evidence obtained by focusing the investigation on Appellant as a result of his compelled disclosures. See Kastigar, supra. It is not conclusive that prosecutors and law enforcement officers assumed, or even knew, Appellant had offered inculpatory immunized grand jury testimony. The issue is what they did with their knowledge or assumptions, i.e., did they violate Kastigar's prohibition from "using the compelled testimony in any respect." Id. at 459 . . . . Appellant's suggestion that, once he offered immunized grand jury testimony he could not later be prosecuted for the crime because prosecutors and officers assumed he had implicated himself under the grant of immunity is tantamount to an argument for transactional immunity, which the United States

> and Pennsylvania Supreme Court have already rejected. Kastigar, supra; Swinehart, supra.
>
> Simply put, as indicated supra, the Commonwealth proved the prosecutors and law enforcement officers did not use Appellant's immunized grand jury testimony as an investigatory lead or focus the investigation on him as a result of his compelled disclosures. An examination of the investigation as it developed reveals the Commonwealth met its burden of proving, by clear and convincing evidence, that the evidence upon which Appellant's subsequent prosecution was brought arose wholly from legitimate, independent sources, and thus, the trial court did not abuse its discretion in denying Appellant's motion to dismiss the prosecution.

Id. at 206-07 (footnote omitted).

Generally, "[t]he determination of whether petitioner's conviction was obtained by use of immunized testimony or evidence derived therefrom is a mixed question of law and fact." Sklar v. Ryan, 752 F. Supp. 1252, 1260 (E.D. Pa. 1990) (citing In re Grand Jury Proceedings, 497 F. Supp. 979, 985 (E.D. Pa. 1980)), aff'd, 937 F.2d 599 (1991). The questions of fact that underlie this ultimate conclusion are governed by the statutory presumption of correctness of state court factual findings found in 28 U.S.C. § 2254(e)(1), which provides that:

> 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.

See Sumner v. Mata, 455 U.S. 591, 597-98 (1982) (when issue before a federal habeas court is a mixed question of law and fact, underlying questions of fact were governed by the statutory presumption of correctness of state court findings); Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001) (same); see also Combs v. Coyle, 205 F.3d 269, 277 (6th Cir.) ("The presumption of correctness accorded to state court findings 'only applies to basic, primary facts, and not to

mixed questions of law and fact,' and it 'applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility.'" (citing Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997), cert. denied, 523 U.S. 1132 (1998))), cert. denied, 531 U.S. 1035 (2000).

With this deferential standard in mind, this court has reviewed the factual findings of the state courts. The state court credited the testimony of the detectives and prosecutors regarding the steps they took to insulate petitioner's immunized testimony from use by the new investigatory and prosecution team. Petitioner has not shown that the state court's findings were erroneous. The steps taken by the prosecution were deliberate and numerous, and proved by clear and convincing evidence that the evidence upon which petitioner's subsequent prosecution was brought arose wholly from legitimate, independent sources. The state court faithfully applied the principles in the Kastigar decision and its adjudication of petitioner's Kastigar claim did not result in a decision that was contrary to, or involved an unreasonable determination of, clearly established Federal law. Further, the state court's decision was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's first habeas claim should be denied.

Claim No. 2 Trial counsel was ineffective for not using impeaching and exculpatory evidence in D. Johnson's first statement to investigators

In support of this claim, petitioner states, in part, as follows:

> The Commonwealth's Chief witness at Handfield's trial was David Johnson, the only witness [] alleged to being present when Handfield shot Jennings. (N.T. Trial p. 294-301). [] Johnson provided several different statements to authorities throughout the investigation, and in all of those versions he said that he was present when Handfield did the shooting – except for one. [] That one statement

> was Johnson's first account of the crime given on 9-7-06, wherein he stated that he did not see Handfield nor Jennings the night Jennings was killed. Johnson provided his whereabouts and that his family would be able to verify that he was at home . . . . Though trial counsel exposed to the jury the fact that Johnson changed his statement multiple times leading up to the trial in 2009, counsel failed to impeach him specifically with his original 9-7-06 statement. [] Not only did trial counsel fail to use this exculpatory evidence; he misled the jury to falsely believe that Johnson had stated all along that Handfield committed the crime. . . . Since Johnson was obviously the most important witness at trial and trial counsel had possession of powerful impeachment evidence from Johnson's own mouth that supported Handfield's innocence which was kept from the jury – demonstrates that there was no reasonable basis for counsel's action.
>
> [] Trial counsel had the material evidence to demonstrate to the jury that the original statement was more reliable than Johnson's trial testimony because it was provided before he began negotiating with the Commonwealth in February 2007 to serve his own interests. Furthermore, this omitted evidence would not have been cumulative to any testimony offered at trial.

(Pet'r's Mem. of Law at 39-40, 42.) Petitioner also asserts that he suffered prejudice as a result of trial counsel's ineffective assistance. See id. at 40-42. Petitioner attached to his Memorandum of Law a copy of Mr. Johnson's September 6, 2006, statement to the police as well as an Affidavit from Mr. Johnson dated December 4, 2014, in which the affiant recants his testimony at petitioner's trial and states that he testified untruthfully at trial "for a plea deal on my pending charges." (Pet'r's Mem. of Law, Exs. A and B.)

Petitioner admits that this claim was not raised in the state courts and now is procedurally defaulted. However, petitioner argues that the default of this claim should be excused under Martinez, because this claim has "some merit" and PCRA counsel was ineffective in failing to raise this claim of trial counsel ineffectiveness. See Pet'r's Mem. of Law at 43.

Petitioner's second claim was not raised in the state courts and, since the time to do so has passed, it now is procedurally defaulted. The only "cause" cited by petitioner to excuse

this procedural default is that PCRA counsel was ineffective for failing to raise this claim of trial counsel ineffectiveness in petitioner's PCRA petition. Respondents urge without elaboration that the claim lacks merit and direct the court to review the trial testimony of Mr. Johnson. (Resp. at 72.) This court will consider whether the Supreme Court's decision in Martinez excuses petitioner's procedural default of this claim. As detailed above, the Martinez Court concluded 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." Martinez, 566 U.S. at 14. As the Third Circuit Court of Appeals recently explained, "whether a claim is '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)).

Review of Mr. Johnson's trial testimony reveals that his September 2006 statement to police was not addressed by either party. However, Mr. Johnson was subjected to vigorous direct, cross, re-direct, re-cross, re-re-direct and re-re-cross examination during which his negotiations with prosecutors were examined extensively. (N.T. 6/9/09, at 293-413.) On cross-examination, Mr. Johnson admitted that initially he was not cooperative with investigators after the instant homicide occurred. Id. at 326. Mr. Johnson further testified that in 2006 he was incarcerated on attempted homicide and possession of a firearm charges in another case, and that his counsel worked with the prosecution to have the charges reduced to aggravated assault in exchange for cooperating in the investigation into the Jennings murder. Id. at 328. In addition, the five-year mandatory minimum sentence and gun enhancement were waived in exchange for Mr. Johnson's cooperation. Id. at 329-30. Mr. Johnson also testified on cross-examination that

after he "agreed to cooperate with the Commonwealth on this case, at some point [he was] released on bail." Id. at 333. Defense counsel also questioned Mr. Johnson about his testimony in favor of the prosecution in a federal drug trial. Id. at 350. Mr. Johnson agreed with the following statement by defense counsel: "They told you if you didn't testify, you would get charged. Therefore, you testified and ultimately were not charged." Id. at 351. See also id. at 372 (Mr. Johnson affirmed that after he "agreed to cooperate and after [he] gave statements to the police against [petitioner], the District Attorney . . . got you released for Christmas [in 2007]."); 380-82 (Mr. Johnson acknowledged that he authorized his attorney to negotiate "what was best" in exchange for his testimony against petitioner.).

On re-direct examination, the prosecutor and Mr. Johnson engaged in the following colloquy:

Q. (Prosecutor)	You have an agreement to provide truthful testimony with the Commonwealth, correct?
A. (Mr. Johnson)	Yes.
Q.	And in return for that truthful testimony, what do you expect to receive?
A.	That my charges was [sic] dropped down from attempted homicide to aggravated assault. And the gun charges, that enhancement was waived.

Id. at 397-98.

Christian Hoey, an attorney who represented Mr. Johnson in a variety of criminal matters, also testified at petitioner's trial. Id. at 413-39. Mr. Hoey testified that an agreement was reached between Mr. Johnson and the District Attorney's Office in exchange for his

cooperation in petitioner's homicide case. Mr. Hoey testified that the following agreement was reached between the prosecution and Mr. Johnson:

> What eventually occurred was the drug case was withdrawn. That was based exclusively on the idea that the search of Mr. Johnson was illegal. We provided some case law and other support legally to the District Attorney's office to justify our position and request to discharge that case.
>
> What was left . . . was the Hawkins shooting in which Mr. Hawkins had testified at a preliminary hearing and offered testimony which held the case over for further action in this courthouse.
>
> At that point the agreement that was reached between the Office of the District Attorney and myself on behalf of Mr. Johnson was that the five-year mandatory minimum that applied to the shooting would be waived in exchange for his cooperation in this case. And that's . . . what occurred, I should note, contingent upon him testifying truthfully. It meant, in other words, he was required to do a lot of things under the agreement, testify truthfully at the preliminary hearing in District Court, offer credible, truthful statements to the detectives on any occasion that they requested to meet with him and then, of course, to testify truthfully at trial before a jury.

Id. at 418-19. Mr. Hoey emphasized that "there was no agreement, that nothing with respect to the drug case or the discharge of that matter was contingent upon [Mr. Johnson] doing anything for the Commonwealth in the murder case." Id. at 421. Defense counsel asked Mr. Hoey the following question on cross-examination: "[I]s it fair to say Mr. Johnson was only willing to cooperate if he got what he wanted?" Mr. Hoey replied as follows:

> No, that's not. In fact, Mr. Johnson really never said anything different to the District Attorney or the detectives after the February 12th, 2007 proffer which, of course, pre-dated the February 13th, '07 and May 10th, '07 letters. So it wasn't as if Mr. Johnson then came forward after I got the minimum mandatory waived and offered some new story to the detectives. He offered them, in essence, an identical rendition of the facts. So there wasn't really anything that changed as a result of the benefit conferred upon my client.

Id. at 435-36.

Because petitioner's underlying claim of trial counsel ineffectiveness lacks at least some merit, Martinez does not apply to excuse the procedural default of petitioner's second habeas claim. As such, this claim cannot be considered by the court herein and should be denied.

Claim No. 3 State court unreasonably applied law governing conflict of interest and unreasonably determined the facts

In support of this claim, petitioner states, in part, as follows:

> The state court unreasonably applied clearly established federal law in Cuyler v. Sullivan where trial counsel engaged in an intolerable conflict of interest while dually representing Handfield and Duron Peoples under 28 U.S.C. section 2254(d)(1) and [un]reasonably determined the facts presented under section 2254(d)(2).

(Pet'r's Mem. of Law at 43.) Petitioner asserts that he was prejudiced by trial counsel's conflict of interest in that counsel failed to call Mr. Peoples as a witness at his trial. See Pet'r's Mem. of Law at 43-49. Attached to petitioner's Memorandum of Law are two affidavits from Duron Peoples, one dated November 10, 2009 (the "November Peoples Affidavit") and the second dated December 31, 2009 (the "December Peoples Affidavit"). See Pet'r's Mem. of Law Ex. D. In the November Peoples Affidavit, Mr. Peoples stated that he was willing to testify at petitioner's trial and would have testified, inter alia, that David Johnson confessed to killing Mr. Jennings and that Mr. Peoples never told anyone that Mr. Jennings died over a stolen chain. In the December Peoples Affidavit, Mr. Peoples stated, inter alia, that Mr. Johnson told Mr. Peoples that he, Mr. Johnson, killed Mr. Jennings. Mr. Peoples further stated that he told his counsel, who also was petitioner's trial counsel, that Mr. Johnson confessed to the murder.

Although Mr. Johnson's September 7, 2006, statement was never addressed during petitioner's trial, Mr. Johnson and his attorney were subjected to vigorous examination regarding promises Mr. Johnson received in exchange for his testimony against petitioner. During the trial, the fact that Mr. Johnson originally did not cooperate with the investigation was revealed. The promises and benefits Mr. Johnson received in exchange for his testimony were addressed in detail during petitioner's trial. The jury knew of Mr. Johnson's prior refusal to cooperate and his change of mind in exchange for favorable treatment in his criminal cases, when it considered the evidence in petitioner's trial and rendered its verdict.[3]

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[3] Petitioner attached to his Memorandum of Law an Affidavit of Mr. Johnson recanting his trial testimony. This could be construed as a claim of actual innocence to excuse his procedural default of this claim. Petitioner's claim of actual innocence does not excuse the procedural default of this habeas claim. A credible claim of actual innocence can act as a "gateway" through which a federal habeas petitioner may pass to have an otherwise procedurally barred constitutional claim considered on the merits. See Schlup v. Delo, 513 U.S. at 315 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)). See also Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004) (finding that a credible allegation of actual innocence constitutes a miscarriage of justice that enables a federal court to hear the merits of otherwise procedurally defaulted habeas claims), cert. denied, 543 U.S. 1070 (2005). The fundamental miscarriage of justice exception is limited to cases of actual innocence where the petitioner can show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of new evidence. Schlup, 513 U.S. at 327. To be credible, a claim of actual innocence must be based on reliable new evidence not presented at trial. Id. at 324. See Sistrunk v. Rozum, 674 F.3d 181, 191 (3d Cir. 2012) ("Proving actual innocence based on new evidence requires the petitioner to demonstrate (1) new evidence (2) that is reliable and (3) so probative of innocence that no reasonable juror would have convicted the petitioner.") (citing Schlup). The "new evidence" offered, i.e., Mr. Johnson's affidavit recanting his trial testimony, is not reliable. Courts have held that recantation testimony should be viewed with suspicion and often is unreliable. See Sistrunk v. Vaughn, 674 F.3d 181, 191-92 (3d Cir. 2012) (letter from recanting witness unreliable); Landano v. Rafferty, 856 F.2d 569, 572 (3d Cir. 1988) ("Courts have historically viewed recantation testimony with great suspicion."). See also Dobbert v. Wainwright, 468 U.S. 1231, 1233-34 (1984) (same). Lastly, the evidence of petitioner's guilt, as detailed by the state courts, was strong. For these reasons, petitioner's claim of actual innocence does not excuse the procedural default of this habeas claim.

Trial counsel, Mr. Green, testified at petitioner's PCRA hearing on March 27, 2015. On cross-examination, the following exchange took place:

Q. (Commonwealth)	I just want to talk to you now about that very issue of conflict. I believe during the direct there were some questions concerning prior to Mr. Handfield's trial, did you discuss with Mr. Handfield that you were also representing Mr. Peoples?
A. (Mr. Green)	I represented Mr. Handfield first. Thereafter, Mr. Peoples came along and asked us to represent him in one or another of his cases. At the time that happened I told Mr. Handfield that we were going to be representing Mr. Peoples and asked him if he had any difficulty with that. I thought there was a conflict. He said he didn't have any problem with that.
Q.	When you say "he," Mr. Handfield said he did not have a problem with that?
A.	That's right.
Q.	Mr. Handfield was aware you were going to represent Mr. Peoples. You spoke to him about that. And Mr. Handfield agreed that he did not have a conflict with that.
A.	Yes.
Q.	And you also, obviously, had that same conversation with Mr. Peoples, right?
A.	I think my partner had that conversation with Peoples, although I had more than one conversation with Mr. Peoples about this.

(N.T. 3/27/15, at 189-90.) On April 6, 2015, Mr. Peoples testified at the PCRA hearing as follows: "But the conflict, I know it was that we both had Joe Green as attorneys. . . . And I waived it. I said I don't have no harm with him helping Earl [Handfield]." (N.T. 4/6/15, at 261, 294.)

The PCRA court rejected this claim, explaining as follows:

> The burden of showing an adverse effect in such matters **is not equivalent** to the requirement of showing prejudice in a claim dealing with actual ineffectiveness – i.e., where the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' Strickland [v. Washington], 466 U.S. [668,] 694, . . .; see [Cuyler v.] Sullivan, 446 U.S. [335,] 349-50 . . . (stating that 'a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief') – **but some showing must be made that the conflict in question had an adverse effect on counsel's performance.**

Commonwealth v. King, 57 A.3d 607, 619 n.12 (Pa. 2012) (emphasis added). In this passage, the King Court reconciled the earlier distinction between Federal and Pennsylvania law by explaining that the adverse effect requirement, while applicable under both paradigms, is distinct from the question of prejudice under Strickland/Pierce. King, supra. Thus it is apparent that the dichotomy of which Defendant speaks has been resolved by the Pennsylvania Supreme Court, id., and that the confusion here lies not in a supposedly different standard applicable under Federal and Pennsylvania law, but in the claimant's erroneous conflation of his burdens under the test for ineffectiveness and the test for whether an alleged conflict of interest is actionable as ineffective stewardship. See id. The test for determining whether an attorney's purported conflict of interest warrants a new trial is the same under Pennsylvania and Federal law; according to King, supra, however, it has two components, and one does not get to the question of whether prejudice under the Strickland/Pierce test for ineffective assistance should be presumed unless one first establishes that the alleged conflict of interest had some adverse effect upon counsel's performance. King, supra. Under the facts of this case, as discussed below, Defendant cannot make the requisite showing of adverse effect in order to reach the question of prejudice.

At the time of the Grand Jury proceedings involving this Defendant and his trial were occurring, there was no conflict between Duron Peoples and Defendant that would give rise to a claim of ineffectiveness on the part of trial counsel. Trial counsel testified at the PCRA hearing and represented to the Supervising Judge of the Thirteenth Chester County Investigating Grand Jury that in his conversations with his client Duron Peoples during the course of his representation of both before the Grand Jury and prior to Defendant's trial, Mr. Peoples told him that he had nothing to do with the theft of the chain from Mr. Handfield's neck by Corey Jennings. (PCRA Hearing Transcript, 3/27/15, N.T. 96-98, 110-11, 114-15, 127; 3/27/15, Ex. P-1, at 17-19 (admitted 4/6/15)). Trial counsel stated that although

> Mr. Peoples acknowledged being in the vicinity of the confrontation between Defendant and another group of men outside the Turkey Hill, it was purely Corey Jennings' idea to snatch Defendant's chain and not in any way instigated by Mr. Peoples. (Id.). If trial counsel is to be believed, Mr. Peoples had nothing to offer Defendant by way of exculpatory evidence or favorable impeachment evidence; Mr. People's [sic] testimony, if trial counsel's PCRA testimony is credited, would have only served to corroborate the Commonwealth's theory that Defendant killed Mr. Jennings in retaliation for Mr. Jennings' theft of Defendant's gold chain from around his neck. (See Trial Transcript, 6/8/09, N.T. 132; Trial Transcript, 6/15/09, N.T. 917-954). We credit trial counsel's PCRA testimony. There would have been no reason to call Duron Peoples to testify on behalf of the Defendant as Duron Peoples' testimony, as it was represented by him to trial counsel, would only have corroborated the testimony of other Commonwealth witnesses establishing Mr. Jennings' theft of the chain as Defendant's motivation for murdering him. (See id.).

Commonwealth v. Handfield, No. CP-15-CR-4908-2007, slip op. at 39-41 (C.P. Chester July 28, 2015) (emphasis in original) (footnote omitted). The PCRA court noted in a footnote that trial counsel's testimony at the PCRA hearing was consistent with his statements to the Supervising Judge of the Grand Jury on March 22, 2007. The court also noted that Mr. Peoples "did not object to or correct counsel's narrative at the time." Id. at 41 n.5. The PCRA court went on to address the November Peoples Affidavit and the December Peoples Affidavit.

