DLD-204 **June 6, 2019**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2899**

CURRY ROBINSON, Appellant

VS.

SUPERINTENDENT HOUTZDALE SCI, et al.

(E.D. Pa. Civ. No. 2:17-cv-01023)

Present: JORDAN, GREENAWAY, JR., and NYGAARD, Circuit Judges

Submitted are:

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

(2) Appellant's motion for appointment of counsel

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied because he has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Jurists of reason would not debate the District Court's decision to deny his habeas petition. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). More specifically, jurists of reason would not debate that several of Appellant's claims, namely his claim that the Superior Court should have remanded to the PCRA court, and his numerous claims of ineffectiveness of PCRA counsel are non-cognizable. See Hassine v. Zimmerman, 160 F.3d 941 (3d Cir. 1998); 28 U.S.C. § 2254(i); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Additionally, even if jurists of reason may debate the District Court's conclusion that Appellant's

fourth claim is non-cognizable, see Piasecki v. Court of Common Pleas, Bucks Cty., PA, 917 F.3d 161 (3d Cir. 2019), jurists of reason would not debate that the claim is meritless. As to Appellant's remaining claims, even if jurists of reason might debate the District Court's conclusion that those claims are procedurally defaulted (which we do not decide), jurists of reason would not debate whether the petition states a valid claim of the denial of a constitutional right. See Slack, 529 U.S. at 484. Finally, Appellant's motion to appointment of counsel is denied. See Tabron v. Grace, 6 F.3d 147 (3d Cir. 1993).

By the Court,

s/ Richard L. Nygaard
Circuit Judge

Dated: July 24, 2019
SLC/cc: Curry Robinson
Douglas M. Weck, Jr., Esq.

A True Copy:

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

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

CURRY ROBINSON,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 17-cv-1023**
	:	
BARRY SMITH, et al.	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **May 30, 2018**

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Curry Robinson ("Petitioner"), an individual currently incarcerated at the State Correctional Institution in Houtzdale, Pennsylvania. This matter has been referred to me for a Report and Recommendation.[1] (Order, ECF No. 2). For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED with prejudice.

I. BACKGROUND[2]

The Superior Court of Pennsylvania provided the following recitation of the facts:

> [Petitioner's] charges arose out of the multiple sexual contacts [Petitioner] had with four minors between 1996 and 2002. Three of the victims are [Petitioner's] step-daughters, and the other is his non-biological niece.

---

[1] During the pendency of these proceedings, the matter was reassigned from the calendar of the Honorable James Knoll Gardner to the calendar of the Honorable Timothy J. Savage. (Order, ECF No. 7).

[2] Respondents have submitted the relevant portions of the state court record ("SCR") in hard-copy format. Documents contained in the SCR will be cited as "SCR No. ___." Additionally, the Criminal Docket Sheet is not available online because Petitioner's case is sealed. Current copies of the Criminal Docket Sheet were forwarded to this Court by the Court of Common Pleas of Philadelphia County's PCRA Unit on May 14, 2018 and May 23, 2018. A copy of Petitioner's currently pending PCRA petition was also forwarded here on May 14, 2018.

Commonwealth v. Robinson, No. 1753 EDA 2006, slip op. at 1-2 (Pa. Super. Feb. 26, 2008) (SCR No. D8). On January 4, 2006, following a non-jury trial, Petitioner was found guilty of rape, 18 Pa. Cons. Stat. § 3121(a)(1), involuntary deviate sexual intercourse, *id.* § 3123(a)(1), two counts of aggravated indecent assault, *id.* § 3125, three counts of contact with a minor, *id.* § 6318(a)(1), four counts of indecent assault of a person less than 13 years of age, *id.* § 3126(a)(7), terroristic threats, *id.* § 2706(a)(i), four counts of endangering the welfare of children, *id.* § 4304(a), four counts of corruption of minors, *id.* § 6301(a)(i), and two counts of indecent exposure, *id.* § 3127. *Commonwealth v. Robinson*, No. CP-51-CR-0601281-2005 (Phila. Cnty. Com. Pl.), Criminal Docket at 4-11; *Robinson*, No. 1753 EDA 2006, slip op. at 1. On May 19, 2006, Petitioner was sentenced to an aggregate term of seven and one-half to fifteen years' incarceration. *Robinson*, No. 1753 EDA 2006, slip op. at 1; Crim. Docket at 33-52. He filed a timely post sentence motion, which was denied on May 31, 2006. (Post Sentence Mot., SCR No. D2; Order, SCR No. D2A); *Commonwealth v. Robinson*, No. CP-51-CR-0601281-2005, slip op. at 2 (Phila. Ctny. Com. Pl. June 2, 2015) (SCR No. D37) [hereinafter "June 2015 PCRA Op."]

On June 26, 2006, Petitioner filed a notice of appeal in the Superior Court, challenging the sufficiency of the evidence. Crim. Docket at 53; *Robinson*, No. 1753 EDA 2006, slip op. at 3. The Superior Court found Petitioner failed to preserve his claim for appellate review, and affirmed his judgment of sentence on February 26, 2008. *Robinson*, No. 1753 EDA 2006, slip op. at 3-8.

On April 8, 2008, Petitioner filed a *pro se* petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"). Crim. Docket at 55; (Mot. for Post Conviction Collateral Relief, SCR No. D10). John P. Cotter was appointed to represent Petitioner, and filed an amended petition on October 10, 2008. Crim. Docket at 55-56; (Letter of

Appointment, SCR No. D11; Am. Pet., SCR No. D12). On April 17, 2009, the PCRA Court granted the PCRA petition in part, and reinstated Petitioner's right to file a direct appeal *nunc pro tunc*. Crim. Docket at 56. Accordingly, Petitioner filed a counseled notice of appeal in the Superior Court on May 5, 2009. Crim. Docket at 56. The Superior Court again affirmed his judgment of sentence on January 10, 2011. Crim. Docket at 58; *Commonwealth v. Robinson*, No. 1343 EDA 2009, slip op. at 1 (Jan. 10, 2011) (SCR No. D18). Petitioner filed a timely petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied July 19, 2011. Crim. Docket at 58; (Order, SCR No. D19).

On November 16, 2011, Petitioner filed a *pro se* PCRA petition. Crim. Docket at 58; (Mot. for Post Conviction Collateral Relief, SCR No. D20). Matthew J. Wolfe entered his appearance, and filed an amended PCRA petition on Petitioner's behalf. Crim. Docket at 58-59; (Am. Pet., SCR No. D24). On June 2, 2014, the PCRA Court sent Petitioner notice of its intent to dismiss his PCRA petition, pursuant to Pennsylvania Rule of Criminal Procedure 907, and on June 15, 2014, it formally denied the petition.[3] Crim. Docket at 59-60; (Order, SCR No. D28). Petitioner filed a timely notice of appeal in the Superior Court, which twice remanded the case to the PCRA Court: first to conduct a hearing pursuant to *Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998); and then to permit Petitioner to file a supplemental Rule 1925(b) Statement. (Not. of App., SCR No. D30); Crim. Docket at 60, 61; June 2015 PCRA Op. at 4-5. The Superior Court affirmed the PCRA Court's decision on June 28, 2016. Crim. Docket at 63; *Commonwealth v. Robinson*, No. 2396 EDA 2014, slip op. at 1 (Pa. Super. June 28, 2016). Petitioner filed an

[3] Petitioner sent a *pro se* Response to the Court's Rule 907 Notice. (Resp., SCR No. D27). The PCRA Court initially stated that it never received Petitioner's Response to its Rule 907 Notice. *Commonwealth v. Robinson*, No. CP-51-CR-0601281-2005, slip op. at 3 (Phila. Ctny. Com. Pl. Dec. 4, 2014) [hereinafter "Dec. 2014 PCRA Op."]. In a later opinion by the PCRA Court, it described Petitioner's Response to the Rule 907 Notice as untimely. *See* June 2015 PCRA Op. at 4.

application for reargument, which was denied July 28, 2016. *Commonwealth v. Robinson*, No. 2396 EDA 2014 (Pa. Super.), Appeal Docket at 7.

On February 1, 2017,[4] Petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania, which was subsequently transferred to this district. (*See* Mem. Order, ECF No. 1). The petition raises the following claims for relief (recited verbatim):

> (1) Remand was warranted by the Superior Court when the PCRA Court violated Petitioner's Due Process right, when it claimed to have never received Petitioner's timely response to its 907 notice. Which bypassed Petitioner's rights to amend new issues and have standby counsel.
>
> (2) Petitioner suffered prejudice due to trial court's restating testimonial facts, which broadened the evidence of when K.M. T.M. and T.T. said the alleged crimes happened. All prior counsel gave I.A.C. for not correcting/preserving this issue for Appellate review.
>
> (3) Petitioner's due process right were violated when trial counsel and PCRA counsel did forgo any investigation regarding Petitioner's detainer hold, which establishes an alibi defense against the sufficiency and insufficiency of the particularities of all sex crimes alleged.
>
> (4) Ineffective assistance of counsel were Trial counsel stipulated to the sexual offenders assessment board's findings, were there was no colloquy to ensure an intelligent agreement, and were Petitioner was not informed of all his rights regarding a SVP hearing.

(Hab. Pet. ¶ 12, ECF No. 1-1).

---

[4] Pennsylvania and federal courts employ the prisoner mailbox rule, pursuant to which the *pro se* petition is deemed filed when it is given to prison officials for mailing. *See Perry v. Diguglielmo*, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. 1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Commonwealth v. Castro*, 766 A.2d 1283, 1287 (Pa. Super. 2001). In this case, Petitioner certified that he gave his habeas petition to prison officials on February 1, 2017, and it will be deemed filed on that date. (Hab. Pet. 28, ECF No. 1-1).

On February 3, 2017, Petitioner filed a Supplement to his petition, seeking to add the following claims:

> (5) Trial counsel and prior counsels were ineffective for having rudimentary knowledge of Petitioner's work history and habits, in order demonstrate facts to contrary to Prosecution's evidence of Petitioner being a baby-sitter and stay at home Dad[.]
>
> (6) Trial Counsel was ineffective for failing to set forth character witnesses, and Direct Appeals counsel was ineffective for failing to discern this issue of trial counsel ineffectiveness, also, PCRA counsel was ineffective for failing to certifying the character witness[.]
>
> (7) Trial counsel was ineffective for failing to set forth the issue of trial judge's bias questioning of Petitioner's witness and stopping his attacks on the victim(s) credibility. Direct appeals ineffective for not raising this issue of trial counsel's ineffectivcncss, PCRA counsel was ineffective for not raising this issue of prior counsels ineffectiveness[.]

(Supp. to Hab. Pet. 2-4, ECF No. 1-6). The Commonwealth filed a Response (Resp. to Pet. for Writ of Habeas Corpus, ECF No. 16 [hereinafter "Resp. to Pet."]), and Petitioner filed a Reply (Pet'r's Resp. to the Resp'ts' Letter Br. for Writ of Habeas Corpus and Mem. of Law, ECF No. 17 [hereinafter "Reply"]). The matter is fully briefed and ripe for disposition.[5]

---

[5] After filing the instant petition, Petitioner filed a PCRA petition on January 3, 2018. Crim. Docket at 63. Petitioner's PCRA matter is next listed for June 29, 2018, and a Rule 907 Notice of Intent to Dismiss is "to be sent." Crim. Docket at 65. Because that petition is pending, the Court has considered whether stay and abeyance is appropriate, and concludes that it is not.

A district court may issue a stay where: "(1) good cause exists for the petitioner's failure to exhaust his claims; (2) the unexhausted claims are not plainly meritless; and (3) the petitioner has not engaged in dilatory or abusive tactics." *Heleva v. Brooks*, 581 F.3d 187, 192 (3d Cir. 2009) (citing *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005)). Here, Petitioner's pending claims are plainly meritless; the PCRA petition was filed beyond the PCRA's one year statute of limitations. Petitioner's judgment became final on October 17, 2011, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal. *See* 42 Pa. Cons. Stat. § 9545(b)(1). He filed his PCRA petition over six years later.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or

---

Petitioner raises two exceptions to the PCRA's one year statute of limitations, alleging the discovery of new facts that could not have been ascertained by the exercise of due diligence, and the assertion of a constitutional right that was recognized to apply retroactively. *See* 42 Pa. Cons. Stat. § 9545(b)(1)(ii)-(iii). He bases these arguments on case law concerning sentencing factors and Pennsylvania's Sex Offender Registration and Notification Act ("SORNA"), specifically: *Alleyne v. United States*, 570 U.S. 99 (2013); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017); *Commonwealth v. Rivera-Figueroa*, 174 A.3d 647 (Pa. Super. 2017); *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017); and *Commonwealth v. Maze*, No. 893 WDA 2016, 2017 Pa. Super. Unpub. LEXIS 4267 (Pa. Super. Nov. 20, 2017).

Petitioner's arguments lack merit. First, judicial determinations are not "facts." *See Commonwealth v. Watts*, 23 A.3d 980, 986 (Pa. 2011). Moreover, in the context of the PCRA, "a new rule of constitutional law is applied retroactively to cases on collateral review only if the United States Supreme Court or [Pennsylvania] Supreme Court specifically holds it to be retroactively applicable to those cases." *Commonwealth v. Miller*, 102 A.2d 988, 995 (Pa. Super. 2014). However, none of the cases on which Petitioner relies have been found to apply retroactively by the United States Supreme Court, or by the Pennsylvania Supreme Court. Further, the Superior Court of Pennsylvania has rejected arguments that *Alleyne* and *Muniz* satisfy the newly-recognized constitutional right exception. *See, e.g.*, *Commonwealth v. Cervantes*, No. 2076 EDA 2017, 2018 WL 2125859, at *2 n.3 (Pa. Super. May 9, 2018) (appellant did not properly invoke the newly-recognized constitutional right exception because the Pennsylvania Supreme Court has not found *Muniz* applies retroactively); *Commonwealth v. Murphy*, 180 A.3d 402, 405-06 (Pa. Super. 2018) (same); *Miller*, 102 A.2d at 995 ("[N]either [the Pennsylvania] Supreme Court, nor the United States Supreme Court has held that *Alleyne* is to be applied retroactively . . . .").

> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies 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 Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because

there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557–59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739–40. A state rule is "adequate" for procedural default purposes if it is "firmly established and regularly followed." *Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802, 1804 (2016) (*per curiam*) (citation omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005), and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Id.* at 708.

Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to

> avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman*, 501 U.S. at 750. To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts*, 228 F.3d at 196. Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only 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 United States;" or (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, and the petitioner bears the burden of rebutting this presumption

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); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. 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." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that 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 (citation omitted).

III. DISCUSSION

As will be discussed in more detail below, the Court finds that Grounds One and Four are not cognizable, and the remaining claims are procedurally defaulted.

A. Ground One: Due Process Violation from PCRA Court's Failure to Consider Response to Rule 907 Notice

In Ground One, Petitioner argues that his due process rights were violated by the PCRA

Court's failure to consider his response to its Rule 907 Notice of intent to dismiss, and by the Superior Court's failure to remand his case to the PCRA Court, given this error. (Hab. Pet. 12-13, ECF No. 1-1). The Commonwealth responds that this claim is not cognizable. (Resp. to Pet. 12-13, ECF No. 16). This Court agrees with the Commonwealth; the claim is not cognizable.

Allegations of error in a state's post-conviction proceeding are not cognizable on federal habeas review. *See Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) ("[A]lleged errors in collateral proceedings . . . are not a proper basis for habeas relief from the original conviction. It is the original trial that is the 'main event' for habeas purposes."); *Hassine v. Zimmerman*, 160 F.3d 941, 954 (3d Cir. 1998) ("[T]he federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's *collateral* proceeding does not enter into the habeas calculation.") (emphasis in original); *Holland v. Folino*, No. 13-6623, 2015 WL 1400660, at *9, *23 (E.D. Pa. Mar. 26, 2015) (petitioner's claim that the PCRA Court's insufficient Notice of Intent to Dismiss denied him due process was not cognizable).

The Court respectfully recommends that Ground One be dismissed as non-cognizable.

B. Ground Two: Trial Court's Misstatement of the Relevant Time Period and Ineffective Assistance of all Prior Counsel for Failure to Correct this Issue

In Ground Two, Petitioner avers, "Petitioner suffered prejudice due to trial court's restating testimonial facts, which broadened the evidence of when K.M. T.M. and T.T. said the alleged crimes happened. All prior counsel gave I.A.C. for not correcting/preserving this issue for Appellate review[.]"[6] (Hab. Pet. 15, ECF No. 1-1). The Commonwealth responds that

[6] To the extent Petitioner argues that trial counsel was ineffective "for allowing the Commonwealth to add any provision to the bill [of information] concerning aforesaid girls" and for failing to "discuss[] with Petitioner that there would be any changes to the billing [sic] information," these claims are not sufficiently developed to permit review. (*See* Hab. Pet. 15-16,

Petitioner's claims are defaulted and meritless. (Resp. to Pet. 13-15, ECF No. 16). The Court finds that Petitioner's claims are procedurally defaulted.

In Petitioner's Supplemental Rule 1925(b) Statement, he alleged, *inter alia*:

> 6. Counsel was ineffective for failing to object to court's mis-characterization of facts which prejudiced [Petitioner] in further review on appeal? (i.e. 'summary of fact' alleging [T.M.] being approximately (9) at the time of the alleged tent event and the time of the alleged assaults being from 1996-2002 for all four alleged victims). Nor was this established through testimony or discovery.
>
> 10. [Petitioner] suffered cumulative ineffectiveness and layered ineffectiveness assistance of counsel due to the dereliction of all prior counsels.

(Ex. D ¶¶ 6, 10 to June 2015 PCRA Op. [hereinafter "Supp. 1925(b) Statement"]). The PCRA Court explained the first claim "was not raised in [Petitioner's] PCRA petition and, accordingly, is waived for that distinct reason." June 2015 PCRA Op. at 10 (citing *Commonwealth v. Lambert*, 797 A.2d 232, 240-41 (Pa. 2001)). It found the second claim "too vague to permit meaningful review," and explained, "each of [Petitioner's] ineffective assistance of counsel claims fail." *Id.* at 11.

On PCRA appeal, Petitioner alleged that his due process rights were violated when the trial court "broaden[ed] the alleged sexual assaults over several years" and that "all prior counsel [were] ineffective for failing to raise this issue[.]" *Robinson*, No. 2396 EDA 2014, slip op. at 2. He also argued that, "trial counsel['s] improprieties were []cumulative, and [he] suffer[ed]

ECF No. 1-1). Petitioner does not explain how counsel could have prevented the Commonwealth's decision to charge the crimes that it did, and fails to indicate how the "billing information" was changed. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991), *cert denied*, 502 U.S. 902 (1991) (a petitioner cannot meet his burden of establishing ineffectiveness with vague and conclusory allegations); *Mayberry v. Petsock*, 821 F.2d 179, 186 (3d Cir. 1987), *cert denied*, 484 U.S. 946 (1987); *United States v. Minerd*, No. 06-212, 2012 WL 1069946, at *3 (W.D. Pa. Mar. 29, 2012) ("[A] claim of ineffective assistance must identify the specific error(s) counsel has made.").

layered ineffectiveness," in that "all prior counsel failed to raise the issues that he is now forced to raise *pro se*." *Id.* at 2, 4. The Superior Court found each claim waived.

As to the trial court's alleged broadening of the time frame, the Superior Court noted, "To the extent that [Petitioner] seeks to raise a claim concerning trial court error, such a claim is not preserved for appellate review because he could have raised it previously." *Id.* at 4 n.4 (citing 42 Pa. Cons. Stat. § 9544(b); *Commonwealth v. Ford*, 809 A.2d 325, 329 (Pa. 2002)). As for Petitioner's allegation that trial counsel was ineffective for failing to raise the issue, the Superior Court found this claim waived for two reasons. First, it was not raised before the PCRA Court. *Id.* at 4. Neither Petitioner nor PCRA counsel raised this claim in the *pro se* or amended PCRA petition. *Id.* at 4 n.5. Accordingly, the Superior Court could not address it for the first time on appeal. *Id.* at 4 (citing *Commonwealth v. Santiago*, 855 A.2d 682, 691 (Pa. 2004)). Moreover, Petitioner failed to raise trial counsel's ineffectiveness in his Concise Statement of matters to be raised on appeal, also resulting in the claim's waiver. *Id.* at 4-5 (citing Pa. R.A.P. 1925(b)(4)(vii); *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998)). Finally, the Superior Court found, "To the extent that [Petitioner] seeks to raise a claim of PCRA counsel ineffectiveness regarding this issue, his claim is waived, as he failed to raise this issue in his *pro se* Response to the PCRA court's Rule 907 Notice of its intent to dismiss [Petitioner's] Amended Petition." *Id.* at 5 n.6 (citing *Commonwealth v. Henkel*, 90 A.3d 16, 29 (Pa. Super. 2014)).

Regarding Petitioner's layered ineffectiveness claim, the Superior Court agreed with the PCRA Court that the claim was "'too vague to permit meaningful review.'" *Id.* at 7 (citing June 2015 PCRA Op. at 11; *Commonwealth v. Hansley*, 24 A.3d 410, 415 (Pa. Super. 2011); *Commonwealth v. Dowling*, 778 A.2d 683, 686 (Pa. Super. 2001)). Moreover, the Superior

Court noted, "[Petitioner] has failed to discuss, let alone satisfy by a preponderance of the evidence, the three prongs of the ineffectiveness test for *each* of his ineffectiveness claims against *each* of his counsel." *Id.* at 8 n.9 (citing *Commonwealth v. Ligons*, 971 A.2d 1125, 1138 (Pa. Super. 2009)) (emphasis in original). Thus, the Superior Court noted that if the layered ineffectiveness claim had not been waived, it "would have determined that [Petitioner] failed to properly develop his claim on appeal." *Id.* (citing *Ligons*, 971 A.2d at 1138; Pa. R.A.P. 2119(a)).

The Superior Court's waiver finding precludes federal review of Petitioner's due process/trial court error, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel claims. The Superior Court relied on independent and adequate state grounds in finding each of these claims waived.

First, the Superior Court's reliance on 42 Pa. Cons. Stat. § 9544(b) in finding Petitioner's trial court error claim waived was based on an independent and adequate state ground.[7] *See, e.g.*, *Patton v. Superintendent Graterford SCI*, No. 17-2142, 2017 WL 5624266, at *1 (3d Cir. Sept. 28, 2017), *cert. denied sub nom. Patton v. Link*, __ U.S. __, 138 S. Ct. 1449 (2018) ("[T]he state court's reliance on 42 Pa. Cons. Stat. § 9544(b) provides an independent and adequate ground to support the judgment."); *Ferguson v. Cameron*, No. 14-3257, 2017 WL 2273183, at *4 (E.D. Pa. Apr. 27, 2017), *report and recommendation approved*, No. 14-3257, 2017 WL 2264676 (E.D. Pa. May 24, 2017) (due process claim defaulted under 42 Pa. Cons. Stat. § 9544(b) when it was available, but not presented, on direct review); *Williams v. Sauers*, No. 12-102, 2015 WL 787275, at *13-14 (E.D. Pa. Feb. 25, 2015).

[7] 42 Pa. Cons. Stat. § 9544(b) provides: "For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."

Similarly, the Superior Court relied on an independent and adequate state ground in finding Petitioner's ineffective assistance of trial counsel claim waived. The Superior Court found Petitioner did not present this claim to the PCRA Court, and thus, did not preserve the claim for appellate review.[8] The requirement that claims be raised before the PCRA Court to be preserved for appellate review has been found to be independent and adequate, and this Court agrees with that assessment. *See, e.g.*, *Suny v. Pennsylvania*, 687 F. App'x 170, 174-75 (3d Cir. 2017) (not precedential) (Superior Court's dismissal of claim due to petitioner's failure to raise it in PCRA Court was based on independent and adequate state ground); *see also id.* at 175 n.36 ("Based on Rule of Criminal Procedure 902(B) and Rule of Appellate Procedure 302(a), Pennsylvania courts routinely decline to consider on appeal an argument that was not explicitly raised in the PCRA petition."); *Thomas v. Sec'y Pennsylvania Dep't or Corr.*, 495 F. App'x 200, 206 (3d Cir. 2012) (not precedential) (finding claim procedurally defaulted due to petitioner's failure to "comply with the clear and unambiguous Pennsylvania rules that require each claim to be separately and explicitly asserted in the PCRA petition") (citing Pa. R. Crim. P. 902(B); Pa. R. App. p. 302(a)).

Finally, the Superior Court relied on an independent and adequate state ground in finding Petitioner's layered ineffectiveness claim – which included a claim that appellate counsel was

---

[8] The Superior Court also cited Pennsylvania Rule of Appellate Procedure 1925(b)(4)(vii), which states, "Issues not included in the [Concise] Statement . . . are waived." This is likewise an independent and adequate rule. *See, e.g.*, *Buck v. Colleran*, 115 F. App'x 526, 528 (3d Cir. 2004) (not precedential); *Ferguson*, 2017 WL 2273183, at *3-4; *Sidberry v. Fisher*, No. 11-888, 2015 WL 3866276, at *16 (W.D. Pa. June 23, 2015). However, as Petitioner points out, he did, indeed, raise this ineffective assistance of trial counsel claim in his Concise Statement. (Hab. Pet. 17, ECF No. 1-1; Reply 6-7, ECF No. 17; *see also* Supp. 1925(b) Statement ¶ 6). The Court recognizes that "[i]t is well-established that 'federal habeas corpus relief does not lie for errors of state law.' This remains true even if the state procedural ruling is incorrect." *Branthafer v. Glunt*, No. 14-294, 2015 WL 5569128, at *8 (M.D. Pa. Sept. 22, 2015) (citations and quotation marks omitted). Nonetheless, because the Superior Court cited another rule in finding waiver, the Court focuses on that rule in finding default.

ineffective for failing to challenge the trial court's broadening of the time frame (Ex. A to Resp. to Pet. 50, ECF No. 18 [hereinafter "App. Br."]) – waived. Although the Superior Court did not cite the specific rule on which it relied, it cited *Hansley* and *Dowling*, which both explain that an issue may be found waived if an appellant's Rule 1925(b) Statement is too vague. *See Hansley*, 24 A.3d at 415 (holding the Superior Court may find waiver where a concise statement is too vague); *Dowling*, 778 A.2d at 686 ("[T]he issue raised on appeal is waived because Appellant's Concise Statement was too vague for the trial court to identify and address the issue to be raised on appeal."). The requirement that issues raised in Rule 1925(b) Statements be pleaded with sufficient clarity has been found to be independent and adequate, and this Court agrees with that finding. *See, e.g.*, *Pugh v. Overmyer*, No. 15-364, 2017 WL 3701824, at *10 (M.D. Pa. Aug. 28, 2017); *Manley v. Gilmore*, No. 15-2624, 2016 WL 9280154, at *9 (E.D. Pa. Feb. 24, 2016), *report and recommendation adopted*, No. 1502624, 2017 WL 2903050 (E.D. Pa. July 7, 2017); *Miles v. Tomaszewski*, No. 04-3157, 2004 WL 2203726, at *3 (E.D. Pa. Sept. 14, 2004), *report and recommendation adopted*, No. 04-3157, 2004 WL 2457732 (E.D. Pa. Oct. 27, 2004).

Because the Superior Court invoked independent and adequate state law grounds in finding waiver, the due process/trial court error and ineffective assistance of trial and appellate counsel claims are procedurally defaulted. The Court cannot review the merits of these claims unless Petitioner establishes cause and prejudice or a fundamental miscarriage of justice. Petitioner argues, "[T]he cause for this would be due to ineffective assistance of all prior counsel compound with the administrative breakdown regarding Petitioner's 907 response which impeded proper procedures that would normally follow." (Hab. Pet. 17, ECF No. 1-1; *see also* Reply 3-6, 8, ECF No. 17). However, as discussed above, Petitioner's claim of appellate counsel's ineffectiveness is procedurally defaulted; therefore, that claim cannot serve as cause to

excuse Petitioner's default. *See Edwards*, 529 U.S. at 451 ("[A] claim of ineffective assistance . . . must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.") (emphasis in original) (citation and quotation marks omitted); *see generally id.* at 450-54; *Vu v. Wetzel*, No. 14-5691, 2016 WL 2733761, at *2 (E.D. Pa. May 10, 2016), *certificate of appealability denied sub nom. Nguyen Vu v. Sec'y Pennsylvania Dep't of Corr.*, No. 16-2679, 2017 WL 6016563 (3d Cir. Mar. 6, 2017). Additionally, Petitioner cannot establish cause and prejudice from "the administrative breakdown regarding [his] 907 response." The issues surrounding Petitioner's Rule 907 Notice – specifically, the PCRA Court's erroneous finding that the Response was untimely, *see infra* Part III.C – did not cause Petitioner's default. The Superior Court found that the PCRA Court erred in finding Petitioner's Response was untimely, but it also concluded that Petitioner's claims were defaulted for numerous other reasons. Thus, the PCRA Court's error did not cause Petitioner's default.[9]

Petitioner also argues that PCRA counsel's ineffectiveness caused his default (Hab. Pet. 15-16, ECF No. 1-1), invoking *Martinez v. Ryan*, 566 U.S. 1 (2012).[10] *Martinez* recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a

---

[9] Petitioner also raises the issues surrounding his Rule 907 Notice as cause and prejudice to overcome the default of Ground Three. (*See, e.g.*, Reply 8-9, ECF No. 17). That argument fails for the same reason.

[10] To the extent Petitioner raises ineffective assistance of PCRA counsel as a substantive claim here or elsewhere, such a claim is not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(i) ("[T]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."); *Martel v. Clair*, 565 U.S. 648, 662 n.3 (2012) ("[M]ost naturally read, § 2254(i) prohibits a court from granting substantive habeas relief on the basis of a lawyer's ineffectiveness in post-conviction proceedings . . . .").

claim of ineffective assistance at trial." 566 U.S. at 9. To successfully invoke the *Martinez* exception, a petitioner must satisfy two factors: that the underlying, otherwise defaulted, claim of ineffective assistance of trial counsel is "substantial," meaning that it has "some merit," *id.* at 14; and that petitioner had "no counsel" or "ineffective" counsel during the initial phase of the state collateral review proceeding. *Id.* at 17; *see also Glenn v. Wynder*, 743 F.3d 402, 410 (3d Cir. 2014). Both prongs of *Martinez* implicate the controlling standard for ineffectiveness claims first stated in *Strickland v. Washington*: (1) that counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. 466 U.S.668, 687 (1984).

Petitioner's claims of PCRA counsel ineffectiveness cannot establish cause under *Martinez* because they are, themselves, procedurally defaulted. Petitioner alleged that PCRA counsel was ineffective in PCRA proceedings, and the Superior Court found those claims waived pursuant to independent and adequate state rules. First, the Superior Court found Petitioner's claim that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness regarding the broadening of the time frame waived because Petitioner failed to raise it in his *pro se* Response to the PCRA Court's 907 Notice, and thus, improperly raised it for the first time on appeal. *See, e.g.*, *Smith v. DiGuglielmo*, No. 06-2918, 2018 WL 1740528, at *7 (E.D. Pa. Apr. 10, 2018) (rule that PCRA counsel ineffectiveness claim cannot be raised for the first time on appeal is independent and adequate). Additionally, the Superior Court found Petitioner's layered ineffectiveness claim, which included a claim of PCRA counsel ineffectiveness (*see* App. Br. 47, ECF No. 18), waived because it was only vaguely raised in his 1925(b) Statement. *See, e.g.*, *Miles*, 2004 WL 2203726, at *3. Because these PCRA counsel ineffectiveness claims are procedurally defaulted, they cannot serve as cause. *See Edwards*, 529 U.S. at 450-54; *Turner v. Coleman*, No. 13-1787, 2016 WL 3999837, at *10 (W.D. Pa. July 26, 2016) (petitioner failed to

establish cause under *Martinez* when PCRA counsel ineffectiveness claim was procedurally defaulted); *Galloway v. Wenerowicz*, No. 13-956, 2016 WL 2894476, at *10 (W.D. Pa. Apr. 20, 2016), *report and recommendation adopted*, No. 13-956, 2016 WL 2866765 (W.D. Pa. May 17, 2016) (same).

In any event, even if Petitioner's PCRA counsel ineffectiveness claims were not defaulted, Petitioner has not established that he fits within *Martinez*' narrow exception. First, *Martinez* applies only to defaulted claims of ineffective assistance of trial counsel; therefore, to the extent Petitioner argues PCRA counsel's ineffectiveness establishes cause for the default of his due process/trial court error and ineffective assistance of appellate counsel claims, this argument lacks merit.[11] *See Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2065 (2017) (declining to extend *Martinez* to defaulted claims of ineffective assistance of appellate counsel); *Murray v. Diguglielmo*, No. 09-4960, 2016 WL 3476255, at *4 (E.D. Pa. June 27, 2016) ("These claims do not involve ineffective assistance of [trial] counsel. *Martinez* does not apply.").

Moreover, Petitioner's underlying claim of trial counsel's ineffectiveness is not "substantial," as it is belied by the record. Petitioner himself avers, "[T]he Court understood that only one alleged victim is claiming the 1996 [to] 2002 date[.]" (Hab. Pet. 15, ECF No. 1-1) (citing N.T. 01/04/06 at 111-12); (*see also* Reply 7, ECF No. 17). Moreover, during K.M.'s testimony, the following exchange between trial counsel and the court occurred:

> The Court: This incident started in '96, right?
>
> Mr. Montoya: That's what [L.M.] has –
>
> The Court: Not with her.

[11] To the extent Petitioner raises PCRA counsel's ineffectiveness as cause for the default of appellate counsel ineffectiveness claims in Grounds Three, Five, Six, and Seven, these arguments similarly lack merit.

> Mr. Montoya: Not with her.
>
> The Court: Well, you're saying it's three years from 2002 to today, you don't have to –
>
> Mr. Montoya: I'm trying to lay the foundation to ask her how she can remember, Judge.
>
> The Court: Just go to the next question. We know there's three years.

(N.T. 01/04/06 at 112:4-17). As this exchange shows, trial counsel alerted the trial court to the very issue Petitioner avers counsel was ineffective for failing to raise. Accordingly, Petitioner's claim that trial counsel was ineffective for failing to correct the trial court's alleged misunderstanding of the time frame is contradicted by the record, is not "substantial," and cannot establish cause under *Martinez*.

The Court respectfully recommends dismissing Ground Two as procedurally defaulted.

C. Ground Three: Due Process Violation and Ineffective Assistance of All Prior Counsel for Failure to Investigate Alibi Defense

In Ground Three, Petitioner avers, "Petitioner's due process rights were violated when trial counsel and PCRA counsel did forgo any investigation regarding Petitioner's detainer hold which establishes an alibi defense against the sufficiency and insufficiency of the particularities of all sex crimes alleged." (Hab. Pet. 18, ECF No. 1-1). He also argues that appellate counsel was ineffective for failing to investigate and use "the alibi record." (*Id.* at 20). The Commonwealth responds that Petitioner's claim of trial counsel ineffectiveness is defaulted and meritless, and to the extent Petitioner alleges PCRA counsel was ineffective for failing to pursue the alibi defense, this claim is not cognizable. (Resp. to Pet. 15-16, ECF No. 16). The Court finds Petitioner's claims are procedurally defaulted.

The PCRA Court found that any claim regarding PCRA counsel's ineffectiveness was

waived "because [Petitioner] did not raise it in the PCRA court during the 20-day response period provided by Pa. R.Crim.P. 907(1)." June 2015 PCRA Op. at 7 (citing *Commonwealth v. Rigg*, 84 A.3d 1080, 1084 (Pa. Super. 2014)).

The PCRA Court also found Petitioner's alibi claim was "without arguable merit, and therefore, trial counsel cannot be held ineffective for failing to assert it." *Id.* at 8. The PCRA Court explained, "an alibi is 'a defense that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party.'" *Id.* (quoting *Commonwealth v. Rainey*, 928 A.2d 215, 234 (Pa. 2007)). To show ineffectiveness for failing to present alibi evidence, a petitioner "must establish that counsel could have no reasonable basis for his act or omission." *Id.* (citing *Commonwealth v. Carpenter*, 725 A.2d 154, 163 (Pa. 1999)).

Petitioner asserted that he was incarcerated from June 2002 to November 2002. *Id.* Therefore, he argued, he could not have committed the sexual assaults against T.T. in the summertime, and his incarceration would have provided an alibi defense against L.M.'s testimony that she saw Petitioner assault T.T. in the summertime. *Id.* However, the PCRA Court concluded, "A reasonable basis for not introducing [the] purported alibi defense is readily apparent from the record." *Id.* Trial testimony revealed that Petitioner sexually assaulted the complainants from 1996 to 2002. *Id.* Petitioner was charged with Attempted Theft of Services and related offenses on June 16, 2002, and those charges were dismissed on November 7, 2002. *Id.* Although the PCRA Court was "unable to determine whether [Petitioner] was actually incarcerated during this time," his "alleged incarceration would not provide an alibi defense for the multiple sexual assaults testified to by each of the complainants that occurred prior to June 2002." *Id.* at 8-9. Additionally, his alleged incarceration would not render it impossible for the

sexual assaults testified to by T.T. and J.M. to have happened "in the summertime." *Id.* at 9. Counsel cannot be ineffective for failing to assert a meritless defense. *Id.*

On PCRA appeal, the Superior Court found Petitioner's claims of ineffective assistance of all prior counsel waived. First, the Superior Court noted, "[Petitioner's] brief addresses additional issues which were not included in his Statement of Questions Involved." *Robinson*, No. 2396 EDA 2014, slip op. at 2 n.3 (citing Brief for Appellant at 15-25, 26-29, 30-33). One of these issues alleged that trial counsel was ineffective for failing to use Petitioner's "county stay and work history as a viable defense." (App. Br. 25-35, ECF No. 18).[12] Because this issue was not included in the Statement of Questions Involved, the Superior Court "decline[d] to address [it]." *Robinson*, No. 2396 EDA 2014, slip op. at 2 n.3 (citing Pa. R.A.P. 2116(a) (providing that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.")).

Additionally, the Superior Court found that under the prisoner mailbox rule, Petitioner's Response to the PCRA Court's Rule 907 Notice was timely, and therefore, "the PCRA court should not have disregarded [it] as untimely filed." *Id.* at 9. However, Petitioner's PCRA counsel ineffectiveness claim was nonetheless waived because it was not stated "with sufficient clarity in his Concise Statement." *Id.* at 10-11 (citing *Hansley*, 24 A.3d at 415; *Dowling*, 778 A.2d at 686). Moreover, Petitioner "failed to discuss, let alone satisfy by a preponderance of the evidence, the three prongs of the ineffectiveness test for *each* of his ineffectiveness claims against *each* counsel." *Id.* at 11 n.11 (emphasis in original). Thus, even if Petitioner's claim had not been "waived for vagueness," the Superior Court "would have determined that he failed to properly develop his claim on appeal." *Id.* (citing *Ligons*, 971 A.2d at 1138; Pa. R.A.P.

[12] Although the Court has cited the ECF pagination, this claim appeared on pages 15 through 25 of Petitioner's brief, as noted by the Superior Court.

2119(a)).

Finally, as discussed above, the Superior Court found Petitioner's layered ineffectiveness claim – which included a claim that prior counsel, including appellate counsel, failed to investigate or utilize Petitioner's detainer hold as an alibi (*see* App. Br. 50, ECF No. 18) – was waived because it was only vaguely raised in Petitioner's 1925(b) Statement. *Robinson*, No. 2396 EDA 2014, slip op. at 7.

The Superior Court's waiver findings precludes federal review of Petitioner's trial and appellate counsel ineffectiveness claims because the Superior Court relied on independent and adequate state court rules. As discussed above, Petitioner's layered ineffectiveness claim is procedurally defaulted pursuant to the requirement that Rule 1925(b) Statements be sufficiently clear, and this rule is independent and adequate. *See supra* Part III.B.

Additionally, the Superior Court's reliance on Rule 2116(a) precludes review of Petitioner's trial counsel ineffectiveness claim because this rule is an independent and adequate state procedural rule. Rule 2116(a) states:

> The statement of the questions involved must state concisely the issues to be resolved, expressed in the terms and circumstances of the case but without unnecessary detail. The statement will be deemed to include every subsidiary question fairly comprised therein. No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby. . . .

Pa. R.A.P. 2116(a). Courts in this circuit have found this provision of the rule to be independent and adequate.[13] *See, e.g.*, *Vega v. State Corr. Inst. at Forrest*, No. 14-2880, 2016 WL 4467924, at *4 (E.D. Pa. July 14, 2016), *report and recommendation adopted*, No. 14-2880, 2016 WL 4430791 (E.D. Pa. Aug. 22, 2016); *Tyson v. Beard*, No. 06-290, 2013 WL 4547780, at *17-18

[13] A prior version of Rule 2116 was found to be inadequate because a page limitation imposed by that earlier version was not regularly followed. *See Nolan*, 363 F. App'x at 871-72. Neither the page limitation nor the earlier version of Rule 2116 is at issue here.

(E.D. Pa. Aug. 27, 2013); *Norton v. Coleman*, No. 09-1751, 2009 WL 5652570, at *5-6 (E.D. Pa. Nov. 25, 2009), *report and recommendation adopted*, No. 09-1751, 2010 WL 290517 (E.D. Pa. Jan. 2010). This Court also finds the Superior Court's denial of this claim on procedural grounds was based on an independent and adequate state rule that existed at the time of Petitioner's default.

The Court may not review the merits of this defaulted claim unless Petitioner has established cause and prejudice, or a fundamental miscarriage of justice. Petitioner again argues that PCRA counsel was ineffective, raising a *Martinez* argument. (*See* Hab. Pet. 20-21, ECF No. 1-1; *see also* Reply 1-3, ECF No. 17). However, Petitioner's claim that PCRA counsel was ineffective is procedurally defaulted because it was not pleaded with sufficient clarity in his Rule 1925(b) Statement. As discussed above, *see supra* Part III.B, this rule is independent and adequate. *See, e.g.*, *Miles*, 2004 WL 2203726, at *3. Because this PCRA counsel ineffectiveness claim is procedurally defaulted, it cannot establish cause. *See Edwards*, 529 U.S. at 450-54; *Turner*, 2016 WL 3999837, at *10; *Galloway*, 2016 WL 2894476, at *10.

In any event, Petitioner has not established that this claim falls within *Martinez*' narrow exception. Petitioner's underlying ineffective assistance of trial counsel claim is not "substantial." The state courts found that the crimes occurred between 1996 and 2002. (*See* N.T. 01/04/06 at 219:12-13); June 2015 PCRA Op. at 8. This is a factual finding to which this Court must defer, as Petitioner has not rebutted it with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Thus, this Court is persuaded by the PCRA Court's conclusion that Petitioner's "alleged incarceration would not provide an alibi defense for the multiple sexual assaults testified to by each of the complainants" that occurred prior to Petitioner's June 2002 charges for attempted theft of services and related offenses. June 2015 PCRA Op. at 8-9.

Accordingly, Petitioner's purported alibi defense lacks merit, and counsel cannot be ineffective for failing to raise a meritless claim. *See Sanchez v. Overmyer*, No. 15-5303, 2016 WL 6836960, at *4 (E.D. Pa. Oct. 31, 2016), *report and recommendation adopted*, No. 15-5303, 2016 WL 6821898 (E.D. Pa. Nov. 18, 2016) (citing *Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998)).

The Court respectfully recommends dismissing Ground Three as procedurally defaulted.

D. Ground Four: Due Process Violation and Ineffective Assistance of all Prior Counsel Regarding Sexual Offenders Assessment Board's Findings

In Ground Four, Petitioner avers that trial counsel was ineffective and that his due process rights were violated because trial counsel stipulated to the Sexual Offenders Assessment Board ("SOAB")'s findings, where "there was no colloquy to ensure an intelligent agreement, and [where] Petitioner was not informed of all his rights regarding a [sexually violent predator ('SVP')] hearing." (Hab. Pet. 22, ECF No. 1-1; *see also* Supp. 1925(b) Statement ¶ 4). He also avers that appellate and PCRA counsel were ineffective for "refus[ing] to assess and raise this issue." (*Id.*). The Commonwealth responds that Petitioner's claims of trial counsel's ineffectiveness and due process violation are defaulted, not cognizable, and meritless; it does not respond to Petitioner's allegations of appellate and PCRA counsel ineffectiveness. (Resp. to Pet. 16-18, ECF No. 16). The Court finds Petitioner's claims are not cognizable.

Petitioner's due process claim is not cognizable because it does not challenge Petitioner's custody. For instance, courts in this Circuit have found that challenges to the registration and notification provisions under Pennsylvania's Megan's Law are not cognizable because such claims do not meet 28 U.S.C. § 2254(a)'s "in custody" requirement. As one court noted:

> I have been unable to locate a single case in which a court found that a habeas petitioner satisfied the § 2254 "in custody" requirement simply because he was subject to the requirements of

a sex offender registration law.

> Courts have also held that any constitutional challenge to the Megan's Law designation must be brought in the form of a civil rights claim rather than as a claim seeking habeas relief. *See, e.g.*, *Virsnieks v. Smith,* 521 F.3d 707 (7th Cir. 2008) (holding that Megan's Law registration requirement did not itself satisfy custody requirement because registration had negligible effects on a petitioner's physical liberty of movement; thus it was insufficient to independently satisfy the custody requirement, even though person was in custody serving sentence for the sex crime that led to registration requirement); *Leslie v. Randle,* 296 F.3d 518, 521–523 (6th Cir. 2002) (stating that courts have rejected uniformly the argument that a challenge to a sentence of registration under a sexual offender statute is cognizable in habeas and holding that, despite the fact that the petitioner was incarcerated at the time of his petition, his challenge to the registration portion of his sentence was not cognizable in habeas).

Diaz v. Pennsylvania, No. 12-7082, 2013 WL 6085924, at *6 (E.D. Pa. Nov. 19, 2013); *see also King v. Walsh*, No. 10-1595, 2014 WL 4639917, at *13-14 (M.D. Pa. Sept. 16, 2014); *Cravener v. Cameron*, No. 08-1568, 2010 WL 235119 (W.D. Pa. Jan. 15, 2010); *Story v. Dauer*, No. 08-1682, 2009 WL 416277, at *1 (W.D. Pa. Feb. 18, 2009). Although Petitioner does not challenge the registration requirement itself, his due process claim similarly fails to challenge his custody, and as such, it is not cognizable.[14]

Petitioner's ineffectiveness claims are likewise not cognizable because trial counsel's alleged ineffectiveness did not result in Petitioner being "in custody in violation of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2254(a); *cf. Holland v. Glunt*, No. 12-4504, 2014 WL 1116686, at *7-8 (E.D. Pa. Mar. 20, 2014) (claim that trial

[14] In any event, "[H]abeas challenges to a state court's sentencing discretion are unreviewable by a federal court provided that the sentence lies within the statutory guidelines, it is not based upon arbitrary considerations, and the defendant's constitutional rights were not violated." *Baenig v. Patrick*, No. 07-2148, 2009 WL 2407819, at *4 (M.D. Pa. Aug. 3, 2009); *see also King*, 2014 WL 4639917, at *12-13 (noting petitioner's challenge to sentencing court's SVP determination was "unreviewable").

counsel was ineffective for failing to request court-appointed psychological expert regarding sexual offender evaluation not cognizable). Rather, trial counsel's conduct resulted only in Petitioner's registration under state laws as a sexually violent predator. As noted above, these registration requirements do not constitute "custody" for purposes of a habeas petition. Thus, Petitioner's claim that trial counsel was ineffective, and his related ineffective assistance of appellate and PCRA counsel claims, are not cognizable. *Cf. Holland*, 2014 WL 116686, at *8.

The Court respectfully recommends that Ground Four be dismissed as non-cognizable.

E. Grounds Five, Six, and Seven: Ineffective Assistance of all Prior Counsel Regarding Work History, Character Witnesses, and Judicial Bias[15]

In Ground Five, Petitioner avers that trial counsel failed to investigate his work history to counter the prosecution's argument that he was "the 'go to man' to baby sit."[16] (Supp. to Hab. Pet. 2, ECF No. 1-6). In Ground Six, Petitioner alleges that trial counsel was ineffective for failing to present character witnesses, appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness, and PCRA counsel was ineffective for failing to certify the character witness, Joel Flowers. (*Id.* at 3). In Ground Seven, Petitioner argues trial counsel was

---

[15] These claims were raised in a Supplement to Petitioner's habeas petition on February 3, 2017, two days after he filed the initial petition. Federal Rule of Civil Procedure 15, the rule governing pleading amendments, applies to habeas proceedings. *See Mayle v. Felix*, 545 U.S. 644, 655 (2005). Pursuant to Rule 15(a)(1), habeas corpus petitioners may amend the petition once without leave of court "within (A) 21 days after serving the it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading." Fed. R. Civ. P. 15(a)(1); *see also Ridgeway v. Folino*, No. 12-5092, 2015 WL 11439084, at *3 n.2 (E.D. Pa. June 25, 2015), *report and recommendation adopted*, No. 12-5092, 2016 WL 4247513 (E.D. Pa. Aug. 10, 2016).

[16] Ground Five also avers that "prior counsels were ineffective" in regard to this issue, but Petitioner presents no argument regarding the ineffectiveness of appellate or PCRA counsel. (*See generally* Supp. to Hab. Pet. 2-3, ECF No. 1-6). He mentions in passing that appellate counsel made a "false" statement "that Petition[er] stayed at home because of money problems," but fails to elaborate. (*See id.* at 2). Accordingly, these claims are not sufficiently developed to permit review. *See Zettlemoyer*, 923 F.2d at 298; *Mayberry*, 821 F.2d at 186; *Minerd*, 2012 WL 1069946, at *3.

ineffective for failing to challenge the trial judge's biased questioning, and appellate and PCRA counsel were ineffective for failing to raise prior counsel's ineffectiveness. (*Id.*). The Commonwealth does not respond to these claims. The Court finds they are defaulted.

Each of Petitioner's claims of trial counsel's ineffectiveness were raised in Petitioner's appellate brief, but were not raised in his Statement of Questions Involved. (*See* App. Br. 36-43, ECF No. 18); *Robinson*, No. 2396 EDA 2014, slip op. at 2 n.3. Accordingly, the Superior Court "decline[d] to address them." *Robinson*, No. 2396 EDA 2014, slip op. at 2 n.3 (citing Pa. R.A.P. 2116(a)). Additionally, as discussed above, the Superior Court found Petitioner's layered ineffectiveness claim, which in relevant part, included the ineffectiveness claims presented in Grounds Five through Seven (*see* App. Br. 49-50, ECF No. 18), was waived for vagueness. *See supra* Part III.B. Finally, the Superior Court found the PCRA counsel ineffectiveness claims raised in Grounds Five and Six waived. Specifically, as to Ground Five, the Superior Court found Petitioner's claim that PCRA counsel failed to raise trial counsel's ineffectiveness for failing to object to the trial court's characterization as the victims' babysitter was only vaguely raised in Petitioner's Rule 1925(b) Statement, and thus, was "waived for vagueness." *Id.* at 10-11, 11 n.11. As to Ground Six, the Superior Court found Petitioner did not allege PCRA counsel's ineffectiveness for failing to get a "proper verification" of Mr. Flowers as a character witness in his Response to the Rule 907 Notice, and impermissibly raised this claim for the first time on appeal. Therefore, it was waived. *Id.* at 10 n.10 (citing *Henkel*, 90 A.3d at 21-30).

The Court finds that Petitioner's claims are procedurally defaulted. In finding Petitioner's ineffective assistance of trial and appellate counsel claims waived, the Superior Court relied on Rule 2116(a) and concluded that Petitioner's Rule 1925(b) statement was overly vague. As discussed above, the Superior Court's reliance on these rules was independent and

adequate. *See supra* Parts III.B and C. Accordingly, Petitioner's ineffective assistance of trial and appellate counsel claims raised in Grounds Five through Seven are procedurally defaulted.

Petitioner has not established cause and prejudice such that this Court can review these claims. To the extent Petitioner raises appellate or PCRA counsel's ineffectiveness as cause, he cannot do so; those claims are, themselves, defaulted. *See Edwards*, 529 U.S. at 450-54; *Turner*, 2016 WL 3999837, at *10; *Galloway*, 2016 WL 2894476, at *10. As the foregoing discussion illustrates, the Superior Court found each ineffective assistance of appellate and PCRA counsel claim waived, and those waiver findings were based on independent and adequate state rules. *See supra* Part III.B (rules requiring that claims be pled with sufficient clarity in Rule 1925(b) Statement and that claims be first presented to the PCRA Court to be preserved for appeal are independent and adequate).

In any event, Petitioner has not established cause under *Martinez*. As to Grounds Five and Seven, PCRA counsel has a reasonably strategic basis for not raising trial counsel's ineffectiveness, and his performance was not deficient. As to Ground Six, the underlying trial counsel ineffectiveness claim is not "substantial." *See Glenn*, 743 F.3d at 411 (default not excused under *Martinez* because underlying ineffectiveness claims lacked merit).

Regarding Grounds Five and Seven, PCRA counsel did not perform deficiently in failing to raise trial counsel's ineffectiveness. Attached to Petitioner's habeas petition is a letter from PCRA counsel, in which PCRA counsel explained:

> The issue regarding the work history is not probative of anything since the work history does not disprove anything since we cannot point to anything in the Commonwealth's evidence that we could refute by introducing work history. This is, of course, because the Commonwealth did not really present any evidence specific enough for us to refute. In other words, if they said that an event took place on a specific time and date and you could prove that you were working that day, then counsel would have been

> ineffective in not introducing that evidence. If, on the other hand (which is the case here) [they said] that the crime occurred when the victim was "around 10 years old," your work history does not refute anything because no matter how much time you worked, you could not refute that there may have been at least some time when she was "around 10 years old" that you could have committed the crime.

(Ex. A to Hab. Pet. 23, ECF No. 1-2). Additionally, Petitioner notes that PCRA counsel did not raise the judicial bias issue because he believed it lacked merit. (*See* Supp. Hab. Pet. 4, ECF No. 1-6) ("PCRA counsel refused to raise this issue, at Petitioner request, because don't believe that the judge comment was subjective of the facts."). Accordingly, PCRA counsel had a reasonably strategic basis for his conduct, and did not perform deficiently in failing to raise trial counsel's ineffectiveness regarding the work history issue or the judge's alleged biased questioning. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). Petitioner has not established cause under *Martinez* as to Grounds Five or Seven.

As to Ground Six, trial counsel was not ineffective for failing to present character witnesses. The PCRA Court noted, "Petitioner had a prior conviction for Receiving Stolen Property, which may have been used in cross-examination as to Mr. Flowers' testimony as to Petitioner's reputation for being an honest and law-abiding citizen." Dec. 2014 PCRA Op. at 10-11. Thus, the PCRA Court found, "it was a reasonable strategy for trial counsel to not present character evidence where there was a possibility that the Petitioner's prior conviction would be presented." *Id.* at 11. This Court is bound by the PCRA Court's conclusions regarding Pennsylvania law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province

of a federal habeas court to re-examine state-court determinations on state-law questions."). The Court agrees that trial counsel was not ineffective for failing to present character evidence, given the risk that this could result in Petitioner's prior conviction being presented to the jury. Accordingly, the underlying ineffective assistance of trial counsel claim is not substantial, and Petitioner has not established cause under *Martinez* as to Ground Six.

The Court respectfully recommends dismissing Grounds Five, Six, and Seven as procedurally defaulted.

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that the petition for writ of habeas corpus be DENIED with prejudice without the issuance of a certificate of appealability.

Therefore, I respectfully make the following:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2899

Curry Robinson,
Appellant

v.

Superintendent Houtzdale SCI; Attorney General Pennsylvania

(E.D. Pa. No. 2-17-cv-01023)

SUR PETITION FOR REHEARING

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

---

* Pursuant to Third Circuit I.O.P. 9.5.3, Judge Richard L. Nygaard's vote is limited to panel rehearing.

APPENDIX E

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/ Richard L. Nygaard
Circuit Judge

Dated: October 11, 2019
Lmr/cc: Curry Robinson
Max C. Kaufman