DLD-020 October 24, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-2156**

KEVIN SOUFFRANT, Appellant

VS.

SUPERINTENDENT HUNTINGDON SCI, ET AL.

(E.D. Pa. Civ. No. 5:18-cv-02848)

Present: RESTREPO, PORTER and NYGAARD, Circuit Judges

Submitted are:

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

(2) Appellee's response; and

(3) Appellant's motion for appointment of counsel

in the above-captioned case.

Respectfully,

Clerk

ORDER

Souffrant's request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would agree, without debate, that all of Souffrant's claims either lack merit, are procedurally defaulted, or are not cognizable on habeas review. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Souffrant cannot show that his trial counsel was ineffective, for the substantially the same reasons provided by the District Court, adopting the Magistrate Judge's report, in evaluating the merits of those claims. Souffrant also cannot show that his due process rights were violated when the trial court denied his suppression motion because he has not presented evidence that his Miranda

waiver was not knowing, intelligent, and voluntary. See Miranda v. Arizona, 384 U.S. 436, 444 (1966). Souffrant's due process claim challenging the trial court's ruling implicating his Fourth Amendment rights is not cognizable on habeas review because he had a full and fair opportunity to litigate issues related to the suppression of his statement in state court. See Stone v. Powell, 428 U.S. 465, 494 (1976). Souffrant's final due process claim, in which he sought to challenge his arrest, was procedurally defaulted because Souffrant failed to raise it in state court and cannot return to state court to raise it now; Souffrant has not made a showing of cause or prejudice or a fundamental miscarriage of justice to excuse the default. See 42 Pa. Cons. Stat. § 9545(b)(1); Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Whitney v. Horn, 280 F.3d 240, 252-53 (3d Cir. 2002); Lines v. Larkins, 208 F.3d 153, 166 (3d Cir. 2000). Souffrant's motion for appointment of counsel is denied.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: November 13, 2019
Lmr/cc: Kevin Souffrant
Andrew J. Gonzalez
Ronald Eisenberg

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

KEVIN SOUFFRANT	:	CIVIL ACTION
	:	
v.	:	NO. 5: 18-2848
	:	
KEVIN KAUFFMAN, *et al*	:	

MEMORANDUM

KEARNEY, J. **April 18, 2019**

Kevin Souffrant objects to Chief Judge Caracappa's January 30, 2019 Report and Recommendation to deny his *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 based on ineffective assistance of counsel and trial court errors. After conducting a *de novo* review of the record and Mr. Souffrant's Objections, we enter the accompanying Order overruling Mr. Souffrant's Objections and adopting Chief Judge Caracappa's Report and Recommendation with additional reasoning described below. We dismiss Mr. Souffrant's petition for habeas relief.

We write further to (1) address two new arguments raised in Mr. Souffrant's Objections to the Chief Judge Caracappa's Report and Recommendation concerning jury selection and (2) supplement Chief Judge Caracappa's reasoning concerning two arguments.

A. We overrule Mr. Souffrant's Objections raising new arguments concerning trial counsel's failure to strike Juror 7.

In his Objection to the Report & Recommendation, Mr. Souffrant raises a new argument concerning Juror 7. Mr. Souffrant may not raise new arguments at this stage.[1] We address these arguments for the sake of exhaustion.

During *voir dire*, trial counsel explained Pennsylvania provides different degrees of homicide: "And you said there's different degrees of homicide; first degree, third degree, voluntary

manslaughter, involuntary manslaughter, there's the defense of self-defense, crime of passion, and you would be able to look at all of these if they're at issue in this case, right, and be fair and impartial?"[2] Juror 7 responded, "If somebody explained to me what the differences are, yes."[3] Mr. Souffrant now argues trial counsel's ineffectiveness because "no one ever explained to this individual juror the difference between the charges[.]"[4]

Assuming he argues trial court error, his claim is procedurally defaulted. Mr. Souffrant did not raise this argument to the state court during post-conviction relief proceedings and cannot now present the claim.

Mr. Souffrant may be attempting to raise an ineffective assistance claim for trial counsel's failure to object to the lack of explanation. Even if we characterize his argument as one of ineffective assistance, the claim does not warrant application of the exception for procedural default in *Martinez v. Ryan* because it lacks merit.[5]

In *Martinez*, the Supreme Court recognized two narrow exceptions in which we may excuse a procedural default for claims of trial counsel's ineffective assistance: (1) if "the state courts did not appoint counsel in the initial-review collateral proceeding"; or, if (2) "appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*."[6] Under the second exception, Mr. Souffrant must show his underlying trial-level ineffective assistance claim is a "substantial one," possessing "some merit."[7] The post-conviction court appointed counsel but counsel did not raise Mr. Souffrant's ineffective assistance claim. But the underlying claim lacks merit. The trial judge explained the differences between the degrees of homicide before jury deliberations.[8] We cannot find trial counsel ineffective for failing to object to a lack of explanation when the trial court provided the explanation. Mr. Souffrant fails to show his trial counsel ineffective assistance claim has "some merit" warranting application of

the *Martinez* exception excusing his procedural default.[9] As the claim is procedurally defaulted, and we find no cause warranting excusal of exhaustion, we dismiss Mr. Souffrant's objection based on an ineffective assistance claim concerning Juror 7.

B. We overrule Mr. Souffrant's Objection based on a new argument concerning trial counsel's failure to strike Juror 39.

Mr. Souffrant's Objections include a new ineffective assistance argument concerning Juror 39. When Mr. Souffrant asked trial counsel to strike Juror 39, trial counsel refused explaining he "was more concerned" about three other potential jurors.[10] The trial judge then excused those three potential jurors. Mr. Souffrant alleges trial counsel knew "there would be no chance" the trial court would seat the three potential jurors. Mr. Souffrant argues trial counsel should have struck Juror 39. Mr. Souffrant's argument is purely speculative. Mr. Souffrant provides no basis for trial counsel's knowledge the trial judge would excuse the three potential jurors. Even assuming trial counsel knew the trial judge would excuse these jurors, Mr. Souffrant fails to show ineffective assistance because, as Chief Judge Caracappa explained, he fails to show Juror 39's bias.

Mr. Souffrant's new ineffective assistance claim concerning Juror 39 is also procedurally defaulted. Even assuming post-conviction counsel's ineffectiveness in failing to raise the claim, the underlying ineffective assistance claim lacks merit warranting application of the *Martinez* exception to excuse Mr. Souffrant's procedural default.[11] Mr. Souffrant cannot show trial counsel's ineffectiveness for failing to strike Juror 39 because he fails to show juror bias. We overrule Mr. Souffrant's Objection raising this new argument concerning Juror 39.

C. We dismiss Mr. Souffrant's ineffective assistance claim for trial counsel's failure to consult a ballistics expert.

In his habeas petition, Mr. Souffrant claims ineffective assistance when trial counsel failed to request a *Frye* hearing concerning the Commonwealth's bullet identification evidence.[12]

Pennsylvania courts apply the standard for admitting expert testimony from *Frye v. United States*.[13] Under *Frye*, "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community."[14] Mr. Souffrant refers to the Commonwealth's expert Trooper Michael Fortley who offered ballistics testimony matching bullets recovered from the crime scene to bullets from an earlier shooting involving Mr. Souffrant. Mr. Souffrant argues trial counsel should have requested a *Frye* hearing to challenge Trooper Fortley's bullet identification evidence. Within this argument, Mr. Souffrant argues ineffectiveness for trial counsel's failure "to enlist an expert witness to testify on behalf of the defendant to rebut the prosecution's expert[.]"[15] Mr. Souffrant argues trial counsel should have consulted its own ballistics expert. He argues ineffective assistance because, had his counsel retained a defense expert, the trial "could have resulted in a different result."[16]

In her Report and Recommendation, Chief Judge Caracappa rejected Mr. Souffrant's ineffective assistance claim for failure to request a *Frye* hearing. She explained trial counsel moved to exclude the evidence and objected to its admission. But she did not specifically address his sub-argument concerning trial counsel's failure to enlist a defense expert. We agree with Chief Judge Caracappa's conclusion Mr. Souffrant fails to show trial counsel's ineffectiveness for failing to request a *Frye* hearing. We now also address Mr. Souffrant's sub-argument which does not alter Chief Judge Caracappa's conclusion.