> Mr. People's [sic] statements to the contrary, as set forth in his Affidavits of October and November 2009 and his testimony at the second day of the PCRA hearing on April 6, 2015, in which he states that he was the one with whom Defendant was fighting outside of the Turkey Hill, that he was the one who picked up the chain after it fell off of Defendant's neck during a brief "tussle" between himself and the Defendant, and that Corey Jennings had nothing to do with the theft of Defendant's chain, were made well after Defendant's June 16, 2009 conviction and sentencing for First Degree Murder. (See Deft.'s Amended PCRA Petition, 8/7/14, Ex. A; PCRA Hearing Transcript, 4/6/15, N.T. 246-51, 271-73, 332, 336-39; Trial/Sentencing Transcript, 6/16/09, N.T. 1011-1045). Defendant's claim of ineffective assistance of counsel due to an active representation of conflicting interests presupposes that this Court will find that Mr. People's [sic] post-conviction statements, as opposed to counsel's testimony of Mr. Peoples' representations to him at the time of Defendant's pre-trial and trial proceedings were taking place, are deserving of credit. This we decline to do. As an after-the-

> fact recantation of his previous position, the veracity of his testimony and these Affidavits is inherently suspect. See Commonwealth v. McCracken, 659 A.2d 541, 545 (Pa. 1995) (recantation testimony "is one of the least reliable forms of proofs, particularly when it constitutes an admission of perjury."). Indeed, Mr. Peoples admitted at the PCRA hearing that, at the time of the Grand Jury Investigation into Corey Jennings['] homicide, he refused to testify, despite suggestions by county detectives that he could help himself in other legal matters with which he was involved. (PCRA Hearing Transcript. 4/6/15, N.T. 259-60). Mr. Peoples testified he told detectives, "I don't want to help nobody." (PCRA Hearing Transcript, 4/6/15, N.T. 259-60.) In his own testimony at the PCRA hearing, Mr. Peoples[] contradicted himself about his supposed willingness to aid the defense at the time he was given the opportunity to testify about his knowledge of the Jennings homicide prior to charges being filed against Defendant. (Id.). Consequently, we find his post-trial narrative of the events surrounding the Jennings homicide and his assertions that he would have testified had he been asked to be dubious at best and not worthy of credence.
>
> Because we credit the testimony of Mr. Green over that of Mr. Peoples, we find that there was no conflict between Defendant and Mr. Peoples prior to or during Defendant's trial, such that there was no reason to call Mr. Peoples as a witness in Defendant's trial because he could not provide any testimony that would have been helpful to the defense. Therefore, Defendant's claim of ineffective assistance of counsel due to counsel's alleged active representation of conflicting interests is without merit.

Commonwealth v. Handfield, No. CP-15-CR-4908-2007, slip op. at 41-43 (C.P. Chester July 28, 2015) (footnote omitted).

As explained in detail above, the PCRA court, as affirmed by the Superior Court of Pennsylvania, concluded that there was no actual conflict between the interests of petitioner and Mr. Peoples prior to or during petitioner's trial. Hence, trial counsel cannot be ineffective for proceeding despite a conflict of interest, where no such conflict existed.

Moreover, Mr. Peoples' claim that he was available to testify at petitioner's trial is not credible. On March 20, 2007, petitioner's trial counsel filed a motion to quash a grand jury subpoena served on Mr. Peoples to testify before the grand jury investigating the Corey Jennings

murder. Trial counsel represented petitioner and Mr. Peoples at that time. See N.T. 3/27/15, at 174-75. The basis for the motion to quash Mr. Peoples' subpoena was a claim that Mr. Peoples had a Fifth Amendment privilege concerning the Jennings homicide. Id. at 176. Trial counsel explained that Mr. Peoples' privilege concerned his involvement in the robbery of petitioner's chain at the Turkey Hill store. The theory offered by the Commonwealth was that petitioner murdered Mr. Jennings because Mr. Jennings stole petitioner's gold chain at the Turkey Hill location. Id. Because Mr. Peoples was present at the Turkey Hill location at the time the chain was stolen from petitioner by Mr. Jennings, the concern was that Mr. Peoples could be charged as a co-conspirator in the robbery of the chain. Mr. Green testified at the PCRA hearing that Mr. Peoples did not disagree with counsel's statement to the Grand Jury judge that Mr. Peoples was present at the Turkey Hill location when the chain was stolen, and that Mr. Peoples' claim of Fifth Amendment privilege was based upon the events that occurred at the Turkey Hill. (N.T. 3/27/15, at 178-79.)

Despite stating in the November Peoples Affidavit that he was willing to testify at petitioner's trial, Mr. Peoples testified to the contrary at the PCRA hearing. At the PCRA hearing, Mr. Peoples testified that he refused to testify at petitioner's grand jury hearing and stated, "I don't want to help nobody." (N.T. 4/6/15, at 259-60.) See also N.T. 4/6/15, at 305-06 (Mr. Peoples acknowledged that it was his decision not to testify before the grand jury "coached by counsel."). At the PCRA hearing, Mr. Peoples explained that he offered to testify at petitioner's trial and that he would testify that he, not Mr. Jennings, took petitioner's chain, thus undercutting the Commonwealth's theory of petitioner's motivation to kill Mr. Jennings. Id. at 297-307, 330.

However, Peoples also testified that he would never testify for the prosecution, because "snitches get it." Id. at 307.

Petitioner testified at the PCRA hearing that Mr. Peoples took his chain, not Mr. Jennings. Id. at 356-59. Mr. Green testified that petitioner identified Mr. Jennings as the individual who took his chain. (N.T. 3/27/15, at 184.) Petitioner also testified that he saw Mr. Peoples when they both were incarcerated at Rockview State Prison and that Mr. Peoples stated that he told Mr. Green that he was willing to testify at petitioner's trial and that he, Mr. Peoples, and not Mr. Jennings, ripped the chain from petitioner's neck during a struggle in front of the Turkey Hill. (N.T. 4/6/15, at 333.)

As noted above, the PCRA court credited Mr. Green's testimony at the PCRA hearing and rejected Mr. Peoples' testimony at that hearing. This court must defer to the state court's factual findings in this regard. Moreover, this court also must be mindful of the "doubly deferential" standard when a state court has already ruled that counsel was not ineffective. As detailed above: "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 115 . See also Woods, 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 Titlow, 134 S. Ct. at 13).

Considering these deferential standards, and after carefully reviewing the ample record in the state court proceedings, this court finds that the record supports the state courts' conclusions that trial counsel did not labor under an impermissible conflict of interest and was not ineffective in this regard. Petitioner's third habeas claim should be denied.

Claim No. 4 The state court unreasonably applied Brady law and unreasonably determined the facts

In support of his fourth habeas claim, petitioner asserts that the "Commonwealth suppressed a video interview of Willie Suber that impeached [the] star witness for the Commonwealth, Adrienne Beckett. And the evidence undermined the Commonwealth's case as a whole in that it was exculpatory. State court's legal findings were in contravention of Brady." (Petition ¶ 12.) See also Pet'r's Mem. of Law at 50-54.

Respondents urge that no Brady violation occurred because trial counsel received a summary of the interview in a supplemental police report. (Resp. at 87.) At the bottom of the police report was a notation that the interview was videotaped. Id.

The PCRA court considered and rejected this claim in the state court finding this claim both waived and meritless. The PCRA court concluded as follows:

> Defendant's claim challenging the Commonwealth's alleged failure to disclose to defense trial counsel a videotaped interview of Mr. Suber conducted by Coatesville Police Department Detective Martin Quinn on January 2, 2007 has its roots in the United States Supreme Court decision in Brady v. Maryland, 83 S. Ct. 1194 (U.S. Md. 1963), which held that 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, and in the mandates of Pa. R. Crim. P. 573, which governs discovery obligations in criminal trials.
>
> . . .
>
> The record at the PCRA hearing demonstrates that, although defense trial counsel did not have the videotape of Detective Martin Quinn's January 2, 2007 interview

of Mr. Suber, he had Detective Quinn's January 2, 2007 "Supplemental Summary" memorializing in writing Detective Quinn's recollections of Mr. Suber's responses during their interview. (See 3/27/15, Ex. P-2 (admitted 4/6/15); PCRA Hearing Transcript, 3/27/15, N.T. 14, 129-32, 144-47; 3/27/15, Ex. P-5 [DVD] (admitted 4/6/15); 3/27/15, Ex. P-5-A [Transcript of DVD Interview] (admitted 4/6/15); 3/27/15, Ex. P-4 [Trial Counsel's Spreadsheet of Items Received and/or Requested from Cmwlth. in Discovery] (admitted 4/6/15)). Detective Quinn's January 2, 2007 Supplemental Summary states the following:

> On 01/02/2007 R/O interviewed Willie Suber about his whereabouts the night Mr. Jennings was killed, he said he was inside 591 E. Chestnut St. Apt. #2 with his mother Adrienne Beckett and little brother Tevin Grove (15 yrs). Mr. Suber said he was talking with his girlfriend Keiantee Twyman (22 yrs. from Delaware) on the cell phone when he heard at least two shots. Mr. Suber asked his girlfriend who he was talking to on the phone if she heard the shots which she replied no. Mr. Suber said he then heard police activity in the area, when asked if he or anyone from his house exited to see what was going on he replied no. Mr. Suber said nobody entered or exited his apartment on the night of the incident, when asked if he knew Earl Handfield "Marbles" he replied yes that he went to school with him. When asked if Earl and his mother were boyfriend and girlfriend he said they went out, when asked if he knew David Johnson "Science" he also replied that he knew him. When asked if either of these people came to the apartment the night of the Jennings homicide he again replied no, nobody came to the apartment that night because they would have to pass by him on the first floor of the apartment. Mr. Suber stated he would know if anyone came to either the front to [sic] back doors because he would be the one to answer, stating his mother never answered the door. When asked if his mother ever left [sic] Earl drive her car he replied that he would know about that.

(3/27/15, Ex. P-2 (admitted 4/6/15)). At the end of this paragraph, Detective Quinn typed, "See video interview", thereby alerting defense trial counsel, who either knew or should have known that this instruction existed on the Exhibit, that there was indeed a videotape of the January 2, 2007 interview between Detective Quinn and Willie Suber. (3/27/15, Ex. P-2 (admitted 4/6/15); PCRA Hearing Transcript, 3/27/15, N.T. 129-32). The claim of an alleged Brady violation, therefore, was either known to counsel, or should have been known to counsel, during the trial and direct appeal stages of this matter. (See PCRA Hearing Transcript, 3/27/15, N.T. 129-32). This claim, therefore, could have been raised in an earlier proceeding, specifically, pre-trial or during trial, or at least on direct appeal. As it was not, this claim qualifies as "waived" under the definition of that status in 42 Pa. C.S.A. § 9544(b). See Commonwealth v. Roney, 79 A.3d 595 (Pa.

2013), cert. denied, Roney v. Pennsylvania, 135 S. Ct. 56 (U.S. Pa. 2014) (defendant waived, for further review, on appeal from denial of his petition for post-conviction relief, a Brady claim based on the Commonwealth's alleged failure to disclose information relating to a purported alternative suspect in robbery and murder case, where defendant never asserted a Brady claim at trial or on direct appeal). See also Commonwealth v. Cam Ly, 980 A.2d 61 (Pa. 2009), reargument denied, 989 A.2d 2 (Pa. 2010) (a court cannot grant relief on PCRA petition upon an issue that has been previously litigated or waived).

. . .

[L]ike the defendant in Roney, supra, we find that Defendant has waived his Brady claim because he has not presented it in terms of ineffective assistance of counsel, layered or otherwise, and because, as a result of this error, he has stated only a direct claim against the prosecution, which claim is deemed waived under the PCRA Act because it is a claim that was available to trial/appellate counsel to raise in earlier proceedings, namely, during Defendant's trial, including the pre-trial stage, and/or his direct appeal.

However, should an appellate court disagree, we find, in the alternative, that Defendant's Brady claim fails for the following additional reasons. A Brady claim will not afford a defendant relief if he either knew of the existence of the evidence in dispute or could have discovered it by exercising due diligence. Commonwealth v. Smith, 17 A.3d 873 (Pa. 2011), cert. denied, Smith v. Pennsylvania, 133 S. Ct. 24 (U.S. Pa. 2012). Trial counsel, who was given a copy of Detective Quinn's January 2, 2007 Supplemental Summary, either knew, or should have known by reading the Summary, that there was a videotape of Detective Quinn's January 2, 2007 interview with Willie Suber. (PCRA Hearing Transcript, 3/27/15, N.T. 129-32). It would have been a reasonable exercise of due diligence for trial counsel, if he wished to pursue Mr. Suber as a witness or simply to investigate Mr. Suber's usefulness to Defendant in any respect, to contact the prosecutor's office and ask them for the copy of the videotape referenced in Exhibit P-2, Detective Quinn's Supplemental Summary Report of his January 2, 2007 interview with Mr. Suber. (See 3/27/15, Ex. P-2 (admitted 4/6/15); 3/27/15, Ex. P-5 (admitted 4/6/15); 3/27/15, Ex. P-5-A (admitted 4/6/15)).

Trial counsel did submit to the prosecutor at the time, Thomas Ost-Prisco, Esquire, a spreadsheet marking off the evidence that he did receive from the Commonwealth and showing the evidence, including the DVD, that counsel did not receive. (See 3/27/15, Ex. P-4 (admitted 4/6/15); PCRA Hearing Transcript, 3/27/15, N.T. 141-45). Trial counsel allegedly sent a letter to the prosecutor along with this spreadsheet asking him for the items that were missing; this letter was not produced at the PCRA hearing and trial counsel's testimony was only that he "thought" his office had sent such a letter to the prosecution. (PCRA Hearing

Transcript, 3/27/15, N.T. 144). Trial counsel testified that despite this request, he never received the DVD of the Willie Suber interview from the Commonwealth. (PCRA Hearing Transcript, 3/27/15, N.T. 132, 145, 147). However, a review of the spreadsheet shows that the date of the purported missing DVD was listed as January 2, 2008. (See 3/27/15, Ex. P-4 (admitted 4/6/15); PCRA Hearing Transcript, 3/27/15, N.T. 143, 145). On this record, there is no evidence that any interview of Willie Suber took place on that date. (See 3/27/15, Ex. P-2 (admitted 4/6/15); 128-162). Trial counsel misidentified the piece of evidence he was seeking. (PCRA Hearing Transcript, 3/27/15, N.T. 143, 145; 3/27/15, Ex. P-4 (admitted 4/6/15)). Given this oversight, a second, accurate letter specifically requesting a copy of the DVD recording of the Willie Suber interview would not have been beyond the realm of the reasonable diligence expected of counsel, nor would a phone call to the prosecutor letting him know that he did not include this item in the materials conveyed be unreasonable to ask trial counsel to do.

Because trial counsel could have obtained a copy of the DVD recording of Detective Quinn's January 2, 2007 interview with Willie Suber by the exercise of due diligence, including the accurate identification of the item of evidence sought, and we note that there is no allegation of bad faith on the part of the Commonwealth such that it could be inferred that the Commonwealth was deliberately trying to withhold the DVD from the Defendant, the fact that the Commonwealth did not include the videotape that was referenced in Detective Quinn's Supplemental Summary report does not give rise to a Brady violation. The Commonwealth gave trial counsel a copy of Detective Quinn's Supplemental Summary report, which states that a videotape of the Suber interview was in existence, thereby putting trial counsel on notice that such a videotape was available. (PCRA Hearing Transcript, 3/27/15, N.T. 129-32). A reading of Detective Quinn's Supplemental Summary report should have triggered, if trial counsel was interested in investigating Willie Suber's potential usefulness at trial, a specific query to the Commonwealth as to where the referenced DVD could be found. To the extent that trial counsel either did not read the Supplemental Summary prepared by Detective Quinn or did not see the utility of pursuing Willie Suber as a witness, trial counsel's actions or inactions are more properly the subject of an ineffectiveness claim for failure to investigate Willie Suber as a witness, which is a separate issue that Defendant has raised in his first PCR Petition and one which we will address presently. However, as discussed above, it is not a predicate for a Brady violation. . . .

Further, there is no Brady violation where the evidence is available to the defense from other sources. Commonwealth v. Roney, 79 A.3d 595 (Pa. 2013), cert. denied, Roney v. Pennsylvania, 135 S. Ct. 56 (U.S. Pa. 2014); Commonwealth v. Lambert, 765 A.2d 306 (Pa. Super. 2000), aff'd, 769 A.3d 1205 (Pa. Super. 2000). In this matter, the content of Willie Suber's responses to Detective Quinn's

questioning was memorialized in writing by Detective Quinn in his January 2, 2007 Supplemental Summary report, which was provided to trial counsel in discovery. (PCRA Hearing Transcript, 3/27/15, N.T. 129-32; 3/27/15, Ex. P-2 (admitted 4/6/15)). In his Supplemental Summary Report, Detective Quinn stated that, "Mr. Suber said nobody entered or exited his apartment on the night of the incident" and

> [w]hen asked if either of these people [Defendant and/or David Johnson] came to the apartment the night of the Jennings homicide he [Mr. Suber] again replied no, nobody came to the apartment that night because they would have to pass by him on the first floor of the apartment. Mr. Suber stated that he would know if anyone came to either the front [or] back doors because he would be the one to answer, stating his mother never answered the door.

(3/27/15, Ex. P-2 (admitted 4/6/15)). Thus, defense counsel, who received a copy of Detective Quinn's January 2, 2007 Supplemental Summary in discovery (PCRA Hearing Transcript, 3/27/15, N.T. 129-32), would have known, or at least should have known, of Willie Suber's position with respect to the issue of whether Defendant or anyone else entered Ms. Beckett's apartment on the night of the Corey Jennings homicide and would have known, or again should have known, of the arguable impeachment value of Mr. Suber's testimony. We use the term "arguable" because, as will be discussed later, we are not persuaded that Mr. Suber's testimony would have been the "smoking gun" that would lead to Defendant's acquittal as Defendant urges this Court to find. Nevertheless, for purposes of argument, to the extent that it might have been somehow useful to the Defendant, counsel either knew or should have known of the substance of Mr. Suber's statements via Detective Quinn's Supplemental Summary Report, an alternate source from the DVD. To the extent one may argue that the DVD would have been a superior source for the defense because it would have shown that Mr. Suber spoke with an emphasis and credibility that cannot be gleaned second-hand from another person's notes, we would point out that if trial counsel had wished to see the "emphatic" and "credible" or "compelling and powerful", as Defendant sets forth in his second Supplement to his first PCRA Petition (Deft.'s Motion to Suppl., 4/2/15, at 4), qualities of Mr. Suber's statements, trial counsel could have conducted his own interview of Mr. Suber in order to glean these particular intangibles that can only be determined by one's own observation. We would note, however, that we have seen Mr. Suber's videotaped interview, and we do not agree that it is in fact as "emphatic", "credible" and/or "compelling and powerful" as Defendant suggests. (See 3/27/15, Ex. P-5 (admitted 4/6/15)). Nevertheless, it is evident that the content and qualities that Defendant claims make the DVD so important were available to the Defendant, not only through the exercise of reasonable diligence, but from other sources that were in fact either given to the

> Defendant or available to him, again were he interested in pursuing them, via the exercise of reasonable diligence, i.e. an independent interview of Mr. Suber.
>
> Because the material of which the Commonwealth allegedly deprived the Defendant was available to him both through the exercise of reasonable diligence and from alternate sources, the Commonwealth's failure to turn over the DVD of Detective Quinn's January 2, 2007 interview of Willie Suber does not constitute a Brady violation.

Commonwealth v. Handfield, No. CP-15-CR-4908-2007, slip op. at 10, 14-22 (C.P. Chester July 28, 2015) (footnote omitted).

As explained above, the state court denied this claim as waived and, in the alternative, opined on the merits. This court will also address the merits of this Brady claim. While a prosecutor's affirmative duty to disclose evidence favorable to a defendant can be traced to early twentieth century prohibitions against misrepresentation, it is predominantly associated with the Supreme Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). The Supreme Court stated the Brady rule as follows: "There are three components to a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Other courts have stated the three prongs thusly: "To establish a Brady violation, it must be shown that (1) evidence was suppressed; (2) the evidence was favorable to the defense; and (3) the evidence was material to guilt or punishment." Simmons v. Beard, 590 F.3d 223, 233 (3d Cir. 2009) (quotation omitted). The second prong of Brady requires proof that the governmental entity either willfully or inadvertently suppressed evidence required to be disclosed. However, it is equally well-settled that "[a] Brady violation does not occur where information was readily

available to the defendant through the exercise of due diligence." Paddy v. Beard, 2012 WL 5881847, at *12 (E.D. Pa. Nov. 20, 2012) (Shapiro, J.) (citing United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991)). 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. Impeachment evidence falls squarely within the Brady rule. United States v. Scott, 2015 WL 1639576, at *10 (3d Cir. Apr. 14, 2015) (citing Giglio v. United States, 405 U.S. 150, 154 (1972)).

Here, the evidence allegedly suppressed by the Commonwealth, a DVD, was disclosed by the Commonwealth and readily available to trial counsel. Trial counsel received a written summary of the DVD, on which the existence of the DVD was noted. Through an exercise of reasonable diligence, trial counsel could have obtained a copy of the DVD. No Brady violation occurred because counsel could have obtained the material through the exercise of reasonable diligence. See Perdomo, 929 F.2d at 973 ("Brady does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence."). Moreover, a Brady violation did not occur because there is no reasonable probability that the suppressed evidence would have produced a different verdict, i.e., the suppressed evidence was not "material." Strickler, 527 U.S. at 281. As explained in this court's discussion of petitioner's fifth habeas claim below, Mr. Suber's testimony would not have

produced a different verdict. For all these reasons, petitioner's fourth habeas claim should be denied.

Claim No. 5 State court unreasonably applied Strickland v. Washington where trial counsel failed to investigate exculpatory witness, Willie Suber, and unreasonably determined the facts presented

In this claim, petitioner asserts that trial counsel was ineffective for failing to investigate Willie Suber as a witness. Petitioner contends that Willie Suber's testimony would have directly contradicted the testimony of Suber's mother, Adrienne Beckett, that petitioner came to their house the night of the shooting. (Pet'r's Mem. of Law at 57-58.)

