DECISION OF THE STATE DISTRICT COURT

APPENDIX A

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

TODD DARRELL BALLARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Civil No. 14-cv-1453
	)	
MICHAEL CLARK, Superintendent, SCI-Albion; JOHN WETZEL, Secretary of Pennsylvania Department of Corrections; DISTRICT ATTORNEY OF ALLEGHENY COUNTY, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,	)	Judge Nora Barry Fischer
	)	
Respondents.	)	

MEMORANDUM ORDER

On January 3, 2018, the Court received from *pro se* Petitioner, Todd Darrell Ballard, the instant "Petition for Relief From Judgment" pursuant to Fed.R.Civ.P. 60(b)(6), with several attachments (ECF No. 77, dated December 22, 2018), asking this Court to reconsider its Memorandum Opinion and Order (ECF Nos. 74 and 75) adopting the Magistrate Judge's September 12, 2018, Report and Recommendation ("R&R") (ECF No. 65) and to reopen this case for further proceedings. Final judgment was issued in this case on December 12, 2018. (ECF No. 76). For the reasons that follow, the motion will be denied.

Federal Rule of Civil Procedure 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). The purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). A

motion for reconsideration must rely on one of three grounds: (1) an intervening change in the law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *N. River Ins Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). A motion for reconsideration should not be used to ask a district court to rethink a decision it has already rightly or wrongly made. *Williams v. Pittsburgh*, 32 F. Supp.2d 236, 238 (W.D.Pa. 1998). Litigants are cautioned to " 'evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant.' " *Waye v First Citizen's Nat'l Bank,* 846 F. Supp. 310, 314 n.3 (M.D.Pa. 1994) (quoting *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625, 626 (S.D.Miss. 1990). Motions for reconsideration should not be used to relitigate issues already resolved by the Court and should not be used to advance additional arguments which could have been made by the movant before judgment. *Reich v. Compton*, 834 F. Supp. 753, 755 (E.D.Pa. 1993), *aff'd in part, rev'd in part*, 57 F.3d 270 (3d Cir. 1995). *See generally United States ex rel. Emanuele v. Medicor Assocs.*, No. CV 10-245, 2017 WL 367591, at *1 (W.D. Pa. Aug. 25, 2017).

After careful review of the motion and attachments, the Court finds that Ballard has failed to meet this standard. He points to no intervening changes of law, provides no new evidence, and does not identify any clear error or manifest injustice. Instead, Ballard reiterates arguments which this Court has previously considered and rejected on the merits.

The Court adheres to its decision in the December 12, 2018, Memorandum Opinion and Order. Ballard's motion seeking reconsideration will be DENIED.

Based on the forgoing, the Court enters the following Order:

AND NOW, this 8th day of January, 2019, **IT IS HEREBY ORDERED** that Ballard's motion for reconsideration (ECF No. 77) is **DENIED**.

s/ Nora Barry Fischer
Nora Barry Fischer
United States District Judge

cc/ecf: All Counsel of Record

Todd Darrell Ballard
HK-0416
SCI Albion
10745 Route 18
Albion, PA 16475

ALD-168 **April 25, 2019**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1143**

TODD DARRELL BALLARD, Appellant

vs.

SUPERINTENDENT ALBION SCI, ET AL.

(W.D. PA. CIV. NO. 14-CV-01453)

Present: McKEE, SHWARTZ and BIBAS, Circuit Judges

Submitted is appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. For substantially the reasons given by the District Court and the Magistrate Judge, appellant has not made a substantial showing of the denial of a constitutional right nor shown that reasonable jurists would find the correctness of the procedural aspects of the Court's determination, including that an evidentiary hearing was unwarranted, debatable. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: June 21, 2019
SLC/cc: Todd Darrell Ballard
Keaton Carr, Esq.

A True Copy:

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

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
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June 21, 2019

Todd Darrell Ballard
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Keaton Carr
Allegheny County Office of District Attorney
436 Grant Street
Room 401
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RE: Todd Ballard v. Superintendent Albion SCI, et al
Case Number: 19-1143
District Court Case Number: 2-14-cv-01453

ENTRY OF JUDGMENT

Today, **June 21, 2019** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App.

P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

s/ Patricia S. Dodzuweit
Clerk

By: s/ Shannon, Case Manager
267-299-4959

cc: Mr.Joshua Lewis

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

TODD DARRELL BALLARD, Petitioner, v. MICHAEL WENEROWICZ, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, JOHN WETZEL, Secretary of Pennsylvania Department of Corrections; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	Civil Action No. 2: 14-cv-1453 United States District Judge Nora Barry Fischer United States Magistrate Judge Cynthia Reed Eddy

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

Before the Court is the *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition") filed pro se by Petitioner, Todd Darrell Ballard ("Petitioner" or "Ballard"). Ballard is currently incarcerated in the State Correctional Institution in Albion, Pennsylvania. For the reasons that follow, it is recommended that the Petition be dismissed and that a certificate of appealability be denied.

II. REPORT

A. Relevant and Procedural Background

This cases arises from the shooting death of Jamie Coles in January of 2006. On October 10, 2007, following a non- jury trial presided over by the Honorable John A. Zottola of the Court of Common Pleas of Allegheny County, Ballard was convicted of First Degree Murder, Endangering the Welfare of Children, Terroristic Threats, and Reckless Endangering Another

Person. On January 7, 2008, Ballard was sentenced to a term of life imprisonment without parole on his first degree murder conviction. No further penalty was given at the remaining counts.

Quoting from the trial court's 1925(a) Opinion for direct appeal, the Superior Court summarized the facts and evidence of the case as follows:

> The Commonwealth presented an eyewitness, Carl Jeffrey Beck, at trial. He is the stepfather of the victim, Jamie Coles, who testified he was present at the house during the time of the shooting on January 12, 2006. Around 2:30 a.m., after [he had gone] to bed [earlier] that evening, he was awaken by the sound of glass breaking and his grand[child] and stepdaughter screaming. After coming downstairs to his living room he saw the Defendant [Ballard] standing in and out [the] doorway and his stepdaughter on the couch with the baby. He was able to identify the Defendant as the person he knows as "T", Todd Ballard.
>
> He then heard his stepdaughter say "Please don't kill my daughter. Don't shoot the baby. Please don't shoot my baby." He then saw the Defendant shoot a .22 caliber gun [in the direction of] his stepdaughter and the baby. He was able to identify the type of gun by the chamber. Beck stated the Defendant came towards him and clicked the gun causing him to run back upstairs. Beck noticed the glass table was smashed which occurred prior to the shots being fired at his daughter. The shattered glass caused his foot to get cut prior to running upstairs. He waited a couple seconds before returning back downstairs and by the time he got to the bottom of the steps, he heard another gunshot. He did not see this particular shot fired and the next thing he heard was the door being slammed. He then found his stepdaughter on the couch gagging[, and the Defendant and baby were gone.] He then found a fully loaded gun clip in the living room love seat. He ran a few doors down the street to a policeman's house. . . . Beck remained outside until the police arrived. When City of Pittsburgh Police officers arrived on the scene, they found the victim, Jamie Coles, dead on the couch.
>
> Dr. Shakir, a forensic pathologist, who performed the victim's autopsy,[1] testified that the manner of death was homicide and the cause of death was a gunshot wound of the trunk. He testified that because there was no evidence of soot or powder stippling from the bullet around the wound, it was concluded that the gun

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[1] The trial transcript reflects that Dr. Shakir did not perform the actual autopsy. Rather, the autopsy was performed by Dr. Bennett Omalu, who at the time of trial was no longer with the coroner's office. At the time of the autopsy, Dr. Shakir was the acting medical examiner and, in that position, was familiar with the autopsy report. (N.T. pp 74).

> was shot from a further distance of at least two feet or more. He [also] testified to the finding of several abrasions on the victim's forearms and right leg.

Commonwealth v. Ballard, No. 838 WDA 2008, 976 A.2d 1998 (Pa. Super Ct. May 21, 2009) (unpublished opinion) (quoting from Trial Court Opinion, 7/29/09). *appeal denied*, 983 A.2d 725 (Pa. 2009) (table) (hereinafter referred to as "*Ballard-I*"). (ECF 38-3, at 1-7).

Ballard, through counsel, appealed his conviction to the Pennsylvania Superior Court raising a single claim:

> The verdict was against the weight of the evidence insofar as the testimony offered by the Commonwealth supports a finding that the shooting occurred during a heat of passion struggle, and rises only to the level of voluntary manslaughter; and the testimony of the alleged eyewitness, Carl Beck, was inherently inconsistent, conflicts with statements he initially made to the police and was contrary to the physical evidence, which reveals that he never actually saw the shooting or the circumstances leading up to it, such that the verdict of guilt first degree murder shocks one's sense of justice, and was based on mere surmise and conjecture.

Petitioner's Br. to Superior Court, at 19 (ECF 38-2 at 9).

After briefing, the Superior Court affirmed the judgment of sentence finding that the conviction for First-Degree Murder was not against the weight of the evidence. The Pennsylvania Supreme Court denied allocator on November 9, 2009, and Ballard's *pro se* Petition for Writ of Certiorari was denied by the Supreme Court of the United States on April 19, 2010. *Ballard v. Pennsylvania*, -- U.S. ---, 130 S.Ct. 2102 (2010) (No. 09-9046).