Mr. Souffrant's ineffective assistance claim for failure to enlist a defense expert is procedurally defaulted since Mr. Souffrant's post-conviction counsel did not raise this claim in state court. Even assuming Mr. Souffrant argues for application of the *Martinez* exception to excuse his default, his underlying trial counsel ineffective assistance claim lacks merit. Mr. Souffrant merely speculates a defense expert "could have resulted in a different result" without

any explanation or evidence showing how a defense expert would alter the result. He argues because counsel failed to enlist an expert, counsel instead relied on "ill-informed cross examination of prosecution's expert."[17] But trial counsel's effective cross-examination resulted in the Commonwealth's expert conceding bullet identification is more difficult without a weapon:

> Counsel: So they in their publications say that it is particularly difficult for examiners to make identifications in the absence of a gun, you disagree with that?
>
> Trooper Fortley: I can make an identification to unknown guns. However, if a gun is submitted, there's a better chance of having a known to compare that evidence I received with the known.[18]

The Commonwealth never recovered the firearm used to kill the victim and Trooper Fortley only compared bullet samples. We cannot find trial counsel ineffective for the strategy he employed. Mr. Souffrant fails to show what a defense expert would add to counter the Commonwealth's evidence. Even assuming trial counsel's performance fell outside the accepted level of professional competence, he fails to show the outcome would be different had counsel enlisted an expert. He merely speculates a defense expert "could have" changed the result. Mr. Soufrant's speculation is insufficient to show prejudice.

Mr. Souffrant cites our Court of Appeals' decision in *Showers v. Beard.*[19] In *Showers*, a jury convicted the plaintiff of first-degree murder for secretly feeding the victim a lethal dose of Roxanol. The Commonwealth offered expert testimony a person can mask the bitter taste of the drug and thus administer the drug secretly. The plaintiff's trial counsel argued one could not mask Roxanol's bitter taste and thus, the victim self-administered the drug. The plaintiff's trial counsel failed to consult an expert concerning the ability to mask Roxanol's taste. During post-conviction proceedings, the plaintiff argued ineffective assistance and provided (1) a forensic pathologist who testified Roxanol's bitter properties could not be masked and (2) the plaintiff's trial psychiatrist

who testified he advised trial counsel to secure an expert to address masking Roxanol and offered counsel three potential experts. Our Court of Appeals affirmed the district court's finding trial counsel's ineffectiveness for failure to consult an expert.[20]

Showers is distinguishable. In *Showers*, the plaintiff proved ineffectiveness by offering expert testimony contradicting the Commonwealth expert's conclusions. She also proved trial counsel rejected offers to consult with potential experts. Mr. Souffrant offers no evidence showing Trooper Fortley reached an incorrect conclusion or used flawed methods. He offers no evidence showing trial counsel rejected proffered defense experts. Mr. Souffrant merely concludes the outcome "could have" been different if trial counsel consulted an expert. We cannot grant Mr. Souffrant habeas relief based on this speculation.

Mr. Souffrant's ineffective assistance claim is procedurally defaulted for failure to raise the claim in state court. We cannot apply the *Martinez* exception to excuse default since Mr. Souffrant's ineffective assistance claim lacks "some merit."[21] We dismiss this claim.

D. We dismiss Mr. Souffrant's ineffective assistance claim challenging trial counsel's failure to call Dr. Wu as a witness.

In his habeas petition, Mr. Souffrant claims ineffective assistance arguing trial counsel "failed to call witnesses on behalf of the defendant whom would have rebutted" the Commonwealth's theory concerning how Mr. Souffrant committed the crime.[22] In his memorandum, he argues trial counsel failed to call Dr. Daniel Wu as a witness to rebut the Commonwealth's theory.

The Commonwealth argued the victim shot Mr. Souffrant while they wrestled on the couch. When shot at close range, Mr. Souffrant argues his wounds would exhibit burn marks or stippling from the firearm's blast. But Dr. Wu treated Mr. Souffrant's gunshot wounds and found no evidence of burn marks or stippling. Mr. Souffrant argues ineffective assistance because his trial

counsel did not call Dr. Wu as a witness. Mr. Souffrant also attempts to make a sufficiency argument in his brief. He claims because of Dr. Wu's assessment, the jury could not believe the Commonwealth's theory about how Mr. Souffrant committed the crime.[23]

In her Report and Recommendation, Chief Judge Caracappa addressed Mr. Souffrant's sufficiency argument concerning Dr. Wu's medical assessment. She construes the petition as Mr. Souffrant arguing Commonwealth's evidence "was insufficient to support the Commonwealth's theory that petitioner was shot by the victim" because of Dr. Wu's medical assessment.[24] Chief Judge Caracappa dismissed the sufficiency claim as procedurally defaulted for failure to raise the claim in state court. Chief Judge Caracappa further explained because Mr. Souffrant failed to raise an ineffective assistance claim, the *Martinez* exception could not apply to excuse the default.

We believe Mr. Souffrant also attempts to raise an ineffective assistance claim concerning trial counsel's failure to offer Dr. Wu as a witness to rebut the Commonwealth's theory of how Mr. Souffrant committed the crime. Even so, Mr. Souffrant failed to raise this claim in state court. Assuming the *Martinez* exception could apply to this ineffective assistance claim to excuse default, the claim is meritless. In cross-examining Commonwealth expert witness Dr. Wayne Ross, trial counsel presented Dr. Wu's observations to cast doubt on the Commonwealth's theory of the case:

> Counsel: Dr. Ross, now, if the attending doctor [Daniel Wu] at Lancaster General Hospital where he was brought from the scene mentioned that there was—that he didn't see significant stippling and it looked like a clean wound and he didn't notice any powder burns to any of his injuries, now what you demonstrated show—what you're saying happened was a shot pretty darn close to his abdomen, right?
>
> Dr. Ross: Well, it's consistent with being close to his abdomen, yes.
>
> Counsel: Would you expect to see powder burns, stippling, that kind of thing?
>
> Dr. Ross: You might or you might not. . . .

Counsel: So the fact that the doctor didn't find anything before it was worked on, that means it could have been from a distance?

Dr. Ross: Well, I—I didn't—a couple feet away if you want to say that, a few feet away, assuming that there's—that it's accurate.[25]

Trial counsel presented Dr. Wu's evidence in cross-examining the Commonwealth's witness to cast doubt on the Commonwealth's theory the victim shot Mr. Souffrant at close range. Trial counsel's performance is not deficient for cross-examining the Commonwealth's witness as opposed to offering Dr. Wu's testimony at trial. Even assuming deficient performance, Mr. Souffrant fails to show how offering Dr. Wu as a witness would change the outcome. We cannot apply the *Martinez* exception to excuse default because Mr. Souffrant's underlying trial counsel ineffective assistance claim lacks "some merit."[26] Mr. Souffrant's claim is procedurally defaulted. We dismiss this claim.

E. Conclusion

We approve Chief Judge Caracappa's Report and Recommendation and overrule Mr. Souffrant's Objections in the accompanying Order.

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[1] *Adkins v. Wetzel*, No. 13-3652, 2014 WL 4088482, at *3 (E.D. Pa. Aug. 18, 2014) (citing E.D. Pa. Local R. Civ. P. 72. 1.IV(c) ("[N]ew issues and evidence shall not be raised after the filing of the Magistrate Judge's Report and Recommendation if they could have been presented to the magistrate judge.")).

[2] N.T. May 5, 2014, at p. 79-80.

[3] *Id.* at p. 80.

[4] ECF Doc. No. 28, at p. 11.

[5] *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).

[6] *Id.*

[7] *Id.*

[8] N.T. May 8, 2014, at pp. 786-93.

[9] *Martinez*, 566 U.S. at 14.

[10] ECF Doc. No. 28, at p. 13.

[11] Under *Martinez*, Mr. Souffrant must show his underlying trial counsel ineffectiveness claim has "some merit" to excuse a procedural default. 566 U.S. at 14.

[12] *Frye v. United States*, 293 F. 1013, 1013 (D.C. Cir. 1923).

[13] *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003).

[14] *Id.*

[15] ECF Doc. No. 2, at p. 42.

[16] ECF Doc. No. 14, at p. 19.

[17] *Id.* at p. 20.

[18] N.T. M. Fortley, May 7, 2014, p. 625.

[19] *Showers v. Beard*, 635 F.3d 625 (3d Cir. 2011).

[20] *Id.* at 634.

[21] *Martinez*, 566 U.S. at 14.

[22] ECF Doc. No. 2, at p. 42.

[23] ECF Doc. No. 14, at p. 39.

[24] ECF Doc. No. 19, at p. 27.

[25] N.T. W. Ross, May 8, 2014, at p. 713-14.

[26] *Martinez*, 566 U.S. at 14.