The PCRA court rejected this claim stating as follows:

> The Commonwealth's probe of Willie Suber's testimony at the PCRA hearing obliterates Defendant's claim that Mr. Suber's testimony would have been helpful to him. (PCRA Hearing Transcript, 3/27/15, N.T. 211-22, 226-29). As we stated above, on cross-examination Mr. Suber admitted that he was not at his mother's apartment for the entirety of the evening on which Mr. Jennings was shot. (PCRA Hearing Transcript, 3/27/15, N.T. 221-22). Thus, he would not have known if someone came to or left the apartment during the time that he was absent. Willie Suber's testimony would not have helped the Defendant because his assertion that no one came to or left Ms. Beckett's apartment on the night of the Jennings homicide would have been easily discredited on cross-examination. Defendant himself, when he identified Mr. Suber to trial counsel Green, added the caveat that "I don't know if he's useful." (See 3/27/15, Ex. P-6, at 7, para. 9 (admitted 4/6/15, see PCRA Hearing Transcript, 4/6/15, N.T. 373; PCRA Hearing Transcript, 3/27/15, N.T. 157, 161-62)). Defendant cannot, on this record, claim prejudice by counsel's failure to find the fault with Willie Suber's testimony earlier. The Commonwealth, on the other hand, certainly suffered prejudice because it had to litigate two issues concerning the purported import of Mr. Suber's testimony to the defense in this PCRA proceeding, but Defendant himself did not suffer any prejudice by counsel's failure to uncover the deficiency of Mr. Suber as a witness prior to trial.
>
> Secondly, as we discussed earlier in connection with Defendant's Brady claim, trial counsel had two reasonable bases for eschewing the pursuit of Mr. Suber as a witness in Defendant's trial. Given the hostile and argumentative attitude of Mr. Suber's mother under cross-examination by defense counsel at trial and her perjury

before the Grand Jury, as well as her defiant demeanor in the wiretapped conversation the Commonwealth recorded with the consent and participation of her friend, Atiyah Shabazz, in which she tells Ms. Shabazz in connection with her own Grand Jury appearance, "Ain't no fuck [sic] white person is going to try belittle me. Goddammit, I'm queen bitch here" (6/10/09, Ex. D-18), admits to giving perjured testimony before the Grand Jury (id.), and encourages Ms. Shabazz to do the same (id.), trial counsel was concerned that Mr. Suber, as Ms. Beckett's son, might not be as cordial and accommodating to the defense at trial as he arguably appeared before Detective Quinn, and might instead engender in the jury negative associations that would hurt Defendant's prospects at trial. (PCRA Hearing Transcript, 3/27/15, N.T. 192-93). As we discussed above, Mr. Suber's appearance at the PCRA hearing confirmed to us the legitimacy of counsel's concerns. Further, trial counsel testified at the PCRA hearing that he did not investigate Willie Suber as a witness because he did not want to be in a position in which he would have to be confrontational with Ms. Beckett's son and perhaps thereby generate potential sympathy in the jury for Ms. Beckett as a mother and possibly undermine the strength and effectiveness of his efforts to impeach Ms. Beckett's credibility and appearance before the jury. (PCRA Hearing Transcript, 3/27/15, N.T. 140, 172, 191-92). We find counsel's course of action was a reasonable one designed to effectuate the interests of his client, the Defendant.

Finally, as we mentioned above, Defendant suffered no prejudice from trial counsel's failure to investigate Mr. Suber as a potential witness prior to trial. To demonstrate prejudice as required under the test for ineffective assistance of counsel, a PCRA petitioner must show how the uncalled witness' testimony would have been beneficial under the circumstances of the case. Commonwealth v. Johnson, 966 A.2d 523 (Pa. 2009). For all the reasons we discussed in connection with Defendant's Brady violation claim, which reasons we incorporate herein by reference, Willie Suber's testimony would not have helped the Defendant. Indeed, it would have bolstered the Commonwealth's contention, as well as Ms. Beckett's testimony, that Defendant came to Ms. Beckett's apartment after the Corey Jennings homicide, because it would have affirmed that there was a window of time in which anyone could have entered Ms. Beckett's apartment and, because Mr. Suber was not there, he would not have known about it. Given the qualitative and quantitative deficiencies in Mr. Suber's testimony, there is no reasonable likelihood or probability that the outcome of Defendant's trial would have changed had Willie Suber been investigated or even called as a witness. Whether trial counsel's legitimate concerns about Mr. Suber's effect upon the jury and lack of usefulness to the defense were confirmed later rather than earlier ultimately makes no difference to Defendant's position. On this record, trial counsel's decision to eschew investigating Willie Suber as a witness at trial did not prejudice the Defendant. To the contrary, trial counsel's actions actually saved Defendant from

> the potential prejudice to his cause inherent in the testimony and demeanor of proposed witness Suber.

Commonwealth v. Handfield, No. CP-15-CR-4908-2007, slip op. at 33-36 (C.P. Chester July 28, 2015).

Here, trial counsel testified at the March 27, 2015, PCRA hearing and explained his rationale for not calling Mr. Suber as a witness at petitioner's trial. Trial counsel explained that he was concerned that Mr. Suber, as Ms. Beckett's son, might not be as cordial and accommodating to the defense at trial as he arguably appeared before Detective Quinn, and might instead engender in the jury negative associations that would hurt petitioner's prospects at trial. (N.T. 3/27/15, at 192-93). As the state court observed, Mr. Suber's appearance at the PCRA hearing confirmed counsel's concerns. Further, trial counsel explained at the PCRA hearing that he did not investigate Mr. Suber as a witness because counsel did not want to be in a confrontational position with him, thereby potentially generating sympathy for Ms. Beckett and undermining the strength of counsel's efforts to impeach Ms. Beckett's credibility and appearance before the jury. (N.T. 3/27/15, at 140, 172, 191-92). This court agrees with the state court that counsel's course of action was a reasonable one designed to protect the interests of petitioner.

Additionally, this court agrees, after a careful review of the record, that petitioner suffered no prejudice as a result of trial counsel's failure to investigate Mr. Suber as a potential witness prior to trial. Mr. Suber's testimony would not have helped petitioner. His testimony would have supported both the Commonwealth's argument and Ms. Beckett's testimony that petitioner came to Ms. Beckett's apartment after the murder of Corey Jennings. Mr. Suber would

have confirmed that there was a window of time during which he was not at Ms. Beckett's apartment; petitioner could have entered the apartment without Mr. Suber knowing about it.

For all the reasons stated above, and mindful of the deferential standard this court must apply when considering state court determinations that trial counsel was not ineffective, this court concludes that the state court's adjudication of petitioner's claim of ineffective assistance of counsel does not warrant habeas relief and petitioner's fifth habeas claim should be denied.

Claim No. 6 State court unreasonably applied law governing the Confrontation Clause/ inadmissible evidence standard when it permitted hearsay from A. Shabazz, and unreasonably determined the facts presented

In support of this habeas claim, petitioner states as follows:

> Over trial counsel's objection, trial court permitted Ataya Shabazz to testify that A. Beckett told her (Shabazz) that petitioner said he committed the crime in question, alleging that he said "I killed Corey." The declarant, Beckett was not made available for this specific statement nor did she testify to it when she took the stand as a Commonwealth witness."

(Petition ¶ 12.) Ms. Shabazz testified that Ms. Beckett told her that petitioner admitted to killing Corey Jennings. (N.T. 6/12/09, at 730-31, 741-42.) Petitioner asserts that

> Giving the jury permission to believe that Handfield said "I killed Corey" was extremely harmful due to it being the central issue of what he was standing trial for. Plus, without this evidence the jury may have interpreted Beckett's actual testimony that Handfield told her, "I did what I had to do" as – Johnson did the shooting and Handfield witnessed the crime, based on the evidence presented, minus Shabazz's inadmissable testimony. . . . Or, the jury could have reasonably believed that Handfield was completely innocent choosing to believe none of Beckett's testimony; again, had Shabazz's hearsay not been admitted, appearing as corroboration evidence of Beckett.

(Pet'r's Mem. of Law at 62.) Respondents urge that this claim lacks merit.

Petitioner raised this claim on direct appeal. The trial court rejected this claim and the Superior Court of Pennsylvania affirmed stating as follows:

> Appellant's next contention is that, during his jury trial, the trial court erred in permitting defense witness Ms. Shabazz to testify as to Commonwealth witness Ms. Beckett's prior consistent statements in violation of Pennsylvania Rule of Evidence 613(c). Specifically, Appellant challenges the following portions of Ms. Shabazz's cross-examination and re-cross examination by ADA Ost-Prisco, to which Appellant properly objected during trial:
>
> | | |
> |---|---|
> | Q. | Prior to wearing a wire, did you have conversations with Ms. Beckett where she told you what happened on the night of the murder? |
> | A. | Yes. |
> | Q. | Did she tell you that she was home when she heard the gunshots? |
> | Defense Counsel: | Objection, Your Honor. |
> | Court: | State your grounds. |
> | Defense Counsel: | Hearsay, confrontation clause, outside the scope of direct examination, 403-B. |
> | ADA: | Prior consistent statement of Ms. Beckett. |
> | Court: | Overruled. |
> | . . . | |
> | A. | Yes. |
> | . . . | |
> | Q. | Did [Ms. Beckett] tell you that when [Appellant] came home, he said to her that he did what he had to do? |
> | Defense Counsel: | Objection, same grounds. |
> | Court: | Overruled. |

A.	Yes.
	. . .
Q.	Did she tell you what [Appellant] did with the gun that he used to kill Corey Jennings?
A.	Yes.
Defense Counsel:	Objection, same grounds.
Court:	Overruled.
	. . .
Q.	Is it fair to say that you told investigators that [Appellant] told Ms. Beckett, "I killed Corey. I killed Corey. And she asked why did he do it? And he said he felt like he had been robbed. He felt like Corey took his manhood." That's what Beckett told you that [Appellant] told her, correct?
Defense Counsel:	Objection, move for a mistrial.
Court:	Overruled.
A.	Yes.

N.T. 6/12/09 at 730-31, 741-42.

Appellant contends the trial court erred in permitting Ms. Shabazz's testimony since (1) although Ms. Beckett testified at Appellant's trial, she did not testify as to prior consistent statements on direct examination, resulting in her being "unavailable for cross-examination," (2) Ms. Beckett's statements could not be admitted through Ms. Shabazz since Ms. Beckett, the declarant, was not offered for cross-examination on the particular statements, and (3) the Commonwealth failed to establish when Ms. Beckett made her prior consistent statements to Ms. Shabazz.

. . .

With regard to Appellant's contention Ms. Beckett was unavailable for cross-examination since she did not testify about her prior consistent statements on direct examination, and the Commonwealth improperly introduced her statements through Ms. Shabazz, the trial court stated, in relevant part, the following in its Pa.R.A.P. 1925(b) Opinion:

> During cross-examination, the Commonwealth questioned Ms. Shabazz about the statements Ms. Beckett had made during the time when Ms.

> Shabazz wore a wire intercept to record the conversations she had with Ms. Beckett. The evident purpose of the Commonwealth's examination was to rehabilitate Ms. Beckett's credibility by demonstrating that Ms. Beckett's trial testimony was consonant with the statements she had previously made to her friend, Ms. Shabazz. Ms. Beckett's credibility at trial had been previously attacked by defense counsel's questioning on cross-examination of Ms. Beckett regarding statements Ms. Beckett made to Ms. Shabazz in which Ms. Beckett allegedly admitted that she had been untruthful in her testimony before the Grand Jury. (See Trial Transcript, 6/10/09, 571-97). [Appellant] objected to the Commonwealth's introduction of Ms. Beckett's prior consistent statements through cross-examination of Ms. Shabazz[.] Appellant never requested the opportunity to recall Ms. Beckett on cross[.]
>
> [Appellant] claims that Ms. Beckett's prior consistent statements cannot be admitted through Ms. Shabazz. However, the Pennsylvania Supreme Court allows prior consistent statements to be proved by the person to whom they were made in order to support the credibility of the witness. Commonwealth v. Hutchinson, 521 Pa. 482, 556 2d 370, 372 (1980) (quotation omitted). See Commonwealth v. Gore, 262 Pa.Super. 540, 396 A.2d 1302 (1978) (prior consistent statement of victim to police officer admitted through police officer's testimony after the victim testified)[.]
>
> . . .
>
> Not only did [Appellant] have the opportunity to cross-examine Ms. Beckett about her prior recorded statements and exercise that opportunity, but he attempted to discredit Ms. Beckett's integrity at trial by portraying her as a defiant liar . . .. [H]e also tried to impugn her credibility by suggesting that she had an improper motive or bias to testify at trial in a manner favorable to the Commonwealth, namely, to avoid prosecution for perjury and the possible life sentence and negative ramifications that such a conversation would cost her for the rest of her life.
>
> . . .
>
> [T]here is no merit to [Appellant's] argument that the prior consistent statements of Ms. Beckett were not admissible through Ms. Shabazz because this Court did not permit [Appellant] to cross-examine Ms. Beckett after Ms. Shabazz testified. [Appellant] never requested of this Court an opportunity to recall Ms. Beckett as on cross, nor did he ask for a cautionary instruction to the jury[.]

Trial Court Opinion filed 9/2/09 at 9-21 (emphasis in original). We find no abuse of discretion in this regard. . . .

As indicated supra, a prior consistent statement is admissible only if it is made before the declarant has a motive to fabricate. Smith, supra. Here, the record

> reveals Ms. Beckett made her statements to Ms. Shabazz shortly after Mr. Jennings' murder, between October 20, 2005, and December 28, 2005. . . .
>
> Based on Ms. Beckett's testimony that she discussed Appellant's statements regarding the murder between October 20, 2005, and December 28, 2005, which was at a time before Ms. Beckett had a motive to fabricate, we conclude the Commonwealth established the timing of Ms. Beckett's prior consistent statements to Ms. Shabazz. See Montalvo, supra. Thus, we conclude that trial counsel did not err in permitting evidence of Ms. Beckett's prior consistent statements pursuant to Pa.R.E. 613(c).

Commonwealth v. Handfield, 34 A.3d 187, 207-10 (Pa. Super. Ct. 2011).

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). Moreover, it is well-established 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.) (citations omitted), cert. denied, 449 U.S. 1042 (1980). 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 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). Under this standard, this court can find no error with the state court's

admission of the evidence. To the extent petitioner contends the trial court improperly admitted Ms. Beckett's testimony, the claim should be denied. Additionally, trial counsel could have but did not request the opportunity to recall Ms. Beckett to explore her prior statement.

Petitioner also asserts that Ms. Shabazz's statements violate the Confrontation Clause. Under the Pennsylvania Rules of Evidence, a prior consistent statement is received for rehabilitation purposes only and not as substantive evidence. See Pa. R. Evid. 613(c). See also Commonwealth v. Curley, 910 A.2d 692, 699 (Pa. Super. Ct. 2006) ("Statements admitted only as corroborating evidence pursuant to [Rule] 613(c) are, by definition, not hearsay. That is, prior consistent statements are not offered to prove the truth of the matter asserted, but rather are offered simply to show that the witness's testimony is consistent."), appeal denied, 910 A.2d 622 (Pa. 2007). Because the statements were offered for rehabilitation purposes only, and not to prove the truth of the matter asserted, petitioner's Confrontation Clause rights are not implicated. Generally, nonhearsay use of statements raise no Confrontation Clause concerns. Adamson v. Cathel, 633 F.3d 248, 258 n.8 (3d Cir. 2011). However, a limited instruction is necessary where, as here, nonhearsay use is made of expressly incriminating statements. Id. In this case, the trial judge did give such an instruction. The judge told the jury the following:

> You heard testimony that Adrienne Beckett made statements to Ataya Shabazz between November of 2005 and January of 2006 that were consistent with her testimony during the trial. And it's up to you to decide whether you heard statements attributable that would be consistent or inconsistent. That's up to you. If you find that they were consistent, this evidence may be considered by you for one purpose only. That is, to help you judge the credibility and weight of the testimony given by Ms. Adrienne Beckett as a witness in this trial. You may not regard evidence of a prior consistent statement as proof of the truth of any mater asserted in the statement. That's regarding Adrienne Beckett.

(N.T. 6/15/09, at 975-76.) Thus, there is no merit to petitioner's Confrontation Clause claim. For all these reasons, petitioner's sixth habeas claim should be denied.[4]

Claim No. 7 Trial counsel was ineffective where he used A. Shabazz as a witness whom [sic] introduced prejudicial testimony

Petitioner alleges that trial counsel was ineffective for calling Ataya Shabazz "to answer questions concerning a domestic dispute between her and David Johnson . . . and about Beckett being recorded on a wiretap that Shabazz initiated." (Pet'r's Mem. of Law at 63.) On cross-examination, the Commonwealth asked Ms. Shabazz the following questions:

Q. (Commonwealth)	Did she tell you what the defendant did with the gun that he used to kill Corey Jennings?
A. (Ms. Shabazz)	Yes. (N.T. Trial p. 731-32).
	. . .
Q.	Is it fair to say that you told investigators that the defendant told Ms. Beckett, I killed Corey. I killed Corey. . .
A.	Yes. (N.T. Trial p. 741-42).

(Pet'r's Mem. of Law at 63-64.)

Petitioner acknowledges that this claim is not exhausted and now is procedurally defaulted, but asserts that application of Martinez excuses the procedural default because PCRA counsel was ineffective for failing to raise this claim of trial counsel ineffectiveness. (Pet'r's Mem. of Law at 65.)

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[4] Petitioner also asserted that the state court's evidentiary ruling gave "the jury permission to believe that Handfield said, 'I killed Corey'" through witness Shabazz. See Pet'r's Mem. of Law at 62. The record belies this allegation. As discussed below with respect to petitioner's seventh habeas claim, trial counsel's questioning of Shabazz revealed that Ms. Beckett did not tell Ms. Shabazz that petitioner said, "I killed Corey."

As discussed above, procedural default may be overcome by application of the Supreme Court's holding in Martinez. The Court noted 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." Martinez, 566 U.S. at 14. "[W]hether a claim is '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, 537 U.S. at 327).

Here, the instant claim of trial counsel ineffectiveness is not "substantial." Ms. Shabazz acknowledged that it was "fair to say" that she told investigators that petitioner told Ms. Beckett, "I killed Corey. I killed Corey." (N.T. 6/12/09, at 741.) On re-re-re-redirect testimony, Ms. Shabazz admitted that Ms. Beckett never said those exact words. The following testimony occurred:

Q. (Defense Counsel)	You tried to get Adrienne Beckett to say words like that for an hour and a half on wiretap, didn't you? You kept asking her, what did he say, words like that right? Police had told you things they wanted you to get her to talk about, right?
A. (Ms. Shabazz)	Yes.
Q.	And she never said any such thing, did she, on the wiretaps. In an hour and a half of recorded conversation, she never said any such thing, did she?
A.	I don't remember if she said anything. Did she? I don't know.
Q.	In fact, ma'am, what you're trying to do when you went and talked to the police and told them what you said Beckett told

you was, you were trying to help David Johnson.[5] He was the target of the investigation; isn't that correct?

A. Yes.

Q. And you told them you could get Adrienne Beckett to say, to repeat to you what you claim she said, right?

A. Yeah.

Q. And that's why you agreed to be recorded, right, because you were going to get Adrienne to repeat to you what you say she said, right?

A. Yes.

Q. And she never said any such thing, in spite of your efforts to get her to say it, right?

A. No.

(N.T. 6/12/09, at 742-43.)

On re-re-redirect, Ms. Shabazz admitted as follows:

Q. (Defense Counsel) What did Beckett tell you the defendant confessed to, because she didn't tell us that. What did she tell you?

. . .

A. (Ms. Shabazz) She told me that the defendant felt like, he said he did what he had to do.

Q. And did he say anything else? Did Beckett say anything else like Marblez [petitioner] said he used a .38 and shot him five times? She never told us that. Did she tell you that? Does that appear anywhere on the tape?

A. No.

(N.T. 6/12/09, at 738-39.)

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[5] David Johnson is the father of Ms. Shabazz's daughter. (N.T. 6/12/09, at 745.)

Defense counsel examined Ms. Shabazz about which statements Ms. Beckett actually said and revealed that Ms. Beckett did not state in the recorded conversations with Ms. Shabazz that petitioner himself confessed to the killing of Mr. Jennings. Additionally, when the Commonwealth attempted to question Ms. Shabazz about her conversations with Ms. Beckett, trial counsel objected. Those objections were overruled. (N.T. 6/12/09, at 725-27.) The trial court overruled the objections because Ms. Shabazz's testimony was admitted as prior consistent statements. Id. at 727-33.

Regardless of why trial counsel called Ms. Shabazz, once her testimony entered the territory of her unrecorded conversation with Ms. Beckett, trial counsel vigorously examined Ms. Shabazz and got Ms. Shabazz to admit that she was trying to help David Johnson, the father of her daughter and an original suspect in the murder of Mr. Jennings, by directing the investigation toward petitioner. See N.T. 6/12/09, at 734 (Q. (By defense counsel) – "You weren't trying to help David [Johnson]; is that your testimony, ma'am?" A. (Ms. Shabazz) – "Well, yeah, yeah, I was.").

Petitioner's claims are belied by the record. Upon questioning from trial counsel, Ms. Shabazz testified that she was trying to help David Johnson, the father of her daughter, by directing the investigation toward petitioner. Upon further questioning from trial counsel, Ms. Shabazz also testified that Ms. Beckett did not tell her that petitioner himself admitted to killing Mr. Jennings. Petitioner failed to establish that trial counsel's conduct fell below that required by the first prong in Strickland. Moreover, the testimony elicited by trial counsel was helpful to petitioner and petitioner has failed to establish that he suffered prejudice as a result thereof. For

all these reasons, petitioner's seventh habeas claim should be denied as procedurally defaulted because the claim has no merit and the Martinez exception does not apply.

Claim No. 8 State court unreasonably applied law governing Confrontation Clause regarding petitioner's right to confront D. Johnson on his forgery case

In support of this claim, petitioner argues that "David Johnson the Commonwealth's star witness and only witness who alleged to being present when [petitioner] shot Jennings was permitted to volunteer false testimony regarding his forgery case." (Pet'r's Mem. of Law at 66.)

Petitioner raised this claim on direct appeal. The state courts rejected this claim; the Superior Court of Pennsylvania explained as follows:

> In the case sub judice, Mr. Johnson testified on direct examination about his prior criminal history and unrelated pending charges, including the forgery case. N.T. 6/9/09 at 328-334. Specifically, with regard to Mr. Johnson's then pending forgery charges, the relevant exchange occurred on direct examination.
>
> | | |
> |---|---|
> | Q. (Commonwealth) | What are you charged with in Delaware County? |
> | A. (Mr. Johnson) | Unauthorized writing and forgery. |
> | Q. | Do you have any sort of an agreement with the Delaware County authorities in return for your cooperation in this case? |
> | A. | No. |
> | Q. | Those charges are still open, correct? |
> | A. | Yes. |
>
> N.T. 6/9/09 at 334.

On cross-examination, the trial court permitted Appellant to question Mr. Johnson regarding his pending forgery charge. See N.T. 6/9/09 at 374-375. The relevant exchange occurred with regard thereto:

Q.	Do you know that you're charged with having committed an act of forgery on February 13th, 2009?
A.	Yes, I know. Before I was called up to the Court, [the ADA] asked me about the case in Delaware County. I told [the ADA] that I know that I had a warrant for my arrest in the computer system, and that was it. That's all I know. And he said that I was going to be – that they charged me with forgery. That was the first time today that I heard anything about it.
Q.	Well, sir, isn't it true that the Delaware County detectives came and interviewed you at the Chester County Prison about this before you were charged?
A.	Yes, they interviewed me. But they said it was another guy by the name of David Johnson running around cashing checks with a different address and a different birth date.

N.T. 6/9/09 at 374-75.

At this point, Appellant's counsel requested a sidebar, at which counsel stated the following:

> Your Honor, I would like to cross-examine Mr. Johnson with the statement that he made to the Delaware County detectives in this case. What he just said to this jury is the police told him it was a different David Johnson and it wasn't him. He gave a recorded statement to the police in which he explains exactly what happened, how he cashed these checks as part of a check cashing scheme. And Johnson explains it in detail in the statement that I received in discovery.
>
> Johnson was met by this guy at a check cashing place, and he would cash the check for me. Johnson said okay and went to the guy's house and gave him a check drawn on the Delaware County Treasurer's account. Johnson then cashed it. Johnson then received another check from the same guy and went to Lancaster.

> N.T. 6/9/09 at 375-376.
>
> Indicating that Appellant's counsel was improperly "getting into specific facts at the [forgery] case," the trial court denied the request to cross-examine Appellant regarding the statement he had given to the police in the pending forgery case. N.T. 6/9/09 at 376. We find no abuse of discretion in this regard. Davis, supra. Simply put, after ensuring the jury was made aware of Mr. Johnson's pending forgery charge, the trial court properly exercised its discretion so as to avoid confusion of the issues, as well as prevent undue prejudice regarding an issue that was marginally relevant to Appellant's guilt. See Bozyk, supra.

Commonwealth v. Handfield, 34 A.3d at 211-12.

Respondents urge that in order to impeach a witness concerning a prior statement, that statement must have been made by the witness. (Resp. at 129 (citing Pa. R. Evid. 613(a).) Respondents argue that because Mr. Johnson testified that "they," i.e., the Delaware County detectives, said a different person named David Johnson was cashing checks, Mr. Johnson cannot be impeached with the statement of a third party. Id. (citing Pa. R. Evid. 613(a) (comment)). Because Mr. Johnson was repeating what another person said, this statement cannot be used to impeach Mr. Johnson's prior statement allegedly admitting his guilt of the charges. Id.

As noted above, the admission or exclusion of evidence is within the sound discretion of the trial court. Scales, 367 U.S. at 256. 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 at 525. Moreover, it is well-established 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, 623 F.2d at 312 (citations omitted). 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

factor." Johnson, 719 F.2d at 1127. Under this standard, this court can find no error with the state court's admission of the evidence. Here, because the charges against Mr. Johnson were pending, the trial court permitted limited examination into the specifics of the charges. Mr. Johnson's forgery charges were unrelated to the charges at issue in petitioner's criminal trial. The jury was presented with the evidence that Mr. Johnson had open criminal charges pending against him. Petitioner has failed to show that the trial court's admission of this evidence, and its denial of trial counsel's request to question Mr. Johnson further in this regard, deprived petitioner of fundamental fairness in his criminal trial. Petitioner's eighth habeas claim should be denied.

Claim No. 9 Trial counsel was ineffective for failing to object to the trial court's erroneous jury instruction that relieved [the] Commonwealth of its burden of proof regarding defense witnesses, Tyrone Hill, Josh McMillan, and Rhalik Gore

In support of his final habeas claim, petitioner states that trial counsel was ineffective for failing to object to the trial court's erroneous jury instruction:

> [The] trial court instructed the jury to disregard the testimony of "Mr. Hill," who's [sic] testimony was exculpatory. The trial court also diminished the credibility and weight of defense witnesses Josh McMillan and Rhalik Gore.

(Petition ¶ 12.) Petitioner admits that he did not raise these claims in the state court and asserts application of Martinez to excuse the procedural default of these claims. (Pet'r's Mem. of Law at 70-74.)

As detailed above, this court will review the merits of these claims to determine if they have "some merit" in order to warrant application of the principles set forth in Martinez to excuse their procedural default. Petitioner asserts that the trial court relieved the Commonwealth of its burden of proof. In considering a habeas claim regarding jury instructions, the habeas court

must consider the jury instructions as whole. It is generally accepted that a jury is presumed to follow the court's instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000). In reviewing jury instructions in a habeas proceeding, the jury instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle, 502 U.S. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

The court's instruction to the jury regarding the Commonwealth's burden of proof reveals that the trial court correctly instructed the jury on this issue. The state court instructed the jury as follows:

> Now, let's consider some principles of law. A fundamental principle of our system of criminal law is that the defendant is presumed to be innocent. The mere fact that he was arrested and accused of a crime or crimes is not any evidence against him. Furthermore, the defendant is presumed innocent throughout the trial and unless and until you conclude, based on careful and impartial consideration of the evidence that the Commonwealth has proven him guilty beyond a reasonable doubt.
>
> It's not the defendant's burden to prove that he is not guilty. Instead it is the Commonwealth that always has the burden of proving each and every element of the crime charged and that the defendant is guilty of that crime beyond a reasonable doubt. The person accused [of] a crime is not required to present evidence or prove anything in his or her own defense. If the Commonwealth's evidence fails to meet its burden, then your verdict must be not guilty. On the other hand, if the Commonwealth's evidence does prove beyond a reasonable doubt that the defendant is guilty, then your verdict should be guilty.
>
> Although the Commonwealth has the burden of proving that the defendant is guilty, this does not mean that the Commonwealth must prove its case beyond all doubt and to a mathematical certainty, nor must it demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs. A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt, it may not be an imagined one, nor may it be a doubt manufactured to avoid carrying out an unpleasant duty.

> So, to summarize, you may not find the defendant guilty based on a mere suspicion of guilt. The Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt. If it meets this burden, then the defendant is no longer presumed innocent and you should find him guilty. On the other hand, if the Commonwealth does not meet its burden, then you must find him not guilty.

(N.T. 6/15/09, at 962-64.) The state court clearly and properly instructed the jury regarding the Commonwealth's burden of proof.

1. Tyrone Hill

Petitioner alleges that the trial court instructed the jury to disregard the testimony of "Mr. Hill." See Pet'r's Mem. of Law at 71. Review of the jury instructions belies petitioner's assertion. Brothers Tyrone Hill and Todd Hill testified as defense witnesses. Todd Hill's testimony concerned statements regarding the "word on the street" about the killing of Mr. Jennings, and hearsay declarations made by a third party. The Commonwealth mentioned Todd Hill and his "word on the street" testimony during its closing argument. Tyrone Hill did not discuss the "word on the street" during his testimony. Thus, the following instruction given by the trial court clearly refers to the testimony of Todd Hill as it references the "word on the street."

> I permitted you to hear evidence, and it was touched on in closing argument, that might be called the word on the street regarding the killing of Mr. Jennings. That evidence was admitted only to provide context for the testimony of Mr. Hill. It was admitted for a limited purpose and that is to help you assess the credibility of Mr. Hill. You may only consider that testimony in determining Mr. Hill's credibility. You may not consider that evidence as proof of the truth of anything that the declarant said. You may not consider that testimony as proving who killed Mr. Jennings. And you may not consider that evidence because the views of others who are not present are not proper evidence in a criminal case.
>
> I specifically instruct you that you must decide this case on the observations of the witnesses who testified here and whatever evidence was offered to help you assess their credibility.

(N.T. 6/15/09, at 974-75.)

Review of the trial court's instructions reveals that the trial court did not instruct the jury to disregard either Tyrone or Todd Hill's testimony. Rather, the instructions explained that Todd Hill's statements regarding the "word on the street" were not admitted for the truth of the matter, but as a means to evaluate the witness's credibility. This instruction would have been beneficial to petitioner because the Commonwealth questioned Todd Hill about his statement to the police that an individual named Chucky Kennedy told Mr. Hill that petitioner killed Mr. Jennings. (N.T. 6/12/09, at 709.) Because petitioner's claim regarding the testimony of Tyrone and Todd Hill lacks any merit, the principles in Martinez do not excuse the procedural default of this claim and the court may not consider it here.

2. Josh McMillan and Rhalik Gore

Petitioner alleged that trial counsel was ineffective for failing to object to the trial court's instruction concerning witnesses Josh McMillan and Rhalik Gore. The trial court gave the following instruction regarding several witnesses, including Mr. McMillan and Mr. Gore:

> You should consider whether any witness' efforts to seek concessions on his or her criminal cases through any statement he or she gave warrants special scrutiny for his or her testimony. The witnesses who may have argued to have sought assistance from the Commonwealth may include Adrienne Beckett, David Johnson, Donte Carter, Josh McMillan and Rhalik Gore.

(N.T. 6/15/09, at 971-72.) At trial, both McMillan and Gore testified that they were cooperating with the government or offering evidence in exchange for help on their own criminal cases.

Trial counsel questioned Mr. McMillan as follows:

Q. (Defense Counsel) Is it correct that you were the defendant in a federal criminal case pending in 2006 and 2007?

A. (Mr. McMillan) Yes.

Q. And was that case pending in the United States District Court for the Eastern District of Pennsylvania?

A. Yes.

. . .

Q. During the pendency of that case, while it was pending, did you have occasion on July 2nd, 2007 to meet with others, including Corporal McEvoy and Detective Murrin from the Coatesville Police Department?

A. Yes.

. . .

Q. Sir, is it correct that prior to July 2nd, 2007, you relayed through your attorney to the United States Attorney that you wanted to provide information to law enforcement about homicide cases?

A. Yes.

Q. And so this meeting was with the investigators in Coatesville to talk about homicide cases; is that correct?

A. Yes.

. . .

Q. And this is information that you relayed to law enforcement in a meeting on July 2nd, 2007 because you were trying to help yourself?

A. Yes.

(N.T. 6/12/09, at 748-49, 753.) Trial counsel engaged Mr. Gore in the following inquiry:

Q. (Defense Counsel) Mr. Gore, I don't want to ask what you were cooperating about. That's not my inquiry. I just want you to indicate for the jury whether you are a cooperating government witness in other matters.

A. (Mr. Gore) Yeah.

Q. As part of your cooperation agreement, did you give a statement to these detectives regarding Mr. Johnson on or about June 13th, 2006?

A. Yes.

(N.T. 6/15/09, at 866.)

Both of these witnesses testified that they were cooperating with the government or testifying in hopes of benefitting themselves. The trial court's instruction did not relieve the Commonwealth of its burden of proof, but merely provided the jury with a framework for determining the credibility of the witnesses. Petitioner's claim regarding Mr. McMillan and Mr. Gore lacks some merit and, therefore, application of the principles stated in Martinez do not excuse the procedural default of this claim and the court may not consider it here. Petitioner's claims regarding Mr. McMillan and Mr. Gore should be denied as unexhausted and procedurally defaulted.

E. Motions for Appointment of Counsel

Petitioner also has filed Motions for Appointment of Counsel (Doc. Nos. 2 and 5). There is no constitutional right to counsel in a federal habeas corpus proceeding. See Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991), cert. denied, 503 U.S. 988 (1992). Appointment of counsel in a habeas proceeding is mandatory only if the district court determines that an evidentiary hearing is required, and the petitioner qualifies to have counsel appointed under 18 U.S.C. § 3006A. See Rule 8(c) of the Rules Governing Section 2254. Otherwise, a court may exercise its discretion in appointing counsel to represent a habeas petitioner, who is "financially eligible" under the statute, if the court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2); Reese, 946 F.2d at 263-64.

Under these guidelines, counsel may be appointed where a pro se prisoner in a habeas action has made a colorable claim, but lacks the means to adequately investigate, prepare,

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

Here, the record was sufficient for this court to determine that petitioner's claims are meritless. Petitioner was able to effectively present his arguments and cite supporting cases without the benefit of counsel. 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.

F. Request for Leave to Amend (Doc. 11) and Supplemental Petition (Doc. 12)

On September 28, 2017, petitioner filed a "Request for 'Leave to Amend' pursuant to Fed. R. Civ. P. 15(a)" (Doc. 11), and a Supplemental Petition pursuant to Fed. R. Civ. P. 15(c)(2) (Doc. 12). In the pleadings, petitioner seeks to add three new claims that were not raised in his initial petition for writ of habeas corpus and not exhausted in the state courts, which

are now barred by AEDPA's one-year statute of limitations, codified at 28 U.S.C. § 2244(d).[6] The new claims petitioner wishes to add are as follows:

> 1. Trial counsel was ineffective pursuant to the 6th Amendment, where he failed to raise a due process violation during trial or in post-trial motions for the prosecutor failing to correct chief Commonwealth witness, D. Johnson's false testimony regarding his forgery case and drug possession. (Doc. 11 at 2.)
>
> 2. Trial counsel provided ineffective assistance in violation of the 6th Amendment when he failed to discover and introduce exculpatory evidence that strongly corroborates that petitioner was not with A. Beckett on the night in question – through defense witness Mondre Boggs. (Doc. 12 at 2.)
>
> 3. Trial counsel was ineffective in failing to object to the trial court's prejudicial jury instruction merging the elements of third degree murder with first degree murder which relieved the Commonwealth of its burden of proof. (Doc. 12 at 14.)

Petitioner is attempting to amend his petition for writ of habeas corpus after the expiration of the one-year statute of limitations period set forth in 28 U.S.C. § 2244(d)(1). For the addition of new claims to be considered timely, the amendment must "relate back" to an original claim made in the petition. Mayle v. Felix, 545 U.S. 644, 650 (2005); Fed. R. Civ. P. 15(c)(1)(B). In Mayle, the Supreme Court held that an amended habeas petition "does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by

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[6] Petitioner's conviction for purposes of 28 U.S.C. § 2244(d)(1) became final on December 31, 2012, ninety days after the Pennsylvania Supreme Court denied petitioner's request for allowance of appeal on October 1, 2012. See S. Ct. R. 13(1); Kapral v. United States, 166 F.3d 565, 570 (finding that a state court judgment is considered final "at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires."). Over eight months later, on September 9, 2013, petitioner filed a PCRA petition, which was pending until March 28, 2017, when the Pennsylvania Supreme Court issued an order denying the petition for allowance of appeal. Thus, when the statute of limitations resumed, petitioner had 113 remaining days, or until July 19, 2017, to file an amendment to his petition to add new claims. Petitioner waited until September 28, 2017, to move to amend his original petition (filed on April 6, 2017). Thus, any new claims that do not relate back to the original claims are time-barred.

facts that differ in both time and type from those the original pleading set forth." 545 U.S. at 650. For an amendment to relate back to the initial petition, the claims must arise from a "common core of operative facts uniting the original and newly asserted claims." Id. at 646. The Court warned that "[i]f claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance." Id. at 662.

In Hodge v. United States, 554 F.3d 372, 378 (3d Cir. 2009), the Third Circuit interpreted Mayle and stated that "[a]fter Mayle, it is apparent that new claims can relate back if they arise from the same conduct, transaction, or occurrence," but not if they are "supported by facts that differ in both time and type from those the original pleading set forth." Id. (quoting Mayle, 545 U.S. at 650. Recently, in Wilkerson v. Superintendent Fayette SCI, 2017 WL 3928320 (3d Cir. Sept. 8, 2017) (not precedential), the court again interpreted Mayle, and held "that two claims merely arising from the same 'conviction or sentence' cannot be enough to satisfy the relation back standard and that, in order to properly relate to one another, the claims in the amendment and the claims in the original petition must be 'tied to a common core of operative facts.'" Id. at *11 (quoting Mayle, 545 U.S. at 657).

Here, petitioner's proposed new claims differ in both time and type from the original nine claims. Petitioner's first new claim of ineffectiveness of counsel, for failure to raise a due process claim relating to the prosecutor's presentation of D. Johnson's alleged false testimony regarding his prior forgery and drug possession cases, is not related to any of petitioner's original nine claims. The only original claim close to this new claim is Claim No. 8, which alleges a Confrontation Clause claim relating to the trial judge limiting cross examination

relating to Mr. Johnson's forgery case. However, the legal theory underlying the new claim (ineffective assistance of counsel for failing to raise a due process claim) is different than the original claim (Confrontation Clause). Moreover, the facts of each claim are different in both time and type. The new claim alleges that Mr. Johnson committed perjury with regard to both the prior forgery and drug possession cases, whereas the original claim concerned the trial judge's curtailment of cross-examination of the details of the forgery case alone, without any mention of the drug possession case. More importantly, the original claim focused on an alleged error by the trial judge, whereas the new claim challenges the prosecutor's decision not to correct perjured testimony.

Petitioner's new second claim alleges counsel was ineffective for not eliciting exculpatory evidence through a witness named Mondre Boggs, who is not mentioned in petitioner's original nine claims. This recent claim bears no similarity to any of the original claims. With respect to petitioner's third claim, he alleges that trial counsel was ineffective for failing to object to the court's jury instruction on third and first degree murder. The only claim in the original petition that resembles this new claim is Claim No. 9, which relates to the court's jury instruction regarding defense witnesses Tyrone Hill, Josh McMillan, and Rhalik Gore. Although both claims "coincidentally relate to the jury charge," this common feature is "not enough to make the claims arise from the same 'operative facts' when the problems asserted with the jury charge are entirely unrelated." Id. (quoting Mayle, 545 U.S. at 664). Petitioner's last two new claims are supported by facts that differ both in time and type from those set forth in the original petition.

Thus, under Mayle, petitioner's three new claims do not relate back to the date of the original pleading. Accordingly, petitioner's request to amend his petition to add these claims

must be denied, as the claims are barred by the AEDPA statute of limitations. See 28 U.S.C. § 2254(d)(1).

III. CONCLUSION

Accordingly, for all the above reasons, the court makes the following:

RECOMMENDATION

AND NOW, this 11th day of October, 2017, the court respectfully recommends that the petition for a writ of habeas corpus be **DENIED**, petitioner's motions for appointment of counsel should be **DENIED**, the motions to amend should be **DENIED**, the supplemental petition should be **DENIED**, and no certificate of appealability ("COA") be granted.[7]

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

[7] 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, 537 U.S. at 336.