Unsuccessful on direct appeal, Ballard filed a *pro se* petition pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 - 9546. By Order dated April 27, 2010, attorney Joseph F. McCarthy III was appointed to represent Ballard. On April 7, 2011, Ballard filed, *pro se*, a motion for appointment of new counsel. Ballard filed *pro se* a motion for recusal of the trial judge not to preside over his PCRA proceeding and an amended motion for

PCRA relief. During this time period, Ballard also filed a series of additional *pro se* motions, including a Petition for Writ of Mandamus in the Pennsylvania Supreme Court against Judge John A. Zottola. By Order dated January 18, 2012, Judge Zottola entered an Order vacating the prior order that appointed attorney McCarthy as counsel and ordered that attorney Charles R. Pass, III, be appointed as Ballard's PCRA counsel. The next day, attorney Pass entered his appearance.

On February 3, 2012, attorney Pass filed an extensive *Turner/Finley*[2] no-merit letter in which he addressed and found no merit to the approximately twenty-seven issues[3] that Ballard wanted to raise in his PCRA petition. (ECF 38-5, at 15 - 72). On February 6, 2012, Judge Zottola granted attorney Pass leave to withdraw and sent a Notice of his Intention to Dismiss the PCRA petition. Ballard filed a response on February 24, 2012. On March 14, 2012, the petition was dismissed.

Ballard, *pro se*, filed a timely appeal from the PCRA dismissal order to the Superior Court. On June 22, 2012, Judge Zottola filed the first PCRA 1925(a) Opinion (ECF 38-7 at 7-8), indicating that the court had reviewed the pro se petition, counsel's motion to withdraw and the supporting documents and "has conducted an independent review of the entire file and has concluded the petition was properly dismissed." *Id.* The Superior Court remanded the case and ordered that the PCRA court issue a full opinion which individually addressed each of the claims

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[2] *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.3d 213 (Pa. Super. Ct. 1988) (en banc).

[3] Ballard was seeking to raise approximately thirteen claims involving trial court error, four claims of prosecutorial misconduct, and ten claims of ineffective assistance of trial counsel. Many of these claim had sub-parts. (ECF No. 38-5 at 33-34).

raised by Ballard in his Concise Statement of Matters Complained Upon Appeal. ("Concise Statement").

On April 23, 2013, the PCRA court issued a thorough and exhaustive supplemental Opinion individually addressing each of the twenty-four complaints of error Ballard raised in his Concise Statement. (ECF 38-8 at 62-80). Ballard filed three appellate briefs (a principal brief, a reply brief, and a supplemental brief) in response to the PCRA court's supplemental opinion. On appeal, Ballard presented thirteen numbered claims, many "with multiple, tangentially related subissues." Superior Court Opinion (ECF 38-9 at 37). On August 27, 2013, the Superior Court affirmed the PCRA court's denial and dismissal of the PCRA petition. *Commonwealth v. Ballard,* No. 608 WDA 2012, slip opinion (Pa. Super. Ct. April 27, 2013) (unpublished opinion) (hereinafter referred to as "*Ballard-2*"). (ECF 38-9, at 36 - 43). On September 13, 2013, Ballard filed an Application for Reargument, which was dismissed as untimely on September 25, 2013. (ECF 38-9 at 54). Ballard did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

Having been denied relief in state court, Ballard filed *pro se* the instant habeas petition in the Eastern District of Pennsylvania on August 15, 2014. The petition was transferred to this Court on October 27, 2014. (ECF 10). Ballard then filed a Supplemental / Addendum to his petition on March 3, 2015. (ECF 31). Before this Court, Ballard raises the following sixteen numbered claims, many of which, similar to those raised by Ballard in state court, contain multiple subissues:

> GROUND ONE: **Trial Court Error / Violation**: Based it's finding of guilt on conclusions not presented or substantiated by trial court record in violation of the U.S. Constitution (Amendments VI and XIV).

GROUND TWO: **Trial Court Error**: Should have recused himself from trial proceeding due to non-attentiveness and daydreaming during evidence presentation in violation of U.S. Constitution Amend. VI and XIV.

GROUND THREE: **Trial Court**: Violated due process Amends. VI and XIV (U.S. Const.) by improper ex parte activity (as fact-finder) during trial. Improperly undermines the integrity of the court. Judicial Conduct violated.

GROUND FOUR: **Trial Court**: Failed to conduct / order an competency hearing upon Petitioner (trial) in violation of U.S. Const. Amend. VI & XIV (due process).

GROUND FIVE: **Trial Court**: Unlawfully imposed excessive sentence upon Petitioner without having statutory authorization; and, procedural error as the court did not conduct colloquy(s) for waiver of Petitioner's Right(s) to be sentenced by penalty-phase jury; and consent of stipulations (Petition was not aware of). The Petitioner is not in receipt of sentencing Order for allegedly imposed sentence (with statutory authority). In violation of the U.S. Const. Amends. VI. and XIV.

GROUND SIX: **Trial Court:** Committed procedural default during the Petitioner's appeal stage (PCRA) of this matter and case. Trial court dismissed Petitioner's PCRA Petition / Memorandum without first holding the requested evidentiary hearing. Trial court also committed procedural error by failing to produce an opinion addressing **each** claim by Petitioner, within the set deadline of the Superior court Order.

GROUND SEVEN: **Prosecutor violation(s):** The Commonwealth (prosecutor) withheld material favorable exculpatory evidence from the Petitioner, which was suppressed by the use of comment, and perjured testimony of the actual facts; resulting in the violations of the U.S. Constitutional Amendments VI & XIV, (Pa.R.Crim.P. 573), and the decision in Brady v. The State of Maryland and Napue v. Illinois.

GROUND EIGHT: **Prosecutor violation(s)**: The Commonwealth (prosecutor) unlawfully lead, perjured, and admitted false testimony of actual evidence onto trial court record; in violation of the U.S. Constitutional Amendments VI & XIV, (Rules of Professional Conduct, Rule 8.4), and the decision in Giglio v. United States and Napue v. Illinois.

GROUND NINE: **Trial Counsel:** provided ineffective assistance of counsel for failing to investigate, interview witnesses, and petition and notify the trial court for a competency and culpability hearing; and present evidence and witness testimony to establish the Petitioner's sedative and drugged condition during the time-frame of the alleged crime, and during trial proceedings; in violation of the

U.S. Constitutional Amendments VI & XIV (Rules of Professional Conduct), and the decision(s) in **Strickland v. Washington** and **U.S. v Cronic**.

GROUND TEN: **Trial counsel:** provided ineffective assistance of counsel for failing to investigate, interview witnesses and present evidence in objection to the Commonwealth's (prosecutor's) case, and did not seek to suppress evidence prior to the trial proceedings; and counsel further false incriminated the Petitioner by enter into stipulations (with the prosecutor) without the Petitioner's consent and the safeguards of an on-record colloquy; in violation of the U.S. Constitution Amendments VI & XIV (Rules of Professional Conduct), and the decision(s) in **Strickland v. Washington**.

GROUND ELEVEN: **Trial counsel:** provided ineffective assistance of counsel by failing to object to and motion for recusal of the trial court (fact-finder) for mistrial, due to the trial court's: (1) own admission of **Daydreaming** and being **Abandoned** and (2) engaging into improper ex parte discussions and activity during non-jury trial proceedings; in violation of the U.S. Constitutional Amendments VI & XIV (Rules of Professional Conduct), and the decision(s) in **Strickland v. Washington** and **U.S. v Cronic.**

GROUND TWELVE: **Trial counsel:** provided ineffective assistance of counsel by failing to investigate and object to Commonwealth's (prosecutor's) false testimony, misstatement of facts; and failure to produce expert examination and witness testimony of material evidence that would have negated Commonwealth's (prosecutor's) case and theory; in violation of the U.S. Constitutional Amendments VI & XIV (Rules of Professional Conduct), and the decision(s) in **Strickland v. Washington** and **U.S. v Cronic**.

GROUND THIRTEEN: **Trial counsel:** provided ineffective assistance of counsel for failure to investigate, interview witnesses, and present material evidence to negate all the charges, and, unreasonable insistence (on trial record) of the Petitioner to waive his right to offer testimony and call character witnesses in favor of the defense; in violation of the U.S. Constitutional Amendments VI & XIV (Rules of Professional Conduct) (Pa.R.Crim.Rule 567, 573), (Pa.R.E. Rule 608 & 701), and the decision(s) in **Strickland v. Washington** and **U.S. v Cronic**.

GROUND FOURTEEN: **Appellate counsel:** provided ineffective assistance of counsel by failing to investigate, present, and preserve the Petitioner's requested claims of merit for relief (and first establish proper communication); in violation of the U.S. Constitutional Amendments VI & XIV, (Rules of Professional Conduct), and the decision(s) in **Martinez v. Ryan** and **Trevino v. Thaler**.

GROUND FIFTEEN: The Petitioner's trial was conducted in violation of the Petitioner's right to be indicted or receive a presentment from a Grand Jury,

> resulting in a violation of the U.S. Constitutional Amendment V and U.S. Constitutional Article VI, Clause 2, which has led to a conviction and sentence unlawfully imposed in a tribunal without lawful jurisdiction in the matter.
>
> GROUND SIXTEEN: Trial court conduct violated the Petitioner's right to formal notice of the nature and accusation (procedural due process and equal protection of law) in violation of the U.S. Constitutional Article VI, Clause 3, U.S. Constitutional Amendments V, VI, & XIV, Pennsylvania Constitutional Articles VI, § 3 and I, § 9.

Claims 1 - 14, Habeas Petition (ECF 1); Claims 15 and 16, Supplemental Petition (ECF 31) (quoted verbatim).

Respondents filed a timely Answer (ECF 38) and the relevant state court records, to which Ballard filed a Response and Memorandum of Law in Reply. (ECF 62). The Court has reviewed the filings of the parties, as well as the state court record, including the transcripts from Ballard's preliminary hearing, trial, and sentencing hearing, and the appellate briefs filed with the Pennsylvania Superior Court. The matter is fully briefed and ripe for disposition.

B. Standard of Review

This case is governed by the federal habeas statute applicable to state prisoners. 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214, enacted on April 24, 1996 ("AEDPA"), "which imposes significant procedural and substantive limitations on the scope" of the Court's review.[4] *Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221, 227 (3d Cir. 2017), *cert. denied*, No. 17-7437, -- U.S.---, 138 S.Ct. 1170 (Feb. 26, 2018).

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[4] The first consideration in reviewing a federal habeas petition is whether the petition was timely filed under AEDPA's one-year limitations period. 28 U.S.C. § 2244(d). Respondents do not dispute that Ballard's petition was timely filed.

Where the state courts have reviewed a federal issue presented to them and disposed of the issue on the merits, and that issue is also raised in a federal habeas petition, AEDPA provides the applicable deferential standards by which the federal habeas court is to review the state courts' disposition of that issue. *See* 28 U.S.C. § 2254(d) and (e). In order to merit habeas relief, AEDPA places the burden on Ballard to show that the adjudication by the state court of his claims was contrary to or an unreasonable application of then-extant United States Supreme Court precedent or, in the alternative to show that the state court's factual determinations were unreasonable. *Williams v. Taylor*, 529 U.S. 362 (2000).

However, "[w]here the state court fails to adjudicate or address the merits of a petitioner's claims, unless procedurally defaulted, the federal habeas court must conduct a *de novo* review over pure legal questions and mixed questions of law and fact. *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). If a claim is procedurally defaulted it cannot form the basis of relief, unless the petitioner can demonstrate either "cause" to excuse his failure to comply with state procedure and "actual prejudice resulting from the alleged constitutional violation." *Preston v. Superintendent Graterford SCI,* -- F.3d --, 2018 WL 4212055, at *6 (3d Cir. Sept. 5, 2018) (quoting *Davila v. Davis*, -- U.S. ---, 137 S.Ct. 2058, 2065 (2017) (quoting *Wainwright v. Skyes*, 433 U.S. 72 (1977)).[5]

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[5] A petitioner, alternatively, can overcome a procedural default by demonstrating that the court's failure to review the defaulted claim will result in a "miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 748 (1991); *McCandless v. Vaughn*, 172 F.3d 225, 260 (3d Cir. 1999). "However, this exception is limited to a 'severely confined category [] [of] cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner]'." *Preston*, 2018 WL 4212055, at *7 (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013) (internal alteration in original) (quoting *Schlup v. Delo*, 514 U.S. 298, 329 (1995)). Ballard has not urged that this exception applies here.

Six of the sixteen numbered claims Ballard raises in the instant federal habeas petition are ineffective assistance of counsel ("IAC") claims. The Supreme Court of the United States established the legal principles that govern IAC claims in *Strickland v. Washington*, 466 U.S. 668 (1984). An IAC claim has two components. Under the first prong of *Strickland*, often referred to as the "performance" prong, a petitioner must show that counsel's performance fell below an below an objective standard of reasonableness." *Id.* at 688. Under the second prong, often refereed to as the "prejudice" prong, a petitioner must demonstrate prejudice as a result of counsel's deficient performance. *Id.* at 692. Although a petitioner must satisfy both prongs to succeed on his ineffectiveness claim, the Supreme Court noted that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697. *See also Mathias v. Superintendent Frackville SCI*, 876 F.2d 462, 477 (3d Cir. 2017).

The United States Court of Appeals for the Third Circuit has held that Pennsylvania's test for assessing IAC claims is not contrary to *Strickland. Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000); *see also Commonwealth v. Pierce,* 527 A.2d 973, 976 (Pa. 1987) (expressly stating that Pennsylvania follows the *Strickland* standard of review). Thus, the relevant question is whether the decisions of the Pennsylvania courts involve an unreasonable application of *Strickland. Jacobs v. Horn*, 395 F3d 92, 106 n.9 (3d Cir. 2005). That is, a petitioner must show that the state courts "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002).

When resolving an IAC issue, the question is not whether the defense was free from errors of judgment, but whether defense counsel exercised the customary skill and knowledge that normally prevailed at the time and place. *Strickland,* 466 U.S. at 689. The Supreme Court

has "declined to articulate specific guidelines for appropriate attorney conduct and ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms'." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 699).

Our Court of Appeals has made clear that "the 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." *Hassine v. Zimmerman,* 160 F.3d 941, 954 (3d Cir. 1998). Put simply, "habeas proceedings are not the appropriate forum for [a prisoner] to pursue claims of error at the PCRA proceeding . . . . It is the original trial that is the 'main event' for habeas purposes." *Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004).

Ballard's claims will be reviewed with these standards in mind.

C. Discussion[6]

As detailed *supra*, Ballard raises a whole host of claims. Because the Court finds that the state courts rejected most of his claims on the merits, and because Ballard fails to show that the state courts' disposition of his claims was contrary to or an unreasonable application of United States Supreme Court precedent, those claims cannot afford Ballard relief. The remaining claims that were not addressed by the state courts on the merits are procedurally defaulted and cannot serve as a basis for relief as Ballard has not demonstrated cause or actual prejudice to excuse the default.

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[6] For organizational purposes, the Court has grouped various claims by common operative issues. For example, where Ballard raises a claim on its merits and then has a separate related ineffective assistance of counsel claim, those claims have been grouped together.

Claim One, Ten, and Thirteen

In Claims One, Ten, and Thirteen, Ballard raises a due process claim challenging the evidence presented at his trial and his trial counsel's overall effectiveness in disputing the evidence presented. In essence, as he has through many varied incarnations in his filings in state court, claimed that his due process rights were violated when the trial court erred by finding him guilty of first degree murder.[7] Instead, according to Ballard, the evidence shows that he shot the victim in the "heat of passion."[8]

Ballard's weight of the evidence claim was considered on the merits by the state courts and determined to be insufficient to warrant a new trial under Pennsylvania law. Thus, the claim is exhausted and is not procedurally defaulted for federal habeas review. If the issue is interpreted as a "sufficiency of the evidence" claim, however, that claim was not raised on direct appeal and would be considered to be waived for appellate review in state court now. As such, the "sufficiency of the evidence" argument is procedurally defaulted for federal habeas review. To the extent that the "sufficiency of the evidence" claim could have been raised on collateral appeal in the context of an ineffectiveness of appellate counsel (for failing to raise the claim on direct appeal), such a claim, as will be addressed below, fails as the default cannot be excused

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[7] Ballard's argument that the trial court "admitted on the record that he was daydreaming (during trial proceedings) and missed evidence, " Pet. at ¶ 12, as well as the argument that the "opinion for guilt was based on presumptions outside the record defy logic and science," Reply at 15, ¶ 39, is addressed in the Court's discussion regarding Claim Two of the habeas petition.

[8] The Court notes that in his Reply, Ballard also argues "there is no conclusive evidence [forensic or ballistic] establishing a connection of the Petitioner as the actual assailant / combatant in this case. It was not proven that the Petitioner was at the scene of the shooting. . . ." Reply at ¶ 216 at 86.

since the underlying claim lacks merit and, therefore, is not substantial. *Martinez v. Ryan*, 566 U.S. 1, 13-15 (2012).[9]

Petitioner's challenge to the weight of the evidence necessarily "concedes that there is sufficient evidence to sustain the verdict. . . . An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. . . . [T]he role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Rainey v. Varner*, 603 F.3d 189, 199 (3d Cir. 2010) (quoting *Commonwealth v. Widmer*, 744 A.2d 745, 751–52 (Pa. 2000)). Such a "weight of the evidence" claim is simply not cognizable by a federal court, entertaining a habeas petition from a state prisoner. *See Tibbs v. Florida*, 457 U.S. 31, 37-38 (1982) (weight of the evidence raises questions of credibility); *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("[F]ederal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court"). Accordingly, this claim does not afford Ballard relief.

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[9] For claims of ineffective assistance of trial counsel not preserved and thus defaulted on collateral review, *Martinez* provides a possible means for establishing cause to excuse the default. Under *Martinez,* a procedural default will be excused where "(1) the claim of 'ineffective of trial counsel' was a 'substantial' claim; (2) the "cause" consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective-assistance-of-trial-counsel [claim] . . . be raised in an initial-review collateral proceeding." *Trevino v. Thaler*, -- U.S. --, 133 S. Ct. 1911, 1918 (2013) (quoting *Martinez*, 566 U.S. at 13-15). Here, the third and fourth prongs of the *Martinez* exception are met as the PCRA proceeding was the "initial" review proceeding with respect to the "ineffective-assistance-of-trial claim" and Pennsylvania state law expressly requires the defendant to raise a claim of ineffective of assistance of trial counsel in an initial review proceeding.

An insufficiency of the evidence claim is closely related to a weight of the evidence claim.[10] However, under Pennsylvania law, a sufficiency challenge and a weight challenge are "discrete inquiries." *Commonwealth v. Whiteman*, 485 A.2d 459, 461 (1984). "A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner [as it would be in a sufficiency challenge]." *Widmer*, 744 A.2d at 751 (internal citations omitted).

The Due Process Clause of the Fourteenth Amendment requires that a criminal conviction be supported by proof beyond a reasonable doubt with respect to every fact necessary to constitute the offense charged. *In re Winship*, 397 U.S. 358, 363-64 (1970). The standard for determining if a conviction is supported by sufficient evidence is "whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See also Coleman v. Johnson*, 566 U.S. 650 (2012).

In its 1925(a) opinion, the trial court extensively reviewed the evidence of record and after summarizing the law with respect to voluntary manslaughter and first degree murder, the PCRA court determined, "[t]aken in the light most favorable to the Commonwealth, the evidence was clearly sufficient to support the conviction. Therefore, the Defendant's claim alleging insufficient weight of the evidence exists for his conviction of First Degree Murder must fail." ECF 38-1, 64 - 69 (emphasis added).

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[10] In fact, it appears that the PCRA court may have conflated a sufficiency of the evidence claim with Ballard's weight of the evidence claim.

On direct appeal, the Superior Court, after extensively discussing the inconsistences in the statements given by the eyewitness, Carl Beck, at the crime scene and his trial testimony, determined:

> In its role as factfinder, however, the trial court apparently disregarded the inconsistency in statements regarding the alleged first two shots fired as Beck was sleeping, and subordinated the discrepancy regarding whether Beck only heard the second-to-last shot fired as he came downstairs or actually saw it. Indeed, it is clear that regarding that penultimate shot, the court gave greatest weight to the consistency and substance of Beck's account. For whether the shot was fired immediately before or immediately after he had entered the living room, Beck stated each time that [Ballard] fired the shot from the front doorway of the apartment, clear across the room from where the victim sat crying on a sofa with her infant child in her arms. This account is consistent in all of Mr. Beck's statements, and deals a substantive blow to [Ballard's] "heat of passion" mitigation argument, as it reveals [Ballard's] dominion over an essentially powerless, fearful victim just moments before the final, mortal shot was fired.
>
> Mr. Beck's accounts of that final shot, moreover, were consistent - if not of identical amount of detail - with one another, and his description of a quiet prelude to the shot further belies the defense theory of a violent struggle or passionate, emotional outburst rendering [Ballard's] mind incapable of reason as he pulled the trigger.[1] Thus, the record of a seated victim begging for her and her child's life from across a room simply does not support [Ballard's] claim that discord between him and the victim provoked him to a point beyond the ability to reason when he shot the victim to death. See Commonwealth v. Walker, 540 Pa. 80. 92, 656 A.2d 90, 92 (1995), cert. denied, 516 U.S. 854, 133 L. Ed. 2d 100, 116 S. Ct. 156 (1995) (defendant's heat of passion claim meritless where defendant failed to demonstrate that there was sufficient provocation to incite reasonable person into killing rage).
>
> In short, there is evidentiary support for the trial court's verdict of First Degree Murder and subsequent ruling dismissing the post-trial motion, such that one's sense of justice is not shocked by the outcome of this case. Accordingly, finding no abuse of discretion below, we reject [Ballard's] challenge herein.

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[1] On this point, too, [Ballard] attacks Mr. Beck's ability to have either heard or comprehended these last moments accurately. Forensic evidence and corresponding expert testimony, however, corroborated Mr. Beck's account of a seated, passive victim by indicating [Ballard] fired the deadly shot at a downward angle from a distance of at least several feet away.

Ballard-I at 5-7 (ECF 38-3 at 5-7). Applying the proper standard for an insufficiency claim, this Court, to the extent the claim should be reviewed *de novo*, finds the reasoning of the Superior Court persuasive, and comes to the same conclusion as did the Superior Court. Specifically, the Court finds that the evidence in this case, viewed most favorably to the Commonwealth as verdict-winner, supports the proposition that the Commonwealth proved beyond a reasonable doubt every element necessary to sustain Ballard's conviction of first degree murder.

Turning to Ballard's related IAC claims, the Court notes as a preliminary matter that Ballard's allegations are multi-faceted and often are restated throughout the habeas petition as subissues in multiple separate claims making it difficult for the Court to ensure that it has addressed each ineffectiveness claim. To that end, the Court will now address the various related subissues raised in Claims Ten and Thirteen.

First, in Claim Ten, Ballard argues that trial counsel provided ineffective assistance in a number of ways, *to wit*:

> (1) failing to investigate, (2) interview witnesses, (3) present evidence in favor of the defense, (4) and impermissibly entered to stipulations waiving the Petitioner's right to confront his accusers, (5) failure to suppress inadmissible and irrelevant evidence, (6) and further falsely incriminated the Petitioner in violation of the United States Constitutional Amendments VI and XIV, Pennsylvania Constitution Article 1, § 9, Rules of Professional Conduct, and decisions in Strickland v. Washington and United States v. Cronic, et al.

Reply at ¶ 253, at 71. In Claim Thirteen, Ballard raises a similar claim arguing that counsel failed to "investigate, interview witnesses and present material to negate all the charges" and that counsel insisted on Ballard waiving "his right to offer testimony and call character witnesses."

It is unclear from the record whether Ballard raised the many subissues of Claim Ten and Thirteen before the Superior Court on PCRA review. In fact, the appellate court noted the trouble it had in deciphering Ballard's claims:

> Appellant presents thirteen numbered claims for our review (most with multiple, tangentially related subissues) in a complicated fashion that makes it difficult for us to ensure that we have a complete picture of each [claim]. . . . Accordingly, where it is reasonably feasible for us to discern an appellate issue properly before us, we will address it. Any issues we do not address are deemed to be waived.

Ballard-II, at 3 (ECF 38-9). Thus, to the extent that the Superior Court did not address an issue , it deemed that issue waived and it is now procedurally defaulted. Ballard has proffered no persuasive argument why the procedural default should be excused.

However, to the extent these claims should be reviewed *de novo,* while the Court recognizes that neither the no-merit letter by PCRA counsel nor the PCRA court's supplemental opinion are binding on this Court, the analysis in both are persuasive. In the no-merit letter, counsel explained why the PCRA could not provide relief as the suppression claim was meritless:

> Defendant claims trial counsel failed to litigate the claim of error in the Court's denial of suppression where Defendant, after being interrogated by police for 15 minutes, posed a hypothetical question about an individual being permitted to pick up his child but then the mother changes her mind. First, prior to that hypothetical being posed, Detective Fisher were (sic) having a discussion about religion and other matters unrelated to the commission of the offenses in this matter. NJT at 219. Additionally, Defendant had asked for his mother and/or his brothers to be present. Id. at 219. Detective exited the interview room at that point and police then tried to contact those persons. Id. Upon re-entering the interview room, Defendant indicated he wanted to explain what happened, Detective Fisher told Defendant that his brothers were on the way to see Defendant and then said hypothetical was posed. Id. at 220-221.
>
> Although Defendant was [in] custody, said hypothetical question was not elicited by questioning or coercion by police. Second, any motive that was revealed by the hypothetical was cumulative of other evidence that Defendant went to the victim's residence for the purpose of, and actually took, the victim's daughter. Consequently, trial counsel's failure to further litigate this issue was

> non-prejudicial as it is not likely that, had said statement been suppressed, the result at trial would have differed.
>
> Accordingly, this claim is meritless.

No merit letter at 45-46 (ECF 38-5). The PCRA court also found the claim to be without merit:

> The Motion for Leave to Withdraw filed by Attorney Pass suggests that this claim is made for counsel's failure to litigate a claim of error in the Court's denial of suppression of a hypothetical statement posed to Petitioner during his initial interrogation by the police. Trial counsel's failure to further litigate the issue was not prejudicial, since the suppression of the statement would not have altered the Court's verdict.

PCRA § 1925(a) Supplemental Opinion, 4/26/2013 (ECF 38-8 at 75).

Similarly, PCRA counsel also explained why the claim regarding counsel entering into stipulations was meritless and could not provide relief to Ballard under the PCRA, stating:

> What Defendant is complaining of here is the fact that trial counsel entered stipulations. However, the stipulations were on minor matters (chain of custody, toxicology / forensic testing results, expert qualifications, etc.) which had insignificant impact on the matter of Defendant's guilt or innocence of Murder and there is no indication that having witnesses testify to the matters stipulated to would change the impact / nature of the evidence as stipulated or would likely lead to a different result at trial on any charge of which Defendant was convicted.

No merit letter at 40-41 (ECF 38-5). The PCRA court reviewed the issue and also found it to be without merit (although the PCRA court reviewed the claim in the context of a claim concerning the waiver of Confrontation rights):

> Counsel for the Petitioner did not "waive" the Petitioner's right to confront and cross-examine witnesses, therefore the Petitioner is presumably complaining of counsel's willingness to stipulate to minor matters such as evidentiary chain of custody, toxicology and forensic testing results, and expert qualifications. Any matters to which counsel stipulated were insignificant in the Court's consideration of a verdict. Furthermore, the Petitioner has not provided any argument to support a conclusion that having witnesses testify to the stipulated matters would have changed the impact or nature of the evidence, or that the Court would have rendered a different result. Therefore the claim also fails for lack of prejudice.

> Since the Petitioner's underlying claim concerning the waiver of Confrontation Clause rights fails, his argument that counsel was ineffective for waiver of such rights is therefore meritless and improper, and is dismissed.

PCRA § 1925(a) Supplemental Opinion, 4/26/2013 (ECF 38-8 at 75).

Finally, as to Ballard's claims that his trial counsel failed to "negate" the Commonwealth's evidence or present evidence or witnesses on his behalf, the Court finds that the record belies such a claim. The trial transcript reflects that defense counsel conducted significant cross-examination of the Commonwealth's witnesses and meaningfully tested the Commonwealth's case. Further, as the PCRA court noted, counsel's advice not to have Ballard testify was reasonable:

> In light of inconsistent statements made by the Petitioner in regard to the shooting and his efforts to avoid apprehension, and otherwise indicating a consciousness of guilt. Character evidence on truthfulness would not have changed the Court's verdict due to these statements, and evidence of character for non-violence, as pointed out by Attorney Pass, would have been rebutted by the Petitioner's prior assault convictions. . . .

Id. (ECF 38-8 at 77). The PCRA court also addressed Ballard's argument that counsel was ineffective for failing to secure an independent expert:

> Counsel need not call its own forensic experts to impeach the evidence or testimony of the Commonwealth's experts, if there is no reason to believe that significant impeachment would not be forthcoming or where defendant counsel was able to conduct significant cross-examination of the Commonwealth's experts on material matters. *Commonwealth v. Chmiel*,30 A.3d 1111, 1143-4 (Pa. 2011). In the instant case, trial counsel was afforded and took advantage of the opportunity to cross-examine the Commonwealth's experts on all material matters. Moreover, the Petitioner has not demonstrated that he was in any way prejudiced by counsel's failure to have an independent expert examine physical evidence.

Id. To the extent the claims are procedurally defaulted and such default should be excused, the Court, while recognizing that neither the no-merit letter nor the PCRA supplemental opinion are

binding on this Court, adopts the reasoning of both and finds that the IAC claims are without merit.

For these reasons, the Court recommends that Claims Ten and Thirteen be dismissed.

Claims Two and Eleven (Subissue One)[11]

In his second claim, Ballard alleges that his due process rights were violated as a result of the trial court's lack of attentiveness during the trial. In his related IAC claim (Claim Eleven, subissue one), Ballard argues that his counsel should have objected and sought the recusal of the trial judge or moved for a mistrial.

Because Ballard did not raise his due process claims on direct review, both the PCRA court and the Superior Court found the issues waived. However, both the PCRA court and the Superior Court addressed the underlying merits of the due process claim in the context of an IAC claim.

The PCRA Court addressed the issue as follows:

> [T]he Petitioner fails to present any evidence which proves that trial counsel was ineffective for having failed to request a mistrial on the grounds of alleged judicial misconduct.
>
> The Court specifically refutes the Petitioner's accusation that the Court was inattentive during any portion of the trial, or that evidence was misstated in relation thereto. Although perfectly compliant with the Pennsylvania and federal rules of evidence, some exhibits introduced by the Commonwealth were presented to the Court in a non-sequential manner, and any remarks which appear on the record in regard to those exhibits were merely made by the Court in order to clarify which exhibits corresponded to which exhibit numbers.

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[11] Claim Eleven has two subissues - that counsel was ineffective for failing to object and seek recusal of the trial judge or a mistrial due to the trial court's (1) daydreaming and being abandoned and (2) engaging in improper ex parte discussions. The underlying merits of Claim Eleven, subissue one, relate to Claim Two. Subissue two is grouped with Claim Three.

> In addition, the Court's later statement that the victim was shot in the back (although she was, in fact, shot in the chest) was based on Dr. Shakir's testimony that the victim was shot "in the trunk" and was an irrelevant and harmless inaccuracy, which did not in any way affect the Court's verdict, or cause prejudice to the Petitioner (e.g., it did not affect the grade of homicide with which he was charged, or increase his sentence from life to death). . . .
>
> Since the Petitioner's underlying claim concerning alleged judicial misconduct fails, his argument that counsel was ineffective for failing to object to such conduct is therefore meritless and improper, and is dismissed.

PCRA § 1925(a) Supplemental Opinion 4/26/13 (ECF 38-8 at 73) (emphasis added). The Superior Court affirmed finding the ineffectiveness claim lacked merit:

> The trial court explains in its opinion that its "admission" concerned its efforts to clarify the non-sequential order of certain Commonwealth exhibits. Appellant fails to establish any merit to his argument.

Ballard-2, at 6 (ECF 38-9 at 41).[12]

A review of the record reflects that the trial court's comment about "daydreaming" supports the conclusion that, when read in context, the trial court's comment that "I might have been daydreaming and missed it" was in response to the numbering of the Commonwealth's exhibits which had been admitted very shortly before that comment. (N.T. 129). And while the trial court admittedly misstated in its 1925(a) Supplemental Opinion that the victim was shot from behind, this Court notes that the 1925(a) Supplemental Opinion is not binding or of any effect other than to provide an explanation to an appellate court for a ruling. In fact, the Superior Court does not appear to have been misled by this mistake.[13]

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[12] It does not appear that the Superior Court addressed the allegations that the trial court stated it was "abandoned" or that it made a misstatement in its 1925(a) supplemental opinion.

[13] Ballard portrays that the "misstatement" as an "opinion and verdict" outside the record. Reply at ¶ 15.

Further, even under the more exacting *de novo* standard, Ballard's due process claims related to the "abandoned" statement and the misstatement in the 1925(a) Supplemental Opinion fail. The "abandoned" comment was made in response to the prosecutor's request for lighting and, in response, the trial court said, "They have abandoned me. Let me figure it out." (N.T. 130). This was clearly a reference to the court staff not being readily available to turn the courtroom lights on. Again, taken in context, this comment does not indicate that the trial court was not paying attention during the course of the trial. And as to the misstatement in the 1925(a) Supplemental Opinion, Ballard has failed to overcome the presumption of correctness that must be applied to factual conclusions reached by the state courts; namely, that the statement did not in any way affect the Court's verdict. The Court finds that neither of these statements constitute some sort of structural error, where prejudice should be presumed. Accordingly, the Court recommends that Claim Two be dismissed.

As to the related ineffectiveness claim, the Superior Court found that Ballard had failed to establish any merit to his IAC claim. *Ballard-2* at 6 (ECF 38-9 at 41).

The Court finds that the Superior Court applied the correct standard and Ballard has not demonstrated that the Superior Court's decision was an unreasonable application of *Strickland.* Counsel cannot be found to be ineffective for failing to raise a meritless claim. Accordingly, the Court recommends that Claim Eleven, subissue one, be denied.

Claims Three and Eleven (Subissue Two)

In his third claim, Ballard asserts that his rights to due process were violated when the trial court engaged in improper ex parte activity during the trial and in Claim Eleven, subissue two, Ballard raises a related IAC claim. Although Ballard did not raise the claim of trial court error on direct appeal, the merits of his underlying due process claim was fully addressed in the

context of an ineffectiveness claim. The parties agree that AEDPA standard of review applies as the underlying merits of the stand-alone due process claim were analyzed by the PCRA courts in denying the related IAC claim. *See Mathias*, 876 F.3d at 479-80.

The PCRA court addressed the issue as follows:

> [T]he Petitioner fails to present any evidence which proves trial counsel was ineffective for failure to object to alleged ex parte discussions between the Court and the prosecution.
>
> It is widely recognized that a defendant's presence is mandatory only when actions substantial to a verdict are being conducted, such as evidentiary presentation or examination of witnesses. See, e.g., Commonwealth v. McLaurin, 437 A.2d 440, 443-5 (Pa. Super Ct. 1981). Any matters discussed at sidebar before the Court, in which counsel for the Petitioner fully participated and cannot therefore be considered ex parte, concerned the order of witnesses, scheduling of testimony, and other purely logistical matters which were wholly unrelated to the Defendant's substantive rights. As aptly pointed out in Attorney Pass's motion to withdraw, this claim also fails for lack of prejudice, since nothing discussed at sidebar affected the Court's verdict or judgment of sentence.
>
> Since the Petitioner's underlying claim concerning alleged ex parte discussions fails, his argument that counsel was ineffective for failing to object to such discussions is therefore meritless and improper, and is dismissed.

PCRA § 1925(a) Supplemental Opinion, 4/26/2013 (ECF 38-8 at 74).

The Superior Court affirmed finding the ineffectiveness claim lacked merit:

> [Ballard] cites to two instances where, he argues, the trial court asked to, and did, speak with counsel alone. One instance, he claims involved his counsel; the other, he claims involved counsel for the Commonwealth. However, the trial transcript does not confirm [Ballard's] recitation of events. In both instances, the court requested to speak with "counsel" in chambers. N.T., 10/05/07, at 228, 253. The record does not reflect that "counsel" signified any individual attorney. This claim fails for lack of merit.

Ballard-2, at 6 (ECF 38-9 at 41).

The Court finds that Ballard has failed to establish that the state court's adjudication of his claim was contrary to or an unreasonable application of then extant Supreme Court

precedent. Nor has he established that the state court's factual determinations were unreasonable. Accordingly, the Court determines that Ballard has failed to show entitlement to any relief for this portion of Claim Eleven, *i.e.,* the ineffective assistance of counsel claim regarding Ballard's absence from the sidebar and in-chambers conferences, and recommends that this portion of Claim Eleven be dismissed.

Claims Four and Nine

In his fourth claim, Ballard contends that his rights to due process were violated because the trial court failed to conduct a competency hearing and in his related ninth claim, Ballard claims that his trial counsel provided ineffective assistance in failing to investigate, interview witnesses, and notify the trial court of the need for a competency hearing. Although Ballard did not raise the claim of trial court error on direct appeal, the merits of his underlying stand-alone due process claim was fully addressed in the context of an ineffectiveness claim.

The PCRA court addressed the issues as follows:

> [T]he Petitioner fails to present any evidence which proves that trial counsel was ineffective for failure to petition the Court for a competency hearing or an examination, or present any further evidence of [Ballard's] incompetency due to medication.
>
> The Petitioner did not raise the issue of competency before or during the trial, and there is nothing in the record to suggest that Petitioner was in any way incompetent to stand trial. Although Petitioner was on medication at the time, the Petitioner specifically responded "No" when asked if he was "suffering from any mental or physical impairment that would affect [his] ability to understand what [was] going on" (N.T. pp 4-5). He agreed that he was "clear-headed" (N.T. p 18) and that his answers to the Court and to counsel during the *jury* waiver colloquy were entirely regular (N.T. pp. 3, 19). The record does not disclose any difficulty by Petitioner in understanding what was going on, and he did not raise the issue of competency at any subsequent point during the trial or sentencing.
>
> Since the Petitioner's underlying competency claim fails, his argument that counsel was ineffective is therefore meritless and improper and is dismissed.

. . .

> The standard for establishing a diminished-capacity defense for intoxication or use of medication is also very high: "[I]t must be established that the defendant was 'overwhelmed to the point of losing his sensibilities." [Commonwealth v. Spotz, 896 A.2d 1191, 1219 (Pa. 2006).] Because of this high burden, the defense has been consistently rejected in Pennsylvania jurisprudence except when the defendant is alleging a mental defect. Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa. 1982).
>
> In the instant case, the Petitioner did not suffer from a mental disease or defect, and was not intoxicated or medicated to the point that would excuse his actions in whole or in part. Furthermore, his actions and conduct at and shortly before and after the shooting strongly contradict any notion that his behavior was excusable or less culpable than the offense of which this Court found him guilty. The Court would not have found a diminished-capacity defense persuasive, and in any case, counsel acted within the scope of his representation in choosing to instead pursue acquittal.
>
> Since the Petitioner's underlying claim concerning a diminished capacity defense fails, his argument that counsel was ineffective for failing to present such a defense is therefore meritless and improper, and is dismissed.

PCRA 1925(a) Supplemental Opinion, 4/26/13 (ECF 38-8 at 70-71).

The Superior Court affirmed, finding that the ineffectiveness claim lacked merit:

> [Ballard] next argues that trial counsel was ineffective for failing to investigate the effects of medication Appellant was taking: (1) at the time of the crime; and (2) at the time of trial. However, he does not assert that he was in any way affected by his medication at the time of the crime and his (sic) does not provide any support for his bald assertion that he could not assist his defense at trial as a result of his medicated state. These claims fail for lack of merit.

Ballard-2, at 6-7 (ECF 38-9 at 41-42).

The Court finds that the decision of the Superior Court withstands review under AEDPA. It is clear that the Superior Court applied the correct standard and Ballard has not demonstrated that the Superior Court's decision was an unreasonable application of *Strickland*.

The Court also finds that the state court's discussions of the underlying due process claims - that Ballard's medicated state was an issue during the crime and during trial - withstand

review under AEDPA. These claims, and the applicable law, were reviewed and discussed by the state court as part of the IAC analysis. To that end, Ballard has failed to overcome the presumption of correctness that must be applied to factual conclusions reached by the state courts; namely, the trial court's observations of Ballard's competency during trial.

Moreover, PCRA counsel in his no-merit letter thoroughly addressed the issue as follows:

> Instantly, the evidence showed that Defendant did not suffer from a mental disease or defect or was intoxicated to a point that would excuse his actions in whole or in part. He went to the victim's home with a gun; he shot the victim and was prepared to shoot any eyewitnesses (i.e., point the gun at Mr. Beck); he took the victim's daughter from said house, to a hospital, and took part in her safe return; he was making stories about how the shooting occurred so as to downplay his involvement or culpability in connection therewith; he went to an ex-girlfriend's house (with whom he had not spoken for nearly two years) to hide and evade arrest; and he disposed of the murder weapon. Consequently, Defendant's actions at, and shortly before and after, the shooting strongly contradict any notion that his behavior was excusable or less culpable than the offense of which he was convicted.

No-merit letter at 39-40 (ECF 38-5 at 60-61). While the Court recognizes that the no-merit letter is not binding on this Court, the Court finds that the no-merit letter analysis is persuasive and supported by the evidence and testimony offered at trial.

For all these reasons, the Court finds that the record fully supports the dismissal of these claims. Ballard's attempt to support his claim by noting various medications he has been prescribed, is unavailing. Therefore, it is recommended that Ballard be denied habeas relief on Claims Four and Nine.

Claim Five

In Claim Five, Ballard contends, *inter alia*, that his rights to due process were violated by the illegality of his sentence and because the trial court did not conduct a colloquy for waiver of

Ballard's rights to be sentenced by a penalty-phase jury.[14] The merits of the legality of Ballard's sentence was addressed by both the PCRA Court and the Superior Court. Accordingly, this Court's review is governed by AEDPA's standard of review. The subissue of Claim Five relating to the failure of the trial court to conduct a conduct a colloquy for waiver of rights to be sentenced by a penalty-phase jury was not raised and is now procedurally defaulted.

In affirming the trial court's decision to dismiss the PCRA claim, the Superior Court found as follows:

> Appellant next asserts a claim that his life sentence was imposed illegally. Our review of the certified record reveals only one theory for this claim raised in the PCRA court: that the life sentence was imposed without statutory authority. Appellant was convicted of murder of the first degree and properly sentenced to life imprisonment per 18 Pa. C.S.A. § 1102(a)(1) (providing, in pertinent part, ". . .. a person who has been convicted of a murder of the first degree or of murder of a law enforcement officer of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with 42 Pa. C.S. § 9711.")

Ballard-2, at 3 (ECF 38-9 at 38).

Ballard's reliance upon Pennsylvania Rules of Criminal Procedure 802 and 807 are misplaced. These procedural rules had no application in Ballard's criminal trial as the Commonwealth was not seeking, nor did the Court impose, the death penalty. Thus, the Commonwealth did not have to file a "Notice of Aggravating Circumstances" before his sentencing.

Similarly, Ballard's reliance on the procedures outlined in 42 Pa. C.S.A. § 9711(b) are misplaced as those procedures apply only when a defendant, in a capital murder case, has consented to waive his or her jury rights under Pennsylvania's death penalty statute.

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[14] Ballard's claims regarding counsel's ineffectiveness for entering into stipulations without his consent are addressed in this report as part of the ineffectiveness claims raised in Claim 10.

For these reasons, the Court recommends that Ballard's fifth claim as it relates to the imposition of an illegal sentence be dismissed as Ballard has not proven that the resolution of his state claim was either clearly contrary to or a clearly unreasonable application of any federal law.

As stated supra, the subissue of Claim Five relating to the failure of the trial court to conduct a conduct a colloquy for waiver of rights to be sentenced by a penalty-phase jury is procedurally defaulted. Ballard has offered no argument as to why the default should be excused. Further, the Court notes that this claim is without merit. The Commonwealth was not seeking the death penalty. Under Pennsylvania law, a separate penalty-phase jury is empaneled only when the Commonwealth is seeking the death penalty.

Claim Six

In his sixth claim, Ballard contends that his due process rights were violated because the PCRA court (1) dismissed his PCRA petition without a holding an evidentiary hearing and (2) committed procedural error by failing to produce an opinion addressing each claim.

Both subissues of this claim can be dismissed rather summarily. First, as to the denial of an evidentiary hearing by the PCRA court, such a claim is not cognizable in federal habeas corpus review. The issue of whether a PCRA petitioner is entitled to an evidentiary hearing is a question of state law that is not subject to review by a federal court. *Preister v. Vaughn,* 382 F.3d 394, 402 (3d Cir. 2004).

Moreover, even if the state court erred as a matter of state law in not granting an evidentiary hearing, Ballard would not be entitled to habeas corpus relief because errors in the course of a state's post conviction process simply are not cognizable in a federal habeas petition. *Hassine v. Zimmerman,* 160 F.3d 941, 954 (3d Cir. 1998) ("The 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. . . . Federal habeas power is 'limited . . . to a determination of whether there has been an improper detention by virtue of the state court judgment." ').

The second part of Claim Six - that Ballard's due process rights were violated by the inadequacy of the initial PCRA opinion, - "has been mooted by the issuance of a supplemental PCRA court opinion at the direction of [the Superior Court]." *Ballard-2*, at 3 (ECF 38-9 at 38). The appellate court then proceeded to address each of Ballard's claims in its opinion (that it did not find waived) and affirmed the supplemental PCRA court opinion dismissing the PCRA petition.

For these reasons, the Court recommends that Claim Six be dismissed.

Claims Seven, Eight, and Twelve

Claims Seven and Eight involve claims of prosecutorial misconduct. In Claim Seven, Ballard raises a *Brady* claim, arguing that the prosecutor withheld material favorable evidence; and in Claim Eight, he claims that the prosecutor "lead, perjured and admitted false testimony of actual evidence onto trial court record."[15] In Claim Twelve, Ballard claims his counsel was

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[15] Apparently, Ballard takes issue with the Commonwealth's presentation of evidence and the method of questioning witnesses during trial. PCRA counsel addressed the issues in his no-merit letter:

> Defendant claims the prosecutor revealed reports to prosecution witnesses on direct examination where those witnesses did not author them. However, such conduct was appropriate in order to refresh the recollections of witnesses.
>
> . . .
>
> Instantly, while leading questions were employed by the prosecutor on direct examination, there appears to be no pattern of abuse by the use of such questions.

ineffective for failing to "investigate and object to the Commonwealth's (prosecutor's) false testimony, misstatement of facts; and failure to produce expert examination and witness testimony of material evidence that would have negated the Commonwealth's (prosecutor's) case and theory."

The Superior Court reviewed and rejected on the merits Ballard's *Brady* claim that the prosecutor withheld favorable evidence bearing on the mental condition of the Commonwealth's eyewitness, Carl Beck. Ballard relied upon an Affidavit dated February 19, 2011, from Jevon Everett, which states *in toto*, as follows:

> I, Jevon Everett, deposes and says, that the statements set forth herein are of first-hand knowledge, true, certain and complete. These facts I provide in relation to (COMMONWEALTH V. BALLARD) are as follows:
>
> * On February 19, 2011 I (Jevon Everett-Affiant) relayed the following facts to the defendant (Todd Ballard).
>
> 1. I know the key witness (Carl Beck) who was used to testify in the defendant's trial for criminal homicide. I also have knowledge of his character and reputation since the early part of the nineties.
>
> 2. I have known of Carl Beck's Psychological Disorders; and that he has been admitted to the psychological hospital / ward for treatment in the past.
>
> 3. I also have knowledge of his family member (Larry) of whom is in a wheelchair, in my encounters over the years.

> Further, . . ., the record belies any contention that the Commonwealth knowingly presented false testimony.

No-merit letter at 30, 33 (ECF 38-5). The PCRA court found the claims to be without merit, stating that it did not observe prosecutorial misconduct and further explaining that "the Court refuses to speculate on which witness was improperly led, which witness's testimony or evidence was misquoted, which admitted evidence was false. Petitioner has not alleged these facts with enough particularity for the Court to do any more than restate that the Court considered all testimony and evidence advanced by both parties, and found it to be reliable and material in considering a verdict." PCRA § 1925(a) Supplemental Opinion, 4/26/2013 (ECF 38-8 at 73). The Superior Court did not address these claims on the merits.

> I, Jevon Everett, as a competent witness; who is willing, and able to testify to these facts. I also verify that the following statements are the truth. The Affiant also understands that false statements made are subject to 18 Pa.C.S.A. § 4904.
>
> Date: February 19, 2011 s/Jevon Everett

(ECF 53-35 at 16). The PCRA court found that the claim was waived for review under the PCRA. On appeal, the Superior Court declined to find that the *Brady* claim was waived and instead addressed the claim on the merits finding as follows:

> Appellant fails to prove that the evidence he alleges was withheld, concerning a Commonwealth witness's psychiatric admission(s) and criminal convictions, was in the exclusive control of the prosecution at the time of trial,[1] or that Appellant could not have discovered the evidence through reasonable diligence. Accordingly, this claim fails.
>
> [1] Indeed, it is unclear whether the alleged evidence existed at the time of the trial.

Ballard-2 at 5 (ECF 38-9 at 40). The Court finds that the decision of the Superior Court easily withstands review under AEDPA. Ballard has failed to establish that the state court's adjudication of his claim was contrary to or an unreasonable application of then extant Supreme Court precedent, i.e., *Brady v. Maryland.* Nor has he established that the state court's factual determinations were unreasonable. *See Pemberthy v. Beyer*, 19 F.3d 857, 864 (3d Cir. 1994) (holding that presumptions of correctness of state court determinations apply "not only when a state trial court makes what are conventionally regarded as findings of fact, but also when a state appellate court makes factual determinations in a written opinion").

As to the claim of the prosecutor's alleged misstatement of evidence during the trial,[16] this claim is procedurally defaulted for federal habeas review as it was not addressed on the

[16] The allegation that the prosecutor made a "false statement" refers to a statement the prosecutor made in her closing argument - that an operable gun was available to the victim, when in fact the victim's gun was inoperable and was upstairs substantially out of reach and

merits by the state courts and can not now be raised in the state court. Because the claim is procedurally defaulted, and because Ballard has not presented any persuasive argument to overcome the default, this claim should be dismissed.

Additionally, to the extent that the claim could have been raised on collateral review by PCRA counsel as an ineffectiveness of appellate counsel claim (for failing to raise the claim on direct appeal), such a claim cannot excuse the procedural default since the underlying due process claim is without merit, as both the PCRA court and the Superior Court found no merit in the related IAC claim.

Claim Twelve raises IAC claims with respect to counsel failing to object to the alleged prosecutorial misconduct. Both the PCRA court and the Superior Court found the claim to be without merit. The PCRA court found as follows:

> Although ineffectiveness of counsel is grounds for appeal under Section 9543 of the PCRA, the Petitioner fails to present any evidence which proves that trial counsel was ineffective for failure to object to alleged prosecutorial misconduct.
>
> The rules of evidence do not provide grounds for a claim of prosecutorial misconduct. "Prosecutorial misconduct occurs when the effect of the prosecutor's comments would be to prejudice the trier of fact, forming in its mind fixed bias and hostility toward the defendant so that it could not weigh the evidence objectively and render a true verdict." Commonwealth v. Duffy, 831 A.2d 1132 (Pa. Super. Ct. 2003). In the instant case, the prosecution did not make any comments so improper as to affect the Court's decision, and moreover, the Petitioner seems to be alleging improper trial tactics or improper use of the rules of evidence. The Court, however, did not observe the prosecution engaging in either of those behaviors at trial.
>
> Moreover, the Court refuses to speculate on which witness was improperly led, which witness's testimony or evidence was misquoted, which admitted evidence was false. Petitioner has not alleged these facts with enough particularity for the Court to do any more than restate that the Court considered all

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unavailable to the victim. This issue was not addressed by either the PCRA court or the Superior Court.

> testimony and evidence advanced by both parties, and found it to be reliable and material in considering a verdict.
>
> Since the Petitioner's underlying claim concerning alleged prosecutorial misconduct fails, his argument that counsel was ineffective for failing to object to such conduct is therefore meritless and improper, and is dismissed.

PCRA § 1925(a) Supplemental Opinion, 4/26/2013 (ECF 38-8 at 73-74). The Superior Court affirmed the PCRA Court, stating as follows:

> Appellant's next argument challenges trial counsel's ineffectiveness for failing to: (1) investigate relevant evidence; and (2) object to the Commonwealth's misstatement of fact. The sole prejudice Appellant identifies in this argument is that, due to these failings, the trial court "could not evaluate actual evidence before rending his verdict and opinion." Appellant's brief at 38. However, Appellant does not explain how the "actual evidence" would have lead to a different outcome in the proceedings. These claims fail where Appellant does not persuade us that any prejudice resulted from these failings.

Ballard-2, at 7 (ECF 38-9 at 42).

Based on the state courts' analyses, this Court finds that Ballard has failed to meet his burden to prove that the resolution of his claims was either clearly contrary to or a clearly unreasonable application of any federal law. Moreover, the Court finds that Ballard has failed to overcome the presumption of correctness that must be applied to factual conclusions reached by the state court on these claims.

For all these reasons, the Court recommends that Claims Seven, Eight, and Twelve be dismissed.

Claim Fourteen

In his fourteenth ground for relief, Ballard argues that appellate counsel provided ineffective assistance by "failing to investigate, present, and preserve the Petitioner's requested claims of merit for relief (and first establish proper communication)."

The PCRA court rejected the claims on the merits, stating as follows:

> Although ineffectiveness of counsel is grounds for appeal under Section 9543 of the PCRA, the Petitioner fails to present any evidence which proves that appellate counsel was ineffective for failure to litigate and preserve the Petitioner's claims.
>
> It is unclear what claim Petitioner is actually attempting to advance, and the Court agrees that if the Petitioner had possessed any meritorious claims, Attorney Pass would have been responsible for litigating then. But is well-established in PCRA jurisprudence that post-conviction counsel for a defendant may withdraw at any time of the proceedings if he, in the exercise of his professional judgment, determines that issues raised in those proceedings are meritless, and the post-conviction court concurs with his assessment. *Commonwealth v. Bishop*, 645 A.2d 274 (Pa. Super. Ct. 1994). Counsel must first submit a "no-merit" letter detailing the nature and extent of the attorney's knowledge of the case, listing each issue which petitioner wished to raise, and specifically explaining why those issues lack merit. *Id.* The Court, if it agrees with counsel, may then grant him leave to withdraw.
>
> Attorney Pass submitted an exhaustively thorough brief in conjunction with his motion to withdraw, which detailed each claim raised by the Petitioner and explained why each lacked merit. Therefore, since this Court agreed that the Petitioner's PCRA claims were meritless, and granted Attorney Pass's motion to withdraw, his decision not to litigate the Petitioner's claims did not constitute ineffective of counsel.
>
> Therefore, this issue raised by the Petitioner is dismissed as meritless and improper.

PCRA § 1925(a) Supplemental Opinion, 4/26/2013 (ECF 38-8 at 78-79). The Superior Court also rejected the claims on the merits finding as follows:

> Appellant's first IAC claim concerns the failure of direct appeal counsel and PCRA counsel to raise the claims Appellant wished to have raised, which he claims were meritorious. Appellant fails to make any serious effort to develop these claims of ineffectiveness within the [Turner/Finley] framework outlined above; thus, he has failed to persuade us that he is entitled to relief thereupon.

Ballard-2, at 5-6 (ECF 40-41).

The Court recommends that this claim be dismissed as Ballard as not proven that the resolution of his ineffectiveness claim by the state courts was either clearly contrary to or an unreasonable application of the *Strickland* standard.

Claims Fifteen and Sixteen

In Ballard's final two claims, he again raises alleged due process violations. In Claim Fifteen, he contends that the "trial was conducted in violation of the Petitioner's right to be indicted or receive a presentment from a Grand Jury" and, in Claim Sixteen, he contends that the trial court's "conduct violated the Petitioner's right to formal notice of the nature and accusation (procedural due process and equal protection of law)." Both these claims can be dismissed rather summarily.

These claims were never presented to the state courts; thus, the claims are procedurally defaulted. Further, to the extent that the underlying issues could have been raised on collateral appeal in the context of an ineffectiveness of appellate counsel (for failing to raise these two issues on direct appeal), such claims fail as the default cannot be excused since the underlying claims lack merit and, therefore, are not substantial. *Martinez*, 566 U.S. at 13-15 .

Alternatively, even if the Court were to address *de novo* the underlying claims on the merits, the Court would recommend that relief be denied. Claim Fifteen is without merit as the Pennsylvania Constitution allows the initiation of criminal proceedings by criminal information. *See* Pa.Const.Art 1, § 10 ("Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law"); *see also* Pa.R.Crim.P. Rule 560(A) ("After the defendant has been held for court following a preliminary hearing or an indictment, the attorney for the Commonwealth shall proceed by preparing an information and filing it with the court of common pleas").

Ballard's argument that the United States Constitution conflicts with the Pennsylvania Constitution and that the Supremacy Clause of the United States Constitution dictates that the

United States Constitution must prevail is misplaced. The requirement in the United States Constitution regarding grand juries does not apply to Pennsylvania and, moreover, Pennsylvania's Constitution and Rules of Procedure allow charges to be brought by criminal information, as was properly done in this case.

Similarly, Ballard's arguments in support of Claim Sixteen are misplaced. The official state court record reflects that the official criminal complaint filed in Ballard's criminal case includes the necessary signatures and seal by the issuing authority. (ECF 38-1, at 21 - 38). Further, the signature of Ballard's attorney appears on Receipt of Copy of Information confirming that a copy of the criminal information was given to defendant's counsel on April 28, 2006. (ECF 38-1, at 39).

Likewise, Ballard's claim that he was not specifically informed of the degree of homicide for which he would stand trial should also be dismissed as without merit. The criminal information indicates that Ballard was charged with homicide generally under Pennsylvania Criminal Code Section 2501, which states: "Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter." 18 Pa.C.S.A. § 2501(b). Ballard was informed by the criminal information that he was defending against a charge of general homicide and, therefore, each of the grades of criminal homicide.

For these reasons, the Court finds that Claims 15 and 16 are without merit and recommends that both should be dismissed.

D. Request for Evidentiary Hearing

A district court has discretion to grant an evidentiary hearing if the petitioner meets the limitations of section 2254(e)(2). *Goldblum v. Klem*, 510 F.3d 204, 220–21 (3d Cir. 2007). The decision to hold an evidentiary hearing should focus on whether the hearing would be

meaningful. *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000). A petitioner bears the burden of "forecast[ing] . . . evidence beyond that already contained in the record' that would help his cause, 'or otherwise . . . explain[ing] how his claim would be advanced by an evidentiary hearing.' " *Id.* (quoting *Cardwell v. Greene*, 152 F.3d 331, 338 (4th Cir. 1998)). An evidentiary hearing "is not required on issues that can be resolved by reference to the state record." *Id.* at 221 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)).

The Court finds that the record in this case is sufficient to allow review of Ballard's claims, which are either non-cognizable, defaulted, or meritless. Furthermore, Ballard has failed to demonstrate how an evidentiary hearing could assist him in avoiding those inevitable legal conclusions. Thus, the Court finds no basis on which an evidentiary hearing would be meaningful, and the request for an evidentiary hearing should be denied.

E. Certificate of Appealability

Section 102 of AEDPA, which is codified at 28 U.S.C. § 2253, governs the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. It provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong." *Id.* Applying those standards here, the Court concludes that jurists of reason would not find it debatable whether each of Ballard's claims should be dismissed. Accordingly, a certificate of appealability should be denied.

F. Conclusion

For all of the above reasons, it is respectfully recommended that the request for an evidentiary hearing be denied and that the petition for a writ of habeas corpus be dismissed. It is further recommended that there is no basis upon which to grant a certificate of appealability.

Any party is permitted to file Objections to this Report and Recommendation to the assigned United States District Judge. In accordance with 28 U.S.C. § 636(b), Fed.R.Civ.P. 6(d) and 72(b)(2), and LCvR 72.D.2, Petitioner, because he is a non-electronically registered party, may file objections to this Report and Recommendation by **October 1, 2018,** and Respondents, because they are electronically registered parties, may file objections by **September 27, 2018.** The parties are cautioned that failure to file Objections within this timeframe "will waive the right to appeal." *Brightwell v. Lehman*, 637 F.3d 187, 193 n. 7 (3d Cir. 2011).

Dated: September 12, 2018

s/ Cynthia Reed Eddy
Cynthia Reed Eddy
United States Magistrate Judge

cc: TODD DARRELL BALLARD
HK-0416
SCI Albion
10745 Route 18
Albion, PA 16475
(via United States First Class Mail)

Keaton Carr
Allegheny County District Attorney's Office
(via ECF electronic notification)

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

TODD DARRELL BALLARD, Petitioner, v. MICHAEL CLARK,[1] Superintendent, SCI-ALBION, JOHN WETZEL, Secretary of Pennsylvania Department of Corrections; DISTRICT ATTORNEY OF ALLEGHENY COUNTY, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	)	Civil No. 14-cv-1453 Judge Nora Barry Fischer

JUDGMENT ORDER

AND NOW, this 12th day of December, 2018, **IT IS ORDERED** that final judgment of this Court is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure in favor of Respondents Michael Clark, Superintendent of SCI-Albion, the District Attorney of Allegheny County, John Wetzel, Secretary of Pennsylvania Department of Corrections, and The Attorney General of The State of Pennsylvania, and against Petitioner, Todd Darrell Ballard.

s/ Nora Barry Fischer
Nora Barry Fischer
United States District Judge

[1] Effective March 27, 2016, Michael Clark was appointed as the Superintendent of SCI-Albion. Under Federal Rule of Civil Procedure 25(d)(1), he is automatically substituted as the respondent in this action.

cc/ecf: All counsel of record

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Additional material from this filing is available in the Clerk's Office.