ALD-169 April 23, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-3740**

PERRY BURRIS, Appellant

VS.

SUPERINTENDENT MAHANOY SCI, ET AL.

(E.D. Pa. Civ. No. 2-17-cv-02161)

Present: MCKEE, SHWARTZ and PHIPPS, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

To the extent that Appellant's notice of appeal purports to seek appellate review concerning the District Court's October 2018 habeas judgment, we lack appellate jurisdiction here, see Fed. R. App. P. 4(a)(1)(A) (setting a 30-day notice of appeal deadline); Bowles v. Russell, 551 U.S. 205, 209-10 (2007) (holding that a timely notice of appeal is a jurisdictional requirement). Furthermore, we previously considered and denied Appellant's request for a certificate of appealability related to the October 2018 judgment in C.A. No. 18-3422. Regarding the District Court's denial of Appellant's motion under Federal Rule of Civil Procedure 60(b), Appellant's request for a certificate of appealability is denied. Jurists of reason would not debate the District Court's conclusion that Rule 60(b) relief was unwarranted. See 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Morris v. Horn, 187 F.3d 333, 340-41 (3d Cir. 1999). Appellant's motion challenged the District Court's prior merits determination of his ineffective assistance of counsel claim concerning his consent defense. The District Court lacked jurisdiction to consider the motion, which was in the nature of an unauthorized second or successive habeas petition. See Gonzalez v. Crosby, 545 U.S.

"APPENDIX A"

524, 530-32 (2005). To bring a second or successive habeas petition, a petitioner first must obtain permission from this Court. See 28 U.S.C. § 2244(b)(3)(A).

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: June 9, 2020

kr/cc: Perry Burris
Max C. Kaufman, Esq.
Ronald Eisenberg, Esq.

A True Copy:

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3740

PERRY BURRIS,
Appellant

v.

SUPERINTENDENT MAHANOY SCI; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OFPENNSYLVANIA

(E.D. Pa. No. 2-17-cv-02161)

SUR PETITION FOR REHEARING

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

"APPENDIX A"

s/Patty Shwartz
Circuit Judge

Date: September 14, 2020
SLC/cc: Perry Burris
Max C. Kaufman, Esq.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0000712-2008

V. :

PERRY BURRIS :

OPINION

By: The Honorable Harold M. Kane

PROCEDURAL HISTORY

On September 17, 2008, the defendant, Perry Burris, was tried by the undersigned sitting without a jury on charges of rape, involuntary deviate sexual intercourse, sexual assault, simple assault, robbery and burglary. The court found defendant guilty of all charges. Burris was sentenced on November 13, 2008 to an aggregate term of thirty (30) to sixty (60) years of imprisonment.

Post-sentence motions were dismissed on March 25, 2009. A Notice of Appeal was filed on April 1, 2009. On April 8, 2009, the court ordered defendant to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). The court subsequently granted counsel an extension of time, and a 1925(b) statement was filed on June 19, 2009.

FACTUAL HISTORY

The victim in this case, Denise Herbert, was home alone in her residence in the early morning hours of September 24, 2007 when she was awakened by the doorbell. Ms. Herbert opened the door, believing it to be her sister, but saw no one at the door. The defendant then came around from behind

APPENDIX B

I was supposed to have punched her in her stairwell. Now in the Living Room

the door and made Ms. Herbert go inside to the livingroom where he punched her in the face and head, warned her not to scream, and ordered her to take her clothes off. The defendant put his mouth on the victim's vagina and then put his penis inside her anus, causing her to defecate on herself. Defendant then grabbed the victim by the neck and took her to the shower where he put her under hot water. He later took the victim into her bedroom where he inserted his penis into her vagina. Defendant repeatedly told Ms. Herbert that he would have to kill her so she could not report him to police. N.T. 9-17-08, pp. 7-23.

As the incident was occurring, Danny, a friend of the victim who stored some his belongings there, came to the door and rang the bell. The victim convinced defendant to let her open the door on the pretense of getting rid of her friend. Ms. Herbert grabbed a shirt and ran out the door, telling her friend she had just been raped. The victim's friend called police while Ms. Herbert hid down the street. From her hiding place, Ms. Herbert saw the defendant leave her residence, walk up the street and turn the corner. When police arrived seconds later, the victim, shaking, crying and wearing nothing but a little top with a blanket wrapped around her, ran up to the police vehicle and reported the rape. A rape kit confirmed the presence of defendant's sperm in the victim's body. The rent money Ms. Herbert kept on the top of her television was missing after the incident.

DISCUSSION

In the 1925(b) statement, counsel states that she intends to file an Anders brief in this case. The defendant, however, contends that the court failed to consider his individualized needs in sentencing him to the statutory maximum for each crime, and erred by focusing solely on the seriousness of the offense. These claims are without

Imposition of sentence is vested in the sound discretion of the sentencing court and will not

be disturbed absent an abuse of discretion. Commonwealth v. Smith, 543 Pa. 566, 673 A.2d 893, 895 (1996). A trial court is afforded broad discretion in sentencing criminal defendants "because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." Commonwealth v. Mouzon, 571 Pa. 419, 812 A.2d 617, 620 (2002).

Here, the court sentenced Burris to 10 to 20 years for rape, robbery and burglary, and ordered these sentences to run consecutively for an aggregate sentence of 30 to 60 years. Although the sentences imposed were the statutory maximum for each crime, they were also within the standard range of the guidelines due to defendant's prior record score of REVOC. [1] The court saw no reason to sentence below the standard range in view of the brutal nature of the crime and defendant's long criminal history which included fourteen prior convictions and juvenile adjudications. Indeed, defendant had been arrested twenty times since age thirteen, and had been out of prison a mere thirteen months before committing this offense. Clearly, prior attempts to rehabilitate defendant had failed miserably, and defendant showed himself in this case to pose a grave danger to the community. Accordingly, in addition to the seriousness of the offense, the court also considered the defendant's character and the danger he posed to society in sentencing him.

He used Juvenile My cases against me when at sentencing Page 11 Lines 23-35 He stated it revealed

For all of the foregoing reasons, it is the opinion of this court that defendant's judgment of sentence should be affirmed.

BY THE COURT:

---

[1] It should be noted that the court did not impose sentences for the crimes of involuntary deviate sexual intercourse and simple assault despite having found defendant guilty of those offenses.

HONORABLE HAROLD M. KANE

DATE: 8-3-09

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 179 EM 2016
Respondent	:	
v.	:	
PERRY BURRIS,	:	
Petitioner		

ORDER

PER CURIAM

AND NOW, this 16th day of December, 2016, the Petition for Leave to File Petition for Allowance of Appeal *Nunc Pro Tunc* is **DENIED**.

A True Copy
As Of 12/16/2016

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

APPENDIX C

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

PERRY BURRIS	:	**CIVIL ACTION**
	:	
v.	:	**NO. 17-2161**
	:	
TERESA DALBALSO, *et al.*	:	

ORDER

AND NOW, this 18th day of October 2019, upon considering the Petitioner's Motion for relief (ECF Doc. No. 32) under Fed. R. Civ. P. 60(b) from our October 9, 2018 Memorandum and Order (ECF Doc. Nos. 25, 26) denying his *habeas* relief for several grounds including lack of merit and procedural defaults including on his defense of victim consent, the United States Court of Appeals' March 28, 2019 Order denying Petitioner's application for a certificate of appealability (ECF Doc. No. 29), Petitioner now rearguing the previously decided federal grounds for relief concerning lack of consent but now specifically citing medical records not mentioned in the *habeas* Petition nor raised in his Objections (ECF Doc. No. 24) to the exhaustive Report and Recommendation (ECF Doc. No. 21), but also procedurally defaulted and lacking merit as he further fails to show exceptional or extraordinary circumstances warranting relief under Rule 60(b)(6) under *Reeves v. Fayette SCI*,[1] it is **ORDERED** Petitioner's Motion for

[1] 897 F.3d 154 (3rd Cir. 2018). In *Reeves*, Mr. Reeves, a state prisoner, asserted ineffective assistance of counsel, alleging counsel "fail[ed] to discover or present to the fact-finder the very exculpatory evidence that demonstrate[d] his actual innocence, [and] such evidence constitute[d] new evidence . . . for purposes of the actual innocence [miscarriage of justice] gateway" to excusing procedural default of a state prisoner's habeas claim. 897 F.3d 154, 164–65 (3d Cir. 2018). Under *Schlup v. Delo*, the Supreme Court held "to qualify for this exception, the petitioner must present new, reliable evidence showing it is more likely than not that no reasonable juror would have voted to convict him." *Reeves*, 897 F.3d at 157 (citing *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). Mr. Burris does not argue in his Rule 60(b) motion the victim's medical records are demonstrative of his actual innocence, nor how this evidence would make it more likely than not no reasonable juror would have voted to convict him. He does argue how

APPENDIX D

Rule 60(b) relief (ECF Doc. No. 32) is **DENIED** as Petitioner waived our *de novo* review of this claim by failing to raise this fact issue in this habeas petition or in his Objections[2] and there is no ability to find this medical records evidence claim is not procedurally defaulted or demonstrates actual innocence based on the overwhelming evidence.

KEARNEY, J.

---

this evidence would have changed the outcome, but under the *Schlup* standard, his argument does not reach the heightened requirement this exception requires.

[2] *Eisen v. Horn*, No. 99-1624, 2009 WL 3045596 (W.D.Pa. Sept. 22, 2009). "[W]ith limited (if any) exception, parties objecting to a Magistrate Judge's report or order are required to adhere to the arguments, evidence, and issues they presented first to the Magistrate Judge." *Masimo Corporation v. Philips Electronic North America Corporation*, 62 F. Supp. 3d 368–77 (D. Del. 2014). Mr. Burris presented the issue of his counsel failing to investigate and present the victim's medical records to the trial court in his initial brief to Judge Heffley. Although Judge Heffley did not consider the medical records in her report and recommendation, likely because Mr. Reeves only included the issue in his brief, rather than in his *habeas corpus* petition itself, *see Dedmon v. Warden*, No. 16-1776, 2016 WL 5912869, at *1 n.1 (E.D. Pa. Oct. 11, 2016) ("Magistrate Judge Caracappa did not address any claim of actual innocence in the analysis of whether any exceptions to the time bar applied. The petitioner has not objected to Judge Caracappa declining to address such a claim. Presumably, Judge Caracappa did not address it because the petition did not properly raise it. The court agrees that it does not appear that the petitioner has asserted such a claim here."), Mr. Reeves retained the opportunity to include this issue in his objection to the report and recommendation and such an opportunity is not waived. But he did not raise this concern in his Objections.

Superior Court of Pennsylvania
Eastern District

Joseph D. Seletyn, Esq.
Prothonotary
Charles E. O'Connor, Jr., Esq.
Deputy Prothonotary

530 Walnut Street
Suite 315
Philadelphia, PA 19106
(215) 560-5800
www.pacourts.us/courts/superior-court

June 22, 2015

Perry Burris
SCI @ Rockview, # HU-9132
Box A
Bellefonte, PA 16823

RE: Com. v. Burris, P.
No. 3259 EDA 2014
Trial Court Docket No: CP-51-CR-0000712-2008

Dear Perry Burris:

Enclosed please find a copy of an order dated June 22, 2015 entered in the above-captioned matter.

Very truly yours,

Joseph D. Seletyn, Esq.
Prothonotary

/fhi
Enclosure
cc: Hugh J. Burns Jr., Esq.
The Honorable Denis P. Cohen, Judge

APPENDIX E

Filed 06/22/2015

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
PERRY BURRIS,	:	No. 3259 EDA 2014
	:	(C.P. Philadelphia County
Appellant	:	No. 51-CR-0000712-2008)

ORDER

Upon consideration of Appellant's *pro se* "Application For Relief," the Court of Common Pleas of Philadelphia County docket indicating Appellant filed a *pro se* "Statement of Matters Complained on Appeal" on March 2, 2015, and the Court of Common Pleas of Philadelphia County docket indicating "Grazier Hearing Held – Defendant Permitted to Proceed Pro Se" on May 29, 2015, Appellant's *pro se* "Application For Relief" is DENIED, without prejudice to Appellant's right to apply to the PCRA court for the requested relief.

PER CURIAM

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, APPELLEE v. PERRY BURRIS, APPELLANT	CP-51-CR-0000712-2008 SUPERIOR COURT NO. 3259 EDA 2014

OPINION

A. PROCEDURAL HISTORY

On September 17, 2008, in a waiver trial[1] before the Honorable Harold Kane of the Court of Common Pleas, the defendant was found guilty of Rape – Forcible Compulsion[2], IDSI – Forcible Compulsion[3], Sexual Assault[4], Simple Assault[5], Robbery – Inflict Serious Bodily Injury[6], and Burglary[7]. On November 13, 2008, Judge Kane sentenced the defendant to ten (10) to twenty (20) years of incarceration for Rape – Forcible Compulsion, ten (10) to twenty (20) years of incarceration for Robbery – Inflict Serious Bodily Injury, and ten (10) to twenty (20) years of incarceration for Burglary,

[1] Douglas Earl, Esq., represented the defendant at the waiver trial.
[2] 18 PA.C.S. § 3121(a)(1) (a felony of the first degree)
[3] 18 PA.C.S. § 3123(a)(1) (a felony of the first degree)
[4] 18 PA.C.S. § 3124.1 (a felony of the second degree)
[5] 18 PA.C.S. § 2701(a)(1) (a misdemeanor of the second degree)
[6] 18 PA.C.S. § 3701(a)(1)(i) (a felony of the first degree)
[7] 18 PA.C.S. § 3502 (a felony of the first degree)

APPENDIX F

with all sentences running consecutively for a total sentence of thirty (30) to sixty (60) years of incarceration.[8] Also on November 13, 2008, Barbara McDermott, Esq., now the Honorable Barbara McDermott, Judge of the Court of Common Pleas, was appointed as counsel for the defendant for any post-trial motions and appeals.

On November 24, 2008, a Post-Sentence Motion was filed and subsequently denied by operation of law on March 25, 2009. On December 8, 2009, Ms. McDermott filed an *Anders* brief along with an application to withdraw as counsel, stating there were no meritorious issues to be raised on appeal. On June 8, 2010, the Superior Court affirmed the judgement of sentence and permitted Ms. McDermott to withdraw as counsel. On July 23, 2010, the defendant filed a Post-Conviction Relief Act (PCRA) petition. On March 30, 2011, Raymond Bily, Esq. was appointed to handle the defendant's PCRA case. On December 10, 2012, Mr. Bily filed an amended PCRA petition on behalf of the defendant. On October 31, 2014, this Court formally dismissed the defendant's PCRA petition.

On November 19, 2014, Mr. Bily filed a Notice of Appeal. On December 16, 2014, this Court issued a 1925(b) order. On December 31, 2014, Mr. Bily filed a Statement of Matters. On February 20, 2015, Mr. Bily filed an application to withdraw as counsel. On March 2, 2015, the defendant filed a *pro se* Statement of Matters. On May 29, 2015, this Court held a *Grazier* hearing and permitted the defendant to proceed *pro se*. This Court now files a 1925(b) opinion, relying on the defendant's Statement of Matters from March 2, 2015, in which the defendant raises the following issues:

1. Trial counsel was ineffective for stipulating to exculpatory DNA evidence crucial to defendant's defense of consent by the alleged victim. Pa. Constitution Article 1 § 9.

[8] Judge Kane issued no further penalty on the remaining charges.

2. Trial counsel was ineffective for providing incorrect legal advice as to Pa Rules of Evidence and statutory effect on defendant's right to testify on his behalf. 42 Pa.C.S. § 5918.

3. Direct appeal counsel was ineffective for failing to investigate defendant's claims and abandoning appellant through an Anders brief.

4. Collateral appeal counsel was ineffective for failing to motion the court for performance of DNA testing that is related to the investigation and prosecution that resulted the judgement of conviction in accordance with 42 Pa.C.S. § 9543.1 Post-Conviction DNA testing.

5. The prosecutor committed gross misconduct by initiating an agreement between himself and trial counsel to stipulate to exculpatory DNA evidence. See: Model Rules of Professional Conduct 3.8 Special Responsibilities of a prosecutor and 8.4 Misconduct.

B. FACTS

In the early morning hours of September 24, 2007, the defendant, who was intoxicated at the time, rang the doorbell of the victim, whom he had previously unsuccessfully approached for a date. (N.T. 9/17/2008 at 15-19, 24). When the victim answered the door, the defendant forced the victim back into her home, punched her repeatedly in the face, and forced her to take off her clothes. (*Id.* at 20-22). The defendant proceeded to perform oral sex on the victim and then anally raped her, which caused the victim to defecate on herself. (*Id.* at 21-23). The defendant then forced the victim to shower, after which he vaginally raped her. (*Id.* at 23). During all of these heinous and terrifying acts, the defendant repeatedly told the victim that he would kill her once he was finished with her. (*Id.* at 23-24). The defendant also stole rent money from the victim's home. (*Id.* at 31-32). Eventually the victim was able to escape when a friend came to her front door and she ran out of her home and found police. (*Id.* at 27-30).

C. DISCUSSION

In review of ineffective assistance claims, it is well settled that counsel is presumed effective, and that the defendant bears the burden of proving ineffectiveness. *Commonwealth v. Cooper*, 941 A.2d 655, 664 (Pa. 2007). Thus, to prevail on an ineffective assistance of counsel claim a PCRA petitioner must demonstrate that:

> (1) the underlying issue has arguable merit; (2) the course of conduct pursued by counsel did not have some reasonable basis designed to effectuate the petitioner's interests; and (3) the petitioner suffered actual prejudice as a result of counsel's deficient performance. Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Failure to satisfy any prong of this test necessitates rejection of the petitioner's claim.

Commonwealth v. Williams, 9 A.3d 613 (Pa. 2010) (internal citations omitted). In the instant case, all of the defendant's claims are either waived and/or devoid of merit.

Stipulation of DNA evidence

The defendant's claim that trial counsel was ineffective for stipulating to DNA evidence is both waived and meritless. During trial, there was a stipulation between counsel that sperm found inside the victim, had it been tested by a DNA lab, would have been identified as the defendant's sperm. (N.T. 9/17/2008 at 55). As an initial matter, the defendant raises this issue for the first time in his Statement of Matters. As this issue was never raised or argued during any of the PCRA proceedings before this Court, it is

waived. *See* Pa.R.A.P. 302(a).[9] Even if this issue is not waived, it is unclear how the defendant suffered any prejudice, let alone actual prejudice, from the stipulation. The defendant argues that the DNA evidence was crucial to his defense that the sex was consensual, yet had the sex been consensual, the defendant's sperm would still have been inside the victim. As such, the stipulation resulted in no prejudice whatsoever to the defendant. As the defendant has not proven that he suffered actual prejudice from this stipulation, his claim is without merit. *See Commonwealth v. Spotz*, 84 A.3d 294, 321 (Pa. 2014).

Defendant's right to testify

The defendant's vague claim that trial counsel provided incorrect legal advice as to his right to testify is meritless.[10] At trial, Mr. Earl informed Judge Kane that, "...I just want to place this on the record. I have discussed before today and I have discussed today about [the defendant's] right to testify, and [the defendant] has stated he does not wish to testify." (N.T. 9/17/08 at 67-68). The defendant has not provided any evidence that Mr. Earl did not advise him or incorrectly advised him about his right to testify. As the defendant fails to prove by a preponderance of the evidence that trial

[9] "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."
[10] The defendant refers to 42 Pa.C.S. § 5918 in his allegation of error, however that statute refers to protections afforded to a defendant against offenses other than those charged. The defendant fails to explain the relevance of this statute as it relates to the offenses he was actually charged with in this case. Additionally, although he refers to the Rules of Evidence, the defendant fails to identify any Rule that might apply to his case.

counsel was ineffective, his claim must fail. *See* 42 Pa.C.S. § 9543(a)[11]; *see also Commonwealth v. D'Amato*, 856 A.2d 806, 811 (Pa. 2004).

Appellate counsel ineffectiveness

The defendant's claim that his direct appeal counsel was ineffective for failing to investigate the defendant's claims and for filing an *Anders* brief is both waived and without merit. As an initial matter, the issue of Ms. McDermott's alleged ineffectiveness was never raised or argued before this Court, therefore it cannot be raised for the first time on appeal and is waived. *See* Pa.R.A.P. 302(a). Even if the issue is not waived, the defendant has provided no evidence or explanation as to how Ms. McDermott abandoned him. In its opinion affirming the defendant's judgement of sentence, the Superior Court reviewed Ms. McDermott's *Anders* brief and found that she had complied with *Anders* procedure. *See Commonwealth v. Perry Burris*, J. S31006/10, 976 Eastern District Appeal 2009 at 5 (Unpublished). Additionally, the Superior Court stated, "We find that counsel's analysis was accurate; the issues are wholly without merit and frivolous. Furthermore, we have reviewed appellant's record as a whole and we conclude that there are no other issues of merit for appellate review." *Id.* at 8. Accordingly, the defendant's claim is meritless.

[11] "(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following..."

PCRA counsel ineffectiveness

The defendant's claim that PCRA counsel was ineffective for failing to submit a motion for postconviction DNA testing pursuant to 42 Pa.C.S. 9543.1 is waived, as claims of PCRA counsel's ineffectiveness cannot be raised for the first time on appeal. *Commonwealth v. Henkel*, 90 A.3d 16, 30 (Pa. Super. 2014). Additionally, the defendant fails to establish actual prejudice, thus is claim is devoid of merit. *See Spotz*, 84 A.3d at 321.

Prosecutorial Misconduct

The defendant's claim of prosecutorial misconduct is waived. The defendant argues that the Commonwealth committed "gross misconduct" when the prosecutor entered into a stipulation with defense counsel as to the admittance of DNA evidence. As the defendant's claim of prosecutorial misconduct could have been raised earlier on direct appeal and is not cognizable under the PCRA, it is waived. *See* 42 Pa.C.S. § 9544(b)[12]; *Commonwealth v. Ford*, 809 A.2d 325, 329 (Pa. 2002) (Claims of prosecutorial misconduct that could have been raised on direct appeal but instead were raised for the first time in a PCRA petition were waived).

Even if this claim is not waived, it is devoid of merit. In *Commonwealth v. Brown*, the Superior Court stated that, "...comments by the district attorney do not

[12] "(b) Issues waived.--For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."

constitute reversible error unless the unavoidable affect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant so that they could not weigh the evidence objectively and render a true verdict." 480 A.2d 1171, 1176 (Pa. Super. 1984). Moreover, remarks that are unwise or irrelevant are prejudicial only when such remarks deprive the defendant of a fair and impartial trial. *See Commonwealth v. Middleton*, 409 A.2d 41, 44 (Pa. Super. 1979). Finally, a stipulation between counsel which is properly stated by the Commonwealth during trial does not constitute prosecutorial misconduct. *See Commonwealth v. Hanible*, 30 A.3d 426, 466-67 (Pa. 2011).

In the instant case, the Commonwealth announced the stipulation as follows: "There's a stipulation also between counsel that that sperm, if tested by the DNA lab, would come back to the defendant. Obviously, the issue in the case is consent, it's not who did it." (N.T. 9/17/2008 at 55). This Court cannot see any possible way in which the Commonwealth misstated the stipulation between counsel, or how the comments by the prosecutor deprived the defendant of a fair and impartial trial. Additionally, the defendant does not argue that the Commonwealth misstated the stipulation to the DNA evidence, but instead appears to argue that the fact the Commonwealth "initiated" the agreement with trial counsel constitutes misconduct. This Court cannot find any case law to support a claim that a prosecutor commits misconduct simply by entering into a stipulation. As such, the defendant's claim is meritless.

C. CONCLUSION

For the foregoing reasons, the decision of this Court should be affirmed.

BY THE COURT:

DENIS P. COHEN, J.

Dated: June 23, 2015

Commonwealth of Pennsylvania	:	CP-51-CR-0000712-2008
v.	:	
Perry Burris	:	

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Opinion upon the persons, and in the manner indicated below, which service satisfied the requirements of Pa.R.Crim.P. 114:

Type of Service: First Class Mail

Petitioner: Perry Burris, HU 9132
SCI Rockview
Box A
Bellefonte, PA 16823

District Attorney: Appeals Unit
Office of the District Attorney
Appeals Unit
Three South Penn Square
Philadelphia, PA 19107

Dated: June 30, 2015

Denis P. Cohen

DENIS P. COHEN, J.

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

PERRY BURRIS	:	CIVIL ACTION
	:	
v.	:	NO. 17-2161
	:	
TERESA DALBALSO, *et al.*	:	

MEMORANDUM

KEARNEY, J. **October 9, 2018**

Perry Burris objects to United States Magistrate Judge Heffley's Report & Recommendation to deny Mr. Burris's *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 based on ineffective assistance of trial counsel. After conducting a *de novo* review of the record and Mr. Burris's objections, we overrule Mr. Burris's objections, adopt Judge Heffley's Report & Recommendation, and dismiss Mr. Burris's petition for habeas relief.

I. Background

On September 17, 2008, the Honorable M. Harold Kane of the Philadelphia County Court of Common Pleas found Perry Burris guilty of rape, assault, robbery, and burglary after a bench trial.[1]

On November 13, 2008, Judge Kane sentenced Mr. Burris to three ten-to-twenty-year sentences of incarceration running consecutively, and appointed Mr. Burris counsel for post-trial motions and appeals.[2] On December 8, 2009, appointed defense counsel filed a brief under *Anders v. California*,[3] seeking to withdraw because Mr. Burris had no meritorious issues for appeal.[4] On June 8, 2010, the Pennsylvania Superior Court affirmed Mr. Burris's conviction and granted counsel's request to withdraw.[5]

APPENDIX "G"

On July 23, 2010, Mr. Burris filed a Post-Conviction Relief Act (PCRA) petition.[6] On March 30, 2011, the court appointed Mr. Burris counsel.[7] On December 10, 2012, Mr. Burris filed an amended PCRA petition.[8] On October 31, 2014, the PCRA court denied Mr. Burris's petition.[9] Mr. Burris's counsel submitted a Notice of Appeal, then moved to withdraw from the case.[10] On March 2, 2015, Mr. Burris submitted a *pro se* Statement of Matters complained of on appeal.[11] On June 23, 2015, the Court of Common Pleas of Philadelphia County issued a Rule 1925(a) Opinion[12] explaining its denial of Mr. Burris's PCRA petition.[13] On May 13, 2016, the Pennsylvania Superior Court affirmed the denial of Mr. Burris's PCRA petition.[14] On May 8, 2018, Mr. Burris timely petitioned for a writ of habeas corpus under 28 U.S.C. § 2254.[15]

II. Analysis

We may entertain an application for writ of habeas corpus of a state prisoner challenging a state court judgment as unconstitutional.[16] We may not grant the writ unless the state court 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.[17]

Where state procedural remedies are effective, we may not grant a habeas petition unless the petitioner "has exhausted the remedies available in the courts of the State."[18] To satisfy the exhaustion requirement, a "federal habeas claim must have been 'fairly presented' to the state courts, i.e., it must be the substantial equivalent of that presented to the state courts."[19]

All of Mr. Burris's claims allege ineffective assistance of trial counsel under the Sixth Amendment. Under the ineffective assistance of counsel standard defined in *Strickland v.*

Washington, Mr. Burris must show his counsel's actions fell "outside the wide range of professionally competent assistance."[20] The petitioner must also show there is a reasonable possibility the outcome of the underlying proceeding would have been different if not for the counsel's deficient performance.[21]

Mr. Burris argues his trial counsel rendered ineffective assistance on four grounds by: stipulating DNA testing would have shown the Mr. Burris's sperm from the rape kit; denying Mr. Burris his right to a trial by jury; denying Mr. Burris his right to testify; and, failing to call important witnesses who would have testified Mr. Burris and the victim had earlier sexual encounters. Judge Heffley found all Mr. Burris's claims procedurally defaulted, meritless, or both. We agree with Judge Heffley on all counts.

A. Mr. Burris's DNA stipulation claim is procedurally defaulted and meritless.

Mr. Burris argues trial counsel rendered ineffective assistance by stipulating DNA testing of the sperm from the rape kit would have shown it was Mr. Burris's. This claim is procedurally defaulted and meritless.

1. Mr. Burris's DNA stipulation claim is procedurally defaulted.

Mr. Burris did not exhaust his claim regarding the DNA stipulation because he raised it for the first time in his appeal of his PCRA denial, so the claim is procedurally defaulted. In Mr. Burris's amended PCRA petition, he raised three arguments concerning trial counsel failing to: (1) call available witnesses who would have established Mr. Burris and the victim had "frequent sexual relations";[22] (2) conduct an adequate investigation into identified witnesses prior to trial; and, (3) consult with Mr. Burris about his right to testify.[23] Mr. Burris's grievance regarding the DNA stipulation appears for the first time in the PCRA court's 1925(a) Opinion. The PCRA court found Mr. Burris "waived" his DNA claim because he raised it for the first time in his

Statement of Matters.[24] Mr. Burris's failure to "raise and argue this issue discretely before the PCRA court precluded him from raising it subsequently on appeal before the Pennsylvania Superior Court."[25] Mr. Burris can only excuse his procedural default if he can show cause for the default and actual prejudice as its result.[26]

Construing Mr. Burris's *pro se* objections liberally, it appears Mr. Burris argues he has cause for his default based on the Supreme Court's decision in *Martinez v. Ryan*.[27] This argument fails. *Martinez* established two limited circumstances in which a prisoner could establish cause for procedural default: (1) if "the state courts did not appoint counsel in the initial-review collateral proceeding"; or if (2) "appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*."[28] The first circumstance does not exist here, because the state court appointed Mr. Burris counsel in his initial-review PCRA proceeding. The second circumstance requires a showing the ineffective assistance claim is a "substantial one," possessing "some merit."[29] Mr. Burris has not made such a showing for the reasons in the next subsection.

2. Mr. Burris's DNA stipulation claim is meritless.

Assuming for the sake of argument Mr. Burris did exhaust his DNA stipulation claim, we will address its merits. Mr. Burris argues his trial counsel "[tacitly] admitted"[30] his guilt by stipulating the sperm found inside the victim was Mr. Burris's. Mr. Burris bases his argument on the Supreme Court's decision in *McCoy v. Louisiana*,[31] arguing it created a new rule of constitutional law[32] which guarantees a defendant the right to maintain innocence of his crime even over an experienced lawyer's contrary advice admission would constitute a better strategy.

Mr. Burris misplaces reliance on *McCoy* for several reasons. First, *McCoy* is a capital case, and it applies to situations in which a defendant chooses to maintain innocence instead of

confessing guilt to avoid the death penalty.[33] Second, *McCoy* addressed structural errors warranting reversals on direct appeal, not *Strickland* habeas claims.[34] Third, and most fundamentally, Mr. Burris *did* maintain his innocence by presenting a consent defense.[35] Mr. Burris's counsel's consent defense did not fall outside the wide range of professionally competent assistance, nor did Mr. Burris suffer prejudice from it. As Judge Heffley found, Mr. Burris's *Strickland* claim is "utterly meritless."[36]

B. Mr. Burris's trial-by-jury claim is procedurally defaulted and meritless.

Mr. Burris next argues his trial counsel rendered ineffective assistance by failing to honor Mr. Burris's desire for a jury trial. This claim is procedurally defaulted and meritless.

1. Mr. Burris's trial-by-jury claim is procedurally defaulted.

Mr. Burris did not exhaust his claim regarding a jury trial because he presents it for the first time in this habeas petition. He did not present the claim to the PCRA court either at the initial review stage or in an appeal. Mr. Burris again relies on *Martinez* to establish cause for his procedural default, and again we deny this argument because Mr. Burris had PCRA counsel and his claim is meritless, as explained below.

2. Mr. Burris's trial-by-jury claim is meritless.

Mr. Burris claims he intended to ask for a jury trial, but his trial counsel interrupted him before he could. The record does not support his argument. Before the trial, Mr. Burris signed a written jury trial waiver colloquy. Judge Kane questioned Mr. Burris at the start of trial to ensure Mr. Burris reviewed the waiver with his attorney and Mr. Burris understood the waiver. Then, Judge Kane asked Mr. Burris, "It's your choice, judge or jury—judge trial or jury trial?"[37] Mr. Burris responded, "Judge."[38] The record reflects no counsel misconduct or prejudice to Mr. Burris as a result of his bench trial. Mr. Burris's *Strickland* claim is meritless.

C. Mr. Burris's claim regarding his failure to testify lacks merit.

Mr. Burris properly exhausted his testimony claim, so we turn directly to its merits.[39] Mr. Burris argues his trial counsel "provided inaccurate advi[c]e regarding Petitioner's right to testify,"[40] which prejudiced him because he wished to testify about the circumstances related to the crime. We disagree.

Mr. Burris fails to meet both *Strickland* prongs. Mr. Burris is correct the decision to testify on one's own behalf is "reserved for the client."[41] But as Judge Heffley noted, Mr. Burris has not explained how counsel's decision to keep him off the stand constituted an unreasonable strategy.[42] At trial, Mr. Burris's counsel told the court he had discussed with Mr. Burris whether he wished to testify, and Mr. Burris elected not to.[43] Mr. Burris does not argue his counsel misrepresented those facts, nor does he present evidence showing he did intend to testify at trial other than his own bare assertion. Finally, Mr. Burris has failed to argue how his testimony would have changed the outcome of the case. Mr. Burris's *Strickland* claim fails.

D. Mr. Burris's claim regarding counsel's failure to call witnesses is procedurally defaulted and meritless.

Mr. Burris argues his trial counsel rendered ineffective assistance by failing to call witnesses who would have substantiated Mr. Burris's claim the victim consented to their encounter. This claim is procedurally defaulted and meritless.

1. Mr. Burris's claim regarding counsel's failure to call witnesses is procedurally defaulted.

Mr. Burris's claim regarding trial counsel's failure to call witnesses is unexhausted. Mr. Burris raised the claim in his amended PCRA petition, but he did not raise the claim in his Statement of Matters. Mr. Burris's failure to appeal the claim means he did not " 'fairly present[]'" the claim through the state courts.[44]

Mr. Burris tries a new tact to excuse this procedural default, alleging he presented new evidence of "actual innocence" which excuses his default under the Supreme Court's decision in *McQuiggin v. Perkins*.[45] But Mr. Burris presents no new evidence, let alone evidence which would prevent a reasonable juror from finding him guilty beyond a reasonable doubt as *McQuiggin* requires.[46] Instead, Mr. Burris presents bare, unsubstantiated assertions in his petition, arguing counsel should have called other witnesses who would have testified he and the victim had a prior relationship. He attaches only one affidavit, from Erikca McGlond, in which she asserts she would have testified to Mr. Burris's and the victim's ongoing relationship. But Ms. McGlond testified at Mr. Burris's trial, saying she saw Mr. Burris and the victim in bed together at her house.[47] Mr. Burris has not presented the evidence required for a showing of actual innocence, so his claim is procedurally defaulted.

2. Mr. Burris's claim regarding counsel's failure to call witnesses is meritless.

Even assuming Mr. Burris exhausted this claim, it lacks merit. A claim regarding failure to call witnesses requires a showing under *Strickland*:

> (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the absence of the testimony prejudiced appellant.[48]

As Judge Heffley found, Mr. Burris "has not come close to meeting these requirements."[49] Mr. Burris provides two names, Rodney Banks and Erica Miner, without affidavits or any other supporting evidence. Mr. Burris alleges Ms. McGlond could have informed his trial counsel of the other witnesses' whereabouts, yet counsel did not investigate. But none of Mr. Burris's allegations prove the witnesses even existed, let alone prepared to testify. Moreover, these witnesses' testimonies are unlikely to change the outcome of the trial.

Ms. McGlond already testified Mr. Burris and the victim spent time together at her house. Likewise, Mr. Burris's witnesses would have testified he and the victim had an existing relationship. Mr. Burris's *Strickland* claim is without merit.

E. We deny a certificate of appealability.

"Unless a circuit justice or judge issue a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.[50]

When a district court rejects constitutional claims on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[51]

In *Slack v. McDaniel*, the Supreme Court explained when a district court denies a *habeas* petition on procedural grounds without reaching the underlying constitutional claim, a certificate of applicability should be issued "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[52] When a "plain procedural bar is present" and the district court correctly invokes it to dispose the case, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further."[53]

Mr. Burris has not shown, and we cannot find our holding denying his ineffective trial counsel claim could be reasonably debated. Mr. Gonzalez has also not shown, and we cannot find our conclusions barring his claims based on procedural default would allow reasonable judges to debate the correctness of our ruling.

III. Conclusion

Mr. Burris petitions for a writ of habeas corpus, alleging ineffective assistance of counsel. His claims are procedurally defaulted, meritless, or both. In the accompanying Order, we approve and adopt Judge Heffley's Report & Recommendation and dismiss Mr. Burris's habeas petition.

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[1] ECF Doc. No. 20, Ex. C at 1.

[2] *Id.* at 1–2.

[3] 386 U.S. 738 (1967).

[4] ECF Doc. No. 20, Ex. C at 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Pennsylvania Rule of Appellate Procedure 1925(a) requires a state trial court whose decision is appealed to issue a brief opinion explaining the decision.

[13] ECF Doc. No. 20, Ex. C.

[14] ECF Doc. No. 20, Ex. F.

[15] ECF Doc. No. 1.

[16] 28 U.S.C. § 2254(a).

[17] 28 U.S.C. § 2254(d).

[18] 28 U.S.C. § 2254(b)(1).

[19] *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) (as amended) (quoting *Evans v. Court of Common Pleas, Del. Cty., Pa.*, 959 F.2d 1227, 1231 (3d Cir. 1992)).

[20] *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

[21] *Lewis v. Horn*, 581 F.3d 92, 106–07 (3d Cir. 2009).

[22] Petitioner's Amended Petition for Post-Conviction Relief at 2, filed Dec. 10, 2012.

[23] *Id.*

[24] ECF Doc. No. 20, Ex. C at 2.

[25] *Thomas v. Sec'y, Pa. Dep't of Corr.*, 495 F. App'x 200, 206 (3d Cir. 2012).

[26] *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

[27] 566 U.S. 1 (2012).

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

[29] *Id.*

[30] ECF Doc. No. 24 (Petitioner's Objections), at 5.

[31] 138 S. Ct. 1500 (2018).

[32] Cognizant of our duty to construe Mr. Burris's *pro se* petition liberally, we impute this argument to him.

[33] *See McCoy*, 138 S. Ct. at 1505 ("We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.").

[34] *See United States v. Jose*, No. 14-652-10, 2018 WL 3747449, at *4 (E.D. Pa. Aug. 7, 2018) ("While *McCoy* instructs our guidance on the type of structural error warranting reversal on direct appeal, it could not directly address the waiver of *Strickland* prejudice applying when a convicted person seeks habeas relief."), *appeal filed*, No. 18-2848 (3d Cir. Aug. 20, 2018).

[35] N.T., D. Earl at 70-71, Sept. 17, 2008 (closing statement of defense) ("Mr. Burris never denied or disputed that [he and the victim] had relations.").

[36] ECF Doc. No. 21 (Report & Recommendation), at 8.

[37] *See* N.T. p. 5, Sept. 17, 2008. *Commonwealth v. Burris*, No. CP-51-CR-0000712-2008 (Pa. Ct. Com. Pl. Phila. Cty.).

[38] *Id.*

[39] ECF Doc. No. 20, Ex. F at 5.

[40] ECF Doc. No. 24, at 10.

[41] *McCoy v. Louisana*, 138 S. Ct. 1500, 1508.

[42] ECF Doc. No. 21, at 11.

[43] N.T., D. Earl at 67-68, Sept. 17, 2008, *Commonwealth v. Burris*, No. CP-51-CR-0000712-2008 (Pa. Ct. Com. Pl. Phila. Cty.).

[44] *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) (as amended) (quoting *Evans v. Court of Common Pleas, Del. Cty., Pa.*, 959 F.2d 1227, 1231 (3d Cir. 1992)).

[45] 569 U.S. 383 (2013).

[46] *McQuiggin*, 569 U.S. at 386.

[47] N.T., E. McGland at 63, Sept. 17, 2008, *Commonwealth v. Burris*, No. CP-51-CR-0000712-2008 (Pa. Ct. Com. Pl. Phila. Cty. Sept. 17, 2008).

[48] *Moore v. DiGuglielmo*, 489 F. App'x 618, 625 (3d Cir. 2012) (citing *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003)).

[49] ECF Doc. No. 21, at 12.

[50] 28 U.S.C. § 2253(c)(1).

[51] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[52] *Id.*

[53] *Id.*

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

PERRY BURRIS	:	**CIVIL ACTION**
	:	
v.	:	**NO. 17-2161**
	:	
TERESA DALBALSO, *et al.*	:	

ORDER

AND NOW, this 9th day of October 2018, upon careful and independent consideration of the Petition for a writ of *habeas corpus* (ECF Doc. No. 1), the Response to the Petition (ECF Doc. No. 20), United States Magistrate Judge Marilyn Heffley's August 30, 2018 Report and Recommendation (ECF Doc. No. 21), Petitioner's Objections (ECF Doc. No. 24), and for reasons in the accompanying Memorandum, it is **ORDERED:**

1. Judge Heffley's comprehensive August 30, 2018 Report and Recommendation (ECF Doc. No. 21) is **APPROVED** as we **overrule** Petitioner's objections (ECF Doc. No. 24);

2. We **DENY** the Motion for appointment of counsel (ECF Doc. No. 1-5) as moot;

3. We **DENY** and **DISMISS** the Petition for a writ of *habeas corpus* (ECF Doc. No. 1) with prejudice;

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

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

KEARNEY, J.

[1] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).