BLD-178 **May 9, 2019**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-3591**

GEOFFREY ELKINGTON, Appellant

v.

SUPERINTENDENT ALBION SCI; ET AL.

(E.D. Pa. Civ. No. 2-16-cv-02949)

Present: AMBRO, KRAUSE and PORTER, Circuit Judges

Submitted is Appellant's motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)

9in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's motion for a certificate of appealability is denied as he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). The District Court denied Appellant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For substantially the reasons stated in the Magistrate Judge's report adopted by the District Court, Appellant has not shown that reasonable jurists would find its assessment of his claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: May 22, 2019
Lmr/cc: Geoffrey Elkington
Gerald P. Morano

A True Copy:

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3591

GEOFFREY ELKINGTON,
Appellant

v.

SUPERINTENDENT ALBION SCI; ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 2-16-cv-02949)
District Judge: Gerald J. Pappert

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 appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

90 days from 7/11/19 = 10/9/19. 30 days prior = 9/9/19

panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: July 11, 2019

kr/cc: Geoffrey Elkington
Gerald P. Morano, Esq.

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

GEOFFREY ELKINGTON,

Petitioner,

v.

MICHAEL CLARK, *et. al.*,

Respondents.

CIVIL ACTION
NO. 16-2949

ORDER

AND NOW, this 26th day of October, 2018, upon consideration of the Report and Recommendation filed by United States Magistrate Judge Elizabeth T. Hey, (ECF No. 16), and Geoffrey Elkington's objections thereto, (ECF No. 19), it is hereby **ORDERED** that:

1. Elkington's objections are **OVERRULED** and Magistrate Judge Hey's Report and Recommendation is **APPROVED** and **ADOPTED**;
2. Elkington's Motion for Appointment of Counsel, (ECF No. 12), is **DENIED**;
3. Elkington's Petition for a Writ of *Habeas Corpus*, (ECF No. 1), is **DENIED** and **DISMISSED** with prejudice;
4. No certificate of appealability shall issue;[2]
5. This case shall be **CLOSED** for statistical purposes.

[2] No reasonable jurist would disagree with the Court's disposition of petitioner's claims. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

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

GEOFFREY ELKINGTON,

Petitioner,

v.

MICHAEL CLARK, *et. al.*,

Respondents.

CIVIL ACTION
NO. 16-2949

PAPPERT, J. **October 26, 2018**

MEMORANDUM

Geoffrey Elkington filed a *pro se* Petition for a Writ of *Habeas Corpus* under 28 U.S.C. § 2254 and also moves for appointment of counsel. The Court referred Elkington's filings to Magistrate Judge Elizabeth T. Hey who recommended denial of the Petition and Motion. Elkington thereafter asserted certain objections to Judge Hey's R. & R. After thoroughly reviewing the state court record, the parties' papers and the R. & R., the Court overrules Elkington's objections and adopts the R. & R. for the reasons stated therein and summarized below.

I

The case's factual background as well the findings of the Chester County Court of Pleas and the Superior Court of Pennsylvania on direct appeal and post-conviction review are recited in full in the R. & R. and need not be repeated here. Summarized briefly, on April 14, 2010 a Chester County jury found Elkington guilty of one count of attempted rape, eleven counts of sexual abuse of children, nine counts of involuntary deviate sexual intercourse, five counts of aggravated indecent assault, two counts of

indecent assault and two counts of corruption of minors. Verdict Slip, *Commonwealth v. Elkington*, No. CR-1376-2009 (Chester Cty. Ct. Com. Pl. Apr. 14, 2010). These charges arose from the sexual assault of Elkington's girlfriend's two young daughters. The trial judge determined that Elkington is a sexually violent predator under Megan's Law and sentenced him to twenty-five to fifty years of imprisonment. Order, *Commonwealth v. Elkington*, No. CR-1376-2009 (Chester Cty. Ct. Com. Pl. Dec. 16, 2010); Order, *Commonwealth v. Elkington*, No. CR-1376-2009, at 1 n.1 (Chester Cty. Ct. Com. Pl. Mar. 18, 2011).

Elkington filed post-sentence motions, which were denied. (R. & R. 3.) He unsuccessfully appealed the verdict to the Superior Court of Pennsylvania and the Pennsylvania Supreme Court denied allowance of appeal. (*Id.* at 3–4.) Elkington filed a *pro se* Petition for Post-Conviction Relief under the PCRA and was later appointed counsel, who filed an Amended Petition. (*Id.*) The *pro se* Petition raised nineteen claims; the Amended Petition raised two, and one was withdrawn during an evidentiary hearing. (Pet., ECF No. 1, at 5–6.) The trial court denied the Amended Petition and the Superior Court affirmed. The Pennsylvania Supreme Court denied allowance of appeal. (R. & R. 3–5.)

Elkington filed his current Petition on June 9, 2016.[1] He asserts twelve grounds for relief: ineffective assistance of counsel ("IAC") (Grounds 1–6, 9, 10 and 12) and that: the evidence was too unreliable to support the verdict (Ground 7), the trial court erred when it reviewed a document *in camera* (Ground 8), his sentence is excessive and unreasonable (Ground 9), the jury was improperly instructed (Ground 10), he was

[1] Elkington signed the Petition on June 9 and re-filed it with the Court on proper forms on July 25. *See* (R. & R. 6 n.6).

illegally detained (Ground 11) and the Commonwealth violated his rights under the Vienna Convention (Ground 12). (Pet., ECF No. 1.) He also moves for appointment of counsel. (Mot. Appointment Counsel, ECF No. 12.) After reviewing the Petition and Motion, the parties' briefs and the state court record, Judge Hey found:

> Ground One (IAC for failing to have pictures of Petitioner's feet shown to the jury) is exhausted and meritless. Grounds Two through Six . . . are unexhausted and procedurally defaulted. Ground Seven . . . is non-cognizable. Ground Eight . . . is non-cognizable as a state law matter, and if construed as a due process claim, is defaulted. Ground Nine . . . is defaulted, and in any event meritless. Ground Ten . . . is deemed exhausted, but is meritless. Ground Eleven . . . is defaulted, non-cognizable as raised, and in any event meritless. Ground Twelve . . . is defaulted, and in any event meritless. Finally, IAC claims raised as component parts of Grounds Nine through Twelve are defaulted, and in any event meritless. Moreover, there is no basis to appoint counsel.

(R. & R., ECF No. 16, at 44.)

Elkington timely objected to the R. & R. (Pet'r's Objs., ECF No. 19.) In a fifteen page memorandum, he rejects several of Judge Hey's findings and primarily objects to her recommendation to deny the Motion for Appointment of Counsel. Interpreting the memorandum liberally, the Court believes he has also objected to Judge Hey's findings as to Grounds 1, 2, 3, 9, 10 and 12 of the Petition.

II

Where a party timely objects to a magistrate judge's report and recommendation, the Court reviews the portions of the report pertaining to the objections *de novo*. 28 U.S.C. § 636(b)(1). The Court may accept, reject or modify, in whole or in part, the magistrate judge's findings or recommendations. 28 U.S.C. § 636(b)(1)(C).

The Court will first review Elkington's Motion for Appointment of Counsel. It will then review Judge Hey's findings on the grounds for relief to which Elkington

objects, beginning with the procedurally defaulted IAC claims (Grounds 2, 3 and 9, 10 and 12, in part). It will address the remaining objections (Grounds 1 and 9, 10 and 12, in part) in turn.

A

Petitioners have no constitutional right to counsel in federal habeas proceedings, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), but a federal court may appoint counsel for a financially eligible petitioner if "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). The court may consider the complexity of the issues and the petitioner's ability to present his claims. *Reese v. Fulcomer*, 946 F.2d 247, 264 (3d Cir. 1991), *superseded on other grounds by statute*, 28 U.S.C. § 2254(d).

Judge Hey dismissed Elkington's Motion without prejudice while preparing the R. & R. (Order, ECF No. 15.) She revisited the Motion in the R. & R. and recommended dismissal because Elkington presents many grounds for relief with lengthy supporting arguments and the record and claims in this case are not complex. (R. & R. 43–44.)

As Judge Hey concluded, it is evident from Elkington's Petition, supporting memoranda and timely objections to the R. & R. that he understands the procedure for and appropriate presentation of a federal habeas petition. He supports his claims with case law and relies on his own *pro se* PCRA Petition to rebut the Government's argument that many of his federal habeas claims are procedurally defaulted. *See* (Pet. 5–6; Mem. Supp. Pet. 2); *see also Reese*, 946 F.2d at 264 (quoting *La Mere v. Risley*, 827 F.2d 622, 626 (9th Cir.1987)) (finding no abuse of discretion for declining to appoint counsel where petitioner could "forcefully and coherently" present his claims).

Moreover, given the straightforward nature of the issues, the interests of justice do not require the appointment of counsel.

B

Exhaustion of state court remedies is a prerequisite to federal habeas review. *Wertz v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000) (citing 28 U.S.C. § 2254(b)(1)). Judge Hey found Grounds 2 and 3 of the Petition, IAC claims, and Grounds 9, 10 and 12, partial IAC claims, unexhausted. Although Elkington raised the claims in his *pro se* PCRA Petition, his later-appointed counsel removed these claims from the Amended Petition he filed on Elkington's behalf. Thus, the state court did not address the claims in the initial-review collateral proceeding. (R. & R. 26, 35.)

An exception to the "exhaustion requirement" arises where state procedural rules, such as waiver or a statute of limitations, bar the petitioner from exhausting remaining state remedies. *Wertz*, 228 F.3d at 192 (citing *Lambert v. Blackwell*, 134 F.3d 506, 518). The federal court may only review such "procedurally defaulted" claims if the petitioner shows either cause for the default and resulting prejudice or that failure to review the merits of the claim would result in a fundamental miscarriage of justice. *Id.* (quoting *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000)). If the procedurally defaulted claim is ineffective assistance of trial counsel, the federal court may review the claim despite the default if (a) the default was caused by ineffective assistance of PCRA counsel (b) in the initial-review collateral proceeding and (c) the underlying IAC claim is substantial. *Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014) (citing *Martinez v. Ryan*, 566 U.S. 1, 13–17 (2012)). To show that PCRA counsel was ineffective, the petitioner must demonstrate that counsel's performance fell below an

objective standard of reasonableness. *Preston*, 902 F.3d at 376 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (noting that the petitioner need not show he was prejudiced by the deficient performance over and above showing that the underlying IAC claim is substantial).

Judge Hey found Elkington's IAC claims in Grounds 2, 3, 9, 10 and 12 of the Petition procedurally defaulted. *See Preston*, 902 F.3d at 375 (finding petitioner's IAC claim procedurally barred where PCRA counsel did not raise the claim on state collateral review). She concluded that Elkington cannot excuse the default because the IAC claims are not substantial and "none of them undermines the strength of the Commonwealth's witness testimony or forensic computer evidence at trial." (R. & R. 28.)

1

In Ground 2, Elkington claims his trial counsel was ineffective for failing to introduce time sheets that would purportedly have shown Elkington was working when he allegedly offered, in person, money for sex with one of the victims. Judge Hey found this claim was not substantial because "even assuming the in-person meeting did not take place . . . the Petitioner had already made the same offer by email" and the jury had plenty of other reasons to discredit the witness who testified to the in-person offer. (R. & R. 28.) Elkington objects that "there is an immense difference between" in-person and email offers for the victim's virginity. (Pet'r's Objs. 6.)

Ground 2 of the Petition is procedurally defaulted and Elkington cannot overcome the default because, as Judge Hey explained, the claim is not substantial and PCRA counsel's decision to remove Ground 2 from the Amended Petition did not fall

below an objective standard of reasonableness. Counsel explained that he saw this claim as another attempt to undermine witness testimony, which had already been addressed by the Superior Court on direct appeal. Am. Pet. Post-Conviction Relief at ¶ 9(f), *Commonwealth v. Elkington*, CR-1376-2009 (Chester Cty. Ct. Com. Pl. Apr. 7, 2014). Elkington has not overcome the strong presumption that the decision not to raise the claim on collateral review could be considered sound strategy. *See Strickland*, 466 U.S. 668, 689.

2

Ground 3 contends that Elkington's trial counsel was ineffective because she did not introduce into evidence medical records from one of the victims that would have purportedly undermined another witness's testimony that the victim suffered forced penetration. Judge Hey found that Elkington cannot overcome the procedural default of this claim because it is not substantial and "in light of the significant photographic and forensic evidence," the medical records would not have changed the outcome of the trial and the jury was aware that there was no medical evidence of harm to the victims. (R. & R. 29.)

In addition, PCRA counsel's decision to remove Ground 3 from the Amended Petition did not fall below an objective standard of reasonableness. Counsel explained that he saw this claim as another attempt to undermine the weight and sufficiency of the evidence, a non-cognizable issue in PCRA proceedings. Am. Pet. Post-Conviction Relief at ¶ 9(h), *Commonwealth v. Elkington*, CR-1376-2009 (Chester Cty. Ct. Com. Pl. Apr. 7, 2014). Again, Elkington has not overcome the strong presumption that the decision not to raise the claim on collateral review could be considered sound strategy.

3

Ground 9 alleges in part that Elkington's trial counsel was ineffective for failing to object to Elkington's sentence as excessive and unreasonable. Judge Hey found this claim is not substantial because Elkington admits that his sentence is within the guideline range. (R. & R. 37.) PCRA counsel's decision to remove Ground 9 from the Amended PCRA Petition did not fall below an objective standard of reasonableness; counsel removed the claim because Elkington understood that the sentence is under the lawful maximum for his offenses. Am. Pet. Post-Conviction Relief at ¶ 9(n), *Commonwealth v. Elkington*, CR-1376-2009 (Chester Cty. Ct. Com. Pl. Apr. 7, 2014).

4

In Ground 10, Elkington claims in part that his trial counsel failed to object to improper jury instructions on the charge of possession of child pornography. Specifically, Elkington contends that he could not have been found in "possession" of child pornography because pornographic images were recovered from "unallocated" space on his computer. (Pet., ECF No. 1-1, at 14.) As Judge Hey found, the trial judge identified for the jury all three elements of the offense of possession of child pornography. Those elements were straightforward enough for the jury to understand and Elkington conceded that the images could be recovered from his computer using special tools. (R. & R. 19–20.)

Ground 10 is procedurally defaulted and Elkington cannot overcome the default because the claim is not substantial. Counsel's decision not to include this claim in the Amended PCRA Petition did not fall below an objective standard of reasonableness because, as he explained, he viewed this claim as another attempt to undermine the

weight and sufficiency of the evidence, a non-cognizable issue in PCRA proceedings. Am. Pet. Post-Conviction Relief at ¶ 9(m), *Commonwealth v. Elkington*, CR-1376-2009 (Chester Cty. Ct. Com. Pl. Apr. 7, 2014). Elkington has not overcome the strong presumption that the decision not to raise this claim on collateral review could be considered sound strategy.

5

Elkington, a British national, claims in Ground 12 that his trial counsel should have argued that the Commonwealth violated the Vienna Convention when it did not promptly notify the British Consulate of Elkington's detention or inform Elkington of his right to request assistance from the Consulate. Judge Hey found Elkington could not show cause for procedural default or resulting prejudice, noting that Elkington was protected by the Due Process Clause during his detention and trial and that the Vienna Convention does not prescribe specific remedies for violations. (R. & R. 41–42.) Elkington objects that he has shown cause, namely that PCRA counsel refused to include the claim in the Amended Petition, and that he was prejudiced because the Commonwealth precluded any chance of him receiving help from the Consulate. (Pet'r's Objs. 10.)

PCRA counsel did not include this claim in the Amended PCRA Petition because Elkington did not offer any evidence that the Commonwealth's delay in notifying the British Consulate of his detention denied him a fair trial. Am. Pet. Post-Conviction Relief at ¶ 9(p), *Commonwealth v. Elkington*, CR-1376-2009 (Chester Cty. Ct. Com. Pl. Apr. 7, 2014). Elkington has not overcome the strong presumption that the decision not to raise this claim on collateral review could be considered sound strategy.

C

Even if a petitioner exhausts available state court remedies, the federal court may not grant habeas relief if the claim was adjudicated on the merits in state court unless the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). The state court's application of federal law must be objectively unreasonable to warrant review; an incorrect application of federal law does not meet this standard unless the incorrect application of law was itself unreasonable. *Wertz*, 228 F.3d at 196 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)).

1

Ground 1 of the Petition alleges that Elkington's trial counsel was ineffective for failing to offer into evidence a picture of Elkington's feet which allegedly do not look like the feet of a man in a picture with one of the victims. Although this claim was exhausted in state court, Judge Hey found it unreviewable because the state court did not unreasonably apply federal law in denying Elkington relief. (R. & R. 21, 24.) The two witnesses who identified Elkington in the picture did not identify him by his feet and the jury verdict rested on other photographic and forensic evidence. Trial counsel "articulated a trial strategy that did not necessitate taking a photograph of [his] feet, and [he] did not refute the reasonable basis of that strategy by presenting any . . . evidence that his foot could not have been the foot in the photograph." (*Id.* at 24–25.)

This claim is unreviewable because it was adjudicated on the merits in state court and the state court did not unreasonably apply federal law. On appeal from the initial-review collateral proceeding, the Superior Court of Pennsylvania applied

Strickland and *Commonwealth v. Pierce*, 527 A.2d 973 (1987), and held that Elkington could not satisfy either prong of *Strickland*'s analysis. The court found that the lack of photographic evidence of Elkington's feet did not prejudice him at trial, in part because the witnesses did not identify him in the photograph by his feet. It also found Elkington could not prove trial counsel acted unreasonably by failing to introduce a picture of his feet after she testified that she did not think it would be strategically wise to do so. *Commonwealth v. Elkington*, CV-2926-2014 (Pa. Sup. Ct. Apr. 8, 2015).

2

Ground 9, addressed in part above, also alleges that the trial court erred in imposing an excessive and unreasonable sentence. Elkington did not raise the claim on direct appeal but did raise it in his *pro se* PCRA Petition. PCRA counsel, however, did not include it in the Amended Petition. (Pet., ECF No. 1-1, at 13.) Judge Hey found that the claim is procedurally defaulted and Elkington has not shown cause and resulting prejudice to excuse the default. (R. & R. 35–36.) Elkington offers no explanation for his failure to raise this claim on direct appeal, other than that he could not raise the related IAC claim until the collateral proceeding. (Pet., ECF No. 1-1 at 13.) Judge Hey also found that this claim is outside the scope of federal habeas review because sentencing is a state court matter. (*Id.* at 36 (citing *Smith v. Kerestes*, No. 08-0061, 2009 WL 1676136, at *16 (E.D. Pa. June 15, 2009), *aff'd*, 414 F. App'x 509 (3d Cir. 2011) ("[A]bsent a Constitutional violation, a federal court has no power to review a sentence in a habeas corpus proceeding unless it exceeds the statutory limits.")).

3

Ground 10, addressed in part above, also contends that the trial court improperly instructed the jury. Elkington did not raise the claim on direct appeal but raised it in his *pro se* PCRA Petition though PCRA counsel did not include it in the Amended Petition. (Pet., ECF No. 1-1, at 15.) Judge Hey found the claim procedurally defaulted and Elkington had no excuse for failing to raise it on direct appeal. (R. & R. 16.) Judge Hey did, however, construe the claim liberally as a challenge to the sufficiency of the evidence, an issue Elkington did raise on direct appeal, and addressed the claim on the merits. (*Id.*) She concluded that because Elkington controlled the computer from which the images were extracted, a reasonable juror could find the essential elements of the crime of child pornography in Elkington's case beyond a reasonable doubt. (*Id.* at 19.)

This claim is procedurally defaulted and Elkington offers no explanation for his failure to raise it on direct appeal, other than that he could not raise the related IAC claim until the collateral proceeding. (Pet., ECF No. 1-1 at 15.) The Superior Court of Pennsylvania addressed Elkington's claim on direct appeal that the evidence was insufficient to support the verdict, and the state court did not unreasonably apply federal law in denying relief. *See Commonwealth v. G.E.*, No. 1075-2011, at 11–14 (Pa. Sup. Ct. July 24, 2012).

4

Finally, Elkington contends in Ground 12 that the Commonwealth violated the Vienna Convention when it did not promptly notify the British Consulate of Elkington's detention or inform Elkington of his right to request assistance from the British

Consulate. Elkington did not raise the claim on direct appeal or in his *pro se* PCRA Petition, and PCRA counsel did not include it in the Amended Petition. (Pet., ECF No. 1-1, at 19.) Judge Hey thus found the claim procedurally defaulted and that there was no excuse for the default. (R. & R. 41.)

This claim is procedurally defaulted and Elkington cannot show cause for his failure to raise this claim on direct appeal. To the extent Elkington blames his trial counsel for failing to raise this issue, *see* (Pet., ECF No. 1-1, at 19), the Court has already addressed this IAC claim above.

An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

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

GEOFFREY ELKINGTON	:	CIVIL ACTION
	:	
v.	:	
	:	
MICHAEL CLARK, et. al.	:	NO. 16-2949

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. May 16, 2018

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by Geoffrey Elkington ("Petitioner"), who is currently incarcerated at State Correctional Institution in Albion, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

On April 14, 2010, a jury sitting before the Honorable Thomas G. Gavin of the Chester County Court of Common Pleas found Petitioner guilty of ten counts of involuntary deviate sexual intercourse, one count of attempted rape of a child, five counts of aggravated indecent assault (complainant less than thirteen years of age), two counts of corruption of minors, and eleven counts of sexual abuse of children (possession of child pornography), in connection with Petitioner's abuse of two minors between the fall of 2006 and October 2007. Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Verdict Slip (Chester C.C.P. Apr. 14, 2010); Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Docket Sheet (Chester C.C.P.) ("Docket Sheet") (entry dated 4/14/10).

