IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 228 WAL 2004
	:	
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court entered March 19, 2004, at No. 332WDA2004, quashing the appeal from the Order of the Court of Common Pleas of Clearfield County entered January 8, 2004 at No. 82-481-CRA.
v.	:	
	:	
CHARLES S. RENCHENSKI,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 25th day of January, 2005, the petition for allowance of appeal is GRANTED. The order of the Superior Court is vacated and the matter is remanded to the Superior Court for disposition on the merits in light of the fact that the appeal from the order of the Court of Common Pleas of Clearfield County was timely. See Pa.R.Crim.P. 114; Pa.R.A.P. 301.

Judgment Entered January 25, 2005,

John A. Vaskov

DEPUTY PROTHONOTARY

EXHIBIT - 1

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 4 WAL 2010
	:	
Respondent	:	Petition for Allowance of Appeal from the
	:	Order of the Superior Court
	:	
v.	:	
	:	
	:	
CHARLES S. RENCHENSKI,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 25th day of October, 2010, the Application for Leave to File Supplement to Petition for Allowance of Appeal is **DENIED**. The Petition for Allowance of Appeal is **GRANTED**, limited to the following issues:

1. Whether the Superior Court erred in concluding that 42 Pa.C.S. § 9543(b) of the Post Conviction Relief Act (PCRA) applies to delay in litigating a pending PCRA petition?

2. What obligation, if any, does a petitioner have to seek expeditious litigation of his PCRA petition?

The trial court is directed to appoint counsel to assist Petitioner with this appeal.

A True Copy Patricia Nicola
As of: October 25, 2010
Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

EX. 2

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA Plaintiff	:	
vs.	:	No. 82 - 481 - CRA
CHARLES S. RENCHENSKI Defendant	:	

PETITION FOR LEAVE TO WITHDRAW AS COUNSEL
AND FOR PAYMENT OF FEES

TO: THE HONORABLE JOHN K. REILLY, PRESIDENT JUDGE

NOW COMES John R. Ryan, Esquire, counsel for the abovenamed Defendant, and petitions the Honorable Court as follows:

1. Your Petitioner was appointed Counsel for Charles S. Renchenski by Order of this Court dated March 6, 1992, pursuant to a Petition for Post Conviction Relief filed by Mr. Renchenski pro se.

2. Mr. Renchenski was convicted after trial by jury of first degree homicide and on January 30, 1985, was sentenced to life imprisonment.

3. Your Petitioner has reviewed the case, including a careful review of the trial transcript and the appeals filed on behalf of the Defendant, and has concluded that there exist no issues which are the proper subject of a Petition under the Post Conviction Relief Act.

LAW OFFICES OF
COLAVECCHI & RYAN
221 E. MARKET ST.
(ACROSS FROM
COURTHOUSE)
P. O. BOX 131
CLEARFIELD, PA.

EX. 3

4. Your Petitioner has advised Defendant of his conclusions, and has requested that Defendant give his written permission for Petitioner's withdrawal as counsel.

5. Attached is a true copy of a letter dated July 2, 1993, from Defendant to Petitioner which indicates that Defendant does not object to Petitioner being released as counsel. See Exhibit "A".

6. Your Petitioner has incurred time on behalf of Defendant as set forth on the statement attached hereto as Exhibit "B".

WHEREAS, Petitioner respectfully requests that he be granted leave to withdraw as Counsel for Charles S. Renchenski, and that Counsel fees be paid as set forth at Exhibit "B" herein.

Respectfully submitted,

JOHN R. RYAN, ESQUIRE

LAW OFFICES OF
COLAVECCHI & RYAN
221 E. MARKET ST.
(ACROSS FROM
COURTHOUSE)
P. O. BOX 131
CLEARFIELD, PA.

Sir:

2-2-93

In response to your recent letter informing me that there's nothing you can do to help me in the courts, and your desire to be relieved from representing me.

Needless to say, I wasn't encouraged by your letter. To be honest, I simply can't believe there's "nothing" that can be done. First of all, the only evidence they had were my own statement which I've constantly affirmed was forced and not 100% accurate, for God's sake they (the police) threatened my grandmother, then appeared with her at the mission!

From your letter it's painfully clear that you don't wish to be involved with my case, so it's also evident that you would not be able to effectively produce a qualified in-depth argument in my defense; therefore, as you've requested, here's a written release from me of your services.

Respectfully,

Randie A. Pinchback

EXHIBIT A

R. 52b

DATE	TYPE OF SERVICE	TIME
3/11/92	Review of docket entries and Petition	15 mins.
3/12/92	Letter to Charles Renchenski	5 mins.
6/30/92	Review of Post-trial Motions; trial transcript; Memorandum and Order	60 mins.
6/30/92	Review of trial transcript	40 mins.
7/01/92	Review of trial transcript	45 mins.
6/16/93	Letter to Charles Renchenski with evaluation of case	15 mins.
	TOTAL:	165 MINS.
	165 mins. at $30 per hour:	$82.50
	TOTAL:	$82.50

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CLEARFIELD, PA.

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA Plaintiff	:	
vs.	:	No. 82 - 481 - CRA
CHARLES S. RENCHENSKI Defendant	:	

ORDER

AND NOW this 12 day of July, 1993, upon consideration of the foregoing Petition, and the Court being satisfied that the Defendant consents to the withdrawal of John R. Ryan, Esquire, as counsel as evidenced by Exhibit A attached to said Petition, it is therefore ordered that John R. Ryan, Esquire, is hereby granted leave to withdraw as counsel for Charles S. Renchenski, and counsel fees in the amount of $82.50 are hereby approved.

BY THE COURT:

/s/ John K. Reilly, Jr.

JOHN K. REILLY, JR.
PRESIDENT JUDGE

JUL 13 1993

LAW OFFICES OF
COLAVECCHI & RYAN
221 E. MARKET ST.
(ACROSS FROM
COURTHOUSE)
P. O. BOX 131
CLEARFIELD, PA.

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

CHARLES S. RENCHENSKI, Petitioner,	:	
v.	:	Case No. 3:10-cv-217-KRG-KAP
DAVID A. VARANO, SUPERINTENDENT, S.C.I. COAL TOWNSHIP, Respondent	:	

Report and Recommendation

Recommendation

Petitioner Charles Renchenski's Amended Petition for a writ of habeas corpus, docket no. 18, should be denied without a certificate of appealability.

Report

I

In the early morning hours of August 18, 1982, Charles Renchenski killed Rosemarie Foley by manual strangulation. According to Renchenski's statements to investigating officers approximately a week later he encountered Foley in a bar in Clearfield County, Pennsylvania, on August 17, 1982 and after several hours of drinking and playing pool drove with her to an isolated rural location, intending to have her perform oral sex on him. When (again according to Renchenski) Foley expressed a preference for intercourse and mocked Renchenski's manliness in not wishing to have intercourse by grabbing his testicles and stating that if he wasn't going to use them he really didn't need them, Renchenski punched the much smaller Foley in the face, knocking her to the ground. He then strangled her.

APPENDIX "A"

The Amended Petition sets out what Renchenski presumably intends as an exculpatory version of events:

> The series of events in this case involved, in material aspects, that Mr. Renchenski tried to get oral sex from Ms. Foley, who declined. Mr. Renchenski was sucking on Ms. Foley's breast and caressing her vagina with his hand when Ms. Foley said, while fondling his penis and ball sack "if you don't fuck women then you don't need these" and squeezed down on his balls. Due to the amount of alcohol Ms. Foley consumed, she had a .24 alcohol level, she squeezed quite hard on Mr. Renchenski's balls. In the hope that she would let go Mr. Renchenski bit down on her breast. Rather than let go Ms. Foley yanked real hard on Mr. Renchenski's testicles. That pain and shock caused Mr. Renchenski to snap out, hit Ms. Foley and immediately choke her to death.

docket no. 18 at 27. Renchenski mutilated Foley's corpse by cutting skin off her right breast, then hid Foley's body in the brush by the side of the road and drove away in her car. After Foley's decomposing body was found on the afternoon of August 20, 1982, the autopsy disclosed multiple blunt force traumas to Foley's face and torso and abrasions and contusions to her genitals. See also Renchenski v. Williams, 622 F.3d 315, 320 (3d Cir.2010).

Because there was no dispute as to the cause of death and because Renchenski had given a statement to the police admitting that he was the one who strangled Foley (Renchenski gave two taped statements to the Pennsylvania State Police troopers investigating Foley's death; in the first of two statements, given on August 22, 1984, Renchenski denied any involvement in Foley's death; in the second on August 24, 1984, Renchenski gave an account admitting having strangled Foley) the trial focused on the degree of Renchenski's guilt. Trial counsel, Kim Kesner, Esquire, and John

Sughrue, Esquire, pursued the tack that Renchenski was guilty only of voluntary manslaughter because the sudden intense pain caused by Foley constituted serious provocation.

Renchenski took the stand at trial, presided over by President Judge John Reilly. Renchenski told the jury that he went to the Wagon Wheel, a bar in Soldier, Pennsylvania, at about 3:30 p.m. on Tuesday, August 17, 1982. He picked that bar because it had draft beer at half price and a pool table; Renchenski liked to play pool because he was good at it and the custom was that the loser bought the winner a beer. Renchenski said that he did not know Foley before that day, and met her after her arrival at what was estimated by other witnesses as 8:30 p.m.. The two of them spoke and danced together, while Renchenski continued to play pool for some time. Renchenski then left (he recalled on cross-examination that it was dark when he did so) and drove to the Rhododendron Bar in Sykesville; Foley followed in her car some time after. The two of them spoke and drank some more - Renchenski said he had a couple of beers - and because the bar was not busy they spoke about going to Reas's (sometimes in the record as Reese's), a bar near DuBois. They drove there together in Foley's car, and as they traveled Renchenski said that he suggested that he drive because she was intoxicated and looked like she was going to wreck; Foley moved to the passenger seat and let Renchenski drive. The two arrived at Reas's at what one witness estimated was about five

minutes before 1:00 a.m. on August 18, 1982. Renchenski testified they drank there and then left before closing time, with Renchenski driving, to find "a secluded place to do a little necking."

After driving around for half an hour, Renchenski said, they parked in a place he might have driven by at some point when on his motorcycle but with which he had no particular familiarity, and the two began kissing and fondling one another. Renchenski testified that he thought that he could have Foley perform oral sex on him, and he suggested it nonverbally and she declined nonverbally. On cross-examination Renchenski also recalled her saying "I don't do that." Renchenski thought that he could have Foley change her mind about oral sex if they left the car and continued their activity. He said the two of them moved outside with Foley seated on the hood of her car and Renchenski sucking on her breasts, and then Foley took her pants off and groped Renchenski in a nonverbal suggestion that the two have intercourse, which Renchenski declined nonverbally. On cross-examination Renchenski recalled that he also said "something to the nature that I ain't going to fuck you."

Renchenski testified that Foley then "persisted a little bit," and when he said "no, I'm not going to do it," she made a response that amounted to "if you don't fuck women you don't need these" and pulled on his testicles. Renchenski said that he then bit down on Foley's breast "in hopes that she'd leave go" but this

provoked a "healthy tug" from Foley. Renchenski said he responded with another, harder, bite, to which Foley responded with a "healthy yank," and at this point "I snapped out and hit her." Renchenski said he hit Foley "as a follow through motion, I don't know, it was a rapid succession -- socked her and hit her with a log." Foley fell off the hood and Renchenski said "I just went right after her." He then strangled Foley.

Renchenski did not describe the strangulation itself, responding to his counsel's question about whether he applied pressure to Foley's throat with the answer "I'd imagine so." Renchenski resumed his more detailed account at a point after Foley was dead, relating that he sat down and cried by her body, then decided to attempt to cover up his bite marks by slicing Foley's skin off with a razor blade that he found in Foley's car, then pulling Foley's body back a "couple" or a "few" feet into the brush where it was eventually found. Renchenski did not explain how Foley's body acquired the multiple blunt force injuries and contusions described in the autopsy. Renchenski did explain that he then drove Foley's vehicle to his residence, then called a friend and retrieved his own automobile from the Rhododendron. The next morning he drove Foley's car to where he thought she lived in Sykesville and left it, keeping the keys. His explanation to the jury for this behavior was the following process:

> ... somehow during the night what actually happened was blocked out and there was a story in my conscious mind except exactly what

happened. I mean, somehow a mental block formed and that is what came out. I thought she had left with somebody at Reas's, I thought she was going to be getting her car sometime.

T.T. at 450. The jury convicted Renchenski of first degree murder on July 12, 1984. On January 30, 1985, Judge Reilly sentenced Renchenski to life imprisonment.

II

In August 2010, Renchenski filed a federal habeas corpus petition at docket no. 1, asserting that his confinement violated the Due Process Clause because of "Excessive & Inordinate delay in processing PCHA petition by state court& denying opportunity to be heard on claims," Petition, ¶12 Ground One; because the jury instruction was erroneous, Petition, ¶12 Ground Two; because the inculpatory statements used in his trial were obtained in violation of the Sixth Amendment, Petition, ¶12 Ground Three; because the trial court should have changed the venue of trial, Petition, ¶12 Ground Four; because trial counsel was ineffective in violation of the Sixth Amendment in failing to call or use the deposition of Dr. Walter Finken, who had examined Renchenski while he was committed at Warren State Hospital, to support a heat of passion defense, Petition, ¶12 Ground Five; because the prosecutor's closing argument was inflammatory, Petition, ¶12 Ground Six; because trial counsel was ineffective in failing to call character witnesses, Petition, ¶12 Ground Seven; because trial counsel was ineffective in failing to preserve any of the claims already mentioned,

Petition, ¶12 Ground Eight; and because Renchenski was actually innocent of first degree murder. Petition, ¶12 Ground Nine.

Renchenski noted in his petition that there were ongoing state court proceedings and that he intended that his petition to be filed protectively. I stayed the petition and directed Renchenski to keep me informed of the progress of the state court proceedings. In June 2012 I added the District Attorney of Clearfield County to the docket for notice purposes and then directed Renchenski and the D.A. to keep me advised of the state court proceedings. Renchenski advised that his state court proceedings had finished in October 2012, filed the Amended Petition in November 2012, and in January 2013 filed a motion at docket no. 21 to amend his petition yet again to add a claim that the state court's delay in disposing of his collateral attack on his conviction violated due process and justified his release. I granted the motion to amend, docket no. 22, and the amendment was filed at docket no. 23, but it can be disposed of without further discussion because even if Renchenski were correct in blaming the state courts for any delay in disposing of his collateral attack on his conviction all of Renchenski's precedents, see Brief in Support, docket no. 24, address delay by state courts in disposing of direct appeals. There is no federal claim that delay in disposing of a collateral attack violates the Sixth Amendment.

Hassine v. Zimmerman, 160 F.3d 941, 954-55 (3d Cir.1998), cert. denied, 526 U.S. 1065 (1999).

The respondent responded in March 2013 at docket no. 28. Renchenski then sought and was granted additional time to file a reply to the response, which he filed at docket no. 30. I then had my deputy clerk obtain copies of the trial transcript and the transcript of the hearing on Renchenski's petition under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S.§ 9541 et seq. See docket no. 31. This prompted a letter from Renchenski at docket no. 32 wondering if there had been *ex parte* contacts between me and counsel for the respondent. Since then Renchenski has sent several letters at docket nos. 33-36 incorrectly characterizing his habeas petition as ripe for decision since August 2010. I had my deputy clerk obtain copies of Newman's amended PCRA petition, see docket no. 37. Renchenski then sought to expand the record to obtain additional material, docket no. 38; the respondent provided the transcript of Renchenski's withdrawal of his guilty plea, docket no. 40. This prompted a motion from Renchenski for additional material, docket no. 41, in response to which the respondent additional parts of the pretrial, trial, and appellate record at docket no. 45.

The operative Amended Petition asserts six claims:

1) Trial counsel was ineffective for failing to call or use the deposition of Dr. Walter Finken and to depose or call other

medical professionals to negate the element of specific intent on the ground that Renchenski was at the time of the killing suffering from mental disorders, intoxication, marijuana use, an underdeveloped brain and the heat of passion. Amended Petition, Question Presented for Review 1.

2) Trial counsel was ineffective for failing to obtain the suppression of the inculpatory statements used in his trial that were obtained in violation of the Fifth and Sixth Amendments. Amended Petition, Question Presented for Review 2.

3) Trial counsel and appellate counsel were ineffective for failing to challenge the jury instruction on first degree murder. Amended Petition, Question Presented for Review 3.

4) Trial counsel and appellate counsel were ineffective for failing to challenge the prosecution's closing argument. Amended Petition, Question Presented for Review 4.

5) Trial counsel and appellate counsel were ineffective for failing to challenge alleged falsehoods in the affidavit of probable cause used to support the complaint. Amended Petition, Question Presented for Review 5.

6) Trial counsel was ineffective for failing to call character witnesses. Amended Petition, Question Presented for Review 6.

III

A.

Before reaching any of Renchenski's claims on their merits it is necessary to determine whether he properly preserved them for review. Habeas corpus is an extraordinary proceedings that exists as a remedy for extreme malfunctions in the state court criminal process, Harrington v. Richter, 562 U.S. 86, 102 (2011), not an opportunity to ask federal court to take a second look at claims unsuccessfully raised in the state court appeals process, much less to examine claims that despite the opportunity to do so the petitioner did not raise in the state courts. A federal court therefore cannot grant relief on any claim unless the petitioner first exhausted the claim by properly presenting it to the state courts. 28 U.S.C.§ 2254(b)(1)(A); Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir.2002). Proper presentation which will exhaust a claim requires presenting the same facts and legal basis for the claim to the Court of Common Pleas and to the Pennsylvania Superior Court. Lambert v. Blackwell, 387 F.3d 210, 234 (3d Cir.2004); see also Duncan v. Henry, 513 U.S. 364, 365-66 (1995)(per curiam).

When a petitioner did not exhaust a federal claim and cannot now exhaust it because there is some procedural bar under state law, that claim is considered procedurally defaulted, Lines v. Larkins, 208 F.3d 153, 160 (3d Cir.2000), unless petitioner can could show "cause" for the default, that is, that some objective

factor "external to the defense" impeded efforts to comply with the state's procedural rule, and "actual prejudice," Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Murray v. Carrier, 477 U.S. 478, 488, 494 (1986), or else demonstrates a miscarriage of justice, that is, that he is actually innocent and no reasonable juror could have found him guilty. Schlup v. Delo, 513 U.S. 298, 316 (1995). Outside the unique rules that apply to capital punishment the miscarriage of justice exception to procedural default typically requires new and reliable physical, scientific, or eyewitness evidence that would persuade any rational juror that the petitioner could not have committed the crime for which he was convicted. See Hubbard v. Pinchak, 378 F.3d 333, 339-40 (3d Cir.2004). Because rearguing what the jury might have concluded from the trial testimony is not evidence of actual innocence I do not discuss further any claim that Renchenski is actually innocent.

For procedural default to bar federal habeas review of a claim presented to the state courts, the last state court to consider the claim must actually have declared that it will not consider the claim because of an independent and adequate procedural bar to the petitioner's claims. Independent means that the state law barrier is not dependent on an evaluation of the merits of the federal claim. For instance, a state court refusing to consider a claim because it was not raised in a timely fashion is relying on an independent ground; a state court refusing to

grant relief on the basis that a claim is unsupported by the facts is not relying on an independent ground.

Adequate means that the state court procedural bar is one that is well-established and regularly (but not necessarily universally) applied with sufficient clarity that the petitioner was on notice of what conduct was required. An exorbitant rule that appears to exist for no other purpose than to bar review of a claim or a rule that would have given no real opportunity to raise a claim is not an adequate rule that would bar review of a federal claim. In sum, federal habeas review of a claim is precluded if review was denied in the state courts based on a state procedural rule that is firmly established and consistently followed. Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012).

B.

To understand the procedural default issues in this case one needs to follow the history of the prosecution and also of Renchenski's collateral attacks on his conviction. After the discovery of Foley's body, members of the Pennsylvania State Police determined from interviewing bar patrons that Foley had last been seen with Renchenski, and they obtained a criminal complaint and an arrest warrant on August 21, 1982. They did not immediately arrest Renchenski, who lived with his grandmother Anna Renchenski, because he was not there when they went to her residence. On Sunday, August 22, 1982, Renchenski called the state police to find

out why they had been at his grandmother's residence, then came to the DuBois barracks as requested, received warnings in accordance with Miranda v. Arizona, 384 U.S. 436 (1966), and gave a taped statement that generally denied any involvement in Foley's death. Renchenski was then arrested, arraigned, and taken to the Clearfield County Prison on Sunday evening, August 22, 1982. The next day, Monday August 23, 1982, Trooper Thomas Fedigan went to the prison, read Renchenski his rights and for about an hour talked with him about Foley's death. Renchenski seemed foggy, tired from little sleep, and confused; because the exchange seemed unproductive Fedigan asked to talk to Renchenski the next day. Fedigan testified that Renchenski expressed some concern about his grandmother.

On August 24, 1982, Fedigan, along with Trooper Frank Muto and Anna Renchenski, returned to the prison. The troopers advised Renchenski of his rights and left him with his grandmother for about ten minutes. After talking with his grandmother Renchenski executed a waiver acknowledging that he had been advised of his right to counsel and waived that right, and gave a second taped statement, this one confessing to killing Foley. The statement is similar to Renchenski's trial testimony except for the significant comment that the reason Renchenski decided to strangle Foley was that when she threatened to tell her friends that Renchenski refused to have intercourse and hit her "I decided she

wasn't gonna tell anybody and I started choking her." The latter statement appears as an exhibit to the Amended Petition at docket no. 18-3 and at docket no. 45-16 at 14-30; the former statement is docket no. 18-5 and at docket no. 45-16 at 31 through docket no. 45-17 at 22.

Renchenski's first counsel was Benjamin Blakely, Esquire, the Public Defender of Clearfield County. On February 18, 1983 Renchenski, represented by Blakley, reached an agreement to enter a guilty plea to homicide generally and then in May 1983 was remanded to Warren State Hospital for an evaluation of his mental state for the purposes of preparing for a hearing to determine the degree of guilt. Renchenski was at Warren from May 20 to June 27, 1983, and the evaluation was performed by the head of the forensic unit, Dr. Finken; a deposition of Dr. Finken was taken in October 1983. In late December 1983, Renchenski, still represented by Blakely, moved to withdraw his guilty plea. docket no. 45-2 at 17-18. Judge Reilly granted that motion, scheduled the matter for trial, and heard pretrial motions, including one asserting that Renchenski's inculpatory statements should be suppressed as the fruits of an arrest made without probable cause. Blakely's pretrial motions were denied on April 6, 1984. On April 25, 1984, Blakely moved to withdraw as counsel because Renchenski had in March 1984 filed a federal habeas corpus petition, see Renchenski v. Fulcomer, Case No. 84-cv-700-ANB-IJS (W.D.Pa.August 30, 1984)

accusing him of ineffectiveness. See docket no. 45-2 at 8-10. Judge Reilly at first ordered the matter be assigned to another member of the Public Defender's Office but then shortly thereafter replaced the Public Defender's Office with John Sughrue, Esquire, and Kim Kesner, Esquire. Sughrue and Kesner litigated additional pretrial motions, including ones for suppression of Renchenski's statements as having been taken in violation of Miranda, for Judge Reilly to recuse from the case, and for change of venue on the grounds of pretrial publicity. They then represented Renchenski at trial from July 9 through July 12, 1984.

Judge Reilly denied post-trial motions in a Memorandum Order at Commonwealth v. Renchenski, No. 82 CR 481 (C.P. Clearfield January 11, 1985), see docket no. 28-2 at 49-67. After sentencing Renchenski on January 30, 1985, Judge Reilly at first appointed Allen Welch, Esquire, the new Public Defender, to handle the direct appeal, and then re-appointed Sughrue and Kesner on April 29, 1985. The Pennsylvania Superior Court affirmed the conviction and sentence on March 3, 1986. Commonwealth v. Renchenski, No. 256 PGH 1985 (Pa.Super. March 3, 1986), see docket no. 28-2 at 68-. Counsel raised seven issues on direct appeal: 1) Renchenski's arrest was not supported by a valid warrant because the affidavit in support of the complaint lacked probable cause; 2) Renchenski's inculpatory statements were the fruit of the unlawful arrest; 3) Renchenski's inculpatory statements were obtained in violation of

Miranda; 4) Judge Reilly should have recused; 5) there was a violation of Pa.R.Crim.P. 1100 (Pennsylvania's relatively new effort to push trial courts to provide speedier criminal trials particularly for defendants in custody, now codified as Rule 600) either due to Judge Reilly's error or to Blakely's ineffectiveness; 6) Judge Reilly should have found Blakely ineffective; and 7) the evidence was insufficient to sustain the conviction.

The appellate panel rejected the first claim and therefore the second claim because it agreed with Judge Reilly's finding that the affidavit in support of the August 21, 1982 complaint was adequate to provide probable cause, and further that there was probable cause for a warrantless arrest when Renchenski was actually arrested on August 22, 1982. As for the Miranda claim, the panel approved Judge Reilly's pretrial decision denying suppression based on his finding that Renchenski's waiver of his right to counsel was knowing and voluntary. The court found that there was no error in Judge Reilly deciding whether he should recuse from the case, and that the evidence that Judge Reilly made comments that were reported in the local newspaper did not show bias, prejudice, or unfairness that would require recusal.

The Pennsylvania Superior Court also denied the Rule 1100 claim, adopting Judge Reilly's opinion discussing the reasons (including the entry of and withdrawal of Renchenski's guilty plea) for the various continuances he granted in the pretrial period; the

Because no Finken and no proper questioning

Superior Court summarily denied the sufficiency of the evidence claim with the comment that the record "overwhelmingly supports" a finding of specific intent. The Pennsylvania Supreme Court denied review without comment.

In October 1987, Renchenski filed a federal petition for a writ of habeas corpus in this court at Renchenski v. Fulcomer, Case No. 87-cv-2090-ANB-IJS (W.D.Pa. March 16, 1988); it was dismissed and there was no appeal.

In May 1988, Renchenski filed a *pro se* collateral attack on his conviction on a form prepared for use under the Post Conviction Hearing Act, the predecessor to the PCRA that by then was in effect. To distinguish it from later filings I will refer to it as the PCHA petition. The PCHA petition raised three issues: 1) that Judge Reilly erred in finding some unspecified pretrial issues waived without a determination that if there were issues that were waived counsel must have been ineffective; 2) Judge Reilly should have recused; and 3) Renchenski was denied a speedy trial in violation of the Sixth Amendment.

Judge Reilly summarily dismissed the PCHA petition on May 12, 1988, because he believed it presented only issues already litigated on direct appeal. Renchenski appealed, and on April 12, 1989, the Pennsylvania Superior Court vacated Judge Reilly's dismissal and remanded the PCHA petition for the appointment of counsel and the filing of an amended petition.

The next activity was almost three years later, when in March 1992 Judge Reilly appointed John Ryan, Esquire, to represent Renchenski. Ryan, asserting that his review of the record disclosed no basis for a collateral attack on the conviction, moved to withdraw the following July. Ryan attached to his motion a July 2, 1993 letter from Renchenski in which Renchenski expressed his belief that the only evidence against him was his statement and that his statement was coerced by a threat against his grandmother; Renchenski ended with "as you've requested, here's a written release from me of your services." On July 12, 1993, Judge Reilly granted Ryan leave to withdraw and ordered that he be paid for the time he had spent. Judge Reilly did not issue an order dismissing the petition, nor did he appoint new counsel.

There the matter sat. In 1988 Pennsylvania amended the PCRA to add 42 Pa.C.S.§ 9543(b), which provides that even if a petitioner proves eligibility for relief:

> the petition shall be dismissed if it appears at any time that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner.

In 1995 Pennsylvania further amended the PCRA to include a one-year statute of limitations. In 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act, changing in significant respects the deference that a federal court considering a habeas petition owes to state court decisionmaking.

In June 2003, one month shy of ten years after Ryan withdrew from the case, Renchenski filed *pro se* what was styled as "Extension of Post Conviction Relief Petition Under §§ 9542, 9543(a)(1)(ii)(iii), and 9545(b)(2)." Renchenski again asserted that he was as a matter of law innocent of first degree murder and that his confession had been coerced, but the heart of the Extension was a claim of new exculpatory evidence: Renchenski asserted that 1) he had received a letter from one Patricia Roy who would testify that she overheard a conversation during the trial between several state troopers in which the troopers admitted to Brady v. Maryland violations, specifically that the bite marks found on Foley were from a man missing a front tooth and "none were bite marks that had matched Renchenski." Roy also would testify that a former boyfriend of her daughter admitted to Roy's daughter that his (the daughter's boyfriend's) brother saw one Donny Olson at or near the crime scene on the night of the murder unloading something from his van. This Donny Olson allegedly was a violent criminal with a record for attacking women.

Renchenski also asserted that 2) he had received a letter from a cousin (first name Brian, apparently in prison) who said that there was an alibi witness, one Beth Shaginaw, who had admitted to Brian that she was with Renchenski when the murder was allegedly committed. He also asserted that based on Roy's observation, Donny Olson was missing a tooth and it was fair to

conclude his bite mark pattern matched the bite marks on Foley. Renchenski's new PCRA pleading also claimed that: 3) Renchenski's bite mark pattern did not match the marks on Foley and that a forensic odontologist should be appointed to confirm this; 4) Renchenski was so intoxicated on the night of August 17, 1982 that he could not have formed the specific intent to kill necessary for first degree murder, and that a forensic toxicologist should be appointed to support this; 5) Sughrue and Kesner had been ineffective for failing to obtain a forensic toxicologist to testify about Renchenski's intoxication; and 6) Sughrue and Kesner had been ineffective for failing to call Dr. Finken as a witness or introduce his deposition in support of a claim that Renchenski could not have formed the specific intent to kill necessary for first degree murder. Renchenski did not appear to be aware that his last three claims of ineffectiveness were inconsistent with his first three claims that Danny Olson and not Renchenski killed Foley.

Judge Reilly dismissed the pleading "as untimely filed." Renchenski appealed to the Pennsylvania Superior Court (which originally dismissed the appeal as untimely but was reversed on that point by the Pennsylvania Supreme Court) and on August 8, 2006, the Pennsylvania Superior Court vacated Judge Reilly's dismissal and remanded for further proceedings. Commonwealth v. Renchenski, No. 332 WDA 2004 (Pa.Super. August 8, 2006). The

Pennsylvania Superior Court reasoned that the Extension was not untimely because it was an attempt to amend the PCHA petition that had been filed at a time when the PCRA had no statute of limitations for collateral attacks.

Judge Reilly had taken senior status in 2004 and the matter was inherited by the Honorable Fredric Ammerman, who in August 2006 promptly appointed Gary Knaresboro, Esquire, to represent Renchenski. Shortly thereafter, Renchenski hired private counsel, George Newman, Esquire, and Newman entered an appearance in April 2007. Newman filed in October 2007 what he called an Amended Petition for Relief under the Post Conviction Hearing Act that more correctly is an amended PCRA petition. It abandoned the Extension's newly discovered evidence of innocence claims and asserted six claims of ineffective assistance of counsel on the part of Blakely and Sughrue/Kesner: 1) the jury charge was erroneous in its definition of malice and Sughrue/Kesner were ineffective for failure to raise this claim at trial and on direct appeal; 2) Blakely and Sughrue/Kesner, although attempting to suppress Renchenski's inculpatory statements based on a Miranda violation, were ineffective for failing to also challenge the confesssion under the Sixth Amendment; 3) Blakely and Sughrue/Kesner, although moving for a change of venue, were ineffective for failing to raise the issue on direct appeal; 4) Sughrue/Kesner allegedly were ineffective for failing to call Dr.

Finken as a witness (or move his deposition into evidence if Dr. Finken were unavailable) because "Dr. Finken testified that Mr. Renchenski did not intentionally kill the decedent" and provided other testimony in his deposition that would have supported the heat of passion defense. As with the other claims, this one allegedly was not preserved due to ineffective assistance of counsel on direct appeal; 5) Sughrue/Kesner, although they objected to the prosecution's closing argument, were ineffective for failing to challenge other parts of the closing argument. They were also allegedly ineffective for failing to raise on appeal any claim about the improper closing argument; and 6) Sughrue/Kesner were allegedly ineffective for failing to call two proposed witnesses: Beth Shaginaw, mentioned above, and a Gerald Campbell. The proffer as to Shaginaw did not include the claim that she was with Renchenski at the time of the murder or a claim that her existence was known to counsel at the time of trial; the proffer as to Campbell did not claim that he was available when the trial took place or that his existence was known to counsel at the time of trial.

In March 2008 the District Attorney moved to dismiss the amended PCRA petition on the grounds that it was untimely. In July 2008, the District Attorney amended its motion to dismiss the amended PCRA petition under 42 Pa.C.S.§ 9543(b) on the grounds that the Commonwealth would be substantially prejudiced in retrying

Renchenski due to the delay in filing the amended PCRA petition. Judge Ammerman held argument on the motion July 25, 2008 and received testimony by proffer that many of the witnesses from the trial were dead, incapacitated, or not easily located. Judge Ammerman denied the March 2008 motion that claimed the amended PCRA petition was untimely but granted the July 2008 supplemental motion that delay had caused prejudice to the Commonwealth. Judge Ammerman found that due to the death, disability, or other unavailability of witnesses the Commonwealth would be prejudiced if Renchenski were permitted to proceed and on January 30, 2004, issued an Opinion and Order dismissing the amended PCRA petition. Judge Ammerman found that the claim of ineffectiveness (Issue 6(B) in the amended PCRA petition) that trial counsel should have but did not attempt to have Renchenski's August 24, 1982 statement suppressed because of a violation of the Sixth Amendment should in the alternative be dismissed as previously litigated and because trial counsel had not been ineffective.

Renchenski, represented by Newman, appealed to the Pennsylvania Superior Court, raising two issues: 1) Judge Ammerman erred in dismissing the PCRA petition because Renchenski had no duty or opportunity to expedite his collateral attack; and 2) Judge Ammerman erred in dismissing a PCRA petition containing meritorious issues because any delay was the fault of the trial court and the Commonwealth. Newman did not present as a separate issue Judge

Ammerman's dismissal on the merits of the claim that Blakely or Sughrue and Kesner should have attempted to have Renchenski's August 24, 1982 statement suppressed under the Sixth Amendment.

The Pennsylvania Superior Court affirmed the dismissal of the amended PCRA petition at Commonwealth v. Renchenski, No. 241 WDA 2009 (Pa.Super. January 21, 2010). The appellate court held that 42 Pa.C.S.§ 9543(b) applied to both the original PCHA petition and Newman's amended PCRA petition because even though Section 9543(b) applied to delays in "filing" it should be construed to apply to delays either in filing or litigating and Renchenski had abandoned his original PCHA petition. Id., slip op. at ¶7. The court also rejected Renchenski's argument that the Commonwealth's duty to quickly resolve collateral attacks was analogous to its duty to provide a speedy trial under Pa.R.Crim.P. 600 (the successor to Rule 1100). To the contrary, the Superior Court held the Commonwealth bore no responsibility for any delay, writing "it is beyond question that it is a defendant's duty to avail himself of the Act's provisions." Id., slip op. at ¶6.

Finally, the Superior Court found that as to the claim of "meritorious issues" Newman had not set forth any argument why they were meritorious and concluded that as a result the claims were waived under Commonwealth v. Perry, 877 A.2d 477, 485 (Pa.Super.2005). Id., slip op. at ¶9.

Renchenski, now represented by Paul Colavecchi, Esquire, sought review by the Pennsylvania Supreme Court. On October 25, 2010, the Pennsylvania Supreme Court granted allowance of appeal to review two questions: 1) whether 42 Pa.C.S.§ 9543(b) applies to delays in litigating (as opposed to the original filing) of a PCRA petition; and 2) whether a PCRA petitioner has any obligation to seek expeditious litigation of a pending petition. The Pennsylvania Supreme Court affirmed the denial of relief at Commonwealth v. Renchenski, No. 34 WAP 2010 (Pa.September 28, 2012).

The Pennsylvania Supreme Court's unanimous opinion (by Justice Saylor, with an additional concurrence by Justice Todd) is a Solomonic splitting of the positions of the respondent and petitioner: Section 9543(b) applies to the "delay in filing" of petitions and not to delays in litigating them; but "petitions" means "amended petitions" as well. That is, Section 9543(b) permits dismissal of an amended petition if the delay in filing the amended petition is found to be prejudicial to the Commonwealth's ability to retry its case. The Pennsylvania Supreme Court held that Judge Ammerman had been correct in finding that Renchenski's delay in filing the Extension in 2003 was prejudicial, and it was therefore unnecessary to decide whether a petitioner had any duty to advance the disposition of a timely petition. On that point, the Pennsylvania Supreme Court expressed in dictum its concern with

the "troubling nature of the lengthy delay," particularly that caused by Judge Reilly's failure after the 1989 remand to appoint counsel to represent Renchenski.

Justice Todd's concurrence added the point that the dismissal of Renchenski's *pro se* Extension and Newman's amended PCRA petition due to the prejudice resulting from the delay in filing them would not imply that the original *pro se* PCHA petition Renchenski filed in 1988 could be dismissed but that neither the Pennsylvania Superior Court nor the parties had made any distinction between the two petitions (that is, Renchenski did not make any argument that the three claims in the original PCHA petition were preserved.)

The three claims in the original PCHA petition were that 1) Judge Reilly erred in finding some unspecified pretrial issues waived without a determination that if there were issues waived counsel must have been ineffective; 2) Judge Reilly should have recused; and 3) Renchenski was denied a speedy trial in violation of the Sixth Amendment. None of these three claims was asserted in Renchenski's 2010 Petition or in his 2013 Amended Petition. They are therefore not bases for habeas relief. But if they had been presented to this court, the first issue was stated so indefinitely in the PCHA petition that it failed to preserve any claim for relief. The recusal issue was addressed on the merits by Judge Reilly and by the Pennsylvania Superior Court in the

direct appeal and therefore exhausted. If it were presented, Renchenski never at any point in the record makes a colorable claim that Judge Reilly' denial of the motion for recusal was wrong, much less unreasonable in light of the evidence presented in the state court. Renchenski would not get a second opportunity to make an evidentiary record because Judge Reilly in fact held a pretrial hearing in which Renchenski's trial counsel set forth their evidence (comments in local newspapers about the procedural status of the case) and made arguments in support of recusal.

A speedy trial claim based on the Sixth Amendment was never presented to the state courts and so is procedurally defaulted. The Rule 1100 (or Rule 600) claim that was exhausted in the state court is a state law procedural claim, not a federal Sixth Amendment speedy trial claim. Wells v. Petsock, 941 F.2d 253, 256 (3d Cir.1991). If despite all the levels of default the merits of a speedy trial claim were assessed, none of the Barker v. Wingo, 407 U.S. 514 (1972) factors, not even the first threshold factor (length of the delay of trial) is arguably in Renchenski's favor: Renchenski was at his request given new counsel, and was tried less than six months after his guilty plea was withdrawn. Newman's amended PCRA petition is the only attempt Renchenski can arguably claim to have made to exhaust the claims in the Amended Petition. The Pennsylvania Supreme Court upheld the dismissal of the amended PCRA petition because Renchenski's delay *

in filing the Extension and the amended PCRA petition were prejudicial. Unless Renchenski can show that the Pennsylvania Supreme Court's reliance on Section 9543(b) is not an independent and adequate basis for its decision he cannot avoid procedural default. Renchenski does not do so.

Based on the record made by Judge Ammerman at the hearing on July 25, 2008, (at pages 18-19, Newman stipulated to the testimony by the Commonwealth's proposed witness that several of the witnesses from the trial were deceased, ill, or had moved out of the area, see Exhibit 1 to Commonwealth's Supplemental Motion to Dismiss PCRA Petition, at p.121ff of docket no. 28-2) there is an adequate factual basis for finding that the Commonwealth would be prejudiced in its ability to retry the case. The question of procedural default therefore boils down to whether the state courts were unreasonably wrong in holding Renchenski responsible for the delay in filing the *pro se* Extension in 2003 or Newman's amended PCRA petition in 2007.

There are four distinct periods of time to consider: 1) from 1988 until 1993, from the filing of the PCHA petition until Judge Reilly apparently construed Renchenski's discharge of Ryan as a withdrawal of the PCHA petition; 2) from 1993 to the filing in 2003 of the Extension; 3) from 2003 to 2007, during which time Judge Reilly dismissed the Extension, the dismissal was reversed by the Pennsylvania Superior Court, Knaresboro was appointed as

counsel, and Newman entered as private counsel; and 4) from 2007 when Newman filed the amended PCRA petition to 2009 when Judge Ammerman decided that the Extension and the amended PCRA petition were untimely.

As noted above, the Pennsylvania Supreme Court obviously held Judge Reilly responsible for the delay between 1988 and 1993, and Judge Ammerman and the Pennsylvania appellate courts clearly did not delay between 2006 and 2009. That leaves the fourteen years from 1993 to 2007. Renchenski points to nothing between 1993 and 2003 for which the Commonwealth might be responsible that prohibited him from demanding action on his PCHA petition, inquiring into the status of the 1988 PCHA petition, requesting the name of his counsel, or otherwise signaling to Judge Reilly that Renchenski believed that he had a collateral attack pending in the Court of Common Pleas. The state courts were not wrong, much less unreasonable, in holding Renchenski responsible for delay during the period from 1993 to 2003. Since Newman's amended PCRA petition contained only one point in common with the *pro se* Extension (the failure to call Dr. Finken claim) the state courts were not unreasonable in holding Renchenski responsible for the period from 2003 to 2007 either, and all of the petitioner's claims but the Dr. Finken claim derive from the amended PCRA petition. Section 9543(b) acts as an independent and adequate state ground for the dismissal of Renchenski's collateral attacks on his conviction.

It is important to remember that the only reason Renchenski's federal petition is not barred by AEDPA's statute of limitations in the first place is because Pennsylvania held that despite Renchenski's complete abandonment of the 1988 PCHA petition for the new claims in the 2003 Extension and Newman's almost complete abandonment of the 2003 Extension for the new claims in the 2007 amended PCRA petition there was one continuous collateral attack.

IV

Despite the procedural default of all of Renchenski's claims I touch briefly on their merits. Renchenski's Extension is a preposterous salmagundi of claims: a new witness contacts Renchenski after 20 years with a tale of having overheard troopers discuss their belief Renchenski's innocence in a scenario contrary to Renchenski's own sworn trial testimony; a witness who knew Renchenski actually saw another suspect at the crime scene at the time of the murder, contrary to Renchenski's own sworn trial testimony; a witness described a conversation with yet another witness who volunteered that she could have provided an alibi contrary to Renchenski's own sworn trial testimony; a speculation that if Renchenski had a forensic odontologist he would have been able to blame some of the mutilation of Foley's body on a suspect with a missing tooth, contrary to Renchenski's own sworn trial testimony; a speculation that if Renchenski had quantified his

drinking on the night of August 17, 1982 in a manner contrary to his sworn trial testimony a toxicologist might have been able to provide evidence in support of a different attack on specific intent than the one Renchenski actually took at trial; and a claim that if Dr. Finken had been called as a witness and had testified consistently with his deposition despite the lack of foundation that resulted from Renchenski's own sworn trial testimony, Dr. Finken might have been able to provide evidence in support of a different attack on specific intent than the one Renchenski actually took at trial.

The last of the claims in the Extension, that trial counsel were ineffective for failing to call or use the deposition of Dr. Finken or call other medical professionals was substantially repeated as the fourth claim in Newman's amended PCRA petition and the first claim in the Amended Petition.

The pretrial proceedings and Dr. Finken's deposition make it clear that before Renchenski changed his mind and proceeded to a jury trial he had entered a guilty plea to homicide generally. He was evaluated by Dr. Finken at Warren State Hospital in anticipation of a degree of guilt hearing. Renchenski contends that Dr. Finken's testimony was so favorable that failure to call him as a witness was ineffectiveness. The standard for ineffectiveness of counsel is whether Sughrue and Kesner had a reasonable basis for the course of defense that they actually

pursued, not Renchenski's supposition that ineffectiveness is proved if another course of action might have been successful:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel's was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances 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.

Strickland v. Washington, 466 U.S. 668, 689 (1984) (internal citations and quotations omitted). But even accepting Renchenski's assumption that Sughrue and Kesner's effectiveness stands or falls on their use of Dr. Finken or his deposition, Dr. Finken's deposition, unless it is cut and pasted in the most selective way, is hardly favorable to Renchenski.

Dr. Finken too starts from the premise that Renchenski killed Foley. In opining about Renchenski's mental state around the time Renchenski killed Foley, Dr. Finken delivered the observation that he was "speculating" but doubted that Renchenski drove with Foley to a secluded spot with the plan of killing her, and concluded that it was unlikely that Renchenski premeditated the killing. Finken depo. at 26-27, 37. Dr. Finken's speculation shows no familiarity with Pennsylvania law, which does not require

a declaration of a plan hatched hours before a killing to prove specific intent. Dr. Finken's conclusion also would not have been admissible because it is without foundation. (For more irrelevant comments by Dr. Finken, see depo. at 28: "[Y]ou know, this man is not without conscience, I don't really think he looks upon himself as a murderer." That aside, delivered in the course of speculating about why Renchenski mutilated Foley's corpse, is a stunning *non sequitur* even as a psychiatric evaluation.) Second, Dr. Finken's opinions were based on accounts supplied by Renchenski directly or indirectly through interviews of his grandmother and the proffer of his counsel at the time, Blakely. Dr. Finken had not even read Renchenski's statements to police. depo. at 36. (That Renchenski's account of events was self-servingly selective as to crucial information even Dr. Finken acknowledged: "how his hands got up to her throat, I don't know I guess none of us will ever know." depo. at 27; see also depo. at 32: "He was a little vague about the act itself... .") Much of Renchenski's pre-trial account was not supported by the evidence Renchenski actually presented at trial, so Dr. Finken's opinions as expressed in his deposition would for a second time lack a foundation. Three striking examples of this are Dr. Finken's speculations that because Renchenski had more than twenty beers, depo. at 23, was "pretty well stoned" from using marijuana, depo. at 21, and was possibly rendered impotent by intoxication, depo.

at 25-26, he may have become even "more" enraged when Foley allegedly grabbed his genitals, and was probably unable to form a specific intent to kill Foley. When Renchenski testified at trial there was no mention of twenty beers nor mention of any marijuana use at all. Renchenski not only did not testify to any adverse effects of the beer he consumed on his judgment or on his considerable skill at billiards, he testified that he took over the driving from Foley (without reported difficulty) because she was impaired by alcohol. Renchenski certainly did not testify about impotence causing him to be enraged. Renchenski did not testify to hitting Foley with a log in an attempt to make sure she was dead either, which is what Dr. Finken apparently believed: he testified that hitting Foley with a log followed immediately after his initial punch to her head and prior to strangling her. Compare depo. at 36-37 with T.T. at 446.

If that is not enough, Dr. Finken's deposition contains plenty of unflattering data about Renchenski used by Dr. Finken in the course of reaching his conclusions. If Dr. Finken had been called to testify he might have been cross-examined about his opinion that Renchenski was a substance abuser with anti-social or borderline personality disorder (but no evidence of a major psychiatric disorder or brain damage), depo. at 13-14, who had "considerable anger" over abandonment by his mother that may "generalize" toward women who reject him, depo. at 14-15, who

tended to show inappropriate anger or lack of control of anger, depo. at 17, and who tended to be aggressive, to be reckless, and "to lie considerably," depo. at 18. Dr. Finken summed up Renchenski as "lousy" in school, disruptive, into drugs and a thief, with "a lot of that quality" of being self-centered and having no regard for others, and a "real psychopath" depo. at 29. It is probable that Renchenski would be alleging counsel's ineffectiveness if defense counsel had called Dr. Finken. It is possible that on cross-examination the Commonwealth could also have asked Dr. Finken about the otherwise inadmissible data he used to arrive at his opinions, including Renchenski's school suspensions for fighting, his lack of employment, and his "hundreds" of episodes of drug use, depo. at 7, and perhaps his arrest for possession of controlled substances, depo. at 8. The Strickland v. Washington test is not a game in which a defendant gets to allege ineffectiveness for the choice not taken each time counsel pursues one of two or more options.

What makes "the failure to call Dr. Finken" claim in Newman's amended PCRA petition meritless is more true of the ineffectiveness claims based on alleged failures to call any of the other examining doctors that did not provide reports, or for that matter the additional new ineffectiveness claims made in the *pro se* "Extension" based on the failure to retain a forensic odontologist to testify that Renchenski was not the source of the

bite marks on Foley's body or a toxicologist to testify that Renchenski was too intoxicated to form the specific intent to kill. Renchenski's claims amount to speculation that if counsel had evidence that Renchenski never presented and that was contrary to the testimony he did present they could have retained an expert who would have presented a helpful opinion. That is not the Strickland v. Washington test either. An odontologist testifying that Renchenski was not the source of the bite marks would have been a figure of ridicule. As for a toxicologist, any foundation for an expert opinion of voluntary intoxication was removed by Renchenski's own trial testimony.

Renchenski's second claim, that trial counsel were ineffective for failing to obtain the suppression of the inculpatory statements used in his trial that were obtained in violation of the Fifth and Sixth Amendments, is in part an attempt to ask for federal review of the merits of the suppression ruling by Judge Reilly, and in part a reiteration of the claim by Newman in the amended PCRA petition that Sughrue and Kesner, though they properly raised and litigated an attempt to suppress Renchenski's statements as taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), were ineffective because they did not cite the Sixth Amendment as well as the Fifth Amendment.

Renchenski's attempt to have this court declare the state court suppression findings unreasonable in light of the facts

presented in state court is meritless. Renchenski argues that he felt pressured to speak to police because of an innuendo by one of the investigating officers that the police could harm his grandmother. He testified to this at the suppression hearing before Judge Reilly and Judge Reilly did not find him believable. Renchenski argues that this was incorrect but does not attempt to suggest why, much less why this was unreasonable. Renchenski's arguments that it was somehow a violation of the Sixth Amendment for the police to make an attempt to have Renchenski "believe that he was not 'under arrest'," Amended Petition at 56, or to create a situation where they could question him "without him realizing that he really needed a lawyer," Amended Petition at 52, or that his statement that he wished to talk to his grandmother is equivalent to invoking his right to counsel, Amended Petition at 52, are not based on any principle of federal law.

As for the ineffectiveness claim advanced by Newman but never fleshed out, undoubtedly Sughrue and Kesner did not pursue a Sixth Amendment argument because at the time they filed their appellate brief for Renchenski Michigan v. Jackson, 475 U.S. 625 (1986), had not been decided. The controlling precedent at the time of trial, Brewer v. Williams, 430 U.S. 387, 405-06 (1977), had refused to hold that a defendant whose right to counsel had attached "could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments." Michigan v.

Jackson, held that if police initiate interrogation after a defendant's assertion at arraignment of a right to counsel, any waiver of defendant's right to counsel for that police-initiated interrogation is invalid. Using this, supported by testimony from Renchenski that he did invoke his right to counsel at his arraignment on Sunday August 22, 1992, may have been the tack Newman planned to take. In 2009, Montejo v. Louisiana, 556 U.S. 778 (2009), overruled Michigan v. Jackson, holding that neither a defendant's request for counsel at arraignment nor appointment of counsel by court give rise to presumption that any subsequent waiver by defendant to police-initiated interrogation is invalid. Even if trial counsel could be charged with predicting the brief reign of Michigan v. Jackson, Montejo clarifies that Michigan v. Jackson is not the law. The state courts held that Renchenski waived counsel and knowingly and voluntarily spoke to troopers about Foley's murder, after valid Miranda warnings. That finding is not unreasonable.

In the amended PCRA petition Newman claimed that the jury instruction was incorrect and necessarily claimed that trial and appellate counsel were ineffective for not preserving this claim. The third claim in the Amended Petition repeats this. Renchenski cites a portion of the jury charge at T.T. 510 at which the court reporter quoted Judge Reilly as saying "a killing is with malice if it is with the specific intent to kill and without circumstances

reducing the killing to voluntary manslaughter which we will discuss shortly." Renchenski argues that this was confusing and that counsel were ineffective for failing to assert this as one of the issues raised on direct appeal.

A jury charge must be taken as a whole. Read as a whole, as opposed to the fragment Newman and Renchenski picked out twenty years later, the jury charge for first degree murder, which Judge Reilly correctly repeated when the jury came back with a question, see T.T. 535, adequately explained malice and specific intent. Counsel was not ineffective for failing to object to a portion of a charge that as a whole was not erroneous.

I assume Renchenski is correct in his assertion that there was something for counsel to have missed, but add that based on thirty years of experience in reading records of trials in Western Pennsylvania it is quite possible that the reason for counsel not objecting is that any error is in the transcript and not the fault of the judge and attorneys. Attorneys and judges do misspeak: for an example in this trial, the prosecutor in his closing argument referred to involuntary manslaughter when it is clear that he meant voluntary manslaughter. T.T. 485. Sometimes, as with minimal vowel pairs ("affect" for "effect" see T.T. 290) it is uncertain whether the witness or the court reporter made the mistake. Sometimes a court reporter will signal the word is uncertain. (See T.T. 282, where "venals (phonetic spelling)" is

used because the reporter did not catch the word "venous.") Short but significant words are far easier to miss than in long ones: "the suspect" versus "a suspect" is a far more common error than "hyperbaric" versus "hypobaric." Sometimes a court reporter will interpret phrase or even a pause differently from the speaker so that the sense changes radically. ("A woman without her man is helpless," versus "a woman: without her, Man is helpless," and "the panda eats shoots and leaves" versus "the panda eats, shoots, and leaves" are classic examples.) Sometimes the transcript sounds enough like what was said that it is clear that the reporter misunderstood the speaker ("The murder took place in Crescent, Pennsylvania and was committed with a six-hour pistol" almost certainly means the court reporter was unfamiliar with the borough of Cresson and the Sig Sauer pistol). Sometimes the reporter will get the words exactly right but the key to understanding the words was the witness's ironic tone (Q. Did the defendant say anything? A. He said I had a nice business and it would be a shame if anything were to happen to it), so that the sense that was taken by the jury is exactly the opposite of what the transcript says. Sometimes the transcript gets the witness's words exactly right but omits the nonverbal cues that the jury used to make sense of the anacoluthon. (Q. So you told the witness he was not under arrest [pause transcribed as ellipsis] ... and was free to go? A. I told the witness he was not [pause transcribed as ellipsis and omitting

the gesture with the hands indicating the officer brooming the suspect out the door] ...free to go.) Sometimes a court reporter will miss a word and the error will be unreconstructable. A reviewing court therefore is bound to interpret the record in the light most favorable to the verdict winner, and should examine with special care a claim that an isolated fragment of a transcript, even if it contains error, means that the jury was misled.

But assuming that Judge Reilly, the two prosecutors, and the two defense counsel all missed the error Renchenski asserts, the most that can be said is this: any error was in Renchenski's favor. Telling the jury that proof of malice requires proof of specific intent imposed a burden on the Commonwealth to prove murder three by the same proof that murder one requires. If the jury had heard no other instruction but this instruction fragment they would have not been able to find Renchenski guilty either of murder one or murder three without proof of specific intent. It was the prosecutors and not defense counsel who had an incentive to claim that this fragment contained an error.

The Amended Petition's fourth claim also is taken from Newman's amended PCRA petition and asserts that trial and appellate counsel were ineffective for failing to challenge or preserve a challenge to comments in the prosecution's closing argument, the first that given the discrepancy between Renchenski and Foley's sizes Renchenski was "probably like a giant with a rag doll just

squeezing the life out of her" T.T. 493, and the second that if the jury only found voluntary manslaughter because they did not find malice, that would be "like saying that ... he's a nice guy for what he did to her." T.T. 501.

Even *de novo* the first comment was a fair comment on the evidence: Renchenski was almost twice Foley's weight, and by his own testimony to the jury sucker-punched her, hit her with a log that was inexplicably close at hand, and then proceeded to strangle her for what he estimated was five minutes and Dr. Rozin, the prosecution's expert, said was several minutes. Dr. Rozin testified that death by manual strangulation could come in anywhere from 20 seconds to several minutes depending on what the precise mechanism of death was, T.T. 286, but that in this case the evidence showed compromise of Foley's airway, T.T. 282, which meant death in a "few" or "three or four minutes to five." T.T. 286.

It is hard to imagine a method of killing that more clearly demonstrates specific intent to kill than one which, like manual strangulation, requires sustained effort and attention. The prosecutor's description, using Renchenski's own account to convey this to the jury, was hardly inflammatory. An even less flattering possible conclusion the jury could have reached, if they listened to Doctor Rozin's account of the injuries inflicted on Foley before her death, or credited the testimony of a witness named John Weaver who testified that he lived near where Foley's body was found and

that on the night of Foley's death he heard a woman's screaming that sounded like "she was getting beat or something," T.T. 184, was that Renchenski assaulted Foley until she fell unconscious, then strangled her.

The "nice guy" comment, one that trial counsel objected to but did not include in the list of issues presented on direct appeal, can be characterized as rhetorical excess in the prosecutor's argument that the jury should reject manslaughter and find malice. It was hardly inflammatory. The precise two-part question Strickland v. Washington mandates is whether the comment so clearly would have caused the appellate court to reverse Renchenski's conviction that any competent counsel would have known to make it an issue on appeal. I doubt that any judge familiar with criminal trials would have reversed the verdict for this and so cannot find prejudice. But the first Strickland v. Washington element is missing too: for counsel to present effective appellate argument there must be some culling of the weaker issues so that the better issues stand out more clearly. Even considered de novo, to not include this issue on appeal is the sort of judgment call well within the range of choices made by effective counsel.

Renchenski adds several more portions of the closing argument that he incorrectly characterizes as the prosecutor expressing a personal opinion about the strength of the evidence or about Renchenski's credibility. Amended Petition at 75-79.

Even on de novo review, they too appear to be fair comment on the evidence.

The Amended Petition's fifth claim, that trial and appellate counsel were ineffective for failing to challenge alleged falsehoods in the affidavit of probable cause used to support the complaint, is meaningless because Renchenski's custody is based on the verdict of the jury, not on the complaint. Renchenski's general argument, Amended Petition at 83, that "everything that transpired after the illegal arrest was the fruit of an illegal arrest and should have been suppressed" preserves no issues for review. Renchenski could not relitigate Fourth Amendment issues in habeas, Stone v. Powell, 428 U.S. 465 (1976), and in any challenge to the Commonwealth's use of the statements he made the complaint is irrelevant because the statements were made before he was arrested on the complaint or after a valid waiver of counsel. Further, counsel did challenge the sufficiency of the complaint's affidavit of probable cause before trial and were unsuccessful, and counsel presented the claim in the direct appeal to the Pennsylvania Superior Court.

The Amended Petition's sixth claim, adopted from Newman's amended PCRA Petition, is that trial counsel were ineffective for failing to call character witnesses. Newman did not provide for his two character witnesses an affidavit necessary under Pennsylvania law indicating that they, their testimony, and their

availability were made known to trial counsel. Renchenski, in his October 30, 2012 affidavit that names eleven alleged character witnesses that he says would have testified, docket no. 18-14, likewise does not indicate that they, their testimony, and their availability were made known to trial counsel. Renchenski adds that his grandmother would have supplied a testimonial to his character for "truthfulness and non-violent nature," Amended Petition at 83, if she had been asked by defense counsel. Renchenski's grandmother was called as a prosecution witness to establish that Renchenski had not been coerced into giving a statement and had not invoked his right to counsel. T.T. 237-44. At this point defense counsel would hardly have wanted the grandmother to present the jury with testimony that Renchenski was truthful. But in any case Renchenski's speculation, made well after Newman raised the issue of character witnesses in 2007, about what Renchenski's grandmother might have said at trial about Renchenski's character is not even relevant evidence, much less proof, of counsel's ineffectiveness in 1984.

Though it is often imagined as an unconstrained opportunity to offer testimonials, "character evidence" is more accurately described as evidence of reputation for a character trait. Renchenski's assertion that the proposed witnesses would have been able to testify that Renchenski was a "peaceful, honest, non-violent and compassionate person," docket no. 18-14 at 1,

misses the initial element of relevant testimony, reputation. Character evidence also must be relevant. The prosecution's evidence that tended to show Renchenski murdered Foley did not attack his reputation for honesty, and the minimal difference between some of the prosecution's evidence and Renchenski's account did not amount to an attack on Renchenski's reputation for honesty that would open the door to character witnesses for truthfulness. See Commonwealth v. Boyd, 672 A.2d 810, 812 (Pa.Super.), allocatur denied, 685 A.2d 541 (Pa.1996).

As for the possibility of Renchenski's witnesses lauding his reputation for non-violence, Renchenski's argument is not coherent. There was no claim of self-defense, and there was no dispute that Renchenski killed Foley. The questions for the jury were whether there was specific intent (murder one), malice without specific intent (murder three), or no malice because of Foley's serious provocation (voluntary manslaughter). The serious provocation was Foley's alleged grasp of Renchenski's testicles plus taunting Renchenski about his lack of desire for intercourse. Even if witnesses would testify that Renchenski had a reputation as a peaceful person who according to his grandmother wouldn't even kill a fly, Amended Petition at 85, that would have been irrelevant unless the witnesses could have related that to Renchenski's demeanor under similar circumstances. Supposing counsel had made an offer of proof to Judge Reilly that persuaded him to admit

evidence of Renchenski's reputation for being peaceful except when mocked about sex and having his testicles squeezed, such evidence would have as easily bolstered a conclusion of specific intent as it would have negated it.

Renchenski acknowledges that he gave a statement to the police admitting that he strangled Foley immediately after she mocked his preference for oral sex over intercourse because "I decided she wasn't gonna tell anybody and I started choking her." Amended Petition at 62. Renchenski, by his own testimony at trial, claimed to have strangled Foley because she had squeezed his testicles while mocking Renchenski's refusal to have intercourse. Defense counsel were faced with two bad versions, and had to try to sell the jury on the less bad one. How Renchenski's alleged reputation for peacefulness would have been relevant to a claim of provocation without bolstering specific intent is hard to imagine. Evidence of Renchenski's reputation for peacefulness would also have opened the door to impeachment by specific acts, including the evidence of fighting in school and quitting jobs because of problems with coworkers, Finken depo. at 6-8, and impeachment for lack of foundation since Renchenski had few acquaintances except for those he met in bars, depo. at 9. Renchenski does not understand the limited nature of character evidence or that "whether or not Mr Renchenski had in fact the predisposition for

violence," Amended Petition at 84, is not even a relevant issue.

V

Renchenski's Amended Petition should be dismissed without a certificate of appealability because he procedurally defaulted any claim he could have made by failing to present it properly in the state court. Jurists of reason could not doubt the correctness of the state court's ruling that the claims attempted to be raised in the Extension and amended PCRA petition were procedurally barred by the delay in presenting them. If the merits of every defaulted claim were considered, the Amended Petition should still be denied. There is no substantial claim of error and the evidence of Renchenski's guilt is overwhelming.

Pursuant to 28 U.S.C.§ 636(b)(1), the parties are given notice that they have fourteen days to serve and file written objections to this Report and Recommendation.

DATE: 25 March 2015

Keith A. Pesto,
United States Magistrate Judge

Notice to counsel of record by ECF and by U.S. Mail to:

Charles S. Renchenski AP-8124
S.C.I. Coal Township
1 Kelley Drive
Coal Township, PA 17866-1021

EX 3

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

CHARLES S. RENCHENSKI, Petitioner,	:	
v.	:	Case No. 3:10-cv-217-KRG-KAP
DAVID A. VARANO, SUPERINTENDENT, S.C.I. COAL TOWNSHIP, Respondent	:	

Order and Report and Recommendation

Petitioner filed a petition for a writ of habeas corpus that was stayed pending exhaustion of state court remedies, re-opened, and ultimately denied. That judgment was entered in April 2015. ECF no. 50. The Court of Appeals denied a certificate of appealability in December 2105. Renchenski v. Superintendent, No. 15-2252 (3d Cir. December 4, 2015), ECF no. 55. The Supreme Court denied a writ of certiorari on October 17, 2016. Renchenski v. Mooney, 137 S. Ct. 338 (2016). Petitioner has at ECF no. 56 filed a motion to proceed *in forma pauperis*, and at ECF no. 57 a 150-page motion under Fed.R.Civ.P. 60(b)(6) to vacate the judgment (Motion). Within that pleading is a motion seeking my recusal and that of Judge Gibson.

Order

The motion to proceed *in forma pauperis* is denied as unnecessary and incomplete. It is not necessary to pay a fee to file or pursue the motion to vacate and, if it were, petitioner's

APPENDIX "A-1"

in forma pauperis motion does not comply with the Prison Litigation Reform Act.

The motion for my recusal contained in the Motion is denied. Between pages 7 and 36 of the Motion, petitioner describes many factual and legal errors he believes are in my Report and Recommendation, and also claims that I erred in denying appointment of counsel, in denying an evidentiary hearing, and in recommending that no certificate of appealability be issued. The relevant recusal statute, 28 U.S.C.§ 455(a) and (b)(1), asks whether a fully informed, rational observer would have reason to question the judge's impartiality based on something other than the judge's ruling against or in favor of a litigant. See In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1314 (2d Cir. 1988)(citing In re IBM, 618 F.2d 923, 929 (2d Cir.1980)). Erroneous rulings are corrected by appeal, not recusal.

Petitioner does assert one extrajudicial source of bias. In Motion at 8, petitioner writes that "M.J. Pesto rendered all of his decisions/conclusions with an eye of favoritism towards the State and went into the proceedings looking for any reason to deny federal review" because there were "ex parte communications" in which "the State prosecutor expressed a desire that [petitioner] remain incarcerated because the victim in this case was well known

NOT TRUE

among law enforcement personnel ... [and petitioner] heard while he was incarcerated in the county prison that the person killed was an undercover informant." If petitioner believes his own statement, that means that in 2017 he is disclosing for the first time that he thinks that in about 2010 I had multiple communications with an unnamed prosecutor who well in advance of exhaustion of petitioner's state court remedies urged me to make my eventual recommendation in this matter on the basis of the victim's status (which the petitioner learned from an unknown source in the county prison almost thirty years earlier) as a confidential informant. If petitioner put this belief into the form of allegations under oath, it would not be "a timely and sufficient affidavit" as required by 28 U.S.C.§ 144. It certainly does not gain weight by being included in a motion seeking recusal under 28 U.S.C.§ 455.

Recommendation

The motion to vacate should be denied.

Report

Gonzales v. Crosby, 545 U.S. 538 (2005), delineates the proper use of Rule 60 motions in habeas corpus practice under 28 U.S.C.§ 2254: a Rule 60 motion attacking the underlying state court conviction, whether by presenting a new claim, new evidence in support of a claim already litigated, or a purported change in the

substantive law, is a successive petition subject to 28 U.S.C.§ 2244(b). 545 U.S. at 531. On the other hand, a Rule 60 motion attacking only some defect in the court's ruling that precluded a determination on the merits, for instance that the petitioner failed to exhaust a claim, procedurally defaulted a claim, or brought the claim out of time (in Gonzalez v. Crosby, the defect was that the lower court allegedly misapplied AEDPA's statute of limitation) is a permissible motion. 545 U.S. at 532-33.

The Supreme Court further cautioned that Rule 60 motions, when permissible, still must satisfy the limitations of Rule 60(b), and in particular held that a Rule 60(b)(6) motion must show "extraordinary circumstance" that "rarely occur in the habeas context." 545 U.S. at 535. In Gonzalez v. Crosby, the Court assumed that the habeas petitioner correctly claimed that in light of a subsequent Supreme Court decision the lower court erred in holding that the original habeas petition was untimely. Nevertheless, that subsequent change in procedural law was not an extraordinary circumstance justifying re-opening of the petition. 545 U.S. at 538.

Applying Gonzalez v. Crosby, our Court of Appeals held in Cox v. Horn, 757 F.3d 113, 115 (3d Cir.2014), that a change in procedural law subsequent to a judgment, specifically the expanded

exception to the procedural default doctrine announced in Martinez v. Ryan, 566 U.S. 1 (2012), was not sufficient by itself to grant a Rule 60(b)(6) motion: the panel remanded for consideration whether the change wrought by Martinez v. Ryan, the diligence of petitioner, and the merits of the underlying ineffectiveness claim, when taken together, justified the "rare" grant of relief. 757 F.3d at 124-25.

Here, all but one of petitioner's specific attacks on the judgment are based on arguments that I committed legal error in my Report and Recommendation. That is the basis for an appeal, not a Rule 60(b)(6) motion. Petitioner's chief legal argument is that his trial, appellate, and PCRA counsel were ineffective and this court mis-applied Martinez v. Ryan when it did not excuse petitioner's procedural default of his claims based on PCRA's counsel's ineffectiveness. Motion at 6. Martinez v. Ryan, however, is not a **subsequent** decision that might, coupled with other factors, constitute extraordinary grounds for Rule 60(b)(6) relief, it is a 2012 decision that was part of the law already considered by this court and available to the Court of Appeals and the Supreme Court in reviewing this court's judgment.

I do not intend to address each argument in the Motion separately. What is extraordinary about this 150-page Motion is

petitioner's doggedness, if not monomania, in reviewing almost every line of my Report and Recommendation in light of his worldview that he cannot be guilty of murder because he believes that he killed the victim in response to provocation, or even that "it was possible that he had not killed her and some pervert saw a female laying there and did something and then killed her himself." Motion at 25. To give just one example, petitioner cites my use of the word "mutilate" in my Report and Recommendation to describe his actions towards the victim's body as a "blatant lie[]" and a "fraud on the court" that provide an extraordinary reason to vacate the judgment. Motion at 10-11. I think that my choice of that word was influenced by Judge Fuentes' use in Renchenski v. Williams, 622 F.3d 315, 320 (3d Cir.2010) of the same word to describe petitioner's actions, and I think it is a fair characterization of the transcript that I reviewed. But if I erred, it was an error available to be corrected by Judge Gibson or the Court of Appeals in the objections and appeal process, and not a basis to vacate the judgment. The same is true of petitioner's other assertions of legal and factual error in my Report and Recommendation.

The one argument that petitioner makes in support of the Rule 60(b)(6) motion that is not a renewed assertion that the

Report and Recommendation contained error is the argument that in conducting review of my Report and Recommendation under 28 U.S.C.§ 636 Judge Gibson could not have read "in excess of Ten-Thousand (10,000) pages [of the record] in **just one evening**." Motion at 148. To make this argument petitioner assumes that the court must agree with him that the record was 10,000 pages long, that Judge Gibson was obliged to read all 10,000 pages to understand the issues raised in the petition and addressed in the Report and Recommendation and objections, and that Judge Gibson could or would only look at the record or at my Report and Recommendation once petitioner's objections were filed. There is no evidence to support any of those assumptions. Further, petitioner twice raised this same argument in the Court of Appeals, see Motion for Certificate of Appealability at 2 n.1, in Renchenski v. Superintendent, No. 15-2252 (3d Cir.), where petitioner asserted that the record that Judge Gibson (who petitioner repeatedly and incorrectly refers to as "she") must have ignored was 1835 pages; see also Petition for Rehearing En Banc and Before Original Panel at 6, in Renchenski v. Superintendent, No. 15-2252 (3d Cir.), where petitioner asserted that the record that Judge Gibson must have ignored was "approximately 2000 pages". The rejected argument does not on its third repetition become a basis for relief under Rule 60.

Pursuant to 28 U.S.C.§ 636(b)(1), the parties are given notice that they have fourteen days to serve and file written objections to this Report and Recommendation.

DATE: 7 June 2017

Keith A. Pesto,
United States Magistrate Judge

Notice to counsel of record by ECF and by U.S. Mail to:

Charles S. Renchenski AP-8124
S.C.I. Coal Township
1 Kelley Drive
Coal Township, PA 17866-1021

Rec. 5/4/15

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

CHARLES S. RENCHENSKI, Petitioner,	:	
v.	:	Case No. 3:10-cv-217-KRG-KAP
DAVID A. VARANO, SUPERINTENDENT, S.C.I. COAL TOWNSHIP, Respondent	:	

Memorandum Order

Petitioner's habeas corpus petition was referred to Magistrate Judge Keith A. Pesto for proceedings in accordance with the Magistrates Act, 28 U.S.C.§ 636, and Local Rule 72 for Magistrate Judges.

The Magistrate Judge filed a Report and Recommendation on March 25, 2015, docket no. 46, recommending that the petition and a certificate of appealability be denied.

The parties were notified that pursuant to 28 U.S.C.§ 636(b)(1) they had fourteen days to serve and file written objections to the Report and Recommendation. After an extension of time, petitioner filed objections at docket no. 49 that I have reviewed but find meritless.

After de novo review of the record of this matter, the Report and Recommendation, and the objections thereto, the following order is entered:

APPENDIX "B"

AND NOW, this 30th day of April, 2015, it is

ORDERED that the petitioner's petition for a writ of habeas corpus is denied. A certificate of appealability is denied. The Report and Recommendation is adopted as the opinion of the Court. The Clerk shall mark this matter closed.

BY THE COURT:

Kim R. Gibson

KIM R. GIBSON,
UNITED STATES DISTRICT JUDGE

Notice to counsel of record by ECF and by U.S. Mail to:

Charles S. Renchenski AP-8124
S.C.I. Coal Township
1 Kelley Drive
Coal Township, PA 17866-1021

EX-4

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

CHARLES S. RENCHENSKI, Petitioner,	:	
v.	:	Case No. 3:10-cv-217-KRG-KAP
DAVID A. VARANO, SUPERINTENDENT, S.C.I. COAL TOWNSHIP, Respondent	:	

Memorandum Order

Petitioner's Motion to Vacate at ECF no. 57 was referred to Magistrate Judge Keith A. Pesto in accordance with 28 U.S.C.§ 636(b)(3) and Local Rule 72 for Magistrate Judges.

The Magistrate Judge filed a Report and Recommendation on June 7, 2017, ECF no. 62, recommending that the motion be denied. The parties were notified, pursuant to 28 U.S.C.§ 636(b)(1), that they had fourteen days to file written objections to the Report and Recommendation. The petitioner filed objections at ECF no. 63 that I have reviewed *de novo* and reject.

Upon *de novo* review of the record of this matter, the Report and Recommendation, and the objections thereto, the following order is entered:

APPENDIX "B-1"

AND NOW, this 29th day of September, 2017, it is ORDERED that the petitioner's Motion to Vacate at ECF no. 57 is denied. The Report and Recommendation is adopted as the opinion of the Court.

BY THE COURT:

KIM R. GIBSON,
UNITED STATES DISTRICT JUDGE

Notice by ECF to counsel of record and by U.S. Mail to:

Charles S. Renchenski AP-8124
S.C.I. Coal Township
1 Kelley Drive
Coal Township, PA 17866-1021

DLD-098 January 11, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-3259**

CHARLES S. RENCHESKI, Appellant

VS.

SUPERINTENDENT COAL TOWNSHIP SCI, ET AL.

(W.D. Pa. Civ. No. 10-cv-00217)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

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

in the above-captioned case.

Respectfully,
Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would not debate that Appellant's Rule 60(b) motion was properly denied by the District Court. See generally Gonzalez v. Crosby, 545 U.S. 524 (2005); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Cox v. Horn, 757 F.3d 113, 125 (3d Cir. 2014).

To the extent that a certificate of appealability is not required to appeal the denial of Appellant's motion for recusal, we summarily affirm because Appellant has not shown that the District Court abused its discretion. See 3d Cir. LAR 27.4; 3d Cir. I.O.P. 10.6.

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: January 23, 2018
ARR/cc: CSR

Certified as a true copy and issued in lieu of a formal mandate on 04/03/2018

Teste: Patricia A. Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-3259**

CHARLES S. RENCHESKI, Appellant

VS.

SUPERINTENDENT COAL TOWNSHIP SCI, ET AL.

(W.D. Pa. Civ. No. 3-10-cv-00217)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges

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

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: March 26, 2018
ARR/cc: CSR