BLD-188 May 16, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1059**

CARL ROBINSON, Appellant

VS.

SUPERINTEDENT RETREAT SCI

(E.D. Pa. Civ. No. 16-cv-04224)

Present: AMBRO, KRAUSE and PORTER, Circuit Judges

Submitted are:

(1) Appellant's motion for the appointment of counsel;

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

(3) Appellant's motion for leave to proceed on the original record;

(4) Appellant's motion to reopen the time to file an appeal;

(5) Appellant's motion to add and amend exhibits;

(6) Appellant's second motion to add and amend exhibits;

(7) Appellant's motion to expand the certificate of appealability;

(8) Appellant's motion to amend his request for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

Robinson's motion to amend the request for a certificate of appealability is granted. The request for a certificate of appealability and motion to expand the certificate of appealability are denied. The District Court determined that Robinson's claims were defaulted and meritless. Jurists of reason would not debate the correctness of the District Court's decision. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Brady v. Maryland, 373 U.S. 83 (1963); Commonwealth v. Rainey, 928 A.2d 215, 237 (Pa. 2007) (diminished capacity defense); Commonwealth v. Reiff, 413 A.2d 672 (Pa. 1980) (voluntary intoxication defense).

While the correctness of the District Court's decision is not debatable, we note that the analysis section of the Report and Recommendation appears to have been taken directly from the Respondent's Supplemental Response with some minor alterations. Compare Supp. Resp. at 7-10 with Report & Recommendation at 10-13. We have disapproved of such practices. See Bright v. Westmoreland County, 380 F.3d 729, 732 (3d Cir. 2004) ("Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.")

The motion for the appointment of counsel is denied. Robinson's motions to proceed on the original record, to reopen the time to file an appeal, and to add and amend exhibits are denied as unnecessary.

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: June 5, 2019
CJG/cc: Carl Robinson
Jennifer O. Andress
Catherine B. Kiefer

A True Copy:

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

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

CARL ROBINSON **Petitioner,** **v.** **VINCENT MOONEY, *et al.*** **Respondents.**	**CIVIL ACTION NO. 16-4224**

ORDER

AND NOW, this 28th day of December 2018, upon consideration of the pending motions, it is hereby **ORDERED** that:

1. Petitioner's Motion Requesting Entry Under Rule 52(b) [Doc. No. 31] is **DISMISSED AS MOOT**. The July 16, 2018 order denying the petition for writ of *habeas corpus* approved and adopted the report and recommendation, which set forth in detail the reasons for the denial, and a copy of which has been sent to Petitioner twice.
2. It appearing that Petitioner is unable to pay the filing fee for an appeal, the Petition for Leave to Continue *In Forma Pauperis* [Doc. No. 33] is **GRANTED**. This Order does not constitute a ruling as to the timeliness of any appeal.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

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

CARL ROBINSON,	:	**CIVIL ACTION**
Petitioner	:	
	:	
vs.	:	**NO. 16-4224**
	:	
VINCENT MOONEY, et al.,	:	
Respondents	:	

ORDER

AND NOW, this 16th day of July, 2018, upon independent consideration of the petition for writ of *habeas corpus*, the response and supplemental response to the petition (Documents #12 and 16), and after careful review of the thorough and well-reasoned Report and Recommendation of United States Magistrate Judge Henry S. Perkin, there being no objections thereto, IT IS HEREBY ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for writ of *habeas corpus* is DENIED with prejudice and DISMISSED without an evidentiary hearing; and

3. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, C. J.

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

CARL ROBINSON, Petitioner,	:	CIVIL ACTION
v.	:	NO. 16-4224
VINCENT MOONEY, et al., Respondents.	:	

Henry S. Perkin, M.J. June 22, 2018

REPORT AND RECOMMENDATION

Before the Court is the *pro se* Petition for Writ of Habeas Corpus filed by the Petitioner, Carl Robinson ("Petitioner"). Petitioner is currently incarcerated in the State Correctional Institution Mahanoy located in Frackville, Pennsylvania. For the reasons that follow, it is recommended that the Petition should be denied with prejudice and dismissed without an evidentiary hearing.

I. PROCEDURAL HISTORY.

On February 8, 2011, Petitioner waived his right to a jury and proceeded to a non-jury trial before the Honorable Shelley Robins-New in the Philadelphia Court of Common Pleas.[1] On February 10, 2011, the court found him guilty but mentally ill of two counts of

[1] In the PCRA court opinion, Judge Robins-New summarized the underlying facts of this case as follows:

> The procedural history of this case was significant. The killings took place on June 1, 2006 and Appellant was arrested at the scene. Before the matter was assigned to this Court for trial, issues concerning Appellant's competency had delayed trial for a number of years. After Appellant was found competent, a capital jury was scheduled before this Court. Prior to trial the Commonwealth chose not to seek capital punishment. Subsequently, each party sought to waive its rights to a jury trial and this Court accepted the matter as a bench trial. The facts of the killing were proven beyond any doubt. The issue in this case was insanity. Both sides presented expert testimony on Appellant's state of mind. This Court after hearing the testimony and reviewing the evidence found Appellant to have been mentally ill but not legally insane.
>
> As found by this Court, the facts were as follows: On June 1, 2006, Appellant entered the

first-degree murder, two counts of attempted murder, two counts of aggravated assault, and a firearms violation. Resp., Ex. A; Docket No. CP-51-CR-0802251-2006. On February 15, 2011, Petitioner received mandatory life sentences for the two first-degree murder convictions and lesser terms of incarceration for the remaining offenses. All sentences were deemed to run concurrently. Petitioner did not file a direct appeal or any post-sentence motions.

On August 15, 2012, Petitioner filed a *pro se* petition for collateral relief pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et. seq.*, followed by an amended petition on June 25, 2013.[2] The PCRA court considered the second *pro se* petition to be a supplement to the first petition, therefore the relevant filing date was August 15, 2012. The first petition raised a claim pursuant to Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012), although the petitioner was an adult, not a juvenile, at the time of the crime. The second petition raised numerous undeveloped claims of procedural error and ineffective assistance of trial counsel. Attorney Stephen O'Hanlon, Esquire, was appointed to represent petitioner. On

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> SK wireless store at Broad Street and Erie Avenues in Philadelphia. The Owner, three employees and several customers were in the store. Appellant who was a former employee announced he needed to use the restroom. He walked behind the counter and down a hall to the restroom. When he returned, Appellant picked up a phone and dialed 911. He told the dispatcher a robbery was occurring and described one of the customers as the robber. That customer left. Appellant made the owner, Sean Kim and an employee, Andy Kim lie on the floor. Appellant then fired a gun a total of fourteen times. Andy Kim was shot twice in the head. Sean Kim also was shot twice in the head and once in the chest. As the shots began panic ensued in the store, as people tried to leave, Appellant fired at them. Nobody else was shot, but the front windows were shot out. The 911 call captured the incident and was played at trial.
>
> Immediately after the shooting Appellant put down the Glock pistol he used. Appellant stole the gun from his cousin three days before the slaughter. Appellant fled, attempted to car jack several vehicles and was apprehended by four police officers a half block from the scene.

Commonwealth v. Robinson, CP-51-CR-0802251-2006, PCRA Ct. Op., 12/20/2016, pp. 1-2.

[2] Although the first petition was untimely, on July 8, 2015, the Pennsylvania Supreme Court granted petitioner's request for extraordinary relief to the extent that it sought mandamus relief and reinstatement of his right to file a PCRA petition. Robinson v. Phila. Ct. of Common Pleas, 118 A.3d 1106 (Pa. 2015)(No. 59 EM2015)(Mem.).

September 25, 2015, Attorney O'Hanlon filed a no-merit brief pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988) (en banc), stating the *pro se* petition was untimely filed, the claims were meritless and after review of the record, no other issues of arguable merit existed.

On March 18, 2016, after conducting an independent review of the record, reading the parties' briefs, and issuing notice of its intent to dismiss the petition in compliance with Pa. R. Crim. P. 907, the PCRA court formally dismissed the petition as meritless and permitted Attorney O'Hanlon to withdraw his representation. Petitioner filed a *pro se* appeal to the Pennsylvania Superior Court. Judge Robins-New issued her PCRA court opinion for the benefit of the Superior Court.[3] Commonwealth v. Robinson, CP-51-CR-0802251-2006, PCRA Ct. Op., 12/20/2016. On January 18, 2017, the appeal was formally docketed and the state court record was transmitted to the Superior Court, which denied the PCRA appeal without decision due to Petitioner's failure to file a brief.

On October 26, 2016, while his PCRA appeal was still pending in the Pennsylvania Superior Court, Petitioner filed the instant *pro se* Petition for Writ of Habeas Corpus, raising four wholly unexhausted claims: 1) A Brady violation - the Commonwealth and police failed to disclose exculpatory evidence and testimony of the psychiatrist physician who evaluated Petitioner's state of mind at the time of the crime; (2) diminished capacity - during the

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[3] Judge Robins-New found the PCRA petition time-barred because it was filed more than one year after the judgment of sentence became final and the court was without jurisdiction to entertain any claims pursuant to the PCRA because petitioner pled none of the three enumerated statutory exceptions to the time requirements of the PCRA statute. The court also found that, even if jurisdiction existed, no relief was due because the Miller claim was inapplicable as petitioner was an adult at the time of the killing, and the second *pro se* PCRA petition contained no developed claim. In addition, the court reviewed the entire record and found no cognizable PCRA claim. Commonwealth v. Robinson, CP-51-CR-0802251-2006, PCRA Ct. Op., 12/20/2016, p. 4.

course of said crime, Petitioner was under the influence of drug intoxicants, high levels of PCP; (3) Fourteenth Amendment equal protection and due process violation - Petitioner was not afforded the equal protection of the law; and (4) First Amendment violation - the right to petition the government for a redress of grievances. See Petition.

In the response filed on May 5, 2017, the Respondents contend that the Petition should be dismissed without prejudice to refile once Petitioner obtained state appellate review of his claims because Petitioner's appeal was still pending in the Pennsylvania Superior Court and none of the claims in the instant Petition were exhausted. The Superior Court docket at that time showed that the appeal was dismissed on April 12, 2017 for failure to file an appellate brief, approximately two weeks before the May 5, 2017 Response was filed. Thus, Petitioner's appeal was no longer pending when the Response was filed. As a result, this Court ordered the Respondents to file a supplemental Response to the Petition on July 27, 2017. On August 11, 2017, a Supplemental Response was filed in which Respondents contend that all of the claims in the Petition are procedurally defaulted, unreviewable, and/or meritless and none warrants habeas relief.

II. STANDARD OF REVIEW.

A. Petitions for Writ of Habeas Corpus.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that a writ of habeas corpus for a person serving a state court sentence shall not be granted unless (I) the state court's resolution of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

all remedies available in the state courts. 28 U.S.C. § 2254(b)(1)(A). To satisfy this requirement the petitioner must "fairly present" his claims to the state courts allowing the state courts a meaningful opportunity to correct alleged constitutional violations. Duncan v. Henry, 513 U.S. 364, 365 (1995); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)(requiring "one complete round" of the state's appellate procedures). Petitioner bears the burden of proving the exhaustion of all available remedies for each claim. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993).

Claims that are not exhausted will become procedurally defaulted, and the petitioner is not entitled to a review on the merits. O'Sullivan, 526 U.S. at 848. Review of a procedurally defaulted claim is permitted in extremely narrow circumstances, where the petitioner can show either (1) cause for the default and actual prejudice or (2) the failure to consider the claim will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 749 (1991).

"Cause" for procedural default is shown when the petitioner demonstrates "some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). "Actual prejudice" occurs when the errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494 (quoting United States v. Frady, 456, U.S. 152, 179 (1982)). A "fundamental miscarriage of justice" occurs when a petitioner presents new evidence of his actual innocence such that "it is [now] more likely than not that no reasonable juror would have convicted him." Schlup v. Delo, 513 U.S. 298, 327 (1995).

In Martinez v. Ryan, 132 S.Ct. 1309 (2012), the Supreme Court examined whether ineffective assistance at the initial review of a collateral proceeding on a claim of

ineffective assistance at trial can provide cause for a procedural defect in federal habeas proceedings. Id. at 1315. This case recognized a narrow exception to the Coleman rule (that ineffective assistance of counsel at the state collateral review level could not establish cause to excuse 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." Martinez v. Ryan, 132 S.Ct. 1309, 1315 (2012).

Thus, a PCRA claim for ineffective trial counsel during an initial state collateral review may qualify as "cause" to excuse the default if: (1) as a threshold matter, the state requires a prisoner to bring an ineffective counsel claims in a collateral proceeding; (2) the state courts did not appoint counsel at the initial review collateral proceeding for an ineffective-assistance-at-trial claim; (3) where appointed counsel at the initial-review collateral proceeding was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) and (4) the underlying ineffective-assistance-at-trial claim is substantial. Martinez, 132 S.Ct. at 1315-18.

C. Ineffective Assistance of Counsel.

Claims for ineffectiveness of counsel are governed by Strickland.[5] Under Strickland, counsel is presumed effective, and to prevail on an ineffectiveness claim, a petitioner must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689. Given this presumption, a petitioner must first prove that counsel's conduct was so unreasonable that no competent lawyer

[5] In Harrington v. Richter, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the United States Supreme Court reaffirmed the continued applicability of the Strickland standard in federal habeas corpus cases. See also Premo v. Moore, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

would have followed it, and that counsel has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687. In addition, a petitioner must prove prejudice. In order to do so, the petitioner must demonstrate that "counsel's errors were so serious as to deprive [petitioner] a fair trial, a trial whose result is reliable." Id. Thus, a petitioner must show a reasonable probability that, but for counsel's "unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome." Id. at 694. This determination must be made in light of "the totality of the evidence before the judge or jury." Id. at 695.

The United States Court of Appeals for the Third Circuit has cautioned that "[o]nly the rare claim of ineffectiveness should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." Beuhl v. Vaughn, 166 F.3d 163, 169 (3d Cir.), cert. denied, 527 U.S. 1050 (1999) (quoting U.S. v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)). Under the revised habeas corpus statute, such claims can succeed only if the state court's treatment of the ineffectiveness claim is not simply erroneous, but objectively unreasonable as well. Berryman v. Morton, 100 F.3d 1089, 1103 (3d Cir. 1996). Recently, the Supreme Court acknowledged that "[s]urmounting Strickland's high bar is never an easy task." Premo v. Moore, 131 S. Ct. 733, 739 (2011) (quotation omitted). The Supreme Court explained that the relevant "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Id. at 740 (citing Strickland, 466 U.S. at 690).

Petitioner must show not only that counsel's conduct was improper, but also that it amounted to a constitutional deprivation. Petitioner must also show that the prosecutor's acts

so infected the trial as to make his conviction a denial of due process. Greer v. Miller, 483 U.S. 756, 765 (1987)(citation omitted). Petitioner must show that he was deprived of a fair trial. Smith v. Phillips, 455 U.S. 209, 221 (1982); Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992), cert. denied, 508 U.S. 947 (1993) (citations omitted) (stating court must distinguish between ordinary trial error, and egregious conduct that amounts to a denial of due process).

Where the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the previous decision, pursuant to 28 U.S.C. § 2254(d)(1). If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Where the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable. Yarborough v. Gentry, 540 U.S. 1, 4, 124 S. Ct. 1 (2003) (*per curiam*) (citations omitted). The Supreme Court recently elaborated on this standard:

> Establishing that a state court's application of Strickland was unreasonable under §2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," id., at 689; Lindh v. Murphy, 521 U.S. 320, 333 n. 7, 117 S. Ct. 2059 . . . , and when the two apply in tandem, review is "doubly" so, Knowles, 556 U.S. at 123, 129 S. Ct. at 1420. The Strickland standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Premo, 131 S. Ct. at 740 (citations omitted).

III. DISCUSSION.

A. Petitioner's Allegation of a "Brady Violation" Is Procedurally Defaulted and Meritless on Its Face.

Petitioner first alleges that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by supposedly withholding exculpatory information. He alleges that "[t]he Commonwealth and Police failed to disclose Exculpatory Evidence and testimony of the Psychiatrist Physician who Evaluated Petitioner's state of mind Right After Said Crime [sic]" See Pet., p. 8. This claim is both procedurally defaulted and meritless.

Petitioner failed to fairly present this claim in state court for merits review or litigate it through one full round of the state courts' established appellate process claim, therefore it is procedurally defaulted. In addition, Petitioner's failure to comply with procedural filing requirements operates as an additional independent and adequate state law ruling to bar merits review in federal court. Walker v. Martin, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment") (internal citations and quotations omitted).

Petitioner's claim is facially meritless because the information which was allegedly withheld from Petitioner does not constitute Brady evidence. Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting Brady, 373 U.S. at 87). To prove a Brady violation, a defendant must show: (1) the evidence was

favorable to him, in that it is exculpatory or impeaching of the government's evidence; (2) the evidence was "suppressed" by the state; and (3) the evidence was material such that the defendant was prejudiced by the failure to disclose it. Strickler, 527 U.S. at 281–82.

Petitioner's consultation with a psychiatrist does not constitute Brady material. Petitioner was aware that he spoke to a psychiatrist, and his supporting brief indicates that the psychiatrist was at Temple University Hospital, a non-governmental entity whose physicians and findings are not controlled by law enforcement. Even assuming that the psychiatrist's testimony might have been favorable to Petitioner, that evidence was neither unknown to Petitioner nor suppressed by the prosecution. This is not a viable Brady claim and the claim fails on the merits even if it were not doubly defaulted.

B. Petitioner's Due Process/Equal Protection Claim Is Procedurally Defaulted and Unreviewable.

Petitioner's second claim alleges a diminish[ed] capacity, due process/equal protection violation. Petitioner states "[d]uring the course of said Crime I was under the influence of Drug intoxication 'PCP' [sic]." See Pet., p. 10. This claim is procedurally defaulted because it was not litigated through one full round of the state courts' established appellate process. In addition, Petitioner's failure to comply with procedural filing requirements operates as an additional independent and adequate state law ruling to bar merits review in federal court. Walker, 562 U.S. at 315.

As Respondents correctly note, this claim is unreviewable because it is impossible to discern why or how Petitioner's PCP use at the time of the crime constitutes a violation of his federal due process or equal protection rights. It is Petitioner's burden to articulate his allegations

counsel's ineffectiveness and failed to do so. Moreover, Petitioner, acting *pro se*, requested and obtained extraordinary relief from the Pennsylvania Supreme Court, which permitted him in 2015 to obtain review of his time-barred PCRA petition. Petitioner's PCRA appeal was dismissed because Petitioner, acting *pro se*, failed to file an appellate brief. Thus, the failure to obtain appellate review of Petitioner's claims is attributable to Petitioner himself, not to an attorney. Accordingly, this claim is both procedurally defaulted and unreviewable due to Petitioner's failure to articulate, develop, and defend any coherent Fourteenth Amendment claim.

D. Petitioner's First Amendment Claim Is Procedurally Defaulted, Meritless, Noncognizable, and Unreviewable.

Petitioner finally alleges a "1st Amendment Violation, for The Right To Petition the Government for A Redress of Grievances." Pet., pp. 13-14. This claim is procedurally defaulted for the same reason as all of the preceding claims. The claim is also unreviewable because this undeveloped allegation fails to set forth a sufficiently developed claim for review. This claim is also meritless because Petitioner filed *pro se* petitions for relief in state courts and in this Court, therefore he has not been prevented from petitioning the government about his various grievances. Petitioner has not shown that this claim is founded on an actual law promulgated by Congress or any state legislature, therefore it is not cognizable as a First Amendment claim and must be denied.

IV. CERTIFICATE OF APPEALABILITY.

The court must also determine whether to recommend granting a certificate of appealability ("COA") with respect to the Petitioner's claims. A COA can issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right and [if] jurists of reason would find it debatable whether the district court was correct in its [] ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The court is of the view that reasonable jurists would not debate the court's determinations, and a COA should not be granted.

For all of the above reasons, I make the following:

RECOMMENDATION

AND NOW, this 22nd day of June, 2018, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus should be DENIED without prejudice and DISMISSED without an evidentiary hearing. There is no cause to issue a certificate of appealability.

The 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.

BY THE COURT:

/s/ Henry S. Perkin
HENRY S. PERKIN
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1059

CARL ROBINSON,
Appellant

v.

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

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 2-16-cv-04224)
District Judge: Cynthia M. Rufe

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

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: July 11, 2019
Tmm/cc: Carl Robinson
Jennifer O. Andress, Esq.