The Pennsylvania Superior Court summarized the trial evidence as follows:

> [Petitioner] was arrested and charged in connection with the sexual assault of his girlfriend's minor daughters, E.A., born in 2000, and L.A., born in 2003 (collectively, "the victims"). In the fall of 2006, [Petitioner] met [Geraldine Alexinas], the victims' mother, through an Internet dating website. After a period of time, [Petitioner] and [Ms. Alexinas] met in person and began a sexual relationship.
>
> [Ms. Alexinas] lived with her children in the basement of her parents' home in Chester County, Pennsylvania. [Petitioner] often visited and would bring gifts for the victims, including lingerie and a sex toy for E.A. [Petitioner] would also bring to [Ms. Alexinas's] home his digital camera and a laptop computer, which he used to view videos depicting child pornography.
>
> During his visits, [Petitioner] began taking photographs of the victims. Initially, the victims were clothed, but soon they were posing nude. Both [Petitioner] and [Ms. Alexinas] would touch the victims in a sexual manner during the photography sessions and, on occasion, a sex toy would be involved. Shortly thereafter, [Petitioner] and [Ms. Alexinas] began involving the victims in their sexual activities. Eventually, [Ms. Alexinas] became jealous of the attention E.A. was receiving from [Petitioner], and the relationship between [Petitioner] and [Ms. Alexinas] ended in October of 2007.
>
> In December of 2008, E.A. disclosed to Chester County Children, Youth and Family Services (CYF) staff the sexual abuse perpetrated against her and her sister by [Ms. Alexinas]. CYF reported E.A.'s allegations to the Chester County District Attorney's Office, which began an investigation. Following interviews with E.A. and [Ms. Alexinas], [Ms. Alexinas] and [Petitioner] were charged with various crimes for their abuse of the victims.
>
> During the course of its investigation into these offenses, the [D.A.'s] Office seized three computers belonging or issued to [Petitioner], as well as numerous hard disks, CDs, and DVDs. A forensic search of this equipment yielded ten photographs of E.A. which had been deleted but were still stored in unallocated space on [Petitioner's] laptop.

Commonwealth v. Elkington, No. 1075 EDA 2011, Memorandum, at 1-3 (Pa. Super. July 24, 2012) (Doc. 11-1 Appx. "H") ("Super. Ct. Op.-Direct") (footnote omitted).[1] On December 16, 2010, Judge Gavin found that Petitioner qualified as a sexually violent predator under Megan's Law and imposed an aggregate sentence of twenty-five to fifty years' imprisonment. Docket Sheet (entries dated 12/16/10).[2] Petitioner filed post-sentence motions, which Judge Gavin denied on March 18, 2011. Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Order of Court (Chester C.C.P. Mar. 18, 2011) ("Trial Ct. Op.").

Petitioner filed a timely notice of appeal, and Judge Gavin issued an opinion recommending affirmance. Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Opinion (Chester C.C.P. June 15, 2011). On July 24, 2012, the Superior Court rejected claims of trial court error for: (1) granting the Commonwealth's request for Petitioner to submit a handwriting sample; (2) performing an in camera review of the victims' CYF records, as opposed to granting defense counsel's request to personally review the file; (3) denying Petitioner's post-sentence motion regarding the weight of the evidence; and (4) denying his post-sentence motion regarding the sufficiency of the evidence for

[1]In its opinion, the Superior Court referred to the victims' mother as "G.A." However, Ms. Alexinas was a named co-defendant who pled guilty and testified for the Commonwealth at Petitioner's trial, her full name appears throughout the state court record and in documents filed in this matter, and the Superior Court used her full name in its opinion on collateral appeal. Therefore, this Report will refer to Ms. Alexinas by her full name.

[2]The state court record does not contain a transcript of the sentencing hearing. During the evidentiary hearing held on collateral appeal, the assistant district attorney surmised that such a transcript was not made because Petitioner did not raise a sentencing issue on direct appeal. N.T. 6/02/14 at 6.

possession of child pornography. Super. Ct. Op.-Direct at 3-4. The Pennsylvania Supreme Court denied allowance of appeal on June 19, 2013. Commonwealth v. Elkington, No. 898 MAL 2012, Order (Pa. June 19, 2013) (Doc. 11-1 Appx. "J").[3]

On September 11, 2013, Petitioner filed a pro se petition pursuant to the Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551, alleging thirteen claims of ineffective assistance of counsel ("IAC"), three claims of prosecutorial misconduct, wrongful conviction for possession of child pornography, and that both his sentence and his confinement were illegal. Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Petition for Post Conviction Collateral Relief, ¶ 6 (Chester C.C.P. filed Sept. 11, 2013) ("PCRA Pet."). Counsel was appointed and filed an amended PCRA petition, asserting two of the claims Petitioner raised in his pro se PCRA petition, albeit reworded as IAC claims, specifically for failing to have pictures of Petitioner's feet shown to the jury, and for failing to object when the Commonwealth failed to provide a copy of an interview of Ms. Alexinas in which she made statements regarding the date of her last meeting with Petitioner that were inconsistent with her trial testimony. Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Amended Petition for Post Conviction Collateral Relief, ¶ 8 (Chester C.C.P. filed Apr. 7, 2014) ("Amended PCRA Pet.").[4] Judge Gavin held an evidentiary hearing on June 2, 2014, at

[3]The trial court granted Petitioner's request to file his petition for allowance of appeal nunc pro tunc. See Docket Sheet (entry dated 11/08/12).

[4]In the Amended PCRA petition, appointed counsel explained why he was not requesting an evidentiary hearing on the other claims asserted in the pro se PCRA petition. Amended PCRA Pet. ¶ 9.

which time counsel withdrew the claim regarding Ms. Alexinas's statement and proceeded only on the IAC claim for failing to show Petitioner's feet to the jury. N.T. 6/02/14 at 11.[5] On September 23, 2014, Judge Gavin denied the petition, finding that the claim lacked arguable merit because Petitioner never offered his feet for inspection. PCRA Ct. Op. at 6. On April 8, 2015, the Superior Court affirmed, finding that Petitioner's claim lacked foundation, he failed to prove that counsel had no reasonable basis for her strategic decision not to pursue the issue, and he failed to prove prejudice. Commonwealth v. Elkington, No. 2926 EDA 2014, Opinion at 11-13 (Pa. Super. Apr. 8, 2015) (Doc. 11-1 Appx. "M") ("Super. Ct. Op.-PCRA"). Petitioner filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on October 26, 2015. Commonwealth v. Elkington, No. 898 MAL 2012, Order (Pa. June 19, 2013) (Doc. 11-1 Appx. "O").

[5]Although the transcript of the PCRA hearing is dated May 2, 2014, this appears to be an error. The Docket Sheet lists three Orders placing the hearing on June 2, 2014: (1) an Order dated April 30, 2014, scheduling a hearing on the pro se PCRA petition for June 2, 2014; (2) a Transportation Order dated May 2, 2014, directing that Petitioner to be transported for the June 2, 2014 PCRA hearing; and (3) an Order dated May 5, 2014, scheduling a hearing on the Amended PCRA Petition for "Monday, June 2, 2014." See Docket Sheet (entries dated 4/30/14, 5/02/14 & 5/05/14). June 2, 2014, did indeed fall on a Monday, whereas May 2, 2014, fell on a Friday. Although the Docket Sheet does not memorialize the hearing, I note that the Commonwealth filed its Post-Hearing Memorandum on June 12, 2014, see id. (entry dated 6/12/14), and Judge Gavin stated in his PCRA court opinion that the hearing occurred on June 2nd. Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Opinion, at 3 (Chester C.C.P. Sept. 23, 2014) ("PCRA Ct. Op."). I will refer to the PCRA hearing Notes of Testimony by the correct date.

Petitioner commenced the present pro se federal habeas petition on June 9, 2016,[6] and he asserts twelve claims for relief:

1. IAC for failing to raise issues regarding the alleged identification of Petitioner in a photograph of a naked man with one of the alleged victims;

2. IAC for failing to enter Petitioner's employment time-sheets into evidence that would have proven the Commonwealth witness was lying about an alleged meeting with Petitioner;

3. IAC for failing to enter medical records of one of the alleged victims into evidence that would have proven the purported abuse could not have occurred;

4. IAC in failing to comply with even the most basic professional duties of loyalty to Petitioner;

5. IAC for failing to call character witnesses;

6. IAC for failing to put Petitioner on the stand during trial;

7. The guilty verdict was against the weight of the evidence due to the unreliable and contradictory testimony of the two Commonwealth witnesses;

8. Trial court error in performing an in camera review of CYF materials rather than granting trial counsel's request to personally review the file;

[6]The court docketed Petitioner's original habeas petition on June 13, 2017. Doc. 1. However, the federal court employs the "mailbox rule," deeming the petition filed when given to prison authorities for mailing. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1998)). Petitioner signed his original habeas petition on June 9, 2016, see Doc. 1-1 at 23 (ECF pagination), and I will therefore assume he gave it to prison authorities for mailing on that date. (All pinpoint citations to Petitioner's filings will use the court's ECF pagination.) Petitioner re-filed his habeas petition on the correct forms on July 25, 2016, asserting the identical twelve claims raised in his June 9, 2016 petition. See Doc. 5 ¶ 12.

9. Trial court error in imposing an excessive and unreasonable sentence;

10. Trial court error in failing to properly instruct the jury as to what constituted possession of child pornography, resulting in a wrongful conviction;

11. Illegal detention by the Pennsylvania Department of Corrections; and

12. Violation of Petitioner's rights as a British national under the Vienna Convention on consular relations.

Doc. 5 ¶ 12 (Grounds One to Twelve).

The Honorable Gerald J. Pappert referred the matter to me for a Report and Recommendation. Doc. 4. Petitioner filed a memorandum of law in support of his petition on August 19, 2016 (Doc. 8), the District Attorney filed a response on September 16, 2016, arguing that Petitioner's claims are either meritless or unexhausted and procedurally defaulted (Doc. 11), and Petitioner then filed a traverse (Doc. 13) and an addendum to his memorandum of law (Doc. 14). Petitioner also filed a motion for appointment for counsel, which I denied without prejudice pending the drafting of this Report. Docs. 12 & 15.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

Before the federal court can consider the merits of a habeas claim, a petitioner must comply with the exhaustion requirement of section 2254(b), by giving "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526

U.S. 838, 845 (1999). In addition, federal constitutional claims must be fairly presented to the state courts, meaning that the petitioner must present the same factual and legal basis for the claim to the state court to put the state court "on notice that a federal claim is being asserted." McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999).

A petitioner's failure to exhaust his state remedies may be excused in limited circumstances on the ground that exhaustion would be futile. Lambert v. Blackwell, 134 F.3d 506, 518-19 (3d Cir. 1997). Where such futility arises from a procedural bar to relief in state court, the claim is subject to the rule of procedural default. See Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). The court may address such a claim only if the petitioner establishes cause for the default and prejudice resulting therefrom, or that a failure to consider the claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192 (citing McCandless, 172 F.3d at 261; Coleman, 501 U.S. at 731)). To meet the "cause" requirement to excuse a procedural default, a Petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). With respect to certain claims of ineffectiveness of trial counsel, a petition can rely on post-conviction counsel's ineffectiveness to establish cause. Martinez v. Ryan, 566 U.S. 1, 14 (2012). To establish prejudice, Petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Id. at 193.

In order for a Petitioner to satisfy the fundamental miscarriage of justice exception to the rule of procedural default, the Supreme Court requires that Petitioner show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Carrier, 477 U.S. at 496). This requires that Petitioner supplement his claim with "a colorable showing of factual innocence." McCleskey v. Zant, 499 U.S. 467, 495 (1991) (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)). In other words, a Petitioner must present new, reliable evidence of factual innocence. Schlup, 513 U.S. at 324.

B. Merits Review

Under the federal habeas statute, review is limited in nature and may only be granted if (1) the state court's adjudication of the claim "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or if (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, rebuttable only by clear and convincing evidence. Werts, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [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."

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

C. Ineffective Assistance of Counsel

Several of Petitioner's claims allege ineffectiveness of his trial counsel. Such claims are governed by Strickland v. Washington, 466 U.S. 668 (1984), in which the Supreme Court set forth a two-pronged test for the consideration of IAC claims. First, the petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair and reliable trial. Id. at 687. In determining prejudice, the question is whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see

also Smith v. Robbins, 528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed"). Counsel will not be considered ineffective for failing to pursue a meritless argument. Real v. Shannon, 600 F.3d 302, 309 (3d Cir. 2010).

III. DISCUSSION[7]

I have reordered Petitioner's claims for ease of discussion, beginning with the two claims that require a review of the trial evidence. First, I will address his challenge to the weight of the evidence. Although not cognizable in habeas review, the state courts' review of the trial evidence in ruling on this claim provides a useful context in considering the other claims. I will then turn to Petitioner's challenge to the sufficiency of the evidence on the child pornography counts, followed by his remaining claims in numerical order.

[7]The petition is timely. Petitioner's conviction became final on September 18, 2013, 90 days after the Supreme Court of Pennsylvania denied his petition for allowance of appeal on direct review. See Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999) (conviction becomes final when time for seeking next level of appeal expires if appeal is not taken); Supreme Court Rule 13(1) (petitioner has 90 days to file petition for certiorari). Petitioner filed his PCRA petition on September 11, 2013 -- before his conviction became final -- and the habeas limitations period tolled from that date until October 26, 2015, the date the Pennsylvania Supreme Court denied his petition for allowance of appeal. See Stokes v. Dist. Att'y of Philadelphia, 247 F.3d 539 (3d Cir. 2001) (habeas limitations period not tolled for the 90 days during which a prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of state post-conviction relief). Because no time had run on the one-year habeas limitations period, Petitioner had until October 26, 2016, to file a timely habeas petition. Therefore, his petition filed on June 9, 2016, was timely.

A. Ground Seven: Verdict was Unreliable (Weight of the Evidence)

Petitioner argues that the guilty verdict was based on the unreliable and contradictory testimony of the Commonwealth's two witnesses. Doc. 5 at 47-51 (Ground Seven); Doc. 8 at 8. This amounts to a challenge to the weight of the evidence, which Petitioner exhausted on direct appeal. Respondent argues that the claim is meritless. Doc. 11 at 36-41.

As alluded to above, Petitioner's claim is not cognizable in this court. Unlike an argument that the evidence was not constitutionally sufficient to sustain the conviction, a weight of the evidence argument by definition relies on the factfinder's weighing of the evidence in reaching a conviction. See generally Tibbs v. Florida, 457 U.S. 31, 37-38 (1982).[8] As such, a weight of the evidence claim does not implicate any constitutional protection and cannot be addressed on federal habeas review. See Marshall v. Lonberger, 459 U.S. 422, 434 (1983) (Section 2254 "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."). Therefore, Petitioner is not entitled to habeas review of this

[8]Under Pennsylvania law, a defendant may request a new trial on the ground that the verdict is against the weight of the evidence, and such motion is entrusted to the discretion of the trial court. See, e.g., Commonwealth v. Bond, 985 A.2d 810, 820 (Pa. 2009). "A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. . . . Rather, the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" Commonwealth v. Widmer, 744 A.2d 745, 319-20 (Pa. 2000) (quoting Commonwealth v. Thompson, 493 A.2d 669, 674 (Pa. 1985)).

claim. Nevertheless, I will review the states courts' consideration of the claim to provide an overview of the evidence.

Petitioner challenged the reliability of two Commonwealth witnesses, (1) Geraldine Alexinas, the mother of the minor victims and lover and co-defendant of Petitioner, and (2) Carole Gifford, Petitioner's ex-wife. On direct appeal, the Superior Court rejected Petitioner's claim:

> In this case, [Ms. Alexinas] was charged as a co-defendant and, prior to [Petitioner's] trial, she pled guilty to four offenses arising from the sexual abuse of the victims. As part of her negotiated plea, [Ms. Alexinas] was sentenced to an aggregate term of 15 to 30 years' imprisonment, and she agreed to testify against [Petitioner]. At trial, [Ms. Alexinas's] testimony, including her physical description of [Petitioner], differed from that provided by [Ms. Gifford], [Petitioner's] ex-wife. [Ms. Alexinas] was unable to recall the specific dates and times of various offenses against the victims. On appeal, [Petitioner] argues that the testimony of [Ms. Alexinas] is "self-serving, inaccurate, and untruthful," and influenced by the plea deal she brokered with the Commonwealth.
>
> The trial court rejected this claim in light of the overwhelming evidence against [Petitioner], along with [Ms. Gifford's] positive identification of [Petitioner] in pornographic photographs taken by [Ms. Alexinas] and discovered on [Petitioner's] laptop computer[.] . . . . The trial court [went] on to reject [Petitioner'] assertion that [Ms. Alexinas] must be discredited as she could not remember the exact dates of assaults by noting that "evidence relative to the exact dates of alleged sexual offenses is not critical where there has been a series of crimes over the course of a period of time." [Trial Ct. Op. at 3.] Moreover, the trial court indicated that the jury was advised to consider [Mr. Alexinas's] testimony as a polluted source as a result of her plea bargain. [Id.] Accordingly, the trial court concluded that

> [Petitioner's] conviction was not against the weight of the evidence. We agree.

Super. Ct. Op.- Direct at 9-10 (brief citations omitted).

Petitioner argues that the verdict is not supported by the testimony of Ms. Alexinas and Ms. Gifford, because their testimony was "unreliable" and/or "contradictory." Doc. 5 at 47. However, reviewing courts, including a federal habeas court, are bound by the fact finder's credibility determinations. See Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court"). In addressing this claim, the Superior Court explicitly relied on the trial court's assessment of the evidence, including Judge Gavin's credibility determinations. As Judge Gavin explained in the lengthy footnote of his Order denying Petitioner's motion for post-sentence relief:

> Upon review of the trial transcripts, I specifically find Ms. Alexinas's testimony to be credible and her identification of [Petitioner] and the crimes he committed solid and unshaken. When asked about [Petitioner's] appearance when they first met at [the] King of Prussia Mall in 2006, Alexinas testified that he appeared five foot seven inches, had a stomach, glasses and gray hair. [N.T. 4/13/10 at 28-29]. In addition, she told investigators prior to [Petitioner's] arrest that he weighed between 200 and 220 pounds. In contrast, [Petitioner's] ex-wife described him as obese and weighing in excess of 300 pounds in 2006 and 2007. [N.T. 4/14/10 at 10-11]. . . . [W]ithout benefit of actually weighing and measuring [Petitioner] herself during the time of their relationship in 2006 and 2007, Alexinas could only guess as to his weight and height. The jury likely concluded that her erroneous estimate of his height and weight was attributable to a misperception rather than a misidentification, and therefore was inconsequential. Moreover, the evidence against [Petitioner] was so overwhelming that the discrepancy on this point between the testimony of Alexinas and [Ms.]

> Gifford . . . was immaterial. Indeed, Commonwealth Exhibit 1 was identified by Ms. Alexinas as depicting [Petitioner] naked holding her daughter on the bed in her basement room. . . . [N.T. 4/13/10 at 70-71]. Importantly, [Ms. Gifford], who also testified credibly, identified [Petitioner] as the naked man depicted in the photographs submitted in evidence as Commonwealth Exhibits 1 and 2 [N.T. 4/14/10 at 13-15]. Alexinas testified that [Petitioner] refused to have his face shown in any of the pictures she took using his camera. [N.T. 4/13/10 at 78]. Without [the] benefit of seeing [Petitioner's] face, Gifford nonetheless was able to identify him by his genitalia and rolls of fat. As for [Petitioner's] claim that Alexinas's testimony should not be believed because she told investigators that he was circumcised when in actuality he was not, the jury was free to credit [Ms. Alexinas's] testimony that she did not know the actual meaning of that term. [Id. at 118-20]. . . . In addition, the discrepancy between the testimony of Alexinas and . . . Gifford regarding the color of [Petitioner's] wedding band is inconsequential considering the other testimonial and photographic evidence supporting the Commonwealth's case.

Trial Ct. Op. at 2-3. The Superior Court endorsed this view of the evidence. Super. Ct. Op.-Direct at 10.

B. Ground Ten: Trial Court Error in Jury Instructions, and IAC in Failing to Raise this Issue

Petitioner argues that the trial court erred by failing to properly instruct the jury as to what constituted possession of child pornography, and counsel was ineffective for failing to raise this issue, resulting in a wrongful conviction on those counts. See Doc. 5 at 57-58 (Ground Ten); Doc. 8 at 11. Respondents argue that this claim is unexhausted and procedurally defaulted because, although Petitioner asserted the claim in his pro se PCRA petition, appointed counsel dropped the claim in his Amended PCRA petition. Doc. 11 at 49-51.

Petitioner did not raise this precise claim on direct or PCRA appeal. However, on direct appeal Petitioner argued that the trial court erred in denying his post-sentence motion challenging the sufficiency of the evidence regarding possession of child pornography. See Super. Ct. Op.-Direct at 11. In that appeal, as here, Petitioner's argument is based primarily on the fact that the images were found on the computer's unallocated space, including that they had been deleted, and therefore he did not "possess" child pornography for purposes of the charged offense. Given the similarity in these arguments, and because pro se filings are to be construed liberally, see Haines v. Kerner, 404 U.S. 519, 520 (1972), I will address the claim on the merits as a claim of insufficiency of the evidence.

Principles of due process dictate that a person can be convicted of a crime only if, "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); see also In re Winship, 397 U.S. 358, 364 (1970); Sullivan v. Cuyler, 723 F.2d 1077, 1083-84 (3d Cir. 1983). Accordingly, in reviewing challenges to the sufficiency of the evidence, a court must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Sullivan, 723 F.2d at 1083-84 (quoting Jackson, 443 U.S. at 319) (emphasis in original).

On direct appeal, the Superior Court stated the following with regard to Petitioner's conviction for possession of child pornography:

> [Petitioner] contends that the Commonwealth failed to prove he knowingly possessed or intentionally viewed any child pornography because the images retrieved from his laptop had been deleted. . . .
>
> > Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act is guilty of a felony of the third degree.
>
> 18 Pa. C.S. § 6312. The Commonwealth must prove the following three elements beyond a reasonable doubt in order to convict an individual of this offense: there must be a depiction of an actual child engaged in a prohibited sexual act or a simulated sexual act; the child depicted must be under the age of eighteen (18); and the defendant must have knowingly possessed **or** controlled the depiction. Commonwealth v. Koehler, 914 A.2d 427, 436 (Pa. Super. 2006) (emphasis added). . . . "Intentionally views" is "[t]he deliberate, purposeful, voluntary viewing of material depicting a child under 18 years of age engaging in a prohibited sexual act or in the simulation of such act. The term shall not include the accidental or inadvertent viewing of such material." Id.
>
> Instantly, [Petitioner] does not dispute that the photographs found in the unallocated space on his computer depicted minor victim E.A. engaged in prohibited acts. Instead, [Petitioner] contends that there is no evidence he intentionally viewed these images. We disagree.
>
> Detective Calarese testified that during the course of his investigation he was able to extract electronic messages between [Ms. Alexinas] and a username assigned to [Petitioner] wherein sexual acts involving the victims were discussed. Following [Petitioner's] arrest in January 2009, investigators seized three computers belonging to [Petitioner], as well as hard disk drives, CDs and DVDs. Computer forensic evaluations conducted on these items yielded images and videos of the victims engaged in prohibited acts. [Ms.

> Alexinas] testified that she and [Petitioner] used [Petitioner's] digital camera to take photographs of the victims.

Super. Ct. Op.-Direct at 11-13 (brief citations omitted). The Superior Court then recited the trial court's analysis of Petitioner's challenge to the sufficiency of the evidence regarding possession of child pornography, in which the trial court stated:

> Clearly, the jury credited the testimony of Detective Calarese and his expert opinion that the images of child pornography recovered from [Petitioner's] computers were viewed by a user of those computers. Further, there was no evidence that these images were ever downloaded or stored on Ms. Alexinas's computer, thus giving rise to the logical inference that they were transferred directly from the camera on which they were photographed to [Petitioner's] computer. Thus, by virtue of the photographing of E.A. on his digital camera and, by reasonable inference, downloading those images to his computer where they were recovered by Detective Calarese, combined with Calarese's expert opinion that the images including the video were viewed on [Petitioner's] computers, [Petitioner] unquestionably is guilty of possessing child pornography.
>
> [Petitioner']s argument that the fact that the images were recovered from an indexed area for discarded data means there is insufficient evidence that he knowingly possess[ed] or intentionally viewed the images is unavailing. To the contrary, it is reasonable to infer that such data was knowingly possessed and intentionally discarded by the user. For instance, Detective Calarese testified that data of the electronic communications between [Petitioner] and Alexinas were located in an unallocated space of the hard drive of [Petitioner's] computer, and that these files were deleted after time and stored in that location where they were recovered. [N.T. 4/14/10 at 41]. Further, the fact that a user may delete a file does not mean that the data in that file is necessarily lost completely. Instead, the computer will mark the space allocated to that file as available and a temporary file, containing the data, is stored by the computer system until otherwise overwritten. [Id. at 42-43]. . . . The logical and reasonable inference when viewing the totality of the evidence is that [Petitioner] transferred the photographs from

> his digital camera to his computers where he possessed and viewed the images. Thus, he exercised dominion and control over the offensive materials. . . .

Trial Ct. Op. at 5-6. The Superior Court agreed with the trial court's analysis. Super. Ct. Op.-Direct at 14.

The state courts reasonably rejected the sufficiency claim. Petitioner's argument that the photographs were not possessed or under his control ignores the uncontradicted fact that Petitioner controlled the computer on which the images were found. It also ignores Detective Calarese's expert forensic testimony regarding computer image storage and the likely origin of the images in question -- from Petitioner's own digital camera -- which was consistent with Ms. Alexinas's testimony regarding Petitioner's use of a digital camera to document the victims' abuse. Moreover, although Petitioner argues that the images' presence in unallocated disk space shows "that the owner/operator of the computer had no intention of retaining such pictures," he concedes that the data could be "recovered using specialized software tools." Doc. 5 at 57. In light of the trial evidence, it is clear that a rational trier of fact could have found the essential elements of the crime of possession of child pornography beyond a reasonable doubt, see Jackson, 443 U.S. at 319, whether the elements are defined by plain meaning or by law.

I also reject Petitioner's argument that the jury would not have convicted him of the crime of possession of child pornography if the trial court had read the specific elements of the crime. As noted by the state courts, a conviction for possession of child pornography in Pennsylvania requires three elements -- a depiction of an actual child engaged in a prohibited sexual act or a simulated sexual act, the child depicted must be

under eighteen years of age, and the defendant must have knowingly possessed or controlled the depiction. 18 Pa. C.S.A. § 6312(d); Koehler, 914 A.2d at 436. Judge Gavin identified each of these elements in his jury instructions, and Petitioner has not identified any error in the instruction. N.T. 4/14/10 at 173-75. Moreover, these elements are set forth in the statutory definition of this crime, and are reasonably straightforward for a jury to understand. The fact that the images were recovered from a computer does not require special instructions.

Finally, with respect to Petitioner's IAC claim for failing to object to the jury instructions, the claim is clearly unexhausted and procedurally defaulted. Petitioner seeks to overcome this obstacle via Martinez v. Ryan, 566 U.S. 1 (2012), because PCRA counsel dropped this claim in the amended PCRA petition. See Doc. 5 at 58. However, because the underlying claim regarding Petitioner's conviction for possession of child pornography lacks merit, counsel cannot be found ineffective for failing to raise this claim. See Real, 600 F.3d at 309. Therefore, even if the default of this claim were to be excused on the basis of Martinez, Petitioner would not be entitled to relief.[9]

C. Ground One: IAC for Failing to Have Pictures of Petitioner's Feet Shown to the Jury

Petitioner argues that trial counsel was ineffective for failing to raise an issue regarding the identification of Petitioner in a photograph of a naked man with one of the victims, purportedly to prove that he did not have an elongated toe like the man in the

[9]Martinez will be discussed in greater in subsection D below.

photograph. Doc. 5 at 17-20 (Ground One).[10] The claim was exhausted on PCRA appeal. Respondents argue that the claim is meritless. Doc. 11 at 24-28.

At the evidentiary hearing on June 2, 2014, Petitioner testified that he learned a few months prior to trial that Judge Gavin granted a Commonwealth request to take a photograph of Petitioner's feet for purposes of comparison. N.T. 6/02/14 at 13-14. The Commonwealth had a photograph of a naked male with one of the victims, and while the male's face was not visible, his "second toe was considerably longer than his big toe." Id. at 14-15. Petitioner further testified that his second toe is not considered to be longer than his big toe, and that when the Commonwealth did not take a picture, he asked his trial counsel to take a picture of his feet so the jury could see them. Id. at 15-17. Petitioner did not offer a photograph or demonstration of his feet at the hearing.

Petitioner's trial counsel also testified at the PCRA hearing. Counsel testified that she recalled the issue of an elongated toe in the photograph with one of the victims, but she did not recall any discussion that Petitioner wanted a photograph of his foot taken. N.T. 6/02/14 at 24-25. Instead, she recalled that Petitioner seemed "kind of cagey" over why the Commonwealth had not photographed his feet after obtaining permission to do so. Id. at 27. Counsel explained that even if Petitioner had asked for such a picture, she "didn't think it was going to move the ball forward," and that she would have advised

[10]This claim is variously worded, as for example the District Attorney captions this claim as "[IAC] For Failing to Raise Issues Related to Identification of Petitioner in a Photograph with the Victim." Doc. 11 at 24. However worded, this ineffectiveness claim involves counsel's failure to show Petitioner's feet to the jury, despite a photograph entered into evidence which depicted one of the victims and portions of a naked man whose foot apparently has a second toe that is significantly longer than his big toe. The photograph itself is not part of the state court record provided to this court.

against it. Id. at 25, 28. Counsel explained that she believed the Commonwealth witnesses' contradictory and inconsistent statements would be "sufficient" to undermine their credibility, and that computer images and other circumstantial evidence posed a bigger problem for the defense than the witness's identification of Petitioner in the photograph. Id. at 25-27, 34-36. Counsel stated, "[t]he jury could have decided that these women don't know what they were talking about . . . and still convict[] him based on the electronic record that was available." Id. at 27. Thus, counsel surmised prior to trial that the Commonwealth did not obtain a photograph of Petitioner's feet because they had enough evidence to proceed, including "multiple people" who identified the photograph of the naked man with one of the victims as being Petitioner. Id. at 27, 31. Counsel acknowledged that she never looked at Petitioner's feet. Id. at 36.

In his opinion, Judge Gavin stated the following with regard to this claim:

> Facially, it appears that counsel was ineffective for not looking at [Petitioner's] feet, especially in light of the Commonwealth's interest in same. There simply was no reason, good or otherwise, for not having done so. However, Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987) requires much more to entitle [Petitioner] to relief. First and foremost, [Petitioner] must demonstrate that his claim . . . has arguable merit. If, in fact, the toes in the photograph were not [Petitioner's] and that could be demonstrated visually, the identification made by the Commonwealth witnesses would certainly have been undermined, if not negated. [Petitioner] testified in support of his petition that the toes in the photograph were not his. This testimony went unchallenged. However, as with any witness, the fact finder is free to believe or disbelieve all or any portion of even uncontradicted testimony. Here, resolution of this issue was as simple as [Petitioner] taking his shoes and socks off and offering his toes for inspection. In fact, I kept waiting for him to do so. His failure to do so was telling. In lieu of the "best evidence"

> available, he offered his opinion. Given his stake in the outcome, his opinion testimony was suspect and not credible. As such, he failed to establish the first prong of Pierce, supra, arguable merit, which requires denial of his petition without the need to address the other prongs. . . .

PCRA Ct. Op. at 4-5. The Superior Court affirmed, but on a different basis:

> Preliminarily, we note that [Petitioner's] issue and his argument mischaracterize the evidence of record. First, [Petitioner] merely makes the bald assertion that "the foot of the man in the photograph had a deformed toe." . . . He fails to identify where in the record the evidence establishes that the man in the photograph had a "deformed" or "disfigured" toe. . . .
>
> . . . .
>
> . . . . [T]he only pertinent evidence of record tends to show that [Petitioner] did not have a deformed toe at all. To the contrary, the ex-wife testified she told the police there was nothing unusual about his feet, and did not even testify that [Petitioner's] second toe was longer than the "big" toe. Furthermore, importantly, neither woman based her identification of [Petitioner] on the allegedly deformed toe. [N.T. 4/13/10 at 71; N.T. 4/14/10 at 14]. [Petitioner's] claim lacks any foundation.
>
> . . . .
>
> The PCRA court correctly noted that it need find only one prong which [Petitioner] failed to meet to deny his ineffectiveness claim.
>
> Nevertheless, we note for completeness that [Petitioner] failed to prove that trial counsel had no reasonable basis for her strategic decision not to pursue the "deformed" toe assertion. To the contrary, at the PCRA hearing, counsel gave her assessment that in view of the eyewitness testimony (which included two identifications) and the forensic evidence linking [Petitioner] to the acts at issue, she didn't think it was a good strategy to proceed with a picture of the foot. [N.T. 6/02/14 at 29].
>
> . . . .
>
> Here, [Petitioner] baldly asserts that trial counsel did not have a reasonable basis for not obtaining a photograph of his foot. This is unsupported by reference to controlling authority, does not refute trial counsel's articulated strategy,

> and offers no argument to establish that [Petitioner's] alternative offered the potential for substantially greater success. [Petitioner] does not refute counsel's reasonable basis for the strategy she selected.
>
> Finally, [Petitioner] fails to prove prejudice. . . .
>
> Here, [Petitioner's] counsel merely surmised at the PCRA hearing that taking a photograph of the feet might have helped and would not have hurt the case: "No harm, no foul kind of thing." [N.T. 6/02/14 at 39]. This amounts to no more than sheer speculation. Mere speculation that a course of action proposed in hindsight would have had little (presumed) downside is insufficient to overcome the presumption of effectiveness, or to prove prejudice.

Super. Ct. Op.- PRCA at 8, 11-13 (state law and brief citations omitted). For these reasons, the Superior Court affirmed the denial of PCRA relief.

The Superior Court's opinion is neither contrary to, nor an unreasonable application of, Strickland. During testimony at the PCRA hearing, counsel articulated a trial strategy that did not necessitate taking a photograph of Petitioner's feet, and Petitioner did not refute the reasonable basis of that strategy by presenting any photographic or visual evidence that his foot could not have been the foot in the photograph. In the absence of such evidence, Petitioner cannot overcome the quality of evidence presented by the Commonwealth at trial. Both Commonwealth witnesses -- Ms. Alexinas and Petitioner's ex-wife -- identified Petitioner in the photograph depicting a naked man and one of the victims, and neither woman based her identification on the allegedly deformed or elongated toe. N.T. 4/13/10 at 71; N.T. 4/14/10 at 14. The sexual abuse depicted in the photograph, and the fact that the male perpetrator's face is not shown, is consistent with Ms. Alexinas's testimony describing her daughter's abuse by Petitioner, which she not only witnessed but admittedly assisted. Even more damning

than the testimony of the Commonwealth witnesses is the Commonwealth's forensic evidence. For example, a search of three computers belonging or issued to Petitioner yielded ten photographs of E.A. which had been deleted but which were still stored in unallocated space on Petitioner's laptop. N.T. 4/14/10 at 46. The detective also recovered a video file, from which several still shots were entered into evidence. Id. at 57. Additionally, Detective Calarese testified that during the course of his investigation he extracted electronic messages between Ms. Alexinas and a username assigned to Petitioner wherein sexual acts involving the victims were discussed. Id. at 33, 41, 60-68.[11]

To state the matter succinctly, Petitioner's conviction did not turn on the witness's identification of him in a photograph depicting a naked man with an elongated toe. Thus, Petitioner cannot show that trial counsel's failure to obtain a photograph of Petitioner's feet gives rise to a reasonable probability that the result of his trial would have been different. Strickland, 466 U.S. at 694. As a result, Petitioner is not entitled to relief as to this IAC claim.[12]

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[11]In the emails, for example, Petitioner asked Ms. Alexinas to "tell [E.A.] to suck me until I cum, to spread her pussy for me to jerk off into," and offered $500 for E.A.'s "virginity." N.T. 4/14/10 at 64, 67. Petitioner also wrote a letter referring to such emails. Id. at 75-76.

[12]The court need not "address both components of the inquiry if the [petitioner] makes an insufficient showing on one." Strickland, 466 U.S. at 697.

D. Grounds Two Through Six: Defaulted IAC Claims

Petitioner's claims two through six are IAC claims which Petitioner asserted in his pro se PCRA petition, but which appointed counsel did not present in the amended PCRA petition, and which the state courts therefore never addressed on the merits. The District Attorney argues that these claims are unexhausted and procedurally defaulted, and that Petitioner does not establish either cause and prejudice or miscarriage of justice to excuse the default of any of these claims. Doc. 11. Petitioner counters that appointed counsel caused the default of his IAC claims by abandoning them in the Amended PCRA, and invokes Martinez to excuse the default. See Doc. 5 at 27-28, 33, 41, 43, 45-46; Doc. 8 at 1; Doc. 13.

In Martinez, the Supreme Court carved out a narrow exception to the rule that ineffective assistance of PCRA counsel does not provide cause to excuse a procedural default, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. The Court explained that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." Id. at 10-11. Thus, the Martinez exception applies only to claims of ineffective assistance of trial counsel where the errors or absence of post-conviction counsel caused a default of these claims at the initial-review post-conviction proceeding. Id. at 14; see also Norris v. Brooks, 794 F.3d 401, 405 (3d Cir. 2015) ("Martinez made very clear that its exception to the general rule . . . applies only to attorney error causing procedural

default during initial-review collateral proceedings, not collateral appeal."). In addition, to take advantage of Martinez, Petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that . . . the claim has some merit." Martinez, 566 U.S. at 14.[13]

In reviewing a claim of ineffectiveness of counsel, a court must apply a "strong presumption that counsel's representation is within the wide range of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citing Strickland, 466 U.S. at 688). Petitioner must demonstrate that counsel "made errors so serious that his representation fell below an objective standard of reasonableness" and this standard cannot be met "based on vague and conclusory allegations." Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) (denying habeas relief on IAC claim when petitioner failed to "set forth facts to support his contention"). Petitioner must also demonstrate that counsel's failure to meet an objective standard of reasonableness "resulted in prejudice so as to deprive the petitioner of a fair trial, that is, a trial whose result is reliable." Id. at 295.

In addressing whether any of Petitioner's IAC claims are "substantial" for purposes of Martinez, it is noteworthy that although the state courts have not addressed these claims, the courts' adjudication of Petitioner's claims regarding sufficiency and

[13]Whether a claim has "some merit" is judged by the standard to obtain a certificate of appealability. Martinez, 566 U.S. at 14 (citing Miller-El v. Cockerell, 537 U.S. 322, 327 (2003) ("A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.")).

weight of the evidence provide valuable guidance with regard to the question of prejudice. Indeed, because the question of prejudice is determinative as to each of these claims, I will consider the claims together.

In these five IAC claims, Petitioner argues that trial counsel was ineffective for failing to enter Petitioner's time-sheets into evidence (Ground Two), Doc. 5 at 24-28, failing to enter one of the victim's medical records into evidence (Ground Three), id. at 31-33, failing to comply with basic professional duties of loyalty (Ground Four), id. at 36-41, failing to call character witnesses (Ground Five), id. at 42-43, and failing to put Petitioner on the stand (Ground Six). Id. at 44-46.[14] As previously noted, to take advantage of Martinez, Petitioner must demonstrate that the underlying IAC claim is "substantial." Martinez, 566 U.S. at 14. This Petitioner cannot do. The claims fail to warrant application of Martinez because none of them undermines the strength of the Commonwealth's witness testimony or forensic computer evidence at trial.

Petitioner's claim that his time sheet would have proven that Ms. Alexinas lied about the time Petitioner allegedly came to his home to offer $500 for E.A.'s virginity is insufficient to overcome his default. Even assuming the in-person meeting did not take place and that the jury would have discredited Ms. Alexinas's testimony, Petitioner had already made the same offer by email. Also, counsel had already provided the jury grounds to find Ms. Alexinas an unreliable witness.

[14]Although counsel's reasoning is not relevant for purposes of the application of Martinez, it is worth noting that PCRA counsel did not simply neglect these claims. Counsel acknowledged that Petitioner raised each of these claims in his pro se PCRA petition, and explained in the Amended PCRA why each claim lacked merit. Amended PCRA Pet. ¶ 9(a), (e), (f), (h).

Petitioner's claim that his counsel should have introduced E.A.'s medical records is similarly insufficient to meet the "arguable merit" standard of Martinez. Specifically, he alleges that a January 2009 examination showed no lesions or scars on E.A.'s genital area, which would have discredited Ms. Alexinas's testimony of repeated forced penetration of E.A.'s vagina. Doc. 5 at 31 & Doc. 5-1 at 1.[15] Again, in light of the significant photographic and forensic evidence, this additional material would not have had an impact on the outcome of the trial. The jury was aware that there was no medical evidence of physical harm to either victim, so the report of an examination over a year after the assaults would not have changed the overall picture of the evidence.

With respect to the failure to call character witnesses and to have Petitioner testify at trial, Judge Gavin conducted a colloquy of Petitioner as to both decisions, and Petitioner acknowledged that he was voluntarily and intelligently giving up the right to both. N.T. 4/14.10 at 96-99. Petitioner did not identify any particular witness in his petition, although he later supplied the name of one witness, Mr. Surjir Bajwa. Doc. 14. Mr. Bajwa authored a November 25, 2016 letter stating that he knew Petitioner well over a period of eight years as a co-worker, and Petitioner was not known to be violent, was a family man, and never showed any sexual interest in children. Id. at 3. Mr. Bajwa also gave his contact information to Petitioner's counsel so that he could be a character witness. Id. Even assuming this would have been proper character evidence, Petitioner's identification of this witness at this late date does not render his claim substantial under

[15]The second of these two pages is missing from the original ECF filing (Doc.5), and was filed separately at Doc. 5-1.

Martinez. See, e.g., United States v. Thomas, 221 F.3d 430, 437-38 (3d Cir. 2000) (IAC for failing to call certain witnesses fails "where the petitioner failed to sufficiently identify potential witnesses").

With respect to his own desire to testify at his trial, Petitioner does not identify his anticipated testimony, although presumably it would have been to deny the allegations. He does not explain the flaw in his counsel's advice that it was not in his best interests to testify and face cross-examination on many damaging points of evidence. Petitioner's allegation that he wanted to testify is insufficient to obtain merits review in light of the clear on-the-record waiver of his right to testify.

Petitioner's claim that trial counsel violated the basic professional duties of loyalty is belied by the trial transcript, as well as by counsel's testimony at the PCRA evidentiary hearing. Petitioner may not have liked the outcome of his trial, but it cannot be said that counsel's trial strategies were intended to harm the defense. Petitioner presents a laundry list of complaints in this claim, for example that counsel failed to conduct an investigation that could have thrown suspicion on another paramour of Ms. Alexinas, would have uncovered a prior conviction of Ms. Gifford and shown her to be vindictive and likely to falsely accuse Petitioner, and would have undermined the Commonwealth's forensic computer evidence. Doc. 5 at 36-40. All Petitioner offers in support of these arguments is his own opinions and a 1990 newspaper article about Ms. Gifford's conviction.

These do not overcome the Commonwealth's evidence as summarized by the state courts in the context of Petitioner's weight of the evidence claim. See supra at 13-15.

The Commonwealth's evidence included Alexinas's testimony that she assisted Petitioner in sexually abusing her daughters over the course of several months, including the use of his digital camera as well as lingerie and penetrative sex toys provided by Petitioner. See N.T. 4/13/10 at 52-56, 60-63, 71-74. Both she and Ms. Gifford, Petitioner's ex-wife, identified Petitioner as the naked man in a photograph with one of the victims. Id. at 71; N.T. 4/14/10 at 14. Counsel cross-examined the witnesses in an effort to show inconsistencies in their testimony, but the jury and trial court clearly found the witnesses to be credible. Additionally, Detective Calarese testified that he located ten photographs of E.A. during a search of three computers belonging or issued to Petitioner, as well as a video file from which several still shots were entered into evidence, and electronic messages between Ms. Alexinas and a username assigned to Petitioner wherein dressing E.A. in lingerie and sexual acts involving the victims were discussed. N.T. 4/14/10 at 33, 41, 46, 57, 60-68. As the state courts found, the jury credited the detective's testimony and expert opinion that the images of child pornography recovered from Petitioner's computers were viewed by a user of those computers, and that because there was no forensic evidence that the images were ever downloaded or stored on Ms. Alexinas's computer, the logical inference was that the images were transferred directly from the originating digital camera to Petitioner's computer. In light of this qualitatively strong evidence, Petitioner cannot show that counsel's failure to introduce Petitioner's employer time sheets or the victim's medical records, and/or counsel's failure to present character witness testimony or to put Petitioner on the stand, prejudiced him such that he was deprived of a fair trial. Zettlemoyer, 923 F.2d at 295.

Because Petitioner has failed to demonstrate prejudice for purposes of any of the underlying IAC claims, the underlying claims are not "substantial" and Petitioner is not entitled to the benefit of Martinez. As a result, each of these IAC claims remains defaulted.[16] Similarly, Petitioner is not entitled to excuse the default of these claim on the basis of the fundamental miscarriage of justice exception because he has not offered any new, reliable evidence sufficient to meet the actual innocence standard. Accordingly, these five IAC claims are defaulted.

E. Ground Eight: Trial Court Error in Performing an In Camera Review of CYF Materials

Petitioner argues that the trial court erred in performing an in camera review of CYF materials rather than granting trial counsel's request to personally review the file. Doc. 5 at 52-53 (Ground Eight); Doc. 8 at 9. Petitioner raised this claim on direct appeal, arguing that the trial court erred because counsel had a right to review the CYF material under state law. Commonwealth v. Elkington, 10785 EDA 2011, Brief for Appellant, at 10-11 (Pa. Super. Apr. 2, 2012) (attached to Doc. 11 Exh. "F"). Respondent argues that the claim is meritless. Doc. 11 at 41-47.

On direct appeal, the Superior Court stated:

> [Petitioner] next claims that the trial court erred in conducting an *in camera* review of the CYF records associated with [Ms. Alexinas] and E.A. [Petitioner] argues

[16]To the extent Petitioner argues that the cumulative effect of counsel's alleged ineffectiveness resulted in prejudice, I reject any such argument for the same reason that each claim fails individually -- that is, the nature of the evidence presented at trial, including the witness testimony and the computer forensic evidence, precludes a finding of prejudice.

that counsel "had the right to review the records" personally in order to advocate for his client. We disagree.

Section 6340(a) of the [Pennsylvania] Domestic Relations Code, which governs the release of information contained in confidential reports and files kept by CYF offices, specifically lists the persons and organizations to which confidential reports shall be made available. These include a court of competent jurisdiction pursuant to court order or subpoena in a criminal matter involving a charge of child abuse; law enforcement officials . . . in the course of investigating cases of sexual abuse or child abuse . . .; and the district attorney or his designee or other law enforcement official . . . . Additionally, "[a]t any time and upon written request, a **subject of a report** may receive a copy of all information, except that prohibited from being disclosed . . . . The statute defines the term "subject of the report" as "[a]ny child, parent, guardian or other person responsible for the welfare of a child or any alleged or actual perpetrator or school employee named **in a report made to the Department of Public Welfare** or a county agency under this chapter."

Instantly, the trial court denied [Petitioner's] request to view the CYF records on the basis that [Petitioner] was not the subject of a CFY report as contemplated by the statute. The trial court came to this determination based upon a letter from the CYF solicitor asserting that CYF's family file on [Ms. Alexinas] and E.A. did not "[contain] any information on [Petitioner] as he was not the focus of the agency's investigation."

We agree that [Petitioner] was not a parent, guardian or person responsible for the welfare of either victim. However, Section 6303 also requires disclosure if the alleged perpetrator of abuse is the subject of a report made to CYF. On this point, the CYF solicitor informed the trial court that the family file on [Ms. Alexinas] and E.A. did not contain any information on [Petitioner] as he was not the focus of the agency's investigation. The solicitor also noted that "CYF's file does not contain any independent interviews, audiotapes, etc. of the child, [Petitioner] or of [Ms. Alexinas]." The trial court reviewed the CYF family file *in camera* and came to the same conclusion.

Additionally, the charging documents, search warrant, and affidavit of probable cause indicate that this case began

> when victim E.A. disclosed to CYF abuse perpetrated by her mother, [Ms. Alexinas]. CYF reported this disclosure to the Chester County [D.A.'s] Office. At that point, detectives from the [D.A.'s] Office interviewed both E.A. and [Ms. Alexinas]. During her interview, [Mr. Alexinas] revealed [Petitioner's] involvement in the sexual abuse. Thus, we conclude that [Petitioner] was not the subject of any report to CYF; rather, he was the subject of the police investigation following [Ms. Alexinas's] interview. Accordingly, as [Petitioner] was not the subject of any report contained therein, we find no error in the trial court's decision to preclude counsel from having direct access to the CYF family file of E.A. and [Ms. Alexinas].

Super. Ct. Op.- Direct at 5-8 (citations to trial court opinion, affidavit of probable cause, statute sections and briefs omitted) (emphasis in original).

Petitioner is not entitled to relief. As previously noted, on direct appeal Petitioner asserted this claim as a state law matter, arguing that defense counsel was entitled to view the CYF documents by operation of governing state statute. He asserts here that he is bringing the same claim that he exhausted on direct appeal. Doc. 5 at 52-53. Additionally, as quoted above, the Superior Court's consideration of the claim rested entirely on state law governing access to CYF material. Therefore, because Petitioner's claim here is also under state law, it is non-cognizable under habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Although Petitioner does not state that he is raising a federal claim, he argues that he was denied access to exculpatory material, Doc. 5 at 52, which can be read to implicate his due process rights under Brady v. Maryland, 373 U.S. 83 (1963). This claim is unexhausted and, because Petitioner cannot return to the state courts to exhaust

the claim, it is also defaulted. Petitioner makes no argument as to why such a default should be excused on the basis of cause and prejudice, nor can the court discern one, and the claim is not subject to analysis under Martinez. Nor does he even identify what exculpatory information the CYF file contains. Petitioner does not argue that the failure to address the claim would constitute a fundamental miscarriage of justice, that is, on the basis of actual innocence. Therefore, this court is foreclosed from addressing the claim further.

F. Ground Nine: Trial Court Error for Imposing an Excessive and Unreasonable Sentence, and IAC in Failing to Raise this Issue

Petitioner argues that the trial court erred by imposing an excessive and unreasonable sentence, and that trial counsel was ineffective in failing to raise the issue during the sentencing hearing or in post-sentence motions. Doc. 5 at 55-56 (Ground Nine); Doc. 8 at 10. Respondents argue that this claim is waived and meritless. Doc. 11 at 48-49.

With respect to the component of this claim alleging trial court error, Petitioner did not raise this claim on direct appeal, and although he asserted it in his pro se PCRA petition, appointed counsel did not include it in the Amended PCRA petition. Therefore, the claim is unexhausted. Moreover, because it is too late for Petitioner to return to the state courts to exhaust this claim, it is also defaulted. With regard to cause and prejudice, Petitioner argues that direct appellate counsel failed to raise the sentencing claim, and PCRA counsel removed the claim from the Amended PCRA petition over Petitioner's express wishes. Doc. 5 at 56. Petitioner fails to show that some objective factor external

to the defense impeded counsel's ability to properly assert a claim that Petitioner's sentence was excessive. Werts, at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). Also, claims of trial court error not fall under Martinez. See Martinez, 566 U.S. at 9 (IAC at initial-review collateral proceedings may establish cause for default of claim of IAC at trial). More importantly, Petitioner cannot show that he was prejudiced.

Sentencing is primarily a matter of state criminal procedure, and thus as a general rule does not fall under the scope of federal habeas review. "[A]bsent a constitutional violation, a federal court has no power to review a sentence in a habeas proceeding unless it exceeds the statutory limits." Smith v. Kerestes, No. 09-2926, 2009 WL 167136, at *16 (E.D. Pa. June 15, 2009), aff'd, 414 Fed. Appx. 509 (3d Cir. 2011). Here, Petitioner does not assert that the sentence is beyond statutory limits. See Doc. 5 at 55 ("Although [the sentence of 25 -to- 50 years] is within the sentencing guidelines, it is clearly unreasonable since the Sentencing Court focused its consideration entirely on the severity of the offenses without considering Petitioner's history, characteristics, and prospects for rehabilitation.") The claim is outside this court's reach. See Bartelli v. Wynder, No. 04-3817, 1010 WL 5904395, at 8-9 (E.D. Pa. Nov. 30, 2010) (Rueter, M.J.) (Report and Recommendation adopted Mar. 7, 2011) (Brody, J.) (challenge to discretionary aspects of sentence not cognizable) (citing Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984)). As a result, Petitioner's claim that his sentence is excessive and unreasonable is both non-cognizable in federal habeas, and meritless.

The IAC component of this claim is unexhausted and procedurally defaulted, and also subject to analysis under Martinez, because PCRA counsel dropped the claim from the Amended PCRA petition. However, the claim is not substantial because it lacks merit under state law. To vacate a sentence, Petitioner would have to establish that the court failed to provide a contemporaneous written statement of the reason or reasons the sentence deviated from the guidelines, which are "purely advisory in nature," or that the sentence imposed was greater than the lawful maximum. Commonwealth v. Yuhasz, 923 A.2d 1111, 1118-19 (Pa. 2007) (citing, inter alia, 42 Pa. C.S.A. § 9721(b)). As previously noted, Petitioner admits that his sentence is within the sentencing guidelines. See Doc. 5 at 55. Accordingly, Petitioner cannot show that an underlying state law claim is "substantial" for purposes of Martinez. Therefore, Petitioner's IAC claim in this regard is meritless.

G. Ground Eleven: Illegal Detention, and IAC in Failing to Raise this Issue

Petitioner next argues he is being illegally detained by the Pennsylvania Department of Corrections because there is no Written Order of Judgment (or Sentencing Order) in his case. See Doc. 5 at 59-60 (Ground Eleven); Doc. 8 at 12. Although he does not assert an IAC component to this claim in the caption or in the opening of this claim, Petitioner avers that "[d]ue to Petitioner's trial counsel's ineffectiveness, this issue was not raised during my Direct Appeals Process." Doc. 5 at 60. Respondents counter that this claim is unexhausted and procedurally defaulted, and in the alternative that it is

meritless. Doc. 11 at 51-57. Respondents do not address the IAC component of this claim.

Petitioner did not raise the illegal detention component of this claim on direct appeal, and although he asserted it in his pro se PCRA petition, appointed counsel did not include it in the Amended PCRA petition. Therefore, the claim is unexhausted. Moreover, because it is too late for Petitioner to return to the state courts to exhaust this claim, it is also defaulted. With regard to cause and prejudice, Petitioner fails to show that some objective factor external to the defense impeded counsel's ability to properly assert a claim that Petitioner's detention is illegal because there was no written Order of Judgment. Werts, at 192-93. Petitioner does not argue that the failure to consider this claim would amount to a fundamental miscarriage of justice, nor does he offer new, reliable evidence of actual innocence. Therefore, this claim remains defaulted.

In any event, to the extent Petitioner argues that he is imprisoned unlawfully because the sentencing court failed to issue an Order of Judgment under state law, the claim is non-cognizable. See Estelle, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). To the extent Petitioner argues that his imprisonment without an Order of Judgment violates his due process rights, the claim is meritless. There is no question Petitioner was tried and convicted and is currently serving a lawful sentence imposed on the charges for which he was convicted. Therefore, Petitioner's argument rests exclusively on a state law question of form and not on any federal constitutional right.

The claim also lacks merit. In its response, see Doc. 11 at 51-57, the Commonwealth relies exclusively on a lengthy block quote from Joseph v. Glunt, 96 A.3d 365, 368 (Pa. Super. 2014), in which the Pennsylvania Superior Court addressed a similar substantive issue in the context of a state habeas corpus petition, specifically whether a sentence is illegal because the state Department of Corrections did not have a written copy of the trial court's sentencing order. Although Respondent's exclusive reliance on a block quote from another case is not generally an effective strategy for addressing the merits of a claim in the context of a federal habeas petition, the outcome here is clear under deferential or de novo review: Under Pennsylvania law, "a record of a valid imposition of a sentence [is] sufficient authority to maintain a prisoner's detention notwithstanding the absence of a written sentencing order" under the governing Pennsylvania statute. Id. at 371-72 (internal citations omitted).

Here, as PCRA counsel explained in the Amended PCRA, Petitioner was sentenced in a way that is proper under state law, and a sentencing sheet containing the charges and sentence received was prepared and sent to the state prison. See Amended PCRA ¶ 9(o). The Docket Sheet in this case indicates that a sentencing hearing was scheduled and held, and the state court record received by this court contains a Sentencing Sheet dated December 16, 2010, which was filled in by hand and signed by Judge Gavin. Commonwealth v. Elkington, No. CP-15-CR-0001376-2009, Sentencing Sheet (Chester C.C.P. Dec. 10, 2010). These official documents memorialize Petitioner's sentence such that the matter proceeded through two rounds of state court review with no apparent concern regarding the propriety of Petitioner's incarceration pursuant to the

sentence imposed by Judge Gavin. Accordingly, even were I to reach the merits of this claim, Petitioner would not be entitled to relief.

As with the previous claims, the IAC prong of this claim is clearly unexhausted and procedurally defaulted, but is subject to Martinez because appointed PCRA counsel did not pursue the claim in his amended PCRA petition. Because the claim lacks potential merit under state law, Petitioner cannot establish that the issue is substantial to overcome the default.

H. Ground Twelve: Violation of Rights under the Vienna Convention and IAC in Failing to Raise this Issue

In his last claim, Petitioner argues that as a British national, his individual rights under the Vienna Convention were violated. Doc. 5 at 61-62 (Ground Twelve).[17] In

[17]The Vienna Convention is a treaty to which the United States is a signatory. See Vienna Convention on Consular Relations, 21 U.S.T. 77 (Apr. 24, 1963) ("Vienna Convention"). The preamble to the Vienna Convention provides that the treaty's purpose is to "contribute to the development of friendly relations among nations." Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006) (citing Vienna Convention, 21 U.S.T. at 79). Article 36 of the Vienna Convention provides in part:

> 1. With a view to facilitating the exercise of consular functions to nations of the sending State: . . .
>
> . . . .
>
> (b) if [a detained person] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a nation of that State is arrested or committed to prison or to custody pending trial or is detained in any other matter. Any communication addressed to the consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

addition, although Petitioner does not explicitly include an ineffectiveness claim in the heading or introduction to this claim, he avers that trial counsel failed to raise this claim during the direct appeal process, and that PCRA counsel was made aware of the issue in a letter dated January 23, 2014, but refused to raise it. Id. at 62. Respondents counter that this claim is unexhausted and procedurally defaulted, and in the alternative that it is meritless. Doc. 11 at 57-61. Respondents do not address the IAC component of this claim.

Petitioner did not raise this claim on direct or collateral appeal, and therefore the claim is unexhausted and procedurally defaulted.[18] Although default can be overcome by a showing of cause and prejudice, see Werts, 228 F.3d at 192, Petitioner cannot establish either. As for cause, Petitioner has made no showing that some objective factor impeded counsel's efforts to pursue this claim, see id., at 192-93, nor has Petitioner explained why he failed to include the claim among the nineteen others he asserted in his pro se PCRA petition. See PCRA Pet. ¶ 6. As for prejudice, Petitioner argues that law enforcement officials and/or the D.A.'s office failed to notify the British consulate of his detention

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> (c) Consular officers shall have the right to visit a national of the sending State who is prison, custody or detention, to converse or correspond with him and to arrange for his legal representation . . . .
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State. . . .

Vienna Convention, Article 36.

[18]The Supreme Court has held that in the context of a federal habeas petition, "Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." Sanchez-Llamas, 548 U.S. at 360.

until January 15, 2010 -- one year and four days after his arrest on the relevant charges -- and, as a result, he was never informed that he had the right to request assistance from the British consul. Doc. 5 at 61. However, the Supreme Court has explained that "Article 36 does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention – not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice of intervention." Sanchez-Llamas, 548 U.S. at 349 (emphasis in original). This is particularly true insofar as foreign nationals, like citizens, are protected by other constitutional and statutory requirements, such as the Due Process Clause. Id. at 350. Moreover, the Vienna Convention does not prescribe specific remedies for violations of Article 36, but rather "expressly leaves the implementation of Article 36 to domestic law." Id. at 343. As a result, Petitioner cannot establish that the state's January 15, 2010 notification to the British consulate prejudiced him for purposes of excusing default. For the same reason -- and because of the nature and extent of the evidence adduced at trial -- Petitioner has failed to show that a failure to consider his Vienna Convention claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192. Therefore, the claim remains defaulted.

The IAC component of this claim is also unexhausted and procedurally defaulted, but subject to Martinez because PCRA counsel did not raise it. Regardless, counsel cannot be found ineffective for failing to raise this claim because the underlying claim lacks merit for the reasons discussed above. See Sanchez-Llamas, 548 U.S. at 349-50. Therefore, the claim remains defaulted.

IV. Motion for Appointment of Counsel

Petitioner also filed a motion for appointment for counsel, which I denied without prejudice pending the drafting of this Report. Docs. 12 & 15. The District Attorney has not addressed the request.

There is no constitutional right to habeas counsel, see Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991), and no statutory right to habeas counsel in a non-capital case. Cf. 18 U.S.C. § 3599(a)(2) (providing for appointment of counsel in federal post-conviction proceedings seeking to vacate a death sentence). The court has discretion to appoint counsel "when the interests of justice so require." Id. § 3006A(a)(2). In making this determination the court should consider the complexity of the factual and legal issues in the case and the petitioner's ability to investigate facts and present his claims. Reese, 946 F.2d at 264. Counsel need not be appointed when the issues are "'straightforward and capable of resolution on the record' . . . or the petitioner 'had a good understanding of the issues and the ability to present forcefully and coherently his conclusions.'" Id. (quoting Ferguson v. Jones, 905 F.2d 211, 214 (8th Cir. 1990); LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987)); see also Ballard v. Duckworth, 656 F. Supp. 693, 675 (N.D. Ind. 1986) (factors to consider include the legal and factual merits of the claims, the degree of complexity of the issues, and the petitioner's apparent physical and intellectual abilities to prosecute the action) (citing, inter alia, Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981)).

I do not find a basis to appoint counsel. Petitioner articulately set forth myriad claims in his petition, attached lengthy supporting argument to the petition, and thereafter

filed a memorandum of law, a traverse, and additional evidence. Docs. 5, 8, 13 & 14. Although Plaintiff raises numerous claims and some documents are missing from the record, neither the claims nor the record are unusually complex. Additionally, Plaintiff has not raised any issue as to his physical or mental ability to address his claims, nor can one be discerned from the record or submissions to this court. Therefore, I recommend that Petitioner's motion for the appointment of counsel be denied.

V. CONCLUSION

Petitioner's habeas petition is timely. However, Petitioner is not entitled to relief. Ground One (IAC for failing to have pictures of Petitioner's feet shown to the jury) is exhausted and meritless. Grounds Two through Six are IAC claims which are unexhausted and procedurally defaulted. Ground Seven (weight of the evidence) is non-cognizable. Ground Eight (trial court error regarding CYF materials) is non-cognizable as a state law matter, and if construed as a due process claim, is defaulted. Ground Nine (trial court error for imposing an excessive and unreasonable sentence) is defaulted, and in any event meritless. Ground Ten (trial court error in jury instructions) is deemed exhausted, but is meritless. Ground Eleven (illegal detention) is defaulted, non-cognizable as raised, and in any event meritless. Ground Twelve (violation of the Vienna Convention) is defaulted, and in any event meritless. Finally, IAC claims raised as component parts of Grounds Nine through Twelve are defaulted, and in any event meritless. Moreover, there is no basis to appoint counsel.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 16th day of May 2018, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. IT IS FURTHER RECOMMENDED that Petitioner's motion for the appointment of counsel be DENIED. Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ELIZABETH T. HEY

ELIZABETH T. HEY, U.S.M.J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEOFFREY ELKINGTON	:	CIVIL ACTION
	:	
v.	:	
	:	
MICHAEL CLARK, et. al.	:	NO. 16-2949

ORDER

AND NOW, this day of , 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 Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED AND ADOPTED;
2. The petition for a writ of habeas corpus is DENIED.
3. Petitioner's motion for the appointment of counsel (Doc. 12) is DENIED.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

GERALD J. PAPPERT, J.

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

5/18/2018

RE: ELKINGTON v. CLARK, ET AL
CA No. 16- CV-2949

NOTICE

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

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

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

KATE BARKMAN
Clerk of Court

By:s/James Deitz_____
James Deitz, Deputy Clerk

cc: G. Elkington, p.p.#JX-1984
G. Morano, Esq

Courtroom Deputy to Judge Pappert

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