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

KEVIN SOUFFRANT	:	**CIVIL ACTION**
	:	
v.	:	**NO. 5: 18-2848**
	:	
KEVIN KAUFFMAN, *et al*	:	

ORDER

AND NOW, this 18th day of April 2019, upon careful and independent consideration of the Petition for a writ of habeas corpus (ECF Doc. No. 2), the Response to the Petition (ECF Doc. No. 16), Chief United States Magistrate Judge Linda K. Caracappa's January 30, 2019 Report and Recommendation (ECF Doc. No. 19), Petitioner's Objections (ECF Doc. No. 28), and for reasons explained below, it is **ORDERED**:

1. Judge Caracappa's January 30, 2019 Report and Recommendation (ECF Doc. No. 19) is **APPROVED** as we **overrule** Petitioner's Objections (ECF Doc. No. 28);

2. We **DENY** and **DISMISS** the Petition for a writ of habeas corpus (ECF Doc. No. 2) with prejudice;

3. There is no probable cause to issue a certificate of appealability;[1] and,

4. The Clerk of Court shall **CLOSE** this case.

KEARNEY, J.

ENT'D APR 18 2019

[1] *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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

KEVIN SOUFFRANT,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
KEVIN KAUFFMAN, et al.,	:	
Respondents.	:	No. 18-2848

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE

Now pending before this court is a petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated in the Federal Correctional Institution Huntingdon in Huntingdon, Pennsylvania. For the following reasons, it is recommended that the petition be DISMISSED.

I. PROCEDURAL HISTORY

On May 9, 2014, following a jury trial presided over by the Honorable Dennis E. Reinaker in the Lancaster County Court of Common Pleas petitioner was convicted of murder of the first degree, aggravated assault, simple assault, terroristic threats with intent to terrorize another, and endangering the welfare of children. See CP-36-CR-0002313-2013; CP-36-CR-0002314-2013. Petitioner was sentenced to life imprisonment without the possibility of parole on the first-degree murder conviction, and an aggregate term of eleven to twenty-two years imprisonment on the remaining charges. See id.

Petitioner filed a direct appeal with the Superior Court of Pennsylvania on July 10, 2014. See CP-36-CR-0002314-2013 at 7. Petitioner raised two claims related to the trial court's denial of petitioner's motion to suppress his statement to the police:

1) Did the trial court err in denying [petitioner's] suppression motion, where his statement was the fruit of illegally obtained medical records and protected health information regarding [petitioner's] level of cognitive awareness, the medication he was receiving, and its effects on [petitioner's] cognition?
2) Did the trial court err in denying [petitioner's] suppression motion, where his statement was not knowing, intelligent and voluntary, and where the statement was obtained in violation of [petitioner's] constitutional rights to end the interrogation?

Commonwealth v. Souffrant, 1299 MDA 2014 at 3 (Pa. Super. 2015). On July 24, 2015, the Superior Court affirmed petitioner's judgment of sentence. See Souffrant, 1299 MDA 2014. Petitioner did not seek discretionary review with the Pennsylvania Supreme Court.

On March 28, 2016, petitioner filed a timely pro se petition for post-conviction relief, pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541, *et seq.* See CP-36-CR-0002314-2013 at 13, see also Resp. to Habeas Pet., 12/14/18, Ex. D (PCRA Petition). Petitioner argued that petitioner's sentence violated due process under Alleyne v. United States, 133 S. Ct. 2151 (2013). See Resp. to Habeas Pet., 12/14/18, Ex. D (PCRA Petition at 4). Counsel was appointed and filed an amended PCRA petition on July 1, 2016, asserting the following two claims: (1) trial counsel was ineffective for choosing a trial strategy that had virtually no chance of resulting in any outcome other than first-degree murder; and (2) trial counsel was ineffective for failing to pursue a reasonable trial strategy, that with reasonable probability, could have produced a verdict other than first-degree murder. See CP-36-CR-0002314-2013 at 14; see also Resp. to Habeas Pet., 12/14/18, Ex. E (Amended PCRA Petition). On August 14, 2016, petitioner filed a letter with the court arguing the PCRA counsel was ineffective and raising issues with the amended PCRA petition. See Resp. to Habeas Pet., 12/14/18, Ex. F. However, prior to the start of petitioner's PCRA hearing, petitioner indicated that he wanted to proceed with the two claims raised by appointed counsel. N.T. 9/23/16 at 3-4. Petitioner also informed the PCRA court that petitioner had a pro se amended PCRA petition that

contained claims not raised by counsel, that petitioner wished to have preserved. N.T. 9/23/16 at 3-6. Petitioner's pro se amended PCRA petition alleged that trial counsel was ineffective for: (1) failing to file a jurisdictional challenge; (2) failing to consult and schedule guilty plea; (3) failing to use peremptory and/or for cause challenges to remove four separate jurors; (4) failing to request a Frye hearing on bullet identification; and (5) failing to object to alleged hearsay testimony. See Resp. to Habeas Pet., 12/14/18, Ex. G (Amended Pro Se PCRA Petition). The court accepted for filing petitioner's amended pro se petition, informed petitioner that those claims were not going to be considered during the PCRA hearing, and instructed appointed counsel to review those claims after the hearing and notify the court if counsel believed any of the new claims raised pro se by petitioner had merit. N.T. 9/23/16 at 3-6, 40-42.

On November 29, 2016, appointed counsel filed a Memorandum of Law in Support of the PCRA petition. Counsel briefed the two ineffective assistance of counsel claims originally raised by counsel in the amended PCRA petition. On January 10, 2017, the PCRA court denied petitioner's PCRA petition, finding the claims meritless. See Resp. to Habeas Pet., 12/14/18, Ex. I (PCRA Ct. Opinion).

Petitioner filed a notice of appeal with the Superior Court, arguing that the lower court erred "by failing to find trial counsel ineffective for choosing a trial strategy that had virtually no chance of producing a verdict other than first-degree murder where an alternative strategy was available that would likely have produced a different verdict[.]" Commonwealth v. Souffrant, 217 MDA 2017 at 4 (Pa. Super. 2017). The Superior Court dismissed petitioner's notice of appeal. Id. On February 14, 2018, the Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal. See Resp. to Habeas Pet., 12/14/18, Ex. M.

On June 28, 2018, petitioner filed the instant pro se petition for Writ of Habeas Corpus.[1] Petitioner raises the following grounds for relief:

> (1) Conviction obtained using evidence obtained pursuant to an unlawful arrest;
> (2) Ineffective assistance of trial counsel for failing to challenge or strike four separate jurors;
> (3) Ineffective assistance of trial counsel for failing to request a Frey hearing in the matter of identification of the bullet fragments;
> (4) Ineffective assistance of trial counsel for failing to present evidence to rebut the testimony of Dr. Wayne Ross;
> (5) Ineffective assistance of trial counsel for failing to object to or impeach numerous prosecution witnesses;
> (6) Ineffective assistance of trial counsel for failing to present evidence of actual innocence; and
> (7) Trial court erred in denying petitioner's motion to suppress his statement to the police,

See Habeas Pet., 6/28/18. Respondents argue that petitioner's seventh claim is meritless, and the remaining claims are procedurally defaulted. See Resp. to Habeas Pet., 12/14/18. After detailed review of the state court records, we find that petitioner is not entitled to relief and petitioner's petition for habeas corpus should be denied.

II. STANDARDS OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for Writ of Habeas Corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

1 Although the habeas petition was not docketed until July 6, 2018, (Doc. 2), the "mailbox rule" applies. Under the "mailbox rule," a pro se prisoner's habeas petition is considered filed on the date the prisoner delivers the complaint to prison authorities for filing. See Houston v. Lack, 487 U.S. 266, 276 (1988). Here, petitioner verified that his petition was placed in the prison mailing system on June 28, 2018.

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court of the United States, in Williams v. Taylor, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 1518-19 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded state court legal decisions, and more clearly defined the two-part analysis set forth in the statute. Under the first part of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly established federal law, as determined by the Supreme Court of the United States." Williams, 529 U.S. at 404. Justice O'Connor, writing for the majority of the Court on this issue, explained that a state court decision may be contrary to Supreme Court precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours [the Supreme Court's]." Id. at 405. However, this "contrary to" clause does not encompass the "run-of-the-mill" state court decisions "applying the correct legal rule from [Supreme Court] cases to the facts of the prisoner's case." Id. at 406.

To reach such "run-of-the-mill" cases, the Court turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). Id. at 407-08. The Court found that a state court decision can involve an unreasonable application of Supreme Court precedent in one of

two ways: (1) "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407. However, the Supreme Court specified that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. The Supreme Court has more recently pronounced: "The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 573, 127 S. Ct. 1933, 1939 (2007).

III. GOVERNING LEGAL PRINCIPLES

A. Exhaustion and Procedural Default

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). A petitioner is not deemed to have exhausted the remedies available to him if he has a right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c) (1994); Castille v. Peoples, 489 U.S. 346, 350 (1989). In other words, a petitioner must invoke "one complete round of the state's established appellate review process," in order to exhaust his remedies. O'Sullivan, 526 U.S. at 845. A habeas petitioner retains the burden of showing all of the alleged claims have been "fairly presented" to the state courts, which demands, in turn, that the claims brought in federal court be the "substantial equivalent" of those presented to the state

courts. Santana v. Fenton, 685 F.2d 71, 73-74 (3rd Cir. 1982). In the case of an unexhausted petition, the federal courts should dismiss without prejudice, otherwise they risk depriving the state courts of the "opportunity to correct their own errors, if any." Toulson v. Beyer, 987 F.2d 984, 989 (3rd Cir. 1993). However, "[i]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas." Coleman v. Thompson, 501 U.S. 722, 735, n.1 (1991); see also McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

A federal court cannot review the merits of procedurally defaulted claims unless a petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claims. See McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). To demonstrate cause for a procedural default, a petitioner must show "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). To demonstrate actual prejudice, a petitioner must show errors during his trial created more than a possibility of prejudice; he must show the errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494 (internal citations and emphasis omitted).

B. Ineffective Assistance of Counsel

The Sixth Amendment recognizes the right of every criminal defendant to effective assistance of counsel. U.S. Const., Amend. VI. The applicable federal precedent for ineffective assistance of counsel claims is the well-settled two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To establish an ineffective

assistance of counsel claim, a petitioner must first prove "counsel's representation fell below an objective standard of reasonableness." Id. In analyzing counsel's performance, the court must be "highly deferential." Id. at 689. The Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, 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.'

Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). A convicted defendant asserting ineffective assistance must therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. The reviewing court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. It follows that counsel cannot be ineffective for declining to raise a meritless issue. See Premo v. Moore, 562 U.S. 115, 124 (2011).

The second part of the Strickland test requires a petitioner to demonstrate that counsel's performance "prejudiced the defense" by depriving petitioner of "a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. To establish prejudice, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694.

If a petitioner fails to satisfy either prong of the Strickland test, it is unnecessary to evaluate the other prong, as a petitioner must prove both prongs to establish an ineffectiveness claim. Moreover, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id. at 697.

Because there is no federal constitutional right to the assistance of counsel in state post-conviction proceedings, PCRA counsel's ineffectiveness historically has not satisfied the "cause" prong to excuse procedural default. See Coleman v. Thompson, 501 U.S. 722, 752 (1991). We note, however, the United States Supreme Court has recognized a narrow exception to this when collateral appeal counsel is the "cause" of the default of an underlying claim of trial counsel's ineffective assistance. In Martinez v. Ryan, 132 S. Ct. 1309 (2012), the Court held in "initial-review collateral proceedings," where collateral review provides the first opportunity to litigate claims of ineffective assistance of appointed trial counsel, ineffective assistance of counsel can be "cause" to excuse the procedural default. Id. at 1315-17. The Court cautioned that its holding did not apply to counsel's error in other kinds of proceedings, such as appeals from initial-review collateral proceedings, second or successive collateral petitions, or petitions for discretionary review in state appellate courts. See id. at 1320. Its "equitable ruling" was designed to reflect the "importance of the right to effective assistance of counsel." Id. In order to establish such "cause," a petitioner must show the state courts did not appoint counsel during initial-review collateral proceeding for a claim of ineffective assistance at trial, or where counsel was appointed, that counsel was ineffective under the standard set forth in Strickland. Id. at 1318. Further, the petitioner must also demonstrate that the underlying ineffectiveness claim is "substantial" and has "some merit." Id.; see also Glenn v. Wynder, 743 F.3d 402, 409-410 (3d Cir. 2014) (quoting Martinez, 566 U.S. at 14, 132 S.Ct. 1309); see also Bey v. Superintendent Greene SCI, 856 F.3d 230, 237-238 (3d Cir. 2017). The Third Circuit Court of Appeals, noting that the Martinez Court compared this standard to that required to issue certificates of appealability, interprets the inquiry into whether the underlying ineffectiveness claim is "substantial" as a "'threshold inquiry'" that "'does not require full consideration of the factual or

legal bases adduced in support of the claims.'" Bey, 856 F.3d at 238 (quoting Miller-El v. Cockerell, 537 U.S. 322, 327, 336 (2003)).

IV. DISCUSSION

a. Claim One: Whether Petitioner's Fourth Amendment Rights were Violated Petitioner's Conviction Obtained Using Evidence Obtained Pursuant to an Unlawful Arrest

Petitioner argues that his Fourth Amendment rights were violated when false statements were made, and signatures were forged on petitioner's affidavit of probable cause and arrest warrant. See Habeas Memo. of Law, 10/29/18 at 8-12. Petitioner alleges that Detective Aaron A. Harnish's statement, in the affidavit for probable cause, that Leonda Washington and Shaina Taylor-Brooks told police that petitioner "was pistol whipping [the victim] [and] they were able to exit the apartment with two out of three of the children [and] [t]hat Shadae Brooks attempted to give Washington and Taylor-Brooks the third child to take with them but [petitioner] physically restrained [the victim] from doing so and pointed a gun at Washington and [] Taylor-Brooks[]" was a false statement. Id. at 9. Petitioner alleges that Ms. Washington and Ms. Taylor-Brooks' testimony at the preliminary hearing and trial was not consistent with the statement from the affidavit of probable cause. Id. at 9-10. Petitioner also appears to allege that Magistrate Judge Cheryl N. Hartman, who signed the arrest warrant was no longer a sitting Judge and that the Judge's signature was forged. Id. at 10-12.

A review of the record reveals that petitioner failed to exhaust this claim, leaving the claim procedurally defaulted. Petitioner failed to raise the allegation that the affidavit of probable cause contained allegedly false statements at any point before the state court on appeal. Petitioner raised a version of the argument regarding Judge Hartman in petitioner's pro se amended PCRA petition. Petitioner argued that there was a jurisdictional issue that trial counsel

was ineffective for failing to raise because petitioner believed that Judge Hartman was not a sitting Judge with the ability to sign his arrest warrant. See Resp. to Habeas Pet., 12/14/18, Ex. G (Amended Pro Se PCRA Petition). In the instant claim, petitioner does not assert a trial counsel ineffective assistance claim for failing to raise a jurisdictional issue, rather petitioner argues that his constitutional right was violated because Judge Hartman's signature was forged. See Habeas Memo. of Law at 10-12. Although petitioner raised a version of the claim relating to Judge Hartman in his pro se amended PCRA petition, that claim was not properly before the PCRA court because appointed counsel did not raise the claim. As discussed supra, appointed counsel filed an amended PCRA petition, and at the PCRA hearing, petitioner informed the PCRA court that petitioner had a pro se amended PCRA petition that contained claims not raised by counsel, that petitioner wished to have preserved. N.T. 9/23/16 at 3-6. The court accepted, for filing, petitioner's amended pro se petition, informed petitioner that those claims were not going to be considered during the PCRA hearing, and instructed appointed counsel to review those claims after the hearing and notify the court if counsel believed any of the new claims raised pro se by petitioner had merit. N.T. 9/23/16 at 3-6, 40-42. On November 29, 2016, appointed counsel filed a Memorandum of Law in Support of the PCRA petition and did not include petitioner's pro se claims. On January 10, 2017, the PCRA court denied petitioner's PCRA petition, addressing only the claims raised by counsel. See Resp. to Habeas Pet., 12/14/18, Ex. I (PCRA Ct. Opinion).

Petitioner's first habeas claim is unexhausted. As explained supra, a petitioner must invoke "one complete round of the state's established appellate review process," in order to exhaust his remedies. O'Sullivan, 526 U.S. at 845. Petitioner cannot now return to state court to litigate these claims, because they would be time barred. See Whitney v. Horn, 280 F.3d 240,

252 (3d Cir. 2002). As such, petitioner's claim is procedurally defaulted. See Coleman, 501 U.S. at 735, n. 1.

Petitioner does not explicitly argue that his default of the instant claim should be excused under Martinez, but any such argument would be meritless. Martinez only applies to potentially excuse the default of an underlying trial counsel ineffectiveness claim, Martinez does not excuse the default of any other types of claims. Petitioner alleges that his Fourth Amendment rights were violated when false statements were made, and signatures were forged on petitioner's affidavit of probable cause and arrest warrant. Thus, petitioner's first habeas claim is procedurally defaulted and cannot be reviewed on the merits.

b. Claims Two, Three, Four, Five, and Six: Whether Trial Counsel was Ineffective for Failing to Present Evidence and Testimony

Petitioner's second, third, fourth, fifth, and sixth claims all raise ineffective assistance of counsel issues. Petitioner's second claim alleges ineffective assistance of trial counsel for failing to challenge or strike jurors. Petitioner's third claim alleges ineffective assistance of trial counsel for failing to request a Frey hearing in the matter of identification of the bullet fragments. Petitioner's fourth claim alleges ineffective assistance of trial counsel for failing to present evidence to rebut the testimony of Dr. Wayne Ross. Petitioner's fifth claim alleges ineffective assistance of trial counsel for failing to object to or impeach numerous prosecution witnesses. Petitioner's sixth claim alleges ineffective assistance of trial counsel for present evidence of actual innocence. Petitioner failed to exhaust any of these claims in state court. Petitioner raised the instant second and third claim in the pro se amended PCRA petition. However, as explained supra, that petition was not considered by the PCRA court because petitioner had appointed counsel. Appointed counsel chose not to pursue said claims. Petitioner's fourth, fifth, and sixth claims were never raised at any level in the state court on

appeal. Thus, petitioner has failed to exhaust his second through sixth claims. Petitioner cannot now return to state court to litigate these claims, because they would be time barred. See Whitney v. Horn, 280 F.3d 240, 252 (3d Cir. 2002). As such, petitioner's claims are procedurally defaulted. See Coleman, 501 U.S. at 735, n. 1.

Although petitioner does not explicitly assert Martinez to excuse the default of each individual claim, petitioner cites to Martinez and its use to excuse procedural default. See Habeas Pet., 6/28/18, Attachment to Grounds Raised at 2-3. Thus, the court will liberally construe petitioner's pro se pleading and address petitioner's default considering Martinez. See Hunterson v. DiSabato, 308 F.3d 236, 243 (3d Cir. 2002)(A pro se habeas petition must be construed liberally.)

i. Trial counsel ineffectiveness for failing to challenge or strike jurors

Petitioner argues that trial counsel was ineffective for failing to strike jurors number 7 and 39. See Habeas Memo. of Law, 10/29/18 at 13-15; see also Habeas Pet., 6/28/18, Attachment to Grounds Raised at 1. Petitioner argues that the trial court erred in failing to excuse jurors' number 7, 15, 26, and 39. See Habeas Memo. of Law, 10/29/18 at 13-15. Petitioner argues that voir dire revealed that all four jurors were unable to be impartial. See id. In Martinez, the Supreme Court held that the ineffective assistance of counsel in state collateral proceedings may constitute "cause" to excuse the procedural default of a claim for ineffective assistance of *trial counsel*. 566 U.S. at 9. Martinez does not excuse the default of a trial court error claim. Petitioner failed to exhaust any claim that the trial court erred in not excusing these jurors. Regarding jurors' number 15 and 26, petitioner only argues that the trial court erred in failing to excuse said jurors. Petitioner fails to raise an ineffective assistance of counsel claim regarding juror number 15 or juror number 26. Petitioner's claim of trial court error is

procedurally defaulted, and it is recommended that it be dismissed as such. The undersigned will now address petitioner's claim of trial counsel ineffectiveness for failing to strike juror number 7 and juror number 39.

Juror number 7

Petitioner argues that juror number 7 stated on voir dire that he had a fixed opinion to give more credence to a police officer's testimony than to petitioner. See Habeas Memo. of Law, 10/29/18 at 13. Petitioner argues that trial counsel was ineffective for failing to move to strike juror number 7. Petitioner argues that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness on collateral appeal.

During voir dire, juror number 7 was questioned regarding his response to the questionnaire question about whether the juror would believe a witness because they were a police officer. N.T. 5/5/14 at 73-74. Juror number 7 explained that he answered yes, he would believe a witness because they were a police officer; however, juror number 7 then changed his answer to no, he would not believe a witness just because they were a police officer. Id. Juror number 7 answered as follows:

The Court:	Did you answer yes to that question on the questionnaire?
The Juror:	Yes. I didn't understand exactly the question. You explained it further later and I would change that to a no.
The Court:	So you'll be able to evaluate the testimony of every witness in this case by the same standard. Is that fair to say?
The Juror:	Yes, sir.

N.T. 5/5/14 at 74. Petitioner's trial counsel then accepted the juror, as did the Commonwealth. See id. at 80.

Petitioner now argues that juror number 7 testified that he had a fixed opinion to give more credence to a police officer's testimony than to petitioner's testimony. See Habeas Memo. of Law, 10/29/18 at 13. Petitioner claims that his default of this claim should be excused under Martinez, arguing the PCRA counsel was ineffective for failing to raise the claim.

Under Martinez, the failure of collateral attack counsel to raise an ineffective assistance of trial counsel claim in an initial-review collateral proceeding can constitute 'cause' if (1) collateral attack counsel's failure itself constituted ineffective assistance of counsel under Strickland and (2) the underlying ineffective assistance of trial counsel claim is 'a substantial one,' which is to say 'the claim has some merit.' " Glenn v. Wynder, 743 F.3d 402, 410 (3d Cir. 2014) (citations omitted). Petitioner has failed to show that the underlying ineffective assistance of trial counsel claim has any merit. Juror number 7 clearly testified that he would evaluate every witness in the case under the same standard. N.T. 5/5/14 at 74. Juror number 7 did not testify that he would believe a police officer simply because they were an officer. Trial counsel cannot be ineffective for failing to move to strike juror number 7 for something that was not testified to. Petitioner has offered no proof that juror number 7 was biased. Therefore, petitioner's PCRA counsel was not ineffective in failing to raise trial counsel's ineffectiveness for failing to object to juror number 7. Petitioner has not shown that the underlying ineffective assistance of counsel claim has any merit in order to excuse petitioner's default under Martinez, thus, the claim should be dismissed.

Juror number 39

Petitioner alleges that juror number 39 testified during voir dire that she would have difficulties being polled, would have a problem if petitioner did not testify, and would believe the police testimony over petitioner's testimony. See Habeas Memo. of Law, 10/29/18 at

14. Petitioner argues that juror number 39 was biased and trial counsel was ineffective for failing to strike the juror. Id.; see also Habeas Pet., 6/28/18, Attachment to Grounds Raised at 1.

Petitioner is incorrect regarding the testimony of juror number 39. Juror number 39 did not testify that she was biased. Juror number 39 testified during voir dire as follows:

The Court:	I believe you indicated that you might have some difficulty if you are polled individually at the end of the case. That's the term we refer to it as. What I would be doing is asking each one of the jurors to rise individually and asking you basically a yes or no question as to whether you agreed with the jury verdict in the case. I mean, that's the extent of it.
The Juror:	Oh, okay.
The Court:	Do you think you would have an issue?
The Juror:	No. I could do that.
The Court:	You could do that?
The Juror:	Yes.
...	
The Court:	You also indicated yes on your questionnaire that you might have a problem in this case if the defendant chooses not to take the stand or present evidence in the case.
The Juror:	I really don't.
The Court:	You heard my instructions about---
The Juror:	Yeah, I heard that afterwards.
The Court:	You can't use that as a factor in any way, shape or form as to whether the Commonwealth has proven the defendant guilty. Do you understand that?
The Juror:	Yeah.
The Court:	Are you confident that you'll be able to apply that properly?

The Juror:	Yeah.
...	
Attorney Larson:	It says would you be more likely to believe the police just because they're the police and then it says would you be less likely to believe the police just because they're the police. You had question marks next to both of those?
The Juror:	I don't have any---I would just listen to what they have to say.
Attorney Larson:	So is there anything about police officers that would make you say—
The Juror:	No.
Attorney Larson:	--oh, I can't believe a police officer?
The Juror:	No.
Attorney Larson:	It's nothing like that?
The Juror:	It just, you know.
...	
Attorney Larson:	Detective Harnish here, it's not as if you look at him a say I wouldn't believe him just because he's a police officer?
The Juror:	No, it's has nothing to do with it.
Attorney Larson:	At the same time, you wouldn't say because he's a detective with the city police, I'm going to believe everything he says. You're going to weight the details and all the other officers and the evidence, right?
The Juror:	Right.

N.T. 5/5/14 at 165-168.

As explained supra, in order to meet the standard of Martinez, petitioner must show that the underlying ineffective assistance of trial counsel claim is 'a substantial one,' which is to say 'the claim has some merit.' " Glenn, 743 F.3d at 410. Petitioner has failed to show the

underlying trial counsel ineffectiveness claim has any merit. The notes of testimony show that juror number 39 testified that she would be okay being "polled" after the verdict was rendered, that she would not consider petitioner's decision not to testify, and that she would weigh all of the evidence appropriately. Petitioner's allegations regarding juror number 39 have no merit, thus, the underlying ineffective assistance of trial counsel has no merit. Petitioner offers no reason trial counsel would have had for striking juror number 39. Petitioner has failed to show that the underlying trial counsel ineffective assistance claim has any merit. Petitioner's procedural default cannot be excused under Martinez. It is recommended that petitioner's claim be dismissed.

ii. Trial counsel ineffectiveness for failing to request a Frye hearing

Petitioner argues that trial counsel was ineffective for failing to request a hearing under Frye v. United States, 392 F. 1013 (D.C. Cir. 1923), regarding the admission of ballistic evidence that bullet fragments from the shooting at bar matched bullet fragments from a prior shooting that was linked to petitioner. See Habeas Memo. of Law, 10/29/18 at 16-22; see also Habeas Pet., 6/28/18, Attachment to Grounds Raised at 1. Petitioner alleges that trial counsel was ineffective for not objecting to the admission of testimony from Trooper Michael J. Fortley, regarding ballistic evidence. See id. Petitioner argues that trial counsel was ineffective for failing to enlist an expert for the defense. See id. Petitioner also argues that trial counsel was ineffective for failing to object to the admission of Trooper Fortley's testimony, because the testimony implicated petitioner in a separate shooting for which petitioner was neither arrested nor convicted. See id.

Under Frye v. United States, 392 F. 1013 (D.C. Cir. 1923), which applies in Pennsylvania, "novel scientific evidence is admissible if the methodology that underlies the

evidence has general acceptance in the relevant scientific community." Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1039, 1043–44 (Pa. 2003). ' "[A] Frye hearing is warranted when a trial judge has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions." ' Commonwealth v. Walker, 92 A.3d 766, 790 (Pa. 2014) (quoting Betz v. Pneumo Abex LLC, 44 A.3d 27, 53 (Pa. 2012)). Expert witness testimony is admissible if it goes beyond a layperson's knowledge, assists the trier of fact in understanding the evidence, and passes the Frye test. Id. at 789.

Trooper Michael J. Fortley, an expert in the field of firearm and toolmark examination, examined bullet fragments from the scene of the crime in the instant shooting of Ms. Taylor Brooks and bullet fragments from the unrelated shooting of Mr. William Blackman, which took place on February 1, 2013. N.T. 5/7/14 at 585-631. Trooper Fortley testified at petitioner's trial that to a reasonable degree of professional certainty the bullet that shot the victim in the instant homicide was fired from the same gun used in the February 1, 2013 shooting. Id. at 616-619. A review of the state court record, including the notes of testimony, indicates that trial counsel filed a motion to preclude Trooper Fortley's testimony. See Motion in Limine, 5/1/14. Trial counsel cited to the Frye standard, arguing that there was a report from the National Academy of Sciences that found "the validity of the fundamental assumptions of uniqueness and reproducibility of firearm-related toolmarks has not yet been fully demonstrated." Id., citing National Academy of Science Report, "Ballistic Imagining," p. 72 (2008). The trial court addressed the defense motion and ruled that Trooper Fortley's testimony was admissible, subject to cross-examination. N.T. 5/5/14, at 197-198. Trial counsel cross-examined Trooper Fortley regarding the National Academy of Science report, which indicated that the validity of the fundamental assumptions of uniqueness and reproducibility of firearm-

related toolmarks has not yet been fully demonstrated. N.T. 5/7/14 at 593-595. Trooper Fortley explained as follows:

> In that report specifically, it's referring to ballistic imaging. I am not making my examinations off of ballistic images. I am doing actual comparisons on physical evidence.
>
> And I do have an affidavit of the chair committee who sat on that board, and he clearly explains that that was actually taken out of context, that statement. It was not their intended—the intention as the way it read in the report.

Id. at 594. Trial counsel also objected to the introduction of the Trooper Fortley's testimony because the testimony implicated petitioner in a shooting that he was not being tried for. N.T. 5/5/14 at 198-202. The court ruled the testimony was admissible and gave the jury the following instruction:

> The testimony that you heard from Trooper Fortley with regard to the analysis of these bullets as well as the testimony from the other witnesses with regard to that February 1, 2013 incident is only to be used by you in determining whether or not there is any link between the firearms that were used in those two incidents.
>
> Obviously, it's up to you at some point to determine whether or not there is. But if you should determine that there is, that's the only purpose that that testimony is being provided to you in this case.
>
> It is not being provided to you in order to demonstrate that the defendant may or may not be a person of bad character or that he has any violent tendencies. That is not an appropriate consideration by you in terms of how you view that evidence.

N.T. 5/5/14 at 202; N.T. 5/7/14 at 620.

Petitioner's claim is procedurally defaulted because this claim was only raised in petitioner's pro se amended PCRA petition, which, as explained supra, the PCRA court could not review because petitioner was represented by counsel and counsel did not raise the instant claim. Petitioner is now time-barred from exhausting this claim in state court. See Coleman, 501 U.S. at 735 n.1; 42 Pa. C.S. § 9545(b)(1) (PCRA petition must be filed within one year of final

judgment except in limited circumstances); Glenn v. Wynder, 743 F.3d 402, 409 (3d Cir. 2014) (PCRA time-bar is adequate and independent state ground). Petitioner does not explicitly argue that PCRA counsel ineffectiveness for failing to bring this claim on collateral appeal excuses his default under Martinez, however, the undersigned finds that Martinez does not excuse petitioner's default of this claim.

Trial counsel was not ineffective for failing to request a Frye hearing. Frye is implicated only when proffered expert testimony involves novel science. Walker, 92 A.3d at 790. "The 'novelty' of scientific testimony turns on whether there is a legitimate dispute regarding the reliability of the expert's conclusions, which is not necessarily related to the newness of the technology used in developing the conclusions." Commonwealth v. Foley, 38 A.3d 882, 888 (Pa. Super. Ct. 2012) (internal citations omitted). Trial counsel questioned Trooper Fortley regarding what counsel believed indicated a dispute regarding the reliability of the expert's conclusions. Trooper Fortley explained that the National Academy of Science report referred to ballistic imagining and not the actual comparison of physical evidence. N.T. 5/7/14 at 594. There is no evidence that Trooper Fortley's testimony involved novel science, warranting a Frye hearing.

Additionally, petitioner has failed to show that there is a reasonable probability that requesting a hearing would have changed the outcome of his trial. See Strickland, 466 U.S. at 694. Trial counsel motioned to preclude Trooper Fortley's testimony, the trial court heard trial counsel's argument and ruled the testimony admissible. The trial court ruled that counsel was free to cross-examine Trooper Fortley and that the jury would be given an instruction regarding the purpose of the evidence. Trial counsel cannot be found ineffective for failing to motion for a Frye hearing, when the trial court had already denied petitioner's motion to exclude the expert

testimony. Petitioner's argument that trial counsel was ineffective for failing to object to Trooper Fortley's testimony because it implicated petitioner in a shooting that he was not being tried for also fails. As explained supra, trial counsel did object to the testimony on this basis, and the trial court overruled that objection.

There is no merit to the claim that trial counsel was ineffective for failing to raise a meritless request for a Frye hearing. Additionally, PCRA counsel was not ineffective for choosing not to raise the meritless claim regarding trial counsel's performance. Petitioner's claim is procedurally defaulted and should be dismissed as such.

iii. Trial counsel's ineffectiveness for failing to present rebuttal evidence

Petitioner's fourth, fifth and sixth claims are all raised in one overarching claim in petitioner's memorandum of law. Petitioner goes back and forth making numerous arguments in one overall claim. Claims four, five and six allege ineffective assistance of trial counsel for failing to present evidence to rebut the testimony of Dr. Wayne Ross, ineffective assistance of trial counsel for failing to object to or impeach numerous prosecution witnesses, and ineffective assistance of trial counsel for failing to present evidence of actual innocence. See Habeas Memo. of Law, 10/29/18 at 25-39; see also Habeas Pet. 6/28/18, Attachment to Grounds Raised at 2-3.

Petitioner's claims are procedurally defaulted because the claims were never raised in state court. Petitioner is now time-barred from exhausting the claims in state court. See Coleman, 501 U.S. at 735 n.1; 42 Pa. C.S. § 9545(b)(1) (PCRA petition must be filed within one year of final judgment except in limited circumstances); Glenn v. Wynder, 743 F.3d 402, 409 (3d Cir. 2014) (PCRA time-bar is adequate and independent state ground). Petitioner argues that

PCRA counsel was ineffective for failing to raise these claims, causing the default of the claims. See Habeas Memo. of Law, 10/29/18 at 23.

Petitioner notes that Dr. Wayne K. Ross, M.D. testified as the Commonwealth's expert regarding the cause of the death and testified that the victim's pants and underwear had been pulled down and the victim had a hair net on her head. See Habeas Memo. of Law, 10/29/18 at 25-27, Ex. I and J; see also N.T. 5/8/14 at 675-723. Dr. Ross testified that the hair net was consistent with the ligature that was used to strangle the victim. Id. at 685. Petitioner argues that Dr. Ross's testimony should have been rebutted by the introduction of Officer Mark Gehron's original police report, which makes no mention that the victim's pants and underwear were pulled down or a hair net. See Habeas Memo. of Law, 10/29/18 at 25-27, Ex. I and J. Petitioner's argument is meritless. Officer Gehron testified at trial that he was the first officer on the scene and that the photograph introduced at trial, which showed the victim with her pants and underwear down, is exactly how Officer Gehron found the victim. N.T. 5/6/14 at 392-393. Petitioner also argues that the attestation from Deputy Coroner Michelle Darlington, who was at the scene of the homicide, should have been introduced to rebut Dr. Ross's testimony that the victim's pants and underwear were pulled down and that there was a hairnet on the body. See Habeas Memo. of Law, 10/29/18 at 31, Ex. L. Petitioner alleges that Deputy Darlington's attestation does not mention a hair net or the status of the victim's clothing at the crime scene, and that attestation should have been admitted rebutting Dr. Ross's testimony. See id. However, the attestation only states that after Deputy Darlington's formal postmortem report was written, her original notes were destroyed. The attestation does not address the body of the victim at the scene of the homicide. The photograph introduced at trial depicted the victim with her pants and underwear down. Trial counsel introducing the police report and the attestation would not have

rebutted the photographic evidence of the scene. Trial counsel is not ineffective for failing to introduce rebuttal evidence which would not have rebutted the photograph of the victim at the crime scene.

Dr. Ross also testified that the victim had multiple bruises on her face and in her rectum and vagina. N.T. 5/8/14 at 685-689. Dr. Ross testified that the bruises on the victim's face matched the ring the police had taken from petitioner and the bruises in her vagina and rectum were consistent with sexual assault. N.T. 5/8/14 at 685-689. Melissa Morgan Lenahan, a forensic scientist with the Pennsylvania State Police, testified that testing showed possible blood on petitioner's ring, but the sample was too small for conclusive testing, and no seminal material was found on the swabs from the victim's anus or vagina. N.T. 5/7/14 at 542-566. Angela DiFiore, a forensic DNA scientist, testified that the blood sample from petitioner's ring showed the presence of three individuals but there was an insufficient amount of DNA because the mixture was very complex, and she was unable to identify who those individuals were. N.T. 5/7/14 at 566-585. Based on Ms. Morgan Lenahan and Ms. DiFiore's testimony petitioner argues that trial counsel was ineffective for failing to call an expert to rebut Dr. Ross's testimony that the victim had bruises on her face that matched petitioner's ring and that the victim had penetration bruising. See Habeas Memo. of Law, 10/29/18 at 31-36. Petitioner argues that trial counsel simply conceded to the medical evidence. However, both scientists testified that based on the samples they were unable to match DNA and there was no seminal material found. That testimony does not rebut Dr. Ross's testimony that the victim had bruising. Trial counsel was able to cross-examine both scientists on their findings and the fact that no DNA or seminal fluid was confirmed. Petitioner fails to offer any additional evidence that an expert would have provided petitioner. Trial counsel was not ineffective for failing to present an expert to confirm

that there was no DNA evidence or seminal fluid evidence. The Commonwealth's own experts had already offered that testimony. That information does not rebut Dr. Ross's testimony that the victim had facial, vaginal, and anal bruising. PCRA counsel was not ineffective for failing to raise a meritless claim that trial counsel was ineffective for failing to hire an expert on this issue.

Petitioner also argues that Dr. Ross's testimony that an abrasion on the victim's arm looked like a bite mark and it matched the "grill" teeth covering taken from petitioner, should have been rebutted by a news article that bite-mark evidence is scientifically flawed. See Habeas Memo. of Law, 10/29/18 at 36-37; see also N.T. 5/8/14 at 689-691. Dr. Ross did not testify that any bite-mark evidence was conclusive. Dr. Ross only testified that the abrasion appeared to be a bite mark. Plaintiff fails to offer any argument that would rebut Dr. Ross's opinion that the abrasion appeared to be a bite mark. Plaintiff's argument that trial counsel was ineffective for failing to rebut Dr. Ross's opinion is wholly meritless. PCRA counsel was not ineffective for choosing not to raise a meritless claim.

Petitioner also argues that Officer Gehron's testimony should have been rebutted due to several inconsistences between his testimony and the police report. See Habeas Memo. of Law, 10/29/18 at 27-30. Petitioner argues that Officer Gehron testified he was called to the scene at 0438 hours, however, Officer Gehron's police report indicates that he arrived at the scene at 0444 hours. See Habeas Memo. of Law, 10/29/18 at 27-30, Ex. I and J. Officer's testimony is consistent with his police report. Officer Gehron's police report indicates that the call came in at 0438 hours and Officer Gehron arrived at 0444 hours. See id.; see also N.T. 5/6/14 at 389. Petitioner again argues that Officer Gehron perjured himself when he testified that the victim's pants and underwear were down when the officer found her, because he did not write that in his police report. See id. The police report makes no mention of the victim's

clothing. The report only indicates that the victim was lying on her back, eyes open with blood on her and appeared to have a gunshot wound to the right side of the head. See Habeas Memo. of Law, 10/29/18 at 16-22, Ex. I. The police report does not contradict Officer Gehron's testimony, nor does it rebut the testimony and photographic evidence that the victim's pants and underwear were pulled down. Petitioner selects portions of Officer Gehron's testimony and alleges that Officer Gehron perjured himself because those items were not written in the police report. Officer Gehron's testimony is consistent with the police report and expands on it. Officer Gehron's testimony is simply more detailed than the report. Petitioner offers no proof or evidence that would have rebutted Officer Gehron's testimony. Trial counsel is not ineffective for failing to rebut Officer Gehron's testimony.

Petitioner also alleges that there were two pieces of physical evidence, a picture of a bone fragment lying between the living room floor and dining room floor and a picture of a bloodstain or footprint in the back stairwell of the apartment building, which would have proven the defense argument that a third party entered the apartment and shot petitioner and the victim. See Habeas Memo. of Law, 10/29/18 at 23-25. Petitioner argues that trial counsel was ineffective for failing to investigate this evidence and present this evidence to the jury. See id. Petitioner fails to prove that any stain in a stairwell was blood, additionally petitioner fails to show how a bone fragment near the living room, where petitioner was shot by the victim, would prove that petitioner was not shot in the living room. To excuse the default of this claim, petitioner would need to show that PCRA counsel was ineffective under Strickland for failing to raise the claim. To establish prejudice under Strickland, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. Petitioner offers no proof he was prejudiced by PCRA counsel not raising a meritless claim

of trial counsel ineffectiveness. Petitioner's claims should be dismissed as procedurally defaulted.

Petitioner's claims that trial counsel was ineffective for failing to call expert witnesses or present rebuttal evidence are meritless. Petitioner's claims should be dismissed as procedurally defaulted.

Petitioner next argues that Dr. Ross's and the Commonwealth's theory that the victim retrieved the gun and shot petitioner at close range before petitioner took the gun back and killed the victim was contradicted by Dr. Ross's testimony. See Habeas Memo. of Law, 10/29/18 at 37-39. On cross-examination defense counsel questioned Dr. Ross as to why there was not any gun powder burns or stippling if petitioner had been shot at close range. Dr. Ross explained that petitioner's wounds had been debrided during surgery and the wounds had been cut out, so it was difficult to tell if there are gun powder burns. N.T. 5/8/14 at 713-714. Petitioner notes that Dr. Daniel Wu, who performed petitioner's surgery, told police that he did not observe gun powder burns on one of petitioner's wound and the other wound had too much blood to be able to tell. See Habeas Memo. of Law, 10/29/18 at 39, Ex. O. Petitioner argues that the evidence from Dr. Ross and Dr. Wu was insufficient to support the Commonwealth's theory that petitioner was shot by the victim. This claim is procedurally defaulted because the claim was never raised in state court. Petitioner is now time-barred from exhausting the claim in state court. See Coleman, 501 U.S. at 735 n.1. Petitioner does not raise an ineffective assistance of counsel claim regarding this issue. Petitioner's claim is procedurally defaulted and it is recommended it be dismissed as such.

c. Claim Seven: Whether the Trial Court Erred in Denying Petitioner's Suppression Motion

Petitioner's seventh and final claim is that the trial court erred in denying petitioner's motion to suppress his statement to police. See Habeas Memo. of Law, 10/29/18 at 40-43. Petitioner first argues that his Fourth Amendment rights were violated because his statement to police was fruit of the poisonous tree because the police questioned a nurse at the hospital regarding petitioner's cognitive state and medication in violation of petitioner's Health Insurance Portability and Accountability Act ("HIPPA") rights under 45 C.F.R. § 164.512(f). Id. Petitioner also argues that his Fifth Amendment rights were violated because his statement was not knowing, intelligent, and voluntary because petitioner was in significant pain and had been given Fentanyl and the police mislead petitioner into thinking that he did not need an attorney. Id.

Petitioner raised these issues on direct appeal and the Superior Court denied them as meritless. See Commonwealth v. Souffrant, 1299 MDA 2014 (Pa. Super. 2015).

The Superior Court explained that the Fourth Amendment of the United States Constitution, does not permit police to conduct searches and seizures absent a lawfully obtained search warrant, and evidence sized as a result of an illegal search must be suppressed. Id. citing Commonwealth v. Dougalewicz, 113A.3d 817, 824 (Pa. Super. 2015). The Superior Court affirmed petitioner's judgement of sentence finding that law enforcement are not "covered entities" under HIPPA subject to confidentiality. The Superior Court explained that even if petitioner's nurse violated HIPPA, HIPPA does not mandate the suppression of evidence in a criminal proceeding. Id.

Courts have routinely recognized that "... a state prisoner may not be granted federal habeas corpus relief on the ground that evidence seized in an unconstitutional search or

seizure was introduced at his trial," if the state has already provided an "opportunity for full and fair litigation" of his Fourth Amendment claim. Stone v. Powell, 428 U.S. 465, 494 (1976); Deputy v. Taylor, 19 F.3d 1485, 1491 (3d Cir. 1994). Stone precludes a habeas petitioner from raising a Fourth Amendment claim if he has been afforded a full and fair opportunity to litigate that claim in state court. Gilmore v. Marks, 799 F.2d 51, 54 (3d Cir. 1986). The Third Circuit has explicitly held that the "opportunity for full and fair litigation" requirement is met when the trial court considered the pre-trial suppression motion and the Superior Court addressed the Fourth Amendment claim on appeal. See United States ex rel. Hickey v. Jeffes, 571 F.2d 762, 766 (3d Cir.1978)(finding Stone to be "an insurmountable obstacle to habeas corpus relief" where state courts afforded a full and fair opportunity to litigate the Fourth Amendment claim). When a petitioner has raised an issue in both pretrial motions and on direct appeal, they have been granted the opportunity to fully and fairly litigate their claim. See Smith v. Giroux, No. 14-1765, 2015 WL 2417542, at *1 n.2 (E.D. Pa. May 13, 2015); Warren v. Glunt, No. 14-552, 2015 WL 1741238, at *3 (E.D. Pa. Apr. 16, 2015).

The undisputed record in this matter as summarized above clearly demonstrates that petitioner was afforded a full and fair opportunity to litigate any Fourth Amendment claims in state court. As evidenced by the record, petitioner pursued a counseled pre-trial motion to suppress his statement to the police. Petitioner also raised this claim on direct appeal and the Superior Court addressed the issue. As petitioner had an opportunity to fully and fairly litigate his Fourth Amendment claim, this court is precluded from reviewing the merits of petitioner's claim.

Petitioner's remaining claim alleges that petitioner's Fifth Amendment rights were violated. See Habeas Memo. of Law, 10/29/18 at 40-43. Petitioner argues that the trial

court erred in failing to suppress petitioner's statement to the police, which was taken in violation of Miranda because petitioner's statement was not knowing, intelligent and voluntary and the police mislead petitioner to believe he did not need an attorney. Miranda v. Arizona, 384 U.S. 436 (1966).

The Fifth Amendment to the United States Constitution contains an individual privilege against self-incrimination, and Miranda v. Arizona, 384 U.S. 436 (1966), provides a mechanism to safeguard that privilege. See id. at 467 ("In order . . . to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."). Miranda serves to exclude from trial statements made by a defendant during a custodial interrogation. See id. at 444. Thus, an individual's Miranda rights apply only when that individual is "in custody" and subjected to "interrogation." See Illinois v. Perkins, 496 U.S. 292, 296, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). "Interrogation" for Miranda purposes includes those words and actions "that the police should know are reasonably likely to elicit an incriminating response" See Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Custodial interrogation includes express questioning or its functional equivalent. Id. at 300-01. The test for custodial interrogation focuses primarily on the perceptions of the suspect, rather than the intent of the police. Id. at 301. The Supreme Court in Perkins found that "[t]he essential ingredients of a 'police dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate." Id. at 296-97.

Before an interrogation, an accused must be fully informed of both the state's "intention to use his statements to secure a conviction," and of his rights to remain silent and to

have counsel present. Miranda, 384 U.S. at 469; Moran v. Burbine, 475 U.S. 412, 420 (1986). An accused may waive his rights verbally or in writing, so long as he makes "a deliberate choice to relinquish the protection those rights afford." United States v. Whiteford, 676 F.3d 348, 362 (3d Cir. 2012) (quoting Berghuis v. Thompkins, 560 U.S. 370, 385 (2010)). When the issue of waiver arises on a motion to suppress statements, the government bears the burden of proving by a preponderance of the evidence that: (i) the defendant was properly advised of his Miranda rights; (ii) the defendant voluntarily, knowingly, and intelligently waived his rights; and (iii) the ensuing statement was made voluntarily. Colorado v. Connelly, 479 U.S. 157, 169 (1986).

The Superior Court found petitioner's waiver of his Miranda rights was knowing, intelligent, and voluntary. See Souffrant, 1299 MDA 2014 at 12-14. The Superior Court considered testimony from Detective Harnish, who interviewed petitioner in the hospital. Detective Harnish testified that the detective had fourteen years of experience as a detective and experience interviewing individuals under the influence and understood the signs and symptoms indicating the individual's ability to comprehend. Id. at 12, citing N.T., 4/15/14 at 59. Detective Harnish testified that petitioner was given his Miranda rights and waived them and at no time did petitioner seem unable to understand the detective and petitioner consistently displayed cognitive awareness. Id. The Superior Court also noted that Detective Harnish testified that while petitioner did indicate that he no longer wanted to speak to police during the interview, petitioner would then "almost in the same breath" continue to speak about the events of March 9, 2013. Id. at 12-13, citing N.T. 4/15/15 at 62. The Superior Court explained that petitioner continuing to speak to police without prompting was a voluntary waiver of petitioner's right to remain silent. Id. at 13. Based on Detective Harnish's testimony the Superior Court found there was no error in the trial court's denial of petitioner's suppression motion. Id. at 14.

Factual determinations of the state court are due a highly deferential presumption of correctness and are presumed to be correct absent clear and convincing evidence to the contrary. See Weeks v. Snyder, 219 F.3d 245, 257 (3d Cir. 2000); 28 U.S.C. § 2254(e)(1). Petitioner has failed to show by clear and convincing evidence that the Superior Court's determination was incorrect. The state court credited the testimony of Detective Harnish that petitioner consistently displayed cognitive awareness and continued to speak with police without prompting after indicating that petitioner no longer wanted to speak with police. See Souffrant, 1299 MDA 2014 at 12-13. Petitioner has not shown by clear and convincing evidence that the state court incorrectly determined petitioner knowingly, voluntarily, and intelligently waived his Miranda rights. Accordingly, it is recommended that petitioner's final claim be denied.

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 30th day of January, 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED. Further, there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/S LINDA K. CARACAPPA
LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE