Number 20-1126

2-16-CV-06273

IN THE

SUPREME COURT OF THE UNITED STATES

RAMON WALL
Petitioner

vs.

SUPERINTENDENT MELISSA R. HAINSWORTH, et al
SCI-LAUREL HIGHLANDS, et al,
Respondents.

APPENDENCES

BLD-220 June 11, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-1126

RAMON WALL, Appellant

v.

SUPERINTENDENT LAUREL HIGHLANDS SCI; ET AL.

(E.D. Pa. No. 2-16-cv-06273)

Present: AMBRO, GREENAWAY, JR., and BIBAS, Circuit Judges

Submitted are

(1) Clerk's suggestion of dismissal due to a jurisdictional defect; and

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing appeal is dismissed for lack of appellate jurisdiction. A notice of appeal in a civil case in which the United States is not a party must be filed within 30 days after entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A). This statutory time limit for taking an appeal is "mandatory and jurisdictional." Bowles v. Russell, 551 U.S. 205, 209 (2007) (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (per curiam)). Appellant's notice of appeal, dated January 9, 2020, was filed 363 days after the District Court's order denying his habeas petition, which was issued on January 11, 2019. See Houston v. Lack, 487 U.S. 266, 276 (1988). Appellant did not seek in the District Court to extend or reopen the time to file an appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5) or (6). Accordingly, Appellant's appeal is untimely and must be dismissed for lack of appellate jurisdiction.

In light of this disposition, we do not reach the question whether to issue a certificate of appealability in this case.

Ex. A

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: July 1, 2020
PDB/cc: Ramon Wall
Max C. Kaufman, Esq

A True Copy:

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

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

RAMON WALL	:	**CIVIL ACTION**
Petitioner-pro se	:	
	:	**NO. 16-6273**
v.	:	
	:	
MS. LUTHER, *et al.*	:	
Respondents	:	

ORDER

AND NOW, this 11th day of January 2019, upon careful consideration of the *pro se* petition for writ of *habeas corpus*, (the "Petition"), filed by Petitioner Ramon Wall ("Petitioner") pursuant to 28 U.S.C. §2254, [ECF 1], the response filed by Respondents, [ECF 14]; the reply filed by Petitioner, [ECF 20], the *Report and Recommendation* (the "R&R") issued on August 23, 2018, by the Honorable David R. Strawbridge, United States Magistrate Judge (the "Magistrate Judge"), which recommended that the Petition be denied, [ECF 22], Petitioner's *pro se* objections to the R&R, [ECF 28], the pleadings, and the available state court record and, after conducting an independent *de novo* review of the objections, it is hereby **ORDERED** that:

1. The *Report and Recommendation* is **APPROVED** and **ADOPTED**;

2. The objections filed are without merit and are **OVERRULED**;[1]

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[1] In his *habeas corpus* petition, Petitioner asserted four grounds for relief: (1) that his conviction violates his Fourth Amendment rights because the police had no basis to arrest him; (2) that his procedural due process rights under the Fourteenth Amendment were violated by various acts of the PCRA court; (3) that his Fifth Amendment rights were violated due to perceived defects in the indictment and/or proof underlying the witness intimidation charge; and (4) that his conviction violated his Sixth Amendment rights of confrontation, that his plea bargain improperly reflected a mandatory minimum sentence, and that trial counsel was ineffective for failing to investigate the Commonwealth's evidence and for allegedly lying about a colloquy having taken place. In the twenty-three page R&R, the Magistrate Judge addressed these contentions and found that all of Petitioner's claims were either procedurally defaulted, non-cognizable, or lacked merit.

In his objections to the R&R, Petitioner essentially concedes that the Magistrate Judge correctly found that many of his claims were procedurally defaulted but repeats his argument that the procedural

3. Petitioner's petition for a writ of *habeas corpus*, [ECF 1], is **DENIED**; and

4. No probable cause exists to issue a certificate of appealability.[2]

The Clerk of Court is directed to mark this matter **CLOSED**.

BY THE COURT:

/s/ Nitza I. Quiñones Alejandro
NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court

default of these claims can be overcome because trial counsel provided ineffective assistance. In making his claim for ineffective assistance of counsel as an objection, however, Petitioner merely repeats and rehashes arguments he made in his Petition which were considered and properly rejected by the Magistrate Judge. As such, Petitioner's objections are nothing more than an attempt to re-litigate various arguments raised in his Petition and reply. This Court finds that the Magistrate Judge thoroughly reviewed each of these arguments in the R&R and correctly concluded that Petitioner's claims were non-cognizable, procedurally defaulted, and/or without merit. This Court has reviewed the pertinent portions of the record *de novo* and further finds that no error was committed by the Magistrate Judge in the analysis of Petitioner's claims. Accordingly, the R&R is adopted and approved in its entirety, and Petitioner's objections are overruled.

[2] A district court may issue a certificate of appealability only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). For the reasons set forth, this Court concludes that no probable cause exists to issue such a certificate in this action because Petitioner has not made a substantial showing of the denial of any constitutional right. Petitioner has not demonstrated that reasonable jurists would find this Court's assessment "debatable or wrong." *Slack*, 529 U.S. at 484. Accordingly, there is no basis for the issuance of a certificate of appealability.

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

RAMON WALL, Petitioner,	:	CIVIL ACTION
v.	:	
MS. LUTHER, et. al. Respondents.	:	NO. 16-6273

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

August 23, 2018

Before the Court for Report and Recommendation is the *pro se* petition of Ramon Wall, a prisoner incarcerated at SCI-Highlands in Somerset, Pennsylvania, for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.[1] Wall is serving a sentence of imprisonment of 5 to 10 years as a result of his negotiated guilty plea to a charge of aggravated assault. He seeks habeas relief on four grounds encompassing a number of individual claims, several of which are non-cognizable or procedurally defaulted and one of which was rejected on its merits in state court. For the reasons that follow, we recommend that the petition be denied and dismissed.

[1] Although Wall is not confined within the Eastern District of Pennsylvania, venue is proper here pursuant to 28 U.S.C. § 2241(d) in that his confinement grew out of a prosecution and conviction in a Court of Common Pleas within the district.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

The conduct that gave rise to the conviction that Wall challenges in this petition occurred on March 1, 2013 but was the latest in a series of domestic violence incidents between Wall and Chemyra Johnson. She did not pursue the charges in court the first time she had him arrested. Following an incident in February 2012, however, when Wall again physically assaulted Ms. Johnson and then called her the next day, threatening to hurt her again, she pressed and pursued charges against him. Wall entered a guilty plea in July 2012 to a charge of stalking, for which he was sentenced to a term of imprisonment of 6 to 23 months. Within a few months of his release on parole, Wall got into another altercation with Ms. Johnson on February 26, 2013 that prompted Ms. Johnson to obtain a temporary restraining order on February 28, 2013.

That protection from abuse ("PFA") case was listed for a hearing on March 1, 2013, but Ms. Johnson was too afraid to serve notice of it on Wall and it appears that neither of them attended the hearing. *See* Resp. at Exs. B, I (ECF Docs. 14-2, 14-9). Rather, Ms. Johnson went to work on March 1, where she received a number of phone calls from Wall, who believed that her shift was to have ended earlier and feared that she may have been cheating on him. He confronted her in person on a public street, cursed at her loudly, slapped her multiple times, and

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[2] In preparing this Report, we reviewed: Wall's habeas petition submitted on December 1, 2016 ("Pet."); the Response in opposition to the petition filed by the Philadelphia District Attorney's Office on April 24, 2017, with appended exhibits ("Resp."); and Wall's Reply docketed on September 7, 2017 ("Pet'r Reply"). We also consulted and have utilized the notes of testimony from Wall's guilty plea hearing ("N.T., 6/10/13") and his PCRA petition, which were available in the state court record received from the Prothonotary of the First Judicial District; the criminal docket for Case No. CP-51-CR-0005311-2013; the discovery for Case No. MC-51-CR-0008630-2013, which was provided to Petitioner during PCRA review; the July 10, 2015 opinion of the PCRA Court ("PCRA Ct. Opin."); and the Superior Court's June 17, 2016 decision following Wall's appeal of the PCRA Court's decision ("Pa. Super. Ct. Opin.").

shoved her head into a metal gate. They then returned to Ms. Johnson's apartment, where the abuse continued. Wall barged in on Ms. Johnson in the bathroom and, while she was sitting on the toilet, began choking her. He told her that the only way she was going to be free of him was when one of them died. When Wall left the room, she placed a call to police. Wall's response to the arrival of the police was to turn off all of the lights and order Ms. Johnson to remove all of her clothes in the bedroom so that he could try to have sexual intercourse with her and so that it would appear that any disturbance was attributed to their intimacy. After the police obtained access to the apartment through the landlord, they entered the bedroom and arrested Wall. *See, e.g.,* N.T. 6/10/13 at 6-7. His new arrest put him in violation of the terms of his probation from his 2012 case.[3]

The following month, while Wall was detained and awaiting trial, he sent Ms. Johnson a letter in which he threatened to "break [her] mouth for lieing [sic] on [him] to the police about these crazy a[—] charges." (Resp. at Ex. A.) Believing that she had been unfaithful to him with another man, he also threatened to "break [their] f[—] faces in places," among other things. (*Id.*) In accordance with the policies of the District Attorney's office at that time in cases where there had been or were feared to be threats or intimidation, the case was presented to a grand jury. The grand jury returned an eleven-count indictment on April 18, 2013 charging him with aggravated assault, attempted rape, attempted sexual assault, unlawful restraint, terroristic threats, simple

[3] Following his conviction in the 2013 case, Wall was brought in for a violation of probation hearing on the 2012 case. He was sentenced to a term of three to six years state incarceration, to run consecutive to the sentence imposed by Judge Brinkley in this case. *See* N.T. 7/11/13 at 30-31, Case No. CP-51-CR-0006889-2012 [ECF Doc. 14-4.]

assault, recklessly endangering another person, and indecent assault. In light of the indictment, Wall's case was not scheduled for a preliminary hearing.

Geoffrey Kilroy, Esquire, from the Defender Association of Philadelphia, who had represented Wall in the 2012 case, entered his appearance in this case as well. Wall faced a possible aggregate sentence of as much as 53 to 106 years if convicted and sentenced consecutively on these charges. *See* Resp. at 21-22. The Commonwealth offered to drop the ten remaining charges if Wall agreed to plead guilty to the one count of aggravated assault and accept a 5- to 10-year prison sentence. Wall agreed. At the plea hearing on June 10, 2013, the Honorable Genece E. Brinkley confirmed with Wall that he was satisfied with Attorney Kilroy's representation (N.T. 6/10/13, at 3); that he reviewed his written guilty plea form with Attorney Kilroy prior to the hearing, (*id.* at 4); that Attorney Kilroy explained to him the maximum possible penalty that could be imposed against him, (*id.*); and that he pled guilty from his own free will (*id.* at 5). Judge Brinkley explicitly asked Wall if he was "pleading guilty because [he was], in fact, guilty," to which Wall responded, "yes." (*Id.* at 8.) The prosecutor then read a summary of what Ms. Johnson's testimony would have been at trial. Judge Brinkley asked Wall if that was "basically what happened," to which Wall responded affirmatively. (*Id.*) The court accepted Wall's guilty plea and imposed the agreed-upon sentence. Wall did not file a direct appeal of his conviction.

Almost four months later, however, on December 3, 2013, Wall filed a *pro se* petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-9546 ("PCRA"). He alleged that he was entitled to post-conviction relief due to ineffective assistance of counsel and contended that his guilty plea was unlawfully induced. (PCRA Pet., 12/3/13, at 2.) He

attached to his petition a 19-page factual account of his version of the March 1 events that explained why he believed he was innocent of aggravated assault. (*Id.* at 3-19.)

The PCRA Court appointed counsel, who filed a *Finley* letter[4] on March 19, 2015 expressing his view that there was no merit to Wall's petition, as there was a factual basis for his plea and the sentence imposed was lawful. The PCRA Court issued a notice on May 5, 2015 pursuant to Pa. Crim. Proc. Rule 907 informing Wall of its intention to dismiss his PCRA petition for the reasons stated in counsel's *Finley* letter. Wall filed a timely response to the Rule 907 notice, but on June 3, 2015, the PCRA Court dismissed the petition.

Wall filed a timely appeal of the dismissal of the petition and proceeded *pro se.* He complained that: (1) the PCRA court improperly withheld discovery from him, (2) he was subjected to prosecutorial misconduct when the prosecutor did not dismiss the charges against him where he believed the evidence did not establish a *prima facie* case of aggravated assault, and (3) Attorney Kilroy ineffectively failed to investigate evidence and witnesses, file a motion to dismiss, and file pretrial motions. Pa. Super. Ct. Opin. at 1-2. The Superior Court found that the PCRA Court furnished Wall with the documents he requested; that he had waived any claim of prosecutorial misconduct or any claim about the sufficiency of the evidence as to aggravated assault; and that the PCRA Court properly concluded that Wall knowingly and voluntarily entered his guilty plea such that defense counsel could not have been ineffective. *Id.* at 2-3.

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[4] In *Commonwealth v. Finley*, the Superior Court established procedures pursuant to which counsel could be permitted to withdraw from the representation of a PCRA petitioner. *Finley*, 550 A.2d 213, 214 (Pa. Super. Ct. 1988). Counsel must provide the court with a "no-merit letter," which must detail the nature and extent of counsel's review of the petition, list each issue that petitioner wishes to have reviewed, and explain why the issues are meritless. *Id.* at 215.

Wall sought review in the Pennsylvania Supreme Court but that court denied his petition on October 24, 2016.

Wall submitted his *pro se* habeas petition to this Court on November 27, 2016, setting forth four grounds for habeas relief that raised a host of sub-claims. The Philadelphia District Attorney's Office filed a response on April 24, 2017, contending that his petition should be dismissed with prejudice, as his reviewable claims were reasonably rejected by the state courts and the vast majority of the claims asserted were defaulted and unreviewable because they were never properly raised in state court proceedings. Resp. at 3. Wall filed a reply to the District Attorney's response on September 7, 2017, reiterating the particulars of his grounds for relief and pointing to the portions of the record that presumably support his contentions. Pet'r Reply at ECF pp. 2-9.

II. LEGAL STANDARDS

Before we discuss Wall's particular claims, we first describe four doctrines that will guide our evaluation of his petition. We first address the question of what claims are cognizable on federal habeas review of a state court conviction. We then briefly set out the legal requirements pertaining to Wall's obligation to exhaust available state court remedies as to his claims and the consequences of a failure to do so. We also describe the constraints upon a federal court reviewing claims adjudicated on the merits in the state court. Finally, inasmuch as several of Wall's claims implicate the Sixth Amendment right to counsel, we describe the standard under which such claims are evaluated.

A. Cognizable claims vs. claims arising from collateral review

This Court's authority to grant habeas relief to "a person in custody pursuant to the judgment of a State court" is limited to situations in which the "custody [is] in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). *See also* 28 U.S.C.

§ 2241(c)(3). In Wall's case, the "judgment of [the] State court" pursuant to which he is in custody is the conviction that followed upon his 2013 negotiated guilty plea for aggravated assault, the judgment of which became final upon the expiration of the time in which to file a direct appeal. By contrast, alleged errors in collateral proceedings do not themselves provide a basis for habeas relief from the original conviction. As our court of appeals has noted, "[i]t is the original trial that is the 'main event' for habeas purposes." *Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004). For this reason, claims on habeas review that are premised upon events in the PCRA proceedings are non-cognizable. *See, e.g., George v. Lamas*, No. 11-cv-1462, 2012 WL 4506077, *10 (M.D. Pa. Oct. 2, 2012) (finding petitioner's argument that PCRA process was defective to be non-cognizable on habeas); *Parker v. Kerestes*, Civ. No. 10-7262, 2012 WL 676984, *3 (E.D. Pa. Feb. 29, 2012) (concluding that even if PCRA Court erred in adjudicating claims without holding an evidentiary hearing, habeas relief was unavailable). *Cf. Lambert*, 387 F.3d at 247 (noting that error in state collateral proceeding "may affect the deference owed to the state court's findings under 28 U.S.C. §§ 2254(d) and 2254e(1))."

The Third Circuit explained this concept comprehensively in 1998 in *Hassine v. Zimmerman*, 160 F.3d 941 (3d Cir. 1998), when it rejected the contention that delay in processing of a collateral petition could justify habeas relief:

> The federal courts are authorized to provide collateral relief where a petitioner is in state custody or under a federal sentence imposed in violation of the Constitution or the laws or treaties of the United States. 28 U.S.C. §§ 2254, 2255. Thus, the federal role in reviewing an application for habeas corpus is limited to *evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation.*

Hassine, 160 F.3d at 954-55 (emphasis added). Congress also has made clear that habeas relief is unavailable to state prisoners for a claim that their detention arises from any alleged deficient performance of counsel in state post-conviction review:

> The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C. § 2254(*i*).

B. Exhaustion and procedural default

Assuming that a claim is cognizable on federal habeas review, relief is ordinarily available only for a claim where the petitioner has exhausted the corrective processes available in the state courts. *See* 28 U.S.C. § 2254(b)(1). It has long been recognized that a petitioner satisfies this obligation and gives the state courts a full and fair opportunity to resolve a federal constitutional claim only when he "fairly presents" his claim in "one complete round of the state's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Where a claim was not properly presented to the state court, the petitioner is considered to have defaulted that claim. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 749 (1991). Such a claim cannot provide a basis for federal habeas relief unless the petitioner can show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or [unless he] demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750. *See also Teague v. Lane*, 489 U.S. 288, 308 (1988) (plurality opinion); *Wainwright v. Sykes*, 433 U.S. 72 (1976). To establish cause, the petitioner must show "that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule" in the presentation of the claim to the state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The fundamental miscarriage of justice exception requires that the petitioner

supplement his claims with a "colorable showing of factual innocence" in order to obtain review of the defaulted constitutional claim. *McCleskey v. Zant*, 499 U.S. 467, 495 (1991).

C. Standards for state-adjudicated claims

Where a cognizable federal claim presented in the federal habeas petition was properly presented to and adjudicated on the merits in the state courts, the federal court may grant habeas relief only if adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A writ may issue under the "contrary to" clause of Section 2254(d)(1) only if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court "unreasonably applies it to the facts of the particular case." *Id.* This standard requires the petitioner to demonstrate that the state court's analysis was "objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).

D. Ineffective assistance of counsel: the *Strickland* standard

The Supreme Court employs the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if a defendant was deprived of his right to counsel as guaranteed by the Sixth Amendment. Pursuant to *Strickland*, a defendant who raises claims

based on the ineffective assistance of his counsel must prove that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

To satisfy the first prong of the *Strickland* test, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In evaluating counsel's performance, a reviewing court should be "highly deferential" and must make "every effort ... 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." *Id.* at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

To satisfy the second prong of the *Strickland* test, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* It follows that counsel cannot be ineffective for failing to pursue meritless claims or objections. *See, e.g., United States v. Sanders,* 165 F.3d 248, 253 (3d Cir. 1999); *United States v. Fulford,* 825 F.2d 3, 9 (3d Cir. 1987).

III. DISCUSSION

Wall seeks habeas relief on four grounds. In Ground One, he claims that his conviction violates his Fourth Amendment rights, as he believes police had no basis to arrest him. Pet. at ECF p. 5. In Ground Two, he contends that his right under the Fourteenth Amendment to procedural due process was violated in several respects. *Id.* at ECF pp. 7-8. Wall asserts in

Ground Three that his Fifth Amendment rights were violated due to what he perceived as defects in the indictment or proof of the witness intimidation charge. *Id.* at ECF p. 10. Finally, in Ground Four, Wall argues that his conviction violated his Sixth Amendment rights in that he never faced his accuser, he believes his plea bargain improperly reflected a mandatory minimum sentence, and he believes that trial counsel ineffectively failed to investigate the Commonwealth's evidence and allegedly lied about a colloquy having taken place. *Id.* at ECF pp. 11-12.[5]

As we explain below, we conclude that his assertions in Ground One are non-cognizable claims for our review. We have also found that many of the claims asserted in Grounds Two through Four are procedurally defaulted. As to those claims that remain in Ground Two, we found them to be non-cognizable, those that remain in Ground Three are without merit, and those that remain of Ground Four were reasonably rejected by the state courts.

A. Ground One, asserting that Wall's Fourth Amendment rights were violated, is non-cognizable.

In Ground One of his habeas petition, Wall asserts that his Fourth Amendment rights were violated due to: (1) the alleged absence of a circumstantial basis for his arrest, (2) the alleged absence of any apparent injury to Ms. Johnson; (3) the lack of service on him of the PFA order involving Ms. Johnson; and (4) Ms. Johnson's alleged failure to appear at the PFA hearing or to ensure that Wall was brought to the hearing. Pet. at ECF p. 5. *See also* Pet'r Reply at ECF

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[5] Wall's reply brief addresses the four grounds of his petition. Unfortunately, he employed in that document a different numbering system that did not correspond with how his claims were laid out in his original habeas petition. His reply addresses first the claim described in his petition as Ground Four, then discusses the claim described in his petition as Claim One, followed by Claim Three and then Claim Two.

pp. 4-5. We construe these assertions to reflect a claim that the arrest on March 1, 2013 violated Wall's Fourth Amendment rights in that the police allegedly lacked sufficient evidence to arrest him where Ms. Johnson did not appear to be injured and where Wall believes the PFA order was not properly obtained or served on him.

It is well established that where a habeas petitioner had an opportunity for full and fair litigation of a Fourth Amendment challenge to actions taken by the police, habeas relief is not available following his conviction on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Stone v. Powell*, 428 U.S. 465, 492 (1976). Here, Wall had an opportunity in state court for a full and fair litigation of any Fourth Amendment claim he wished to assert. He opted, however, to plead guilty to aggravated assault, waiving his opportunity to challenge any actions of the police regarding his arrest and stipulating to the sufficiency of the evidence supporting the single charge of which he was convicted: aggravated assault. *See* N.T. 6/10/13 at 8 (guilty plea hearing). Therefore, Wall's Fourth Amendment claim asserted here as Ground One is non-cognizable on habeas review and his assertions do not otherwise state a claim under the Constitution or federal laws and treaties.

B. Ground Two, asserting that Wall's Fourteenth Amendment rights were violated, contains claims that are procedurally defaulted and non-cognizable.

Wall asserts in Ground Two of his petition that his Fourteenth Amendment procedural due process rights were violated in seven different respects. His assertions touch upon perceived deficiencies in the evidence presented by the Commonwealth and in compliance with discovery obligations but primarily concern issues and procedures that arose during PCRA proceedings, finding fault with all levels of the state court system. We address each assertion in turn.

Wall first contends that he was denied procedural due process where the state court "[d]en[ied] PCRA counsel's motion to receive grand jury's notes of testimony (e.g. status

hearings of 4-8-13 & 4-22-13), and had failed to send order ordering statements for issues raised on appeal by (trial judge)[.]" Pet. at ECF p. 7. We understand this assertion to refer to his request on PCRA appeal for a copy of the Commonwealth's discovery, including grand jury materials.[6] To the extent that Wall complains that the PCRA Court did not promptly provide him with discovery, that claim is non-cognizable for our review, as it implicates Wall's PCRA proceedings and not his original conviction. *See, e.g., Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) (explaining that "alleged errors in collateral proceedings ... are not a proper basis for habeas relief from the original conviction"). Wall's complaint about an alleged defect during his PCRA proceedings does not provide a basis for habeas relief.

Second, Wall claims that during the PCRA process and after the dismissal of his petition, Judge Brinkley failed to order him to submit a statement of the errors complained of on appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. Pet. at ECF p. 7. This claim is also non-cognizable for our review in that it concerns Wall's PCRA proceedings, not the original proceeding that gave rise to his conviction. *See Lambert*, 387 F.3d at 247. Therefore, habeas relief is unavailable to Wall on this claim.

Third, he complains that the "initial issuing authority" failed to prepare a transcript and its original papers pursuant to Pa. R. Crim. Proc. 547(a). Pet. at ECF p. 7. He refers in his reply brief to excerpts from his state court docket sheets, on which he notes that when he was held for court and his indictment was filed on April 24, 2013, formal arraignment was scheduled for May

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[6] The Superior Court ultimately ordered the PCRA Court to provide him with these materials, which it did on October 26, 2015. (St. Ct. Rec. D-14.) These materials included notes of testimony from April 22, 2013, when the grand jury indictment was returned. The Municipal Court docket, 8630-2013, confirms that the case was also called on April 8, 2013, but no transcript of that proceeding or listing is included in the state court record.

13, 2013 but was later cancelled. Pet'r Reply at 70. We are unsure what he means by this, but at most he complains of defects in state proceedings that would have been waived by his guilty plea. Thus, we are satisfied that these allegations fail to show that he is currently in custody due to a violation of the Constitution.

Fourth, Wall contends that the district attorney "failed to produce competent evidence concerning [sic] allege accusations / allegations" prior to or during "the pre-trial conference hearing[,]" which he dates to June 3, 2013. Pet. at ECF p. 8. His reply brief lists a number of items of evidence that he believes was not produced when it should have been. Pet'r Reply at ECF p. 8. Again, this claim appears to have no bearing on the proceeding at which he was convicted of aggravated assault: his guilty plea hearing of June 10, 2013. Even if it did, Wall failed to present any challenge in this regard in his state court proceedings when he pursued PCRA relief. Therefore, this claim is defaulted. He has not demonstrated cause to justify the default of this claim, and no fundamental miscarriage of justice will result from our failure to consider this claim where there is no "colorable showing of factual innocence" here. Therefore, we cannot recommend that Wall be granted habeas relief on this claim.

Fifth, Wall complains of a "failure to provide full and complete pre-trial discovery," referencing the Pennsylvania Superior Court order on PCRA review on August 27, 2015. Pet. at ECF p. 8; Pet'r Reply at ECF p. 9. His claim here relates to the circumstance that, prior to his trial, grand jury material was shared with his lawyer but that Wall's access to it was restricted. Following the withdrawal of appointed PCRA counsel and the initiation of a *pro se* appeal in the Superior Court, Wall filed an "Application for Order Mandating Clerk of Courts And/Or Court Stenographer To F[u]rnish Court Records And Transcribed Notes of Testimony in *Forma Pauperis*," requesting that the Superior Court order the PCRA Court to provide him with

numerous documents. On August 27, 2015, the Superior Court issued an order directing the PCRA Court to give Wall his requested documents. The PCRA Court confirmed its compliance with that order on October 26, 2015.[7] Therefore, Wall's claim that he was deprived of any documents to pursue PCRA relief has no merit, and such a claim would not be cognizable on habeas review in any event.

Sixth, Wall believes his rights were violated when the Superior Court denied a motion to compel without issuing a written opinion. Pet. at ECF p. 8. This assertion appears to concern the circumstance that, after the Superior Court issued the August 27, 2015 order to the PCRA Court to turn over to Wall the documents he requested that were related to his appeal, Wall filed on November 16, 2015 a document listed on the docket as an "Application to Compel." The Superior Court denied his application on December 9, 2015 in a *per curiam* order that explained that Petitioner's motion was denied without prejudice to his right to raise the issue in his Appellant brief. *See* Appeal Dkt. Sheet, No. 1789 EDA 2015, entry of Dec. 9, 2015. Again, this issue does not implicate his conviction but rather the PCRA process. It thus does not provide a basis for habeas relief.

Finally, Wall contends that his Fourteenth Amendment rights were infringed upon when the Supreme Court of Pennsylvania denied his petition for allowance of appeal without issuing an opinion. Pet. at ECF p. 8. This claim is non-cognizable for the same reasons outlined above: the "federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what

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[7] A set of these documents is found in the state court record. Many of them are also appended to Petitioner's reply brief.

occurred in the petitioner's collateral proceeding does not enter into the habeas calculation." *Hassine v. Zimmerman*, 160 F.3d 941, 954-55 (3d Cir. 1998). Wall's assertion does not provide a cognizable claim on habeas review. None of the sub-claims of Ground Two, asserting violations of his rights to procedural due process, demonstrate that Wall was convicted in violation of the Constitution.

C. Ground Three, asserting that Wall's Fifth Amendment rights were violated, is procedurally defaulted and without merit.

In Ground Three, Wall sets out several circumstances which he believes establish that his Fifth Amendment rights were violated. He claims that Ms. Johnson never alleged any information that would give rise to a witness intimidation charge, Pet. at ECF p.10, and that, as a result of this alleged absence of evidence, the district attorney engaged in prosecutorial misconduct. Pet'r Reply at ECF p. 6. He similarly complains that the district attorney failed to provide a "substantial basis" to establish witness intimidation. Pet. at ECF p.10. He further argues that "competent evidence" is required "for alleged accusations," and that "potential evidence and witnesses are required to indict properly." Pet. at ECF p.10. Respondents interpret these claims as focusing on "the prosecutor's supposed failure to produce competent evidence from the victim," and assert that this ground is "devoid of any factual support" where Ms. Johnson's statement to police provided the allegations upon which the charges were based. Resp. at 19.

We construe Wall's claim here to be that his Fifth Amendment rights were violated as he was indicted allegedly without sufficient evidence of witness intimidation. Wall did not raise this ground for relief in state court and the claim is thus defaulted. Moreover, this claim would not appear cognizable in these circumstances, as the charge of witness intimidation was

dismissed as part of the guilty plea and Wall is presently in custody only as a result of a conviction of aggravated assault. Habeas relief is unavailable to Wall on this claim.

D. Petitioner's assertions in Ground Four that his Sixth Amendment rights were violated due to ineffective assistance of counsel were reasonably rejected by the state court; other claims asserted as part of Ground Four are procedurally defaulted.

Wall's fourth and final claim for habeas relief asserts that his Sixth Amendment rights were violated due to five enumerated circumstances:

> (1) Based upon the Petitioner's version of the incident, the trial attorney duty was to investigate the said witnesses and evidence of the alleged accusations; (2) The trial attorney had legal in fact lied [sic] about a colloquy and proceeding that never took place for the Petitioner; (3) I never faced my accuser for any of the alleged accusations / allegations; (4) Within the plea bargain it was unconstitutional to offer a mandatory minimum; and (5) The trial [attorney] duty was to argue the matter and review the discovery with me.

Pet. at ECF pp. 11-12 (spelling and some punctuation corrected). *See also* Pet'r Reply at ECF pp. 2-3 (repeating these assertions). Respondents read Wall's petition to allege generally that Attorney Kilroy failed to conduct an appropriate investigation of the Commonwealth's evidence and presume him to contend that, if Kilroy had conducted a more thorough investigation, he would not have advised Wall to enter into the plea agreement. Resp. at 19. *See also id.* at n.9 (acknowledging that "Petitioner does not specifically allege this, but presumably this argument provides the basis for his ineffective assistance claim"). Respondents note that this ineffectiveness claim was rejected by the state courts on PCRA review. *Id.* at 19. We proceed to consider Wall's allegations in Ground Four both as they relate to the claims he properly presented to the state courts on PCRA review and as to the assertions that are instead procedurally defaulted.

1. Unexhausted claims

Wall claims that his Sixth Amendment rights were violated as he never "faced" Ms. Johnson for the allegations made against him. Pet. at ECF p. 12. To the extent Wall seeks to present this as some sort of claim under the Sixth Amendment Confrontation Clause, we note that Wall did not present this claim to the state courts as required by 28 U.S.C. § 2254(b)(1) and it is now procedurally defaulted. As Wall has made no assertions that the default of this claim can be excused, this aspect of his claim should be dismissed.

Wall's contention at subsection (4), concerning the propriety of his being offered a mandatory minimum sentence as part of the plea bargain, is also defaulted, as it was not presented to the state court. Moreover, this claim is without merit in that he suffered no violation of any Sixth Amendment rights with respect to the sentence he received. The court imposed an agreed-upon sentence, which was 5 to 10 years' imprisonment, followed by 5 years of reporting probation. *See* N.T. 6/10/13 at 9. Wall did not receive any sort of mandatory minimum sentence for this conviction.[8] Therefore, this aspect of his claim must also be dismissed.

2. Exhausted claims

The bulk of Wall's assertions in Ground Four concern the perceived shortcomings of trial counsel, Attorney Kilroy, presumably such that either Wall was left with no choice but to plead guilty or that Kilroy's recommendation that he plead otherwise amounted to ineffective assistance of counsel. Pet. at ECF pp. 11-12. On PCRA review, Wall exhausted these claims on

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[8] Wall's confusion about a mandatory minimum sentence might have arisen from the notice that he was given at the conclusion of sentencing, when the prosecutor advised him that his conviction for a felony of the first degree for a violent offense counted as his "first strike" and that if he was convicted of another violent felony he faced a mandatory minimum sentence of 10 to 20 years. *See* N.T. 6/10/13 at 11-12.

PCRA review when he similarly characterized Attorney Kilroy's representation as ineffective assistance of counsel. In his brief on appeal to the Superior Court, he cited counsel's alleged failure to investigate evidence and witnesses, to file pretrial motions, to explain the grand jury rules to him, and to file a motion to dismiss the charges. Pa. Super. Ct. Opin. at 5 (citing Br. for Appellant at 21-34). *See also id.* at 2-3 (citing Br. for Appellant at 6.)

In its analysis, the Superior Court recited the proper standard: that Wall bore the burden of establishing that the challenged course of conduct pursued by counsel did not have some reasonable basis designed to effectuate the client's interests and that, but for counsel's ineffectiveness, there was a reasonable probability that the outcome of the proceedings would have been different. *Id.* at 5. It also recognized that even during a plea negotiation a criminal defendant has the right to effective representation – advice within the range of competence demanded of attorneys in criminal cases – such that the client's entry of a guilty plea is knowing, voluntary, and intelligent. As a result, the reviewing court assesses whether attorney ineffectiveness caused the defendant to enter an involuntary or unknowing plea, looking to whether a guilty plea colloquy demonstrated that the defendant understood what the plea connoted and its consequences. *See id.* at 5-7. This analysis is consistent with the decisions of the United States Supreme Court. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (recognizing that attorney can perform deficiently if he misinforms client such that the plea is not made knowingly, intelligently, and voluntarily). Pursuant to Supreme Court precedent, the petitioner establishes prejudice in such cases only where he shows that, absent counsel's ineffectiveness, there is a reasonable probability that he would not have taken the plea but instead would have gone to trial. *Id.*

The Superior Court examined Wall's oral colloquy at the guilty plea hearing conducted on June 10, 2013 with these principles in mind. As it explained:

> At the plea colloquy, Wall stated that he understood the English language, and that he was not under the influence of alcohol or drugs. *See* N.T., 6/10/13, at 3. Wall understood the charges against him, and admitted to the facts that led to those charges. *Id.* at 4, 6-8. Wall also stated that by pleading guilty, he understood that he was foregoing certain rights, including, *inter alia*, the presumption of innocence, the right to a jury trial, and most of his direct appeal rights. *Id.* at 4-5, 12-13. Wall affirmed that he was pleading guilty of his own free will and that he was satisfied with his attorney's representation. *Id.* at 3, 5. Further, the trial court informed Wall about the maximum possible sentence and thereafter, imposed the negotiated sentence. *Id.* at 4, 10.
>
> Based upon our review of the totality of the circumstances, we conclude that Wall knowingly and voluntarily entered the guilty plea. Wall has not argued or demonstrated that plea counsel's alleged errors caused him to tender an unknowing and involuntary plea. *See* PCRA Court Opinion, 7/10/15, at 5. Indeed, Wall accepted the factual basis of the guilty plea and admitted to committing aggravated assault. Moreover, Wall confirmed that he understood the rights he was foregoing by pleading guilty, indicated that he was pleased with the representation of counsel, and stated that no one had coerced him into pleading guilty. In light of the guilty plea colloquy, we conclude that Wall knowingly and voluntarily entered the guilty plea, and that Wall's claims of ineffective assistance of plea counsel do not entitle him to relief.

Pa. Super. Ct., slip opin. at 7-9 (citations to state cases omitted).

The Superior Court's analysis does not reflect an unreasonable application of *Strickland v. Washington* or *Hill v. Lockhart*. Wall put himself in a situation in which he faced a severe sentence if he took his case to trial. He was charged with eleven crimes arising from his conduct of March 1, 2013 against a woman whom he had criminally stalked previously. His lack of remorse for his actions, which would likely affect him negatively at sentencing, was further

reflected in the threatening letter he sent the victim from jail a month later.[9] As a result of Attorney Kilroy's negotiations for a guilty plea, the District Attorney agreed to drop every charge except aggravated assault. If Wall had been convicted of every original charge, his potential exposure was an aggregate prison sentence of 53 to 106 years. His negotiated plea involved a sentence of only 5 to 10 years.

Based on Attorney Kilroy's ability to drastically reduce both Wall's prison sentence and total charges, we conclude that Wall cannot satisfy the first prong of the *Strickland* test. Our review of the record informs our conclusion that Attorney Kilroy's performance did not fall below an objective standard of reasonableness considering Wall's significant criminal exposure and the likelihood that the incriminating letter Wall sent to Ms. Johnson would not have earned him any leniency at sentencing. Moreover, the colloquy reflects that Wall was satisfied with Attorney Kilroy's representation. *See* N.T. 6/10/13 at 3. *See also id.* at 4 (Wall's confirmation to court that he reviewed written guilty plea form with Attorney Kilroy prior to the oral colloquy). To be sure, Wall and Attorney Kilroy were in court just a month later on his VOP hearing from the 2012 case, and Wall in no way suggested there was any misunderstanding or dissatisfaction

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[9] When the Common Pleas Court judge with supervision over Wall's 2012 case presided over the violation of probation hearing in July 2013, he imposed a further sentence upon Wall and explained that it was based on Wall's conduct from March 1, 2013 against the same complainant, but also independently based upon the letter Wall sent to her. He described it as "an absolutely gruesome, threatening letter which is so horrendous, I can't even begin to read it in open court, it's just inappropriate for reading." He noted that "the language is so threatening, so crude, so inappropriate," and noted that the letter, apart from all of the curse words used, "talk[ed] about ... hunting her down like a hungry lion out of a jungle and breaking her face, and ... about breaking her hands, talking about torturing her, ... breaking her mouth, it's such a gruesome intent on your part[.]" N.T. VOP Hr'g, 7/11/13 at 28 (No. CP-51-CR-6889-2012) [Doc. 14-4].

with Kilroy's representation in the case that constituted the violation of his supervised release in his 2012 case. *See* N.T. VOP Hr'g 7/11/13 (No. CP-51-CR-6889-2012) [Doc. 14-4].

Based on the above, it is clear that the state court reasonably applied *Strickland* when it adjudicated Wall's claim of ineffective assistance of counsel concerning the performance of Attorney Kilroy when counseling Wall about the plea offer. As the state court reasonably determined that Attorney Kilroy's performance was not deficient, Wall may not obtain habeas relief here. *See* 28 U.S.C. § 2254(d).

IV. CONCLUSION

For the reasons discussed above, we have determined that Wall has not presented any claims that warrant habeas relief. His claims in Ground One, asserting violations of the Fourth Amendment, are not cognizable where the petitioner had an opportunity to litigate them in state court before he opted to enter his guilty plea. His assertions in Ground Two that implicate his PCRA proceedings are non-cognizable as our habeas analysis may only involve proceedings leading up to Wall's original conviction. The remainder of Wall's Ground Two claims, nominally asserting violations of the Fourteenth Amendment, are procedurally defaulted, and as discussed, the record does not reveal that Wall could establish cause and prejudice or that a miscarriage of justice would result from our failure to review them. The claims Wall asserts at Ground Three, that his Fifth Amendment rights were violated when the District Attorney failed to introduce evidence demonstrating witness intimidation, is procedurally defaulted and without merits as to his conviction only of aggravated assault. Finally, certain claims asserted as Ground Four are procedurally defaulted or without merit and the remainder, asserting ineffective assistance of counsel, cannot give rise to relief given that the state courts reasonably applied the *Strickland* standard when it considered and rejected this claim.

Pursuant to Local Appellate Rule 22.2 of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. Under 28 U.S.C. § 2253(c), a habeas court may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As to claims that are dismissed on procedural grounds, the petitioner bears the additional burden of showing that jurists of reason would also debate the correctness of the procedural ruling. *Id.* Here, for the reasons set forth above, we do not believe a reasonable jurist would find the court to have erred in denying the present petition. Accordingly, we do not believe a COA should issue.

Our Recommendation follows.

RECOMMENDATION

AND NOW, this 23rd day of August, 2018, it is respectfully RECOMMENDED that the petition for a writ of habeas corpus be DENIED AND DISMISSED. It is FURTHER RECOMMENDED that a certificate of appealability should NOT ISSUE, as we do not believe that Petitioner has demonstrated that reasonable jurists would find the correctness of the procedural aspects of this Recommendation debatable nor debate whether his petition states a valid claim.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

COURT OPINIONS:

Date: 10-13-20

Ramon Tidwell
Petitioner, Prose

Pursuant to Local Appellate Rule 22.2 of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. Under 28 U.S.C. § 2253(c), a habeas court may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As to claims that are dismissed on procedural grounds, the petitioner bears the additional burden of showing that jurists of reason would also debate the correctness of the procedural ruling. *Id.* Here, for the reasons set forth above, we do not believe a reasonable jurist would find the court to have erred in denying the present petition. Accordingly, we do not believe a COA should issue.

Our Recommendation follows.

RECOMMENDATION

AND NOW, this 23rd day of August, 2018, it is respectfully RECOMMENDED that the petition for a writ of habeas corpus be DENIED AND DISMISSED. It is FURTHER RECOMMENDED that a certificate of appealability should NOT ISSUE, as we do not believe that Petitioner has demonstrated that reasonable jurists would find the correctness of the procedural aspects of this Recommendation debatable nor debate whether his petition states a valid claim.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

DRS for USMJ

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

Ex. C

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

RAMON WALL, Petitioner, v. MS. LUTHER, et. al. Respondents.	:	CIVIL ACTION NO. 16-6273

ORDER

AND NOW, this day of , 2018, upon careful and independent consideration of the pleadings and available state court records, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, it is

ORDERED that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

2. The petition for a writ of habeas corpus is **DENIED AND DISMISSED**;

3. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not made a substantial showing of the denial of a constitutional right nor demonstrated that reasonable jurists would debate the correctness of the procedural aspects of this ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and

4. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

NITZA I. QUIÑONES ALEJANDRO, J.

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RAMON WALL	:	
Appellant	:	No. 3618 EDA 2018

Appeal from the PCRA Order Entered November 30, 2018
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0006889-2012

BEFORE: BENDER, P.J.E., MURRAY, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.: **FILED FEBRUARY 26, 2020**

Appellant, Ramon Wall, appeals from the order entered by the Court of Common Pleas of Philadelphia County dismissing his first petition filed under the Post Conviction Relief Act ("PCRA") seeking reinstatement of his direct appeal rights *nunc pro tunc*. We affirm.

The PCRA court sets forth the facts and procedural history of the case, as follows:

> On July 24, 2012, Ramon Wall ("Defendant") [hereinafter "Appellant"] entered into a negotiated plea to one count of stalking the victim, his former girlfriend Chemyra Johnson.[] [The trial court] sentenced Appellant to a term of six to twenty-three months' incarceration and three years consecutive probation. On the same day, the trial court issued a protective order against Appellant on behalf of the victim. Appellant received credit for time served and was released from incarceration by an order of the trial court on November 15, 2012.

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* Former Justice specially assigned to the Superior Court.

Ex. D

On March 2, 2013, Appellant was arrested for choking and repeatedly striking the same victim, his girlfriend, Chemyra Johnson. While in custody awaiting trial, Appellant sent the victim a letter threatening her physical safety. On June 10, 2013, Appellant appeared before Judge Genece Brinkley and pled guilty to the charge of Aggravated Assault. Judge Brinkley sentenced Appellant to five to ten years' incarceration followed by five years consecutive probation.

On June 13, 2013, the Commonwealth filed a Motion to revoke Appellant's probation. [After a Violation of Probation ("VOP") hearing, the trial court granted that Motion on July 11, 2013, and re-sentenced Appellant to three to six years' incarceration, to run consecutively to Judge Brinkley's five to ten year sentence. [On July 18, 2013, Appellant filed a counseled post-sentence motion to vacate and modify the sentence, which sought a reduction in sentence and the imposition of concurrent rather than consecutive sentences. The motion was denied by operation of law.]

On December 3, 2013, Appellant filed identical PCRA Petitions before the PCRA court and before Judge Brinkley [the latter being later dismissed] . . . alleging his trial counsel, Jeffrey Kilroy, Esq. was ineffective and that Appellant was improperly induced to plead guilty. On [September 28, 2017], Appellant filed [a supplemental] amended petition with the PCRA court alleging[, *inter alia*,] that Mr. Kilroy was ineffective for failing to inform Appellant that the trial court denied his Motion for Reconsideration of Sentence.

On April 27, 2018, Mr. Cotter appeared before the PCRA court and made oral arguments on the issue of ineffectiveness related to failure to file the appeal. On November 30, 2018, the PCRA court held an evidentiary hearing on this issue.

At this hearing, Mr. Kilroy testified that his failure to file an appeal on Appellant's behalf was the result of a discussion of strategy ultimately endorsed by Appellant, which favored the filing of a Motion for Reconsideration. Appellant testified that Mr. Kilroy did not discuss post-trial strategy with him.

The PCRA court ultimately found Mr. Kilroy's testimony credible as to the nature of his discussions of post-conviction strategy with the Appellant, denied Appellant's PCRA, and declined to reinstate

> Appellant's appellate rights *nunc pro tunc*. (N.T. 11/30/18, at 47). Appellant filed this appeal on December 12, 2018.

PCRA Court Opinion, 8/14/19, at 1-3.

Appellant raises the following issue for our review:

> Did the trial court err in denying Appellant an appeal *nunc pro tunc* from the sentence imposed at a violation of probation hearing due to ineffective assistance of counsel at the hearing?

Appellant's brief, at 2.

"[W]e review a denial of PCRA relief to determine whether the findings of the PCRA court are supported by the record and free of legal error." ***Commonwealth v. Orlando***, 156 A.3d 1274, 1280 (Pa.Super. 2017) (quoting ***Commonwealth v. Treiber***, 632 Pa. 449, 121 A.3d 435, 444 (2015)). A PCRA court's credibility findings are to be accorded great deference, and where supported by the record, such determinations are binding on a reviewing court. ***Commonwealth v. Abu-Jamal***, 720 A.2d 79, 99 (Pa. 1998). A PCRA court's legal conclusions, however, are reviewed *de novo*. ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1127 (Pa. 2011).

We presume that the petitioner's counsel was effective, and a petitioner bears the burden of proving otherwise. ***Commonwealth v. Williams***, 732 A.2d 1167, 1177 (Pa. 1999). In assessing Appellant's ineffectiveness claim, we apply the well-settled test enunciated in ***Strickland v. Washington***, 466 U.S. 668 (1984) and adopted in ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987):

> To prevail on an ineffectiveness claim, appellant must establish: (1) the underlying claim has arguable merit; (2) no reasonable

> basis existed for counsel's actions or failure to act; and (3) [appellant] suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014). The failure to prove any one prong is cause alone for dismissal of the claim without the need to determine whether the other two prongs have been met. ***Commonwealth v. Basemore***, 744 A.2d 717 (Pa. 2000).

Appellant's ineffectiveness claim charges that VOP counsel improperly advised him regarding his appellate rights by advocating against the filing of a direct appeal, which, counsel maintained, would divest the VOP court of jurisdiction to grant Appellant's motion for reconsideration. This Court has recognized "it is evident that incorrect advice or failing to properly advise a client can be grounds for an ineffectiveness claim." ***Commonwealth v. Markowitz***, 32 A.3d 706, 716 (Pa.Super. 2011) (citing ***Commonwealth v. Lantzy***, 736 A.2d 564, 572 (Pa. 1999); ***Commonwealth v. Boyd***, 688 A.2d 1172, 1175 (Pa. 1997) (failure to properly explain the advantages and disadvantages of accepting or rejecting a plea offer may be ineffective assistance of counsel), *overruled on other grounds*, ***Commonwealth ex rel. Dadario v. Goldberg***, 565 Pa. 280, 773 A.2d 126 (2001)).

When consulting with a defendant about appellate rights, counsel must "advis[e] the defendant about the advantages and disadvantages of taking an appeal, and mak[e] a reasonable effort to discover the defendant's wishes." ***Commonwealth v. Green***, 168 A.3d 173, 176 (Pa.Super. 2017) (quoting ***Roe v. Flores-Ortega***, 528 U.S. 470, 478 (2000)). Prejudice is shown where

a petitioner can establish that, but for counsel's erroneous advice, he would have filed a direct appeal. ***Green***, 168 A.3d at 179. Upon satisfying the three-prong ineffectiveness test, a petitioner is entitled to the reinstatement of his direct appeal rights *nunc pro tunc*. ***Id.*** ***See also Markowitz***, 32 A.3d at 717.

Initially, we note Appellant fails to develop a requisite prejudice prong argument in his appellate brief, stating only, "The trial court's position stated on page 3 and 4 of its opinion that the defendant must show prejudice is erroneous." ***See*** Appellant's brief at 7-8.[1] For Appellant's failure to plead and prove the prejudice prong of the ***Strickland/Pierce*** test, waiver applies to this issue. Pa.R.A.P. 2119(a)-(b); ***See Commonwealth v. Steele***, 961 A.2d 786 (Pa. 2008) (holding when petitioner fails to properly plead or develop a prong, the petitioner is not entitled to relief and the court may find the claim waived for lack of development). Even if waiver did not apply, this appeal would still fail, as we discern no arguable merit to Appellant's claim of ineffective assistance of VOP counsel.

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[1] In certain limited circumstances, including the actual or constructive denial of counsel, prejudice may be so plain that the cost of litigating the issue of prejudice is unjustified, and a finding of ineffective assistance of counsel *per se* is warranted." ***Commonwealth v. Rosado***, 150 A.3d 425, 429 (Pa. 2016). This exception applies in cases where counsel actually or constructively denied a defendant his right to appeal, such as where counsel neglects to file or perfect a requested appeal. ***Id***. at 430–431 (citing ***Lantzy***, 736 A.2d at 566. As discussed *supra*, however, the present case involves whether counsel rendered erroneous legal advice against filing a requested direct appeal, an issue for which we employ the three-prong ineffectiveness test. ***See Green***, ***supra***; ***Markowitz***, ***supra***.

Appellant maintains in his brief that VOP counsel supplied Appellant with erroneous legal advice regarding post-sentence and direct appeal rights that caused Appellant to abandon his initial request for a direct appeal. This is so, Appellant contends, because VOP counsel told Appellant that he "could either file an appeal or post sentence motions and that the chances of winning on appeal were slim. Counsel never informed [Appellant] . . . that even if counsel believed [Appellant] would not win on appeal [Appellant] still had the right to file an appeal." Appellant's brief, at 7.[2]

At the PCRA hearing, PCRA counsel asked VOP counsel, who had nine years' experience with the Defenders Association of Philadelphia at the time of the VOP hearing in question, about his consultation with Appellant:

> PCRA COUNSEL: The question I want to ask you is, after the hearing did you ever discuss Appellant's appeal rights with him, post-sentence rights – let's put it that way – his post-sentence rights with him after the hearing?
>
> VOP COUNSEL: I did.
>
> Q: Okay. Where did you do that?

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[2] Appellant failed to articulate this claim in his counseled amended petition of September 28, 2017, in which he based the allegation of ineffectiveness only on VOP counsel's failure to notify Appellant that his post-sentence motion had been denied.

At the PCRA hearing, however, PCRA counsel developed for the court's consideration the discrete claim that counsel ineffectively deprived Appellant of proper consultation at the outset of the post-sentence phase by failing to discuss the pros and cons of pursuing only a post-sentence motion and foregoing a direct appeal. PCRA counsel, therefore, preserved this claim below.

A: In the booth after the hearing. If I'm correct, His Honor was sitting in Courtroom 501 at the time.

Q: Okay. And what, if anything, did you discuss with him?

A: So I knew – Mr. Wall had explained to me that he was unhappy with the fact that the sentence was ran [sic] consecutive to the negotiated sentence that he – that I got for him on the other case. I explained to him that in my opinion, I didn't believe there was anything illegal about the Judge's sentence and, therefore, his chances of success on direct appeal to the Superior Court were very slim.

I believed that if he had a chance of getting, A, a reduced sentence or, B, a sentence ran [sic] concurrent, that his best option would be a motion to reconsider sentence. And that was because of the content and some of the things that were brought out at the VOP hearing.

I explained to him that unlike a normal – what we call an active case – the post-sentence, the motion to reconsider sentence, does not toll the appeal period. Therefore, if he chose to file an appeal before Judge Cohen ruled or considered his motion to reconsider sentence, Judge Cohen would lose jurisdiction to rule on a sentence. And his only recourse would be a direct appeal.

And, once again, it was my advice that he would not be successful in that venture.

Q: Okay. So whose idea was it to file? There was a motion to reconsider filed; is that correct?

A: That is correct, at Mr. Wall's request.

Q: And correct me if I'm wrong, but the docket shows no appeal was filed; is that correct?

A: No, that is correct.

Q: Even though you could've filed the post-sentence motion, the post-sentence motions, giving the Judge an opportunity of five to ten days to decide and take an appeal from there; is that correct?

A: I could have done that; that is correct. I did not do that.

Q: Okay. I have no further questions.

. . .

ASSISTANT DISTRICT ATTORNEY: And why didn't you do that?

A: Because, as I stated earlier, I believe because of what had occurred at the VOP hearing, no disrespect to His Honor, if His Honor had a chance to cool down, maybe he would have given Mr. Wall some reconsideration and maybe even reduced the sentence or agreed to run it concurrently with the sentence he was currently serving.

Q: And, Mr. Kilroy, based on your advice, did Appellant agree with you and did not ask you to file an appeal?

A: That is correct. He did not ask me to file an appeal. He asked me to file a motion to reconsider the sentence upon my advice. That is what I advised him to do.

. . .

PCRA COUNSEL: Your advice was not to file an appeal; is that correct?

A: Correct. I believed it would be unsuccessful.

. . .

THE COURT: Mr. Kilroy. Do understand or do you recall at this point what had happened at the hearing that you though would make it more likely that I would reconsider rather than file an appeal?

. . .

A: There was a letter that Mr. Wall wrote to the complainant while he was in custody that was attached to the . . . Commonwealth's motion to revoke probation. Your Honor mentioned it. However, the contents of that letter were disturbing. And that's putting it lightly.

. . .

Your Honor, among many things, it said things like: I am going to hunt you down like a lion. I am going to break your hands. . . . Your Honor, I don't wish to go into it any further, but it was along those lines.

THE COURT: So what was your thought process, if you would, about why I meant — as a judge I would more likely reconsider my sentence because of that letter?

A: Your Honor, because I've been before you a couple of times. I know you'd be a fair jurist. And I think upon the initial reading of the letter – when I first read the letter, I was offended by it. And I Honestly –I want to help Mr. Wall. And I hope I did help him in what I did. And I just thought that Your Honor was a fair jurist.

And maybe after some time, after just sitting back and reflecting, that maybe you would say, 'Okay. Mr. Wall wrote this in a moment of anger, which is what I argued before Your Honor. And maybe I can cut him a break now that I calmed down.

. . .

THE COURT: Okay. That makes sense. Thank you Mr. Kilroy.

N.T. at 22-29.

PCRA counsel began argument first by positing that VOP counsel committed *per se* ineffectiveness by altogether failing to discuss Appellant's appeal rights. PCRA counsel conceded the trial court's observation, however, that such an argument would prevail only if the court credited Appellant's testimony that counsel never discussed his direct appeal rights:

PCRA COUNSEL: You have to accept the credibility of my client, Judge. I agree with that. So, there's a credibility issue here, one, the [VOP] attorney and one of the defendant's. Accepting my

> client's credibility, the defense attorney had the obligation to discuss the appeal because the defendant was dissatisfied.

N.T. at 31-32.

The court did not credit Appellant's testimony in this regard, electing instead to credit VOP counsel's specific recollection that he discussed appellate rights and advised Appellant, in a face-to-face conversation immediately after sentencing, that, in his opinion, a direct appeal carried only a slim chance of vacating the consecutive sentences about which Appellant complained. It was based on counsel's advice, counsel stated, that Appellant retracted his request for a direct appeal. N.T. at 23-24.

PCRA counsel countered that, even if the court credited counsel's testimony, ***Flores-Ortega***, ***supra***, required counsel to discuss the "pros and cons" of a direct appeal:

> There are no cons to an appeal in this case because you take the case up to the Superior Court. If they say it's a reasonable sentence, it's over. The Superior Court can't give him more time [because Appellant was sentenced to a maximum sentence]. . . . So there's no con to this appeal. [He's] not going to get more time."

N.T. at 32. Counsel never advised Appellant of this fact, counsel maintained.

The PCRA court found, however, that VOP counsel identified a legitimate disadvantage to filing a direct appeal in the case *sub judice*. Specifically, VOP counsel advised Appellant that because a post-sentence motion for reconsideration of a revocation sentence does not toll the 30-day direct appeal

period,[3] timely filing the direct appeal while his post-sentence motion was pending would divest the VOP court of jurisdiction and thereby cause him to forego the better chance at a revised sentence run concurrently. N.T. at 24. Therefore, the court determined that VOP counsel reasonably discussed the pros and cons of filing a direct appeal during the pendency of a post-sentence motion in this matter, contrary to Appellant's assertion.

PCRA counsel responded that VOP counsel could have filed a post-sentence motion and, if the VOP court failed to grant reconsideration or withdraw sentence within 29 days, file a timely direct appeal on the 30th, and final, day of the Pa.R.Crim.P. 708 appeal period pertaining to revocation judgments of sentence. N.T. at 41.

The Court countered, however, that it had decided motions to reconsider revocation sentences on the 30th day "many times . . . . So the court cannot agree. But the court has no – the last time I did that was probably within the last month or two. It was done that last day that I ruled on the motion for reconsideration. So yes." N.T. at 44. The court, therefore, rejected PCRA counsel's contention that there were no disadvantages to filing a direct appeal,

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[3] Like most other appeals, an appeal from a sentence imposed after revocation of probation must be filed within 30 days after imposition of the new sentence. ***See*** Pa.R.App.P. 903(a). In contrast to other sentencing situations in which the filing of a post-sentence motion extends the appeal period until after the motion has been decided, ***see*** Pa. R. Crim. P. 720(a)(2), the filing of a motion to modify a sentence imposed after revocation of probation will not toll the 30-day appeal period. Pa. R. Crim. P. 708(E). ***Commonwealth v. Flowers***, 149 A.3d 867, 871 (2016).

for one was the risk of divesting the trial court of jurisdiction to reconsider the sentence the moment the appeal is filed.

Given this record, and in consideration of governing authority, we discern no error with the PCRA court's determination that VOP counsel appropriately discussed with Appellant the pros and cons of pursuing a post-sentence motion for reconsideration of sentence and foregoing a direct appeal so as not to divest the trial court of jurisdiction. N.T. at 43-44. As such, we decline to find counsel provided constitutionally deficient consultation by rendering such advice.

Counsel's advice reflected not a misunderstanding or misrepresentation of relevant law, but, instead, counsel's reasonable opinion—informed by the particular facts of the case—that the better prospect for obtaining a revised sentence run concurrently rather than consecutively lay in a motion for reconsideration filed with the VOP court. When one considers our well-settled jurisprudence, moreover, declining discretionary review of consecutive sentences unless they are "so manifestly excessive in extreme circumstances that it may create a substantial question," ***Commonwealth v. Edwards***, 71 A.3d 323, 330 (Pa.Super. 2013), we cannot say counsel's advice was unreasonable, particularly where the consecutive sentences here involved separate acts in which violence or threat of violence was involved.

Accordingly, as Appellant failed to show that counsel's advice improperly caused him to forego his appellate rights, we discern no error with the PCRA court's order denying relief.[4]

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/26/20

[4] To the extent Appellant presents a second aspect to his claim in which he argues counsel ineffectively failed to notify him of the denial of his post sentence motion, it is without merit. The record shows the VOP court denied the post sentence motion by operation of law, at which time Appellant's 30-day period to file a direct appeal would have already expired. Therefore, though we do not condone counsel's failure to notify Appellant of the denial of the motion, counsel may not be deemed ineffective where no prejudice flowed from the omission.

COURT ORDERS:

Date: 10-13-20

Ramon
Petitioner, Pro Se

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	**CP-51-CR-0005311-2013**
	:	
v.	:	
RAMON WALL	:	

ORDER

AND NOW, this 3rd day of June, 2015, pursuant to *Commonwealth v. Finley*, 550 A.2d 213 Pa. Super. 1988., it is hereby **ORDERED AND DECREED** that following an independent review of Defendant's Pro Se PCRA Petition, Counsel's Finley letter, and 907 Notice having been sent and Defendant's reply to 907 Notice having been received and reviewed Petitioner's Post Conviction Relief Act Petition is **DISMISSED,** based upon Counsel's Finley letter. Defense attorney John Cotter, Esquire is permitted to withdraw from further representation of Petitioner. Petitioner may, however, proceed on appeal on a pro se basis or with retained counsel. Appeals must be filed within thirty (30) days of the entry of this order at: Appellate Division, 206 Criminal Justice Center, 1301 Filbert Street, Philadelphia, PA 19107.

BY THE COURT:

J.

Ex. J-5

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 324 EAL 2016
v.	:	Petition for Allowance of Appeal from the Order of the Superior Court
RAMON WALL, Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 24th day of October, 2016, the Petition for Allowance of Appeal is **DENIED**.

A True Copy
As Of 10/24/2016

Attest:
John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

Ex. D-2.

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

RAMON WALL, Petitioner

v.

ROBERT GILMORE, et al., Respondents.

CIVIL ACTION NO. 16-CV-6273

ORDER

AND NOW this 14th day of December 2016, **IT IS HEREBY ORDERED** that the above captioned case is referred to the Honorable David R. Strawbridge, United States Magistrate Judge, for a Report and Recommendation, and

IT IS FURTHER ORDERED that as per Local Civil Rule 72.1.IV(c), all issues and evidence shall be presented to the United States Magistrate Judge, and that new issues and evidence shall not be raised after the filing of the Report and Recommendation if they could have been presented to the United States Magistrate Judge.

BY THE COURT:

NITZA I. QUINONES-ALEJANDRO, J.

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

RAMON WALL, Petitioner,	:	CIVIL ACTION
v.	:	
MS. LUTHUR, et al., Respondents.	:	NO. 16-6273

ORDER

AND NOW, this 15th day of December, 2016, upon consideration of the petition for a writ of habeas corpus and the order of referral from the Honorable Nitza I. Quiñones Alejandro, **IT IS ORDERED** that:

1. The Clerk of this Court **SHALL SERVE** upon the District Attorney of Philadelphia County a copy of the form Petition for a Writ of Habeas Corpus, with all attachments (Doc. No. 1);

2. The Clerk of this Court **SHALL SERVE** a copy of this Order upon the District Attorney of Philadelphia County and the Office of the Prothonotary of the First Judicial District of Pennsylvania;

3. The District Attorney of Philadelphia County **SHALL FILE** an answer and memorandum of law with supporting exhibits pursuant to Rule 5 fol. 28 U.S.C. § 2254 on or before February 1, 2017;

4. Should Petitioner wish to file a Reply to the Respondents' Answer, he must do so within thirty (30) days after service of the Answer; and

5. The Office of the Prothonotary **SHALL FILE** with the Clerk of this Court on or before February 1, 2017 copies of ALL RECORDS, INCLUDING transcripts of Notes of

Testimony at Arraignment, Trial, Sentencing, Suppression Hearings, Post-Conviction Hearings, Petitions, Pleadings, Opinions and Briefs of State Court proceedings in the matter of Commonwealth v. Ramon Wall, No. CP-51-CR-0005311-2013 (convicted June 10, 2013).

BY THE COURT:

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

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

RAMON WALL *Petitioner-pro se*	:	**CIVIL ACTION**
	:	**NO. 16-6273**
v.	:	
MS. LUTHER, *et al.* *Respondents*	:	JAN 11 2019

ORDER

AND NOW, this 11th day of January 2019, upon careful consideration of the *pro se* petition for writ of *habeas corpus*, (the "Petition"), filed by Petitioner Ramon Wall ("Petitioner") pursuant to 28 U.S.C. §2254, [ECF 1], the response filed by Respondents, [ECF 14]; the reply filed by Petitioner, [ECF 20], the *Report and Recommendation* (the "R&R") issued on August 23, 2018, by the Honorable David R. Strawbridge, United States Magistrate Judge (the "Magistrate Judge"), which recommended that the Petition be denied, [ECF 22], Petitioner's *pro se* objections to the R&R, [ECF 28], the pleadings, and the available state court record and, after conducting an independent *de novo* review of the objections, it is hereby **ORDERED** that:

1. The *Report and Recommendation* is **APPROVED** and **ADOPTED**;

2. The objections filed are without merit and are **OVERRULED**;[1]

---

[1] In his *habeas corpus* petition, Petitioner asserted four grounds for relief: (1) that his conviction violates his Fourth Amendment rights because the police had no basis to arrest him; (2) that his procedural due process rights under the Fourteenth Amendment were violated by various acts of the PCRA court; (3) that his Fifth Amendment rights were violated due to perceived defects in the indictment and/or proof underlying the witness intimidation charge; and (4) that his conviction violated his Sixth Amendment rights of confrontation, that his plea bargain improperly reflected a mandatory minimum sentence, and that trial counsel was ineffective for failing to investigate the Commonwealth's evidence and for allegedly lying about a colloquy having taken place. In the twenty-three page R&R, the Magistrate Judge addressed these contentions and found that all of Petitioner's claims were either procedurally defaulted, non-cognizable, or lacked merit.

In his objections to the R&R, Petitioner essentially concedes that the Magistrate Judge correctly found that many of his claims were procedurally defaulted but repeats his argument that the procedural

ENT'D JAN 11 2019

Ex. B

3. Petitioner's petition for a writ of *habeas corpus*, [ECF 1], is **DENIED**; and

4. No probable cause exists to issue a certificate of appealability.[2]

The Clerk of Court is directed to mark this matter **CLOSED**.

BY THE COURT:

NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court

default of these claims can be overcome because trial counsel provided ineffective assistance. In making his claim for ineffective assistance of counsel as an objection, however, Petitioner merely repeats and rehashes arguments he made in his Petition which were considered and properly rejected by the Magistrate Judge. As such, Petitioner's objections are nothing more than an attempt to re-litigate various arguments raised in his Petition and reply. This Court finds that the Magistrate Judge thoroughly reviewed each of these arguments in the R&R and correctly concluded that Petitioner's claims were non-cognizable, procedurally defaulted, and/or without merit. This Court has reviewed the pertinent portions of the record *de novo* and further finds that no error was committed by the Magistrate Judge in the analysis of Petitioner's claims. Accordingly, the R&R is adopted and approved in its entirety, and Petitioner's objections are overruled.

[2] A district court may issue a certificate of appealability only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). For the reasons set forth, this Court concludes that no probable cause exists to issue such a certificate in this action because Petitioner has not made a substantial showing of the denial of any constitutional right. Petitioner has not demonstrated that reasonable jurists would find this Court's assessment "debatable or wrong." *Slack*, 529 U.S. at 484. Accordingly, there is no basis for the issuance of a certificate of appealability.

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