ALD-254 July 16, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-1654**

NAFIS ANTUAN FAISON, Appellant

v.

SUPERINTENDENT SMITHFIELD SCI; ET AL.

(M.D. Pa. Civ. No. 1-18-cv-02440)

Present: MCKEE, SHWARTZ and PHIPPS, Circuit Judges

Submitted are:

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

(2) Appellant's motion to attach an exhibit to his request for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

Faison's motion to attach an exhibit to his request for a certificate of appealability is granted. His request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). For substantially the reasons that the District Court provided, jurists of reason would agree without debate that counsel did not perform ineffectively by failing to file a motion to suppress because such a motion would have failed. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); Kimmelman v. Morrison, 477 U.S. 365, 382–83 (1986). More specifically, jurists of reason would agree that "the magistrate had a substantial basis for concluding that probable cause existed" to permit the police to acquire location information from Faison's phone. Illinois v. Gates, 462 U.S. 213, 238–39 (1983); see

generally United States v. Brown, 448 F.3d 239, 249–50 (3d Cir. 2006); United States v. Williams, 3 F.3d 69, 72 (3d Cir. 1993). Jurists of reason would likewise agree that the police were permitted to make a warrantless entry into the apartment to execute the arrest warrant, see United States v. Agnew, 407 F.3d 193, 196–97 (3d Cir. 2005), and, once inside, perform a protective sweep, see Buie v. Maryland, 494 U.S. 325, 337 (1990). Jurists of reason would likewise agree that the magistrate had a substantial basis for issuing the search warrant. See Gates, 462 U.S. at 238–39. Finally, while Faison objects to the fact that police reentered the home while awaiting issuance of the search warrant, even setting aside his potential procedural default of this claim, see 28 U.S.C. § 2254(b)(2), jurists of reason would agree without debate that the contraband was seized pursuant to an "independent source"—that is, the search warrant that did not rely on this subsequent entry, see Murray v. United States, 487 U.S. 533, 537 (1988). Jurists of reason would therefore agree without debate that counsel did not perform ineffectively by failing to raise these claims. See Miller-El, 537 U.S. at 327.

By the Court,

s/ Peter J. Phipps
Circuit Judge

Dated: August 12, 2020
CJG/cc: Kenneth A. Osokow, Esq.
Ronald Eisenberg, Esq.
Nafis Antuan Faison

A True Copy:

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

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

NAFIS ANTUAN FAISON,	:	
Petitioner,	:	
	:	**No. 1:18-cv-2440**
v.	:	
	:	**(Judge Rambo)**
JAMEY LUTHER, *et al.*,	:	**(Magistrate Judge Mehalchick)**
Respondents	:	

MEMORANDUM

Before the Court are *pro se* Petitioner Nafis Antuan Faison ("Petitioner")'s petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 1), motion to compel discovery (Doc. No. 7), and motion for clarification/status of case (Doc. No. 8), Magistrate Judge Mehalchick's October 31, 2019 Report and Recommendation (Doc. No. 22) recommending that Petitioner's § 2254 petition be denied and that his motions be dismissed as moot, and Petitioner's objections (Doc. No. 23) to the Report and Recommendation. For the following reasons, the Court will overrule Petitioner's objections, adopt the Report and Recommendation, deny his § 2254 petition, and dismiss as moot his remaining motions.

I. BACKGROUND

Petitioner was tried and convicted in the Court of Common Pleas for Lycoming County of two (2) misdemeanor counts of possession of a controlled substance, one misdemeanor count of possession of drug paraphernalia, one misdemeanor count of possession of a small amount of marijuana, and one felony

count of possession of a controlled substance with intent to deliver. The factual background of this case has been set forth at length by Magistrate Judge Mehalchick in her Report and Recommendation and, therefore, will not be repeated herein. (Doc. No. 22 at 2-8.) Petitioner was sentenced to a total of five (5) to ten (10) years' incarceration. His convictions and sentence were upheld on both direct and post-conviction review in the Pennsylvania state courts.

In his § 2254 petition, Petitioner raises the following claims for relief:

1. The PCRA Court's conclusion that probable cause existed to support the authorization of the disclosure of [Petitioner's] cell phone data was clearly erroneous, thus [Petitioner] was denied effective assistance of counsel where trial counsel failed to file a motion to suppress evidence gleaned from [Petitioner's] cell phone data;

2. The PCRA Court's conclusion that police had the right to enter Simpson's apartment and perform a protective sweep without a search warrant was clearly erroneous, thus [Petitioner] was denied effective assistance of counsel where trial counsel failed to file a motion to suppress evidence seized form the apartment;

3. The PCRA Court's conclusion that [Petitioner] failed to establish any significant or material misstatement in the affidavit of probable cause in support of the search warrant on Simpