APPENDIX

A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3611

JESUS M. GARCIA,
Appellant

VS.

SUPERINTENDENT PHOENIX SCI, ET AL.

(M.D. Pa. Civ. No. 3:14-cv-02214)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: May 28, 2019
CLW/cc: Jesus M. Garcia
Christopher J. Schmidt, Esq.

APPENDIX

B

ALD-144 March 28, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-3611**

JESUS M. GARCIA, Appellant

VS.

SUPERINTENDENT PHOENIX SCI, ET AL.

(M.D. Pa. Civ. No. 3-14-cv-02214)

Present: MCKEE, SHWARTZ and BIBAS, Circuit Judges

Submitted are:

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

(2) Appellees' response; and

(3) Appellant's reply

in the above-captioned case.

Respectfully,

Clerk

ORDER

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

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: May 1, 2019
CLW/cc: Mr. Jesus M. Garcia
Christopher J. Schmidt, Esq.

A True Copy:

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

APPENDIX C

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

JESUS M. GARCIA Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, *ET AL.* Respondents.	No. 3:14-CV-2214 (JUDGE CAPUTO) (MAGISTRATE JUDGE ARBUCKLE)

ORDER

NOW, this 13th day of November, 2018, **IT IS HEREBY ORDERED** that:

(1) The Report and Recommendation (Doc. 22) is **ADOPTED as modified by the accompanying memorandum.**

(2) The Petition under § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1) is **DISMISSED.**

(3) A Certificate of Appealability **SHALL NOT ISSUE.**

(4) The Clerk of Court is directed to mark this case as **CLOSED.**

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

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

JESUS M. GARCIA Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, *ET AL.* Respondents.	No. 3:14-CV-2214 (JUDGE CAPUTO) (MAGISTRATE JUDGE ARBUCKLE)

MEMORANDUM

Presently before me is Magistrate Judge Arbuckle's Report and Recommendation (Doc. 22) to the Petition for Writ of Habeas Corpus filed by Petitioner Jesus M. Garcia ("Petitioner") pursuant to 28 U.S.C. § 2254 (Doc. 1). For the reasons that follow, the Magistrate Judge's recommendation to deny the Petition for Writ of Habeas Corpus will be adopted.

I. Background

As set forth in greater detail in Magistrate Judge Arbuckle's Report and Recommendation, on November 6, 2008, Petitioner was convicted of four (4) counts of unlawful delivery of a controlled substance, two (2) counts of criminal conspiracy, one (1) count of criminal use of a communication facility, one (1) count of corrupt organizations, and one (1) count of corrupt organizations conspiracy in a jury trial. Petitioner's counsel filed a Post-Trial Motion for a Hearing on Alleged Tainted Jury, which was granted on December 15, 2008, but ultimately the trial court did not find evidence of juror misconduct. Petitioner was subsequently sentenced to twenty-five (25) to fifty-two (52) years in prison on January 28, 2009.

On March 20, 2009, Petitioner's counsel filed a direct appeal to the Pennsylvania Superior Court, which granted relief insofar as it found the trial court exceeded the maximum sentence for Counts II, IV, and V, vacated Petitioner's sentence and

remanded the case for re-sentencing. Petitioner was re-sentenced to twenty-five (25) to forty (40) years in prison on May 5, 2010. Petitioner's counsel challenged this new sentence, which was affirmed by the Superior Court on May 9, 2011. Petitioner's counsel then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court which was denied on April 10, 2012.

Petitioner, represented by new counsel, then filed a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), which was denied on all counts by the Lebanon County Court of Common Pleas on March 13, 2013. On April 11, 2013, Petitioner appealed this decision to the Superior Court, who affirmed the lower court's decision on February 18, 2014. Petitioner then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on September 10, 2014.

On November 18, 2014, Petitioner filed the instant § 2254 Petition. On September 14, 2018, Magistrate Judge Arbuckle issued the Report and Recommendation recommending that the Petition be dismissed because Petitioner has not shown entitlement to relief on any claim raised. (Doc. 22). Petitioner timely filed objections to the Report and Recommendation on September 24, 2018. (Doc. 23). No response to the objections has been filed and the time for doing so has passed. Therefore, this matter is ripe for disposition.

II. Legal Standards

A. Standard of Review of Objections to a Report and Recommendation

When objections to the magistrate judge's Report are filed, the court must conduct a *de novo* review of the contested portions of the Report. *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989) (citing 28 U.S.C. § 636(b)(1)). However, this only applies to the extent that a party's objections are both timely and specific; if objections are merely "general in nature," the court "need not conduct a *de novo* determination." *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1984). Indeed, the Third Circuit has instructed that "providing a complete *de novo* determination where only a

general objection to the report is offered would undermine the efficiency the magistrate system was meant to contribute to the judicial process." *Id.* at 7. In conducting a *de novo* review, the court may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the magistrate judge. *See* 28 U.S.C. § 636(b)(1); *Owens v. Beard*, 829 F. Supp. 736, 738 (M.D. Pa. 1993). Uncontested portions of the Report may be reviewed at a standard determined by the district court. *See Thomas v. Arn*, 474 U.S. 140, 154 (1985); *Goney*, 749 F.2d at 7. At the very least, the court should review uncontested portions for clear error or manifest injustice. *See, e.g.*, *Cruz v. Chater*, 990 F. Supp. 375, 376-77 (M.D. Pa. 1998).

B. Habeas Corpus Relief

A habeas corpus petition pursuant to 28 U.S.C. § 2254 is the proper mechanism for a prisoner to challenge the "fact or duration" of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 498-99, 93 S.Ct. 1827 (1973). As Petitioner's conviction became final after 1996, his case is governed by the federal habeas statute applicable to state prisoners, 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) ("AEDPA"). Habeas relief is only available on the grounds that a petitioner's judgment of sentence or confinement violates federal law. 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 5, 131 S.Ct. 13 (2010) (*per curiam*). State law claims are not remediable on federal habeas review, even if state law was erroneously interpreted or applied. *Swarthout v. Cooke*, 562 U.S. 216, 219, 131 S.Ct. 859 (2011)(citations omitted); *see also Glenn v. Wynder*, 743 F.3d 402, 407 (3d Cir. 2014) (quoting *Estelle v. McGuire*, 502 U.S. 67-68, 112 S.Ct. 475 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.")).

III. Discussion

Petitioner objects only to the Magistrate's findings pertaining to Ground Nine of his habeas petition. (Doc. 23 at 2). Because Petitioner does not object to the Magistrate Judge's finding that the state court determinations on which grounds one

through eight of the Petition rest were not contrary to, or unreasonable applications of, clearly established federal law, or unreasonable applications of the facts, and finding that this recommendation is not clearly erroneous, the uncontested portions of the Report and Recommendation will be adopted. However, because of Petitioner's objection to the Magistrate Judge's findings in Ground Nine, I will address Ground Nine of the Petition *de novo*. Petitioner objects to Magistrate Judge Arbuckle's Ground Nine findings for the following reasons: (1) the claims in Ground Nine were not procedurally defaulted because they were exhausted, or if procedurally defaulted, are excused and (2) Magistrate Judge Arbuckle considered only the Commonwealth's evidence and not the entire trial court record in drawing his conclusion that Petitioner's Sixth Amendment right to effective assistance of trial counsel was not violated. (Doc. 23 at 3-5).

In Ground Nine of his Petition, Petitioner levels ineffective assistance of counsel claims against "all counsel"—trial counsel, direct appeal counsel, and PCRA counsel. (Doc. 3 at 50). In particular, Petitioner challenges the performance of trial counsel as ineffective for failing to obtain impeachment evidence, failing to challenge the voice identifications made on the tapes played to the jury at trial, failing to call character witnesses, and failing to meaningfully consult with Petitioner about his case in light of Petitioner's difficulty with the English language. (Doc. 3 at 52-53). Additionally, Petitioner challenges the performance of his direct appeal counsel as ineffective for failing to timely raise two of his alleged constitutional injuries: (1) ineffective assistance of trial counsel by failing to meaningfully consult with Petitioner and (2) failure by the Commonwealth to provide *Brady* material. (Doc. 3 at 53). Lastly, Petitioner challenges the performance his PCRA counsel in appealing the Court of Common Pleas' findings on just two of Petitioner's five claims from his initial PCRA proceeding. (Doc. 3 at 53-54).

A. Exhaustion

Pursuant to the exhaustion rule, codified at 28 U.S.C. § 2254(b)(1)(A), a federal district court may not grant a habeas petition filed on behalf of "a person in custody pursuant to the judgment of a [s]tate court" unless "the applicant has exhausted the remedies available in the courts of the [s]tate" before raising them in a federal habeas action. 28 U.S.C. § 2254(b)(1)(A); *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770 (2011); *Munchinski v. Wilson*, 694 F.3d 308, 332 (3d Cir. 2012). The exhaustion requirement is grounded on principles of comity to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

To exhaust all remedies for a claim under 28 U.S.C. § 2254, a habeas petitioner must give state courts a full and fair opportunity to resolve all federal "constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 525 U.S. 838, 835, 119 S.Ct. 1728 (1992). A habeas petitioner retains the burden of showing that all of the claims alleged have been "fairly presented" to the state courts. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *Rainey v. Varner*, 603 F.3d 189, 198 (3d Cir. 2010) (citations and internal quotation marks omitted). "[A] state habeas petitioner must present the 'substantial equivalent' of his federal claim to the state courts in order to give the state courts 'an opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Collins v. Sec'y of Pa. Dep't Corr.*, 742 F.3d 528, 543 (3d Cir. 2014) (quoting *Picard v. Connor*, 404 U.S. 270, 277-78, 92 S.Ct. 509 (1971)).

A federal habeas petitioner "shall not be deemed to have exhausted the remedies available in courts fo the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2554(c). The petitioner has the burden of establishing that the exhaustion requirement has been met. *Parker v. Kelchner*, 429 F.3d 58, 62 (3d Cir. 2005).

Here, Petitioner failed to exhaust his ineffective assistance of trial counsel claims. The March 13, 2013 decision by the Court of Common Pleas suggests Petitioner's counsel raised the issue of his inability to meaningfully consult with trial counsel claim in the original PCRA petition filed on April 30, 2012, but did not include this claim in the amended PCRA petition filed on September 12, 2012. (Doc. 3 at 61 n.6). Accordingly, this claim has not been exhausted. While Petitioner's PCRA counsel raised trial counsel's failure to obtain impeachment evidence, failure to challenge voice identifications, and failure to call character witnesses in the amended PCRA petition before the Court of Common Pleas, these claims were not pursued on appeal to the Superior Court. (Docs. 3 at 61, 71; 16-38 at 20). These claims are therefore unexhausted as well.

Petitioner's ineffective assistance of counsel claims against his direct appeal and PCRA counsel were not raised at any point during his state proceedings and are therefore unexhausted as a result. To the extent Petitioner raises a *Brady* claim in Ground Nine separate from his ineffective assistance counsel claims, it is unexhausted as well because it was raised only in the original PCRA petition and subsequently excluded from the amended PCRA petition and all further proceedings. (Doc. 3 at 61 n.6).

B. Procedural Default

A claim is procedurally defaulted when it "has not been fairly presented to the state courts (i.e. is unexhausted) and there are no additional state remedies available to pursue; or, when an issue is properly asserted in the state court system but not addressed on the merits because of an independent and adequate state procedural rule." *Rolan v. Coleman*, 680 F.3d 311, 317 (3d Cir. 2012) (citations omitted). All of Petitioner's claims in Ground Nine are procedurally defaulted because they are unexhausted.

A federal court cannot review the merits of procedurally defaulted claims unless either: (1) "cause" for the procedural default and "actual prejudice" results from the

alleged violation of federal law; or (2) failure to consider the claims will result in a "fundamental miscarriage of justice."[1] *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587 (2000); *see also Wenger v. Frank*, 266 F.3d 218, 223-24 (3d Cir. 2001). To establish "cause," a petitioner must establish that "some objective factor external to the defense" impeded his ability to raise the claim in state court. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639 (1986). While under *Coleman v. Thompson*, 501 U.S. 722, 752-53, 111 S.Ct. 2546 (1991), the United States Supreme Court held that an attorney's negligence in a post-conviction proceeding does not create "cause" for excusing procedural default, it has recognized a limited exception to this rule in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911 (2013). The Supreme Court's rulings in *Martinez* and *Trevino* held that, under some circumstances, ineffective assistance of counsel can provide cause to excuse procedural default. In *Martinez*, the Supreme Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 566 U.S. at 18, 132 S.Ct. 1309; *see also Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014). The Supreme Court subsequently expanded the *Martinez* exception in *Trevino*, holding that where a "state['s] procedural framework, by reason of its design

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[1] This narrow exception is confined to cases of actual innocence as compared to legal innocence, under which "[a] petitioner asserting actual innocence . . . must rely on 'reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" not presented at trial. *Munchinski v. Wilson*, 694 F.3d 309, 377-78 (3d Cir. 2012) (citing *Schulp v. Delo*, 513 U.S. 298, 325, 115 S.Ct. 851 (1995)); *see also McQuiggin v. Perkins*, 569, U.S. 383-392-93, 133 S.Ct. 1294 (2013). Here, Petitioner's assertion of actual innocence, which he claims is demonstrated by his "sentence [as] a product of concealment of evidence the denial to due process, [and] the right to full and fair access to the courts in violation of the Constitution of the Commonwealth of Pennsylvania or laws of the United States" provides no new facts or evidence and therefore does not qualify within this narrow exception. (Doc. 3 at 54-55).

and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of counsel on direct appeal, [the] holding in *Martinez* applies." *Trevino*, 569 U.S. at 429, 133 S.Ct. 1911. To emphasize the limited application of this exception, the Supreme Court has specifically directed that it does not apply to claims of ineffective assistance of appellate counsel. *Davila v. Davis*, 137 S.Ct. 2058, 2066 (2017); *see also Richardson v. Superintendent Coal Twp. SCI*, 905 F.3d 750, 761 (3d Cir. 2018) ("[P]risoners who want to challenge the ineffectiveness of their *appellate* counsel on federal habeas cannot turn to *Martinez*.").

Accordingly, where state law requires a prisoner raise ineffective assistance of counsel claims in a collateral proceeding, procedural default will be excused under the *Martinez-Trevino* exception when the following conditions are met: (1) "the default was caused by ineffective assistance of counsel or the absence of counsel";[2] (2) the default occurred "in the initial-review collateral proceeding (i.e., the first collateral proceeding in which the claim could be heard)"; and (3) "the underlying claim of trial counsel ineffectiveness is 'substantial,' meaning 'the claim has some merit,' analogous to the substantiality requirement for a certificate of appealability."[3] *Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014) (quoting *Martinez*, 566 U.S. at 13-16, 132 S.Ct. at 1318-20).

1. Ineffective Assistance of Direct Appeal Counsel

Under Pennsylvania law, ineffective assistance of trial counsel claims are

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[2] This condition goes to the "cause" inquiry for excusing procedural default. To show cause under the *Martinez-Trevino* exception, the petitioner must demonstrate that collateral review counsel was not appointed or was ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052 (1984). *Martinez*, 566 U.S. at 14, 132 S.Ct. at 1318.

[3] This condition goes to the "actual prejudice" injury for excusing procedural default.

deferred to PCRA review, subject to limited exceptions which do not apply in the instant scenario. *See Pennsylvania v. Holmes*, 79 A.3d 562, 583 (Pa. 2013) ("The new rule in *Martinez* fits into the Pennsylvania review paradigm as follows. As a result of the terms of the PCRA . . . claims of ineffective assistance of trial counsel in Pennsylvania are generally deferred to PCRA review and generally are not available on direct appeal."). Because Petitioner's direct appeal counsel would not have been able to raise the ineffective assistance of trial counsel claim for failure to meaningfully consult with Petitioner on direct appeal, Petitioner's claim of ineffective assistance of direct appeal counsel for failure to raise this issue is outside the scope of the *Martinez-Trevino* exception and therefore unexcused.

Petitioner's other claim against his direct appeal counsel—failure to challenge the alleged *Brady* violation—is also beyond the scope of the *Martinez-Trevino* exception, as it is not based on an underlying ineffective assistance of trial counsel claim. Because neither of Petitioner's procedurally defaulted claims against his direct appeal counsel are excused under *Martinez-Trevino*, they will be dismissed.

2. Ineffective Assistance of PCRA Counsel

PCRA counsel raised five (5) issues before the Court of Common Pleas in support of Petitioner's PCRA Petition:

> (1) Whether trial counsel was ineffective for failing to obtain impeachment evidence against Caesar Jaen?
> (2) Whether the Commonwealth knowingly elicited testimony it knew was false in the form of Cesar [*sic*] Jaen, namely the testimony that Mr. Garcia rather than Mr. Jaen was the head of the drug ring?
> (3) Whether trial counsel was ineffective for failing to challenge the voice identifications made with respect to tapes played for the jury?
> (4) Whether trial counsel was ineffective for failing to call character witnesses?
> (5) Whether the Commonwealth used illegal evidence against him in the form of an illegal wiretap?

(Doc. 3 at 61-62). The Court of Common Pleas concluded "none of the arguments proffered by the Defendant entitle him to relief." (*Id.* at 69). In her appeal brief to the Superior Court, Petitioner's PCRA counsel raised only the following two issues: (1)

"whether trial counsel was ineffective for failing to object to the introduction of illegally-obtained wiretap evidence, by the Commonwealth, which ultimately led to Defendant's conviction" and (2) "whether trial counsel was ineffective for failing to object to the Commonwealth's introduction of confidential informant's testimony where the Commonwealth knowingly elicited false testimony therefrom." (Docs. 16-34 at 9; 16-38 at 20).

Petitioner argues his procedurally defaulted claim about his PCRA counsel is excused because of PCRA counsel's failure to raise the other three (3) claims on appeal that were raised in the initial-review PCRA proceeding constitutes ineffective assistance of counsel under *Martinez-Trevino*. However, because his claim alleges his PCRA counsel's ineffective assistance occurred during an appeal from the initial PCRA proceeding rather than the initial proceeding itself, this procedurally defaulted claim is not excusable under the *Martinez-Trevino* exception. *See Norris v. Brooks*, 794 F.3d 401, 404 (3d Cir. 2015) ("[T]he Court stated that the [*Martinez*] exception applies only to attorney error in initial-review collateral proceedings, not appeals from those proceedings."); *Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014) (requiring a prisoner to show "the default was caused by ineffective assistance of post-conviction counsel or the absence of counsel [] in the initial-review collateral proceeding"). Petitioner's ineffective assistance of PCRA counsel claim is therefore not excusable under *Martinez-Trevino* and will therefore be dismissed.

IV. Conclusion

For the above stated reasons, the Petition for Writ of Habeas Corpus will be dismissed. Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a petition under 28 U.S.C. § 2254 is issued, the district court must make a determination as to whether a certificate of appealability should issue. *See* 3d Cir. L.A.R. 22.2 A certificate of appealability should issue "only if the applicant has made a substantial

showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this burden, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484-85, 120 S.Ct. 1595 (2000) (internal citations and quotations omitted). Because reasonable jurists would not debate the disposition of the instant habeas Petition, a certificate of appealability will not issue.

An appropriate order follows.

November 13, 2018
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JESUS M. GARCIA, Plaintiff	)	CIVIL ACTION NO. 3:14-cv-2214
	)	(CAPUTO, D.J.)
v.	)	
	)	(ARBUCKLE, M.J.)
COMMONWEALTH OF PENNSYLVANIA, *ET AL.*, Defendants	)	

REPORT & RECOMMENDATION

I. INTRODUCTION

On November 19, 2014, Petitioner Jesus M. Garcia ("Petitioner"), a prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). Petitioner is currently serving a State Court sentence of twenty-five (25) to forty (40) years for crimes related to the distribution of cocaine. In his Petition, Petitioner raises nine (9) grounds for relief.

This matter has been referred to me to prepare a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Rule 72(b) of the Federal Rules of Civil Procedure. After reviewing Petitioner's arguments and the government's response I find that Petitioner is not entitled to the relief he requests. Accordingly, I RECOMMEND that the Petition be denied.

II. FACTUAL BACKGROUND

In August of 2006, the Cumberland County Drug Task Force arrested Harry Tolbert ("Tolbert") for drug-related offenses. (Doc. 16, p. 6). Tolbert told the Task Force that Caesar Jaen ("Jaen") of Dauphin County was his source for cocaine. *Id.* Cooperating with law enforcement, Tolbert made controlled purchases of illegal drugs from Jaen. *Id.* Law enforcement obtained and executed a search warrant on Jaen's residence and seized twenty-three (23) ounces of cocaine, seventeen (17) pounds of marijuana, and thousands of dollars in cash. *Id.* Thereafter, Jaen agreed to cooperate with the police. *Id.* He told Agent Ronald Diller ("Agent Diller") about a man named "Cano." *Id.* "Cano" was later identified as Petitioner. *Id.* at 6-7. Jaen told Agent Diller that he and Petitioner would supply cocaine to each other. *Id.*at 7.

On March 9, 2007, Jaen contacted Agent Diller and told him that Petitioner agreed to sell, or split, 125 grams of cocaine with him. *Id.* Agent Diller equipped Jaen with recording equipment and followed Jaen to a gas station in Lebanon County. *Id.* Agent Diller observed a blue Honda, which he knew to be registered to Petitioner, park at the gas pump. *Id.* Petitioner and Luis Mojica ("Mojica"), a known associate of Petitioner, interacted with Jaen while he sat in his car. *Id.* After a brief conversation, Petitioner and Mojica drove away. *Id.* Agent Diller met with

Jaen, who handed him a package. *Id.* This package contained 60.9 grams of cocaine. *Id.*

On March 15, 2007, Agent Diller taped a telephone call Jaen made to Petitioner about buying more cocaine. *Id.* at 8. Jaen consented to Agent Diller's taping of the call. *Id.* The next day, Agent Diller met with Jaen and gave him $1,500 to pay Petitioner for the cocaine from the March 9, 2007 transaction. *Id.* Agent Diller followed Jaen to the same gas station and watched as Mojica and Petitioner interacted with Jaen. *Id.* Petitioner told Jaen that he was giving him a "full one," which Jaen understood to be 125 grams. *Id.* After Petitioner and Mojica left, Jaen gave Agent Diller the "two packets" he received from Mojica. *Id.* These packets contained 116 grams of cocaine. *Id.* at 9.

On March 27, 2007, Agent Diller recorded a telephone call where Jaen told Petitioner he would be paid on March 29, 2007 for the most recent drug purchase. *Id.* On March 29, 2007, Agent Diller gave Jaen $3,000 in cash and placed a recorder on him. *Id.* Agent Diller then followed Jaen to the Ono Truck Stop on Route 22 in Lebanon County. *Id.* Petitioner entered Jaen's vehicle and told him that a person in Puerto Rico was supposed to get him ten (10) kilos of cocaine but that "something had to be straightened out" before he could get it. *Id.*

On April 13, 2007 and under the direction of Agent Diller, Jaen placed a recorded call to Alex Emilio Rodriguez ("Rodriguez") to arrange a purchase for

cocaine. *Id.* Jaen told Rodriguez not to tell "Cano" about the sale. *Id.* at 9-10. That same day, Jaen met with Rodriguez and exchanged the money for 123 grams of cocaine. *Id.* at 10. During the meeting, Rodriguez told Jaen that he had to see Petitioner in order to get his money for the crack cocaine he gave to Petitioner. *Id.*

On July 10, 2007, Petitioner contacted Jaen and asked if they could meet at Francisco's Pizza in Lebanon, Pennsylvania. *Id.* Jaen agreed, and went to the meeting equipped with a recording device. *Id.* During the meeting, Petitioner told Jaen that he wanted to sell Jaen his phone for $15,000. *Id.* Petitioner said that the phone made $10,000 per week because people were constantly calling to purchase crack cocaine. *Id.* at 10-11. Petitioner also told Jaen that Rodriguez had offered $25,000 for the phone, but Petitioner did not think Rodriguez would pay the full amount. *Id.* at 11. Petitioner further told Jaen that he was looking for someone responsible to take over his business, and that he would give Jaen a new car and a place to stay if Jaen agreed to purchase the phone. *Id.*

Jaen asked Petitioner if he could get 125 grams of cocaine, and Petitioner said that he routinely obtained a kilogram and a half (1500 grams) of cocaine. *Id.* Petitioner also told Jaen that he had been asked for eight kilograms before. *Id.*

III. PROCEDURAL HISTORY

Petitioner was originally charged with nine (9) offenses in the Commonwealth of Pennsylvania. These charges included four (4) counts of unlawful delivery of a controlled substance, two (2) counts of criminal conspiracy, one (1) count of corrupt organizations, one (1) count of criminal use of a communication facility, and one (1) count of corrupt organizations conspiracy. Petitioner asserted his right to a jury trial, which began on November 4, 2008, and ended two (2) days later. The jury found Petitioner guilty on all nine (9) counts, and the sentencing was deferred for the preparation of a pre-sentence investigation report.

On November 6, 2008, Petitioner was found guilty of: four (4) counts of possession with intent to deliver/delivery of a controlled substance (cocaine); two (2) counts of criminal conspiracy; one (1) count of criminal use of a communication facility; one (1) count of corrupt organizations; and one (1) count of corrupt organizations conspiracy. (Doc. 3, p. 8; Doc. 16, p. 6).

On December 9, 2008, Petitioner's counsel filed a Post-Trial Motion for a Hearing on Alleged Tainted Jury. (Doc. 16, Ex. 15). On December 15, 2008, Pennsylvania Court of Common Pleas Judge Bradford Charles granted the motion and set hearing date for December 31, 2008. (Doc. 16, Ex. 16). The trial court found no evidence of juror misconduct. (Doc. 16).

On January 28, 2009, the Lebanon County Court of Common Pleas sentenced Petitioner for all crimes to a total of twenty-five (25) to fifty-two (52) years in prison. (Doc. 1). On March 20, 2009, Petitioner's counsel appealed the decision to the Pennsylvania Superior Court. (Doc. 16, Ex. 20). On direct appeal, Petitioner's counsel raised the following issues: (1) sufficiency of evidence; (2) weight of evidence; (3) wrongful denial of mistrial for the possible juror misconduct; (4) wrongful denial of motion to impeach the confidential informant; (5) wrongful denial of ability to question confidential informant about prior criminal history; and (6) receipt of an illegal sentence. *Id.* On December 24, 2009, the Superior Court denied relief on issues one (1) through five (5), but found the trial court exceeded the maximum sentence for counts II, IV, and V. (Doc. 16). The Superior Court vacated Petitioner's sentence and remanded the case to the trial court for resentencing. *Id.*

On May 5, 2010, the Lebanon County Court of Common Pleas resentenced Petitioner this time to twenty-five (25) to forty (40) years in prison, a twelve (12) year reduction in the maximum. (Doc. 16, Ex. 22). On June 17, 2010, Petitioner's counsel challenged the new sentence based on abuse of discretion. (Doc. 16, Ex. 23). On May 9, 2011, the Superior Court affirmed the trial court's resentence. (Doc. 16).

On June 8, 2011, Petitioner's counsel filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. (Doc. 16, Ex. 26). The petition raised the following issues: (1) Superior Court erred in affirming trial court's resentence; (2) sufficiency of evidence; and (3) trial court abused discretion by denying the mistrial for juror misconduct. *Id.* On April 10, 2012, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal. (Doc. 16, Ex. 31).

On April 30, 2012, Petitioner filed a Petition under the Post-Conviction Relief Act ("PCRA Petition"). (Doc. 16, p. 8). On September 12, 2012, Petitioner filed a Supplemental PCRA Petition. *Id.* In his PRCA Petition, Petitioner alleged the following grounds for relief: (1) ineffective assistance of counsel for failure to impeach informant; (2) conspiracy by the Commonwealth to obtain false testimony; (3) ineffective assistance of counsel for failing to challenge voice identification on tapes; (4) ineffective assistance of counsel for failure to call character witnesses; and (5) use of an illegal wiretap. (Doc. 16, Ex. 32). On March 13, 2013, the Lebanon County Court of Common Pleas denied Petitioner's PCRA Petition. (Doc. 16, p. 11).

On April 11, 2013, Petitioner appealed the Court of Common Pleas decision denying his PCRA Petition to the Pennsylvania Superior Court. (Doc. 16). In the appeal, Petitioner raised the following issues: (1) the Commonwealth illegally wiretapped Petitioner and trial counsel did not object; and (2) the Commonwealth

garnered false testimony from the informant. *Id.* On February 18, 2014, the Superior Court affirmed the decision of the Common Pleas Court. *Id.*

On March 18, 2014, Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. (Doc. 16, Ex. 38). The Petitioner raised these two issues: (1) the Commonwealth illegally wiretapped Petitioner and trial counsel did not object; and (2) the Commonwealth garnered false testimony from the informant. *Id.* On September 10, 2014, the Supreme Court of Pennsylvania denied Petition for Allowance of Appeal. (Doc. 16, Ex. 39).

On November 19, 2014, Petitioner initiated this action by filing a Petition for Writ of Habeas Corpus (Doc. 1) and Memorandum of Law in Support (Doc. 3) in the United States District Court for the Middle District of Pennsylvania. As relief, Petitioner seeks the dismissal of all charges and/or remand for new trial. (Doc. 1). Petitioner, proceeding *pro se,* raises nine (9) grounds on which he believes he is being held in violation of the Constitution:

(1) "Appellant avers that at trial the Commonwealth failed to present sufficient evidence to prove Appellant's guilt beyond a reasonable doubt." (Doc. 1, p. 14).

(2) "Whether the Jury's verdicts in this case were against the weight of the evidence such that the verdicts shocked one's sense of justice, thereby necessitating the award of a new trial?" (Doc. 1, p. 16).

(3) "The Trial Court abused its discretion in sentencing Appellant to an illegal sentence of 25 years to 52 years which was so manifestly excessive as to constitute too severe a punishment[.]" (Doc. 1, p. 18).

(4) "The Trial Court abused its discretion by denying a mistrial where a member of the jury may have been improperly influenced by prejudicial remarks, thereby denying Appellant a fair and impartial trial." (Doc. 1, p. 20).

(5) "The Trial Court abused its discretion by denying Appellant the ability to impeach the Commonwealth's informant with his multiple identities (aliases)." (Doc. 1, p. 24).

(6) "The Trial Court abused its discretion by denying Appellant the ability to fully and properly cross-examine the confidential informant with his prior criminal history." (Doc. 1, p. 27).

(7) "Trial counsel was ineffective for failing to object to the introduction of illegally-obtained wiretap evidence, by the Commonwealth, which ultimately led to Defendant's conviction." (Doc. 1, p. 31).

(8) "Trial Counsel was ineffective for failing to object to the Commonwealth's introduction of confidential informant's testimony where the Commonwealth knowingly elicited false testimony therefrom." (Doc. 1, p. 35).

(9) "Ineffective assistance of all counsels. [sic]" (Doc. 1, p. 37).

On November 19, 2014, Petitioner filed a Motion requesting the appointment of counsel. (Doc. 2). Petitioner requested federally appointed community defender to further brief Petitioner on the issues. *Id.* Petitioner cited his incarceration, drug conviction, lack of financial resources, lack of legal training, and menial fixed income as grounds for appointed counsel. *Id.* Additionally, Petitioner cited his inability to speak, write, or read English as final reason for requested assistance of counsel. *Id.*

On December 1, 2014, Petitioner filed motion requesting leave to *proceed in forma pauperis*. (Doc. 7). On February 17, 2015, Judge Caputo granted Petitioner's Motion for IFP. (Doc. 14).

On March 16, 2015, Respondents filed their Response. (Doc. 16).

On March 27, 2015, Petitioner filed his reply. (Doc. 17).

The matter is now fully briefed and rip for decision.

IV. STANDARDS OF LAW

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides in pertinent part: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court.

In order to obtain federal habeas corpus relief, a state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

> (b)(1) 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> . . . .
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. A petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the United States," section 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. *See, e.g.*, *Reed v. Farley,* 512 U.S. 339, 354 (1994). Thus, claimed violations of state

law, standing alone, will not entitle a petitioner to habeas relief under section 2254 absent a showing that those violations are so great as to be of a constitutional dimension. *See Priester v. Vaughan,* 382 F.3d 394, 401–02 (3d Cir. 2004).

These same principles, which inform the standard of review in habeas petitions and limit habeas relief to errors of a constitutional dimension, also call upon federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under section 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law, *see* 28 U.S.C. § 2254(d)(1); or (2) was "based upon an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. *See Rice v. Collins,* 546 U.S. 333, 338-39 (2006); *see also Warren v. Kyler,* 422 F.3d 132, 139-40 (3d Cir. 2006); *Gattis v. Snyder,* 278 F.3d 222, 228 (3d Cir. 2002).

In addition, section 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. *See* 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings. *See, e.g., Maggio v. Fulford,* 462 U.S. 111, 117 (1983) (per curiam); *Demosthenes v. Baal,* 495 U.S. 731, 734-35 (1990).

Federal courts are not free to substitute their views for the findings of state judges on issues of: competence to stand trial, *Maggio v. Fulford,* 462 U.S. 111, 117 (1983); competence to waive rights, *Demosthenes v. Baal,* 495 U.S. 731, 734-35 (1990); or whether the defendant's mental competence affected his ability to comply with post-conviction petition filing deadlines, *Nara v. Frank,* 488 F.3d. 187, 200-01 (3d Cir. 2007) (state court finding that defendant's mental incompetence interfered with his ability to file timely petition entitled to a presumption of correctness.) Rather, these factual findings must be presumed to be correct unless the petitioner can show by clear and convincing evidence that these factual findings were erroneous. *See* 28 U.S.C. § 2254(e)(1).

These deferential standards of review also guide our assessment of the legal claims concerning the effectiveness of counsel. Thus, any state court factual findings in this field are presumed correct unless a petitioner can show by clear and

convincing evidence that these findings were erroneous. Moreover, the state courts' decisions applying the Supreme Court's *Strickland* standard for assessing the competence of counsel must be upheld unless it can be shown that these decisions were either: (1) "contrary to" or involved an unreasonable application of clearly established case law, *see* 28 U.S.C. § 2254(d)(1); or (2) were "based upon an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2). *See, e.g.*, *Roland v. Vaughn,* 445 F.3d 671, 677-78 (3d. Cir. 2006) (applying § 2254(d) standard of review to ineffectiveness claim analysis); *James v. Harrison,* 389 F.3d 450, 453-54 (4th Cir. 2004) (same).

Furthermore, state prisoners seeking relief under Section 2254 must also satisfy specific, and precise, procedural standards. Among these procedural standards is a requirement that the petitioner "has exhausted the remedies available in the courts of the State" before seeking relief in federal court. 28 U.S.C. § 2254(b). Section 2254's exhaustion requirement calls for total exhaustion of all available state remedies. Thus, a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). In instances where a state prisoner has failed to exhaust the legal remedies available to him in the state

courts, federal courts typically will refuse to entertain a petition for habeas corpus. *See Whitney v. Horn,* 280 F.3d 240, 250 (3d Cir.2002).

This statutory exhaustion requirement is rooted in principles of comity and reflects the fundamental idea that the state should be given the initial opportunity to pass upon and correct alleged violations of the petitioner's constitutional rights. *O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999). As the Supreme Court has aptly observed, "a rigorously enforced total exhaustion rule" is necessary in our dual system of government to prevent a federal district court from upsetting a state court decision without first providing the state courts the opportunity to correct a constitutional violation. *Rose v. Lundy,* 455 U.S. 509, 518 (1982). Requiring exhaustion of claims in state court also promotes the important goal of ensuring that a complete factual record is created to aid the federal courts in their review of a section 2254 petition. *Walker v. Vaughn,* 53 F.3d 609, 614 (3d Cir.1995). A petitioner seeking to invoke the writ of habeas corpus, therefore, bears the burden of showing that all of the claims alleged have been "fairly presented" to the state courts, and the claims brought in federal court must be the "substantial equivalent" of those presented to the state courts. *Evans v. Court of Common Pleas,* 959 F.2d 1227, 1231 (3d Cir.1992); *Santana v. Fenton,* 685 F.2d 71, 73–74 (3d Cir.1982). A petitioner cannot avoid this responsibility merely by suggesting that he is unlikely to succeed in seeking state relief, since it is well-settled that a claim of "likely

futility on the merits does not excuse failure to exhaust a claim in state court." *Parker v. Kelchner,* 429 F.3d 58, 63 (3d Cir. 2005).

V. ANALYSIS

A. WAS PETITIONER'S PETITION TIMELY FILED?

Respondents acknowledge the Petition was filed within the one-year statute of limitations "as (1) essentially no time expired between the end of direct review and the filing of Garcia's PCRA petition, and (2) little time expired between the end of PCRA review and the filing of the instant habeas action. (Doc. 16, p. 21). I agree, and, therefore, move on to Respondents' other challenges to the Petition.

B. DID PETITIONER EXHAUST ALL GROUNDS IN STATE COURT?

Respondents aver Petitioner likely exhausted Grounds One through Eight in State Court. (Doc. 16, p. 22). Thus, the only Count in dispute with respect to exhaustion is Ground Nine.

Ground Nine of the Petition seems to act as a "catch-all" for instances of ineffective assistance of counsel not raised in Grounds Seven and Eight.[1] As such, Respondents contend Ground Nine was not exhausted "[t]o the extent ground Nine raises ineffectiveness claims outside those raised in Grounds Seven and Eight."

[1] Ground Nine merely states: "Ineffective assistance of all counsels. [sic]" (Doc. 1, p. 37). In Ground Seven, Petitioner argues counsel was ineffective for failing to object ot the introduction of allegedly illegally-obtained wiretap evidence. (Doc. 1, p. 31). In Ground Eight, Petitioner argues counsel was ineffective for failing to object to a confidential informant's testimony wherein there was an alleged conspiracy to elicit knowingly false information." (Doc. 1, p. 35).

(Doc. 16, p. 24). Petitioner does not address the issue of whether Ground Nine was exhausted. Instead, he implicitly concedes that it was not by arguing procedural default should be "excuse[d]" under a narrow exception, and that failure to review Ground Nine would be "grave miscarriage of justice." (Doc. 17, p. 3). Thus, the Court must decide whether Petitioner has established "cause" and "actual prejudice" such that an exception to the procedural default doctrine applies to Ground Nine of the Petition.

As stated above, Petitioner bears the burden of demonstrating his claims have been properly exhausted in State Court. Regarding procedural default, the Third Circuit explained:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "To show cause and prejudice, 'a petitioner must demonstrate some objective factor external to the defense that prevented compliance with the state's procedural requirements.'" *Cristin v. Brennan,* 281 F.3d 404, 412 (3d Cir. 2002) (quoting *Coleman,* 501 U.S. at 753). "To show a fundamental miscarriage of justice, a petitioner must demonstrate that

he is actually innocent of the crime by presenting new evidence of innocence." *Keller v. Larkins,* 251 F.3d 408, 415 (3d Cir. 2001).

There are two situations in which a prisoner may establish cause for the procedural default of an ineffective assistance of counsel claim:

> The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Jones v. Pa. Board of Probation and Parole, 2012 WL 3024969, at *3 (3d Cir. 2012) (quoting *Martinez v. Ryan,* 566 U.S. 1 (2017). Here, Petitioner refers to the latter situation. (Doc. 17, pp. 4-5). Additionally, "the 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.*

Petitioner raises a litany of arguments in support of his contention that the unexhausted ineffectiveness claims in Ground Nine have merit. Specifically, he argues that: PCRA Counsel did not raise "additional issues" on the appeal from the denial of his PCRA Petition; trial counsel failed to obtain impeachment evidence on Cesar Jaen; trial counsel was ineffective for failing to challenge "voice identifications made with respect to tapes played for the jury; trial counsel was ineffective for failing to "call character witnesses"; and trial counsel was

ineffective because Petitioner "could not understand anything being said to him by counsel because he cannot read, write, or speak the English language" and trial counsel failed to provide a "neutral and unbiased interpreter." Respondents contend that Petitioner has failed to meet his burden of establishing cause by demonstrating that his unexhausted ineffective assistance of counsel claims were "substantial" and had "some merit." I will address each of Petitioner's claims below.

As to the claim that trial counsel failed to obtain impeachment evidence on Cesar Jaen (Doc. 1, p. 39), Respondents argue this claim lacks merit. (Doc. 16, pp. 21-22). I agree for several reasons. As an initial matter, Petitioner does not say what impeachment evidence he thinks should have been presented a trial, thus leaving Respondents and the Court to guess what he is referring to. Next, testimony was presented at trial regarding Jaen's prior felony drug record and the fact that he was facing a significant period of incarceration. (Doc. 16-35, p. 4). Indeed, Cesar Jaen himself testified about both his prior bad acts and his convictions. (Doc. 16-36, p. 17). The Superior Court, on direct appeal, stated that "the defense was permitted to extensively cross-examine Jaen upon his improper motives for testifying." (Doc. 16-35, p. 4 (citing *Commonwealth v. Garcia,* 437 MDA 2009 at 20-21 (Pa. Super. 2009))). Additionally, trial counsel filed a pre-trial motion *in limine* concerning impeachment evidence. (Doc. 16-36, p. 16). Given the

great extent to which this impeachment issue has already been presented and considered, it is clear this claim is not substantial and does not meet the cause and prejudice exception to exhaustion.

As to the claim that trial counsel was ineffective for failing to challenge "voice identifications made with respect to tapes played for the jury" (Doc. 1, p. 39), Petitioner had already admitted to trial counsel that he was the speaker on the tapes. (Doc. 16-35, p. 5). Therefore, this claim is not substantial and does not meet the cause and prejudice exception to exhaustion.

As to the claim that trial counsel was ineffective for failing to "call character witnesses" (Doc. 1, p. 39), Petitioner fails to state who these witnesses were and, thus, fails to show that he was prejudiced by not having them testify. Therefore, this claim is not substantial and does not meet the cause and prejudice exception to exhaustion.

As to the claim that trial counsel was ineffective because Petitioner "could not understand anything being said to him by counsel because he cannot read, write, or speak the English language" and counsel failed to provide a "neutral and unbiased interpreter" (Doc. 1, p. 39), it is clear from a review of the record that interpreters were provided and Petitioner participated in the State Court proceedings. Further, at one point during the PCRA hearing, the interpreter had to ask the Judge to direct Petitioner to only speak in Spanish, as Petitioner was

speaking in both English and Spanish and thus making it difficult for the interpreter to translate. (Doc. 16-36, pp. 1-2). Therefore, this claim is not substantial and does not meet the cause and prejudice exception to exhaustion.

For these reasons, I find that all claims raised by Petitioner in Ground Nine are not exhausted because they do not meet the cause and prejudice exception to procedural default. Therefore, these claims should be dismissed.

C. ON THE MERITS, DID THE STATE COURTS MAKE CONCLUSIONS THAT WERE CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, OR AN UNREASONABLE DETERMINATION OF THE FACTS?

1. Generally

The Third Circuit has described the standard for reviewing the merits of claims under section 2254 as follows:

> 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); *Marshall*, 307 F.3d at 50. A federal habeas court must presume that a state court's findings of fact are correct. *See* 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.*

> A state court decision is contrary to Supreme Court precedent under § 2254(d)(1) where the state court reached a "'conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.'" *Marshall*, 307 F.3d at 51 (quoting *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). A state court decision is an unreasonable application under § 2254(d)(1) if the court "identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's 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." *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002) (citing *Williams*, 529 U.S. at 407, 120 S. Ct. (1495)). The unreasonable application test is an objective one--a federal court may not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly. *Wiggins v. Smith*, 539 U.S. 510, 520-521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Gattis*, 278 F.3d at 228.

Jacobs v. Horn, 395 F.3d 92, 99-100 (3d Cir. 2005).

2. Were the State Courts' Conclusions Contrary to, or an Unreasonable Application of, Clearly Established Federal Law?

i. Ground One[2]

The United States Supreme Court has stated that Petitioners in federal habeas proceedings face a "high bar . . . because they are subject to two layers of judicial deference." *Coleman v. Johnson,* 566 U.S. 650, 651 (2012). The Supreme Court explained:

[2] "Appellant avers that at trial the Commonwealth failed to present sufficient evidence to prove Appellant's guilt beyond a reasonable doubt." (Doc. 1, p. 14).

> First, on direct appeal, "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith,* 565 U.S. 1, ——, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (*per curiam*). And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.' " Ibid. (quoting *Renico v. Lett,* 559 U.S. 766, ——, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Id. Further, the minimum evidence the Due Process Clause requires to prove a crime is a matter of federal law in a habeas review. *Id.* at 2064.

Petitioner claims that prosecutors failed to present sufficient evidence at trial to prove Petitioner's guilt beyond a reasonable doubt. (Doc. 1, p. 14). Specifically, Petitioner argues: (1) the Trial Court did not provide jury instructions regarding accomplice liability, (Doc. 1, p. 14); (2) the Attorney General failed to provide mandatory discovery regarding the State's agreement with an informant, Mr. Cesar Jaen, which Petitioner contends would show Jaen's testimony was not voluntarily given, *Id.*; (3) the Trial Court failed to instruct the jury that "they should not consider the deal or benefits in which the confidential informant received in exchange for his testimony against the Appellant," (Doc. 1, p. 15); and (4) the Trial Judge abused his discretion by allowing evidence that should have been deemed inadmissible due to its "inflammatory and prejudicial impact," *Id.*

Respondents contend the State Court's decision concerning the sufficiency of evidence was not objectively unreasonable. (Doc. 16, p. 31). In support of their contention, Respondents cite to the "myriad evidence" a rational trier of fact could have relied on to enter a guilty verdict. *Id.* Relying on exhibits attached to Petitioner's Memorandum of Law in Support of his Petition, Respondents argue the Superior Court described that not only was Petitioner present during transfers of cocaine, but also he arranged the meeting through cell phone conversations and physically prepared the cocaine for shipment. (Doc. 16, p. 32) (citing Doc. 3, Ex. C, pp. 10-13).[3] They argue that the Superior Court further found Jaen's testimony could be used to establish that a corrupt organization existed. *Id.* (citing Doc. 3, Ex. C, pp. 14-15).

I agree with Respondents. After careful consideration of the record there is ample evidence such that this Court cannot find the state court's decisions was "objectively unreasonable." Therefore, I recommend relief be denied with respect to Ground One.

[3] Respondents Cite Exhibit B of Document 3, but it appears clear they intended to cite Exhibit C.

ii. Ground Two[4]

In Ground Two, Petitioner contends the Jury's verdicts were "against the weight of evidence" such that they "shocked one's sense of justice . . . ." (Doc. 1, p. 16). Respondents counter that a "weight of the evidence" claim is not cognizable in the federal habeas corpus proceeding and, thus, the Court does not have the power to grant a writ of habeas corpus on such a claim.

> A weight of the evidence claim requires an evaluation of the credibility of the evidence presented at trial and a state court's credibility findings are binding on a federal habeas court. *Marshall v. Lonberger*, 459 U.S. 422, 434–35, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). Thus, it is well established that a challenge to the weight of the evidence produced at trial is not cognizable in a federal habeas corpus proceeding.

Ramos v. Collins, No. CIV.A. 13-433, 2013 WL 5429285, at *1 (E.D. Pa. June 28, 2013), *aff'd*, No. CIV.A. 13-433, 2013 WL 5429305 (E.D. Pa. Sept. 27, 2013).

In light of the clear case law above, I recommend relief be denied with respect to Ground Two.

iii. Ground Three[5]

Concerning Ground Three, Petitioner contends the Trial Court sentenced him to an "illegal sentence of 25 year to 52 years" which he deems to be "so

[4] "Whether the Jury's verdicts in this case were against the weight of the evidence such that the verdicts shocked one's sense of justice, thereby necessitating the award of a new trial?" (Doc. 1, p. 16).

[5] "The Trial Court abused its discretion in sentencing Appellant to an illegal sentence of 25 years to 52 years which was so manifestly excessive as to constitute too severe a punishment[.]" (Doc. 1, p. 18).

manifestly excessive as to constitute too severe a punishment[.]" (Doc. 1, p. 18). Respondents counter that Petitioner has not shown this case to be "extraordinary" and warranting federal relief. (Doc. 16, p. 28).

The Third Circuit has held:

> Generally, a sentence within the limits imposed by statute is neither excessive nor cruel and unusual under the Eighth Amendment. This is so because we accord substantial deference to [the legislature], as it possesses broad authority to determine the types and limits of punishments for crimes.

United States v. Miknevich, 638 F.3d 178, 186 (3d Cir. 2011).

It further elaborated that:

> Of course, the Eighth Amendment, "which forbids cruel and unusual punishments," does "contain[ ] a narrow proportionality principle that applies to noncapital sentences." *United States v. Walker,* 473 F.3d 71, 79 (3d Cir.2007) (quoting *Ewing v. California,* 538 U.S. 11, 20, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003)). And although this narrow proportionality principle "applies to sentences for terms of years" (such as Martinez's sentence), "only an extraordinary case will result in a constitutional violation." *Id.* (citing *Lockyer v. Andrade,* 538 U.S. 63, 72, 77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)); *see also Rummel v. Estelle,* 445 U.S. 263, 272, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.").

Martinez v. Stridiron, 538 F. App'x 184, 190-91 (3d Cir. 2013). The *Martinez* Court went on to list examples of cases constituting "rare situations in which the difference between the crime and the sentence was unconstitutionally disproportionate:"

> *Compare Solem v. Helm,* 463 U.S. 277, 281, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (holding that the Eighth Amendment prohibited a life sentence without the possibility of parole for a recidivist offender convicted of "uttering a 'no account' check for $100"), *with Harmelin v. Michigan,* 501 U.S. 957, 961, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (rejecting a proportionality challenge to a mandatory sentence of life without the possibility of parole imposed on a first-time offender convicted of possessing 672 grams of cocaine), and *Walker,* 473 F.3d at 83 (concluding that a defendant's fifty-five-year sentence for armed robberies and drug-trafficking crimes was not unconstitutional).

Id. at 191.

This case does not remotely resemble any of these rare situations identified in *Martinez.* As Respondents point out, the imposition of consecutive sentences, as well as an aggregate sentence, does not constitute a "rare situation" of an "unconstitutionally disproportionate" sentence such that Petitioner is entitled to federal habeas relief. (Doc. 3, Ex. C, pp. 23-28). That is, the sentence for each count imposed by the State Court, whether imposed consecutively or concurrently, was either within the standard guideline range or pursuant to an applicable mandatory sentence provision. *Id.* The State Court also provided to Petitioner an explanation for of the reasoning behind each portion of the sentence. *Id.* For these reasons, I recommend Petitioner be denied relief on Ground Three.

iv. Ground Four[6]

[6] "The Trial Court abused its discretion by denying a mistrial where a member of the jury may have been improperly influenced by prejudicial remarks, thereby denying Appellant a fair and impartial trial." (Doc. 1, p. 20).

Concerning Ground Four, Petitioner contends the Trial Court abused its discretion by failing to declare a mistrial because a juror "may have been improperly influenced by prejudicial remarks." (Doc. 1, p. 20). Specifically, he claims that Juror Martie A. Manno overheard inappropriate remarks made by the husband of another juror. Respondents contend Petitioner has failed to establish that the State Court's decision was "egregrious" and, thus, the decision should not be overturned on these grounds. (Doc. 16, pp. 33-34).

"[T]he jurisprudence of our system of trial by jury allows us to overturn a jury's verdict only when its deliberations have taken the most egregious departures from rational discourse." *Anderson v. Miller,* 346 F.3d 315, 324 (2d Cir. 2003). Findings of fact made by the State Court are presumed to be correct. 28 U.S.C. § 2254(e)(1). In *Henderson v. DiGuglielmo,* the Third Circuit upheld a State Court's decision to deny a motion for a mistrial challenged in a habeas motion. 138 F. App'x 463 n.5 (3d Cir. 2005). In *Henderson,* the State Court conducted a post-verdict hearing and determined that no juror bias existed as the petitioner had failed to present clear and convincing evidence to the contrary. *Id.* The Court reasoned:

> The Superior Court-crediting the trial court's credibility determinations-affirmed its denial of a mistrial on jury tampering grounds, reasoning that "[t]he evidence presented abundantly supports the court's finding that the instant allegation of jury tampering is meritless." The trial court had the benefit of the transcript of the grand jury investigation and its first-hand observations of the witnesses'

> demeanor and credibility. Petitioner has not offered clear and convincing evidence to the contrary, thus we presume the state court's factual findings correct. Accordingly, we find the state court's factual determination that no juror misconduct occurred to be reasonable and not contrary to any federal law.

Id.

Here, a letter describing the remarks by Ms. Manno was sent to the Court and all parties, two hearings were held concerning the remarks, and the Trial Court concluded that Petitioner's motion for a new trial based on these remarks lacked merit. (Doc. 16, Ex. K). Similar to *Henderson,* the Trial Court in the instant case had the benefit of the hearing transcript and the "first-hand observations of the witness[']s demeanor and credibility." Considering the State Court is presumed to be correct, and that Petitioner has failed to provide clear and convincing evidence to the contrary, I recommend Petitioner be denied relief on Ground Four.

v. Grounds Five and Six[7]

Concerning Ground Five, Petitioner argues the Trial Court abused its discretion by failing to allow Petitioner to impeach the State's informant regarding his aliases, (Doc. 1, p. 24), and to "properly cross-examine the confidential information with his prior criminal history," (Doc. 1, p. 27). Respondents contend

[7] "The Trial Court abused its discretion by denying Appellant the ability to impeach the Commonwealth's informant with his multiple identities (aliases)." (Doc. 1, p. 24). "The Trial Court abused its discretion by denying Appellant the ability to fully and properly cross-examine the confidential informant with his prior criminal history." (Doc. 1, p. 27).

that the Trial Court's evidentiary ruling concerning the cross-examination of an informant was not contrary to, or an unreasonable applicable of, clearly established federal law. (Doc. 16, p. 36).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "Subject to 'the broad discretion of a trial judge to preclude repetitive and unduly harassing litigation . . . , the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.'" *Wright v. Vaughn,* 473 F.3d 85, 93 (3d Cir. 2006) (quoting *Olden v. Kentucky,* 488 U.S. 227, 231 (1988)). In order to prevail on his claim, a habeas petitioner "must show that the trial court's decision to curtail his cross-examination was contrary to, or involved an unreasonable application of, clearly established federal law." *Wright,* 473 F.3d at 93 (citing 28 U.S.C. § 2254(d)(1)). Evidentiary rulings in violation of the Confrontation Clause are subject to harmless error analysis. *Wright,* 473 F.3d at 93 (citing *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986)). In order to prevail on his claim, a habeas petitioner "must show that the trial court's decision to curtail his cross-examination was contrary to, or involved an unreasonable application of, clearly established federal law." *Wright,* 473 F.3d at 93 (citing 28 U.S.C. § 2254(d)(1)). The United States Supreme Court explained:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might

> nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware, 475 U.S. at 684 (citing *Harrington v. California,* 395 U.S. 250, 254 (1969); *Schneble v. Florida,* 405 U.S. 427, 432 (1972)). Furthermore,

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Delaware, 475 U.S. at 679 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

Here, the Trial Court found that an inquiry into the alleged aliases of Mr. Jaen was not relevant cross-examination. (Doc. 3, Ex. C, pp. 34-36). The Trial Court also permitted cross-examination inquiries into a variety of aspects of Mr. Jaen's criminal history, (Doc. 3, Ex. C, pp. 34-36), and permitted Petitioner's counsel to draw out evidence of Mr. Jaen's motivation to testify, thus granting Petitioner great latitude to otherwise cross-examine Mr. Jaen, (Doc. 3, Ex. C, pp. 37-38). Finally, the overwhelming weight of the evidence presented against

Petitioner, as discussed previously, demands that I find any error in allowing or disallowing particular lines of cross-examination from Petitioner would not have resulted in a rational trier of fact rendering a different verdict. For these reasons, I recommend Petitioner be denied relief on Grounds Five and Six.

vi. Ground Seven[8]

Concerning Ground Seven, Petitioner contends his counsel was ineffective for failing to object to the introduction of "illegally-obtained" wiretap evidence. (Doc. 1, p. 31). Respondents contend there was no merit to challenging the legality of the relevant wiretaps before the Trial Court because Mr. Jaen lawfully consented to the interception of communication pursuant to Pennsylvania's state wiretapping law. (Doc. 16. P. 38).

The Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack of a sentence based upon a claim of ineffective assistance of counsel must meet a two-part test established by the Supreme Court in order to survive. A petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) that, but for counsel's errors, the result of the underlying proceeding would have been different. *Strickland v.*

[8] "Trial counsel was ineffective for failing to object to the introduction of illegally-obtained wiretap evidence, by the Commonwealth, which ultimately led to Defendant's conviction." (Doc. 1, p. 31).

Washington, 466 U.S. 668, 687–88, 691–92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner must satisfy both of the Strickland prongs in order to maintain a claim of ineffective counsel. *George v. Sively,* 254 F.3d 438, 443 (3d Cir.2001).

At the outset, *Strickland* requires a petitioner to "establish first that counsel's performance was deficient." *Jermyn v. Horn,* 266 F.3d 257, 282 (3d Cir.2001). This threshold showing requires a petitioner to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. *Id.* Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* However, in making this assessment "[t]here is a 'strong presumption' that counsel's performance was reasonable." *Id.* (quoting *Berryman v. Morton,* 100 F.3d 1089, 1094 (3d Cir.1996)).

But a mere showing of deficiencies by counsel is not sufficient to secure habeas relief. Under the second *Strickland* prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." *Id.* This prejudice requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Thus, as set forth in *Strickland*, a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer's "representation fell below an objective standard of reasonableness." 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made 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." *Thomas v. Varner,* 428 F.3d 491, 499 (3d Cir. 2005) (quoting *Strickland*, 466 U.S. at 689). The petitioner must then prove prejudice arising from counsel's failings. "Furthermore, in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' " " *Rolan v. Vaughn,* 445 F.3d 671, 682 (3d Cir.2006) (quoting *Strickland*, 466 U.S. at 696.)

Accordingly, a federal court reviewing a claim of ineffectiveness of counsel brought in a petition under 28 U.S.C. § 2254 may grant federal habeas relief if the petitioner can show that the state court's adjudication of his claim was an "unreasonable application" of *Strickland. Billinger v. Cameron,* No. 08-321, 2010 WL 2632286 at *4 (W.D. Pa. May 13, 2010). In order to prevail against this standard, a petitioner must show that the state court's decision "cannot reasonably

be justified under existing Supreme Court precedent." *Hackett v. Price,* 381 F.3d 281, 287 (3d Cir.2004). This additional hurdle is added to the petitioner's substantive burden under *Strickland. See Yarborough v. Gentry,* 540 U.S. 1, 6, (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas.").

I agree with Respondents. Petitioner's claim the wiretaps with Mr. Jaen were "illegal" is without merit, as Mr. Jaen consented to the interception of communications and they were made pursuant to Pennsylvania law. As such, Petitioner's claim his counsel was ineffective for failure to object to the introduction of said evidence is similarly without merit. For these reason, I recommend Petitioner be denied relief on Grounds Five and Six.

vii. Ground Eight[9]

Concerning Ground Eight, Petitioner claims his counsel was ineffective for failure to object to the introduction of a confidential informant's testimony "where the Commonwealth knowingly elicited false testimony therefrom." (Doc. 1, p. 35). Respondents contend Petitioner's claim must fail because there is: (1) no evidence Mr. Jaen provided false testimony; and (2) other evidence presented at trial that verifies Mr. Jaen's testimony. (Doc. 16, p. 39).

[9] "Trial Counsel was ineffective for failing to object to the Commonwealth's introduction of confidential informant's testimony where the Commonwealth knowingly elicited false testimony therefrom." (Doc. 1, p. 35).

Upon applying the *Strickland* standard discussed in the previous section, it appears Ground Eight must fail for similar reasons. After exhaustive search, there does not appear to be any evidence of record to indicate that Mr. Jaen's testimony was false. Indeed, there appears to be significant evidence to the contrary. For these reasons, the State Court's affirmance of the denial of PCRA Relief was not contrary to, or an unreasonable application of, clearly established federal law. Thus, I recommend Petitioner be denied relief on Ground Eight.

viii. Ground Nine[10]

As previously discussed, I find that Ground Nine has not been exhausted. For this reason, I recommend Petitioner be denied relief on Ground Nine.

VI. RECOMMENDATION

For the reasons articulated herein, I RECOMMEND that:

(1) Petitioner's Motion for Writ of Habeas Corpus be DENIED; and

(2) The Clerk of Court CLOSE this case.

Date: September 14, 2018

BY THE COURT
s/William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge

[10] "Ineffective assistance of all counsels. [sic]" (Doc. 1, p. 37).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JESUS M. GARCIA, Plaintiff	)	CIVIL ACTION NO. 3:14-cv-2214
	)	(CAPUTO, D.J.)
v.	)	
	)	(ARBUCKLE, M.J.)
COMMONWEALTH OF PENNSYLVANIA, *ET AL.*, Defendants	)	

NOTICE OF RIGHT TO OBJECT
[LOCAL RULE 72.3]

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition **within fourteen (14) days** after being served with a copy thereof. Such party **shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections** which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. **The briefing requirements set forth in Local Rule 72.2 shall apply.** A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Date: September 14, 2018

BY THE COURT
s/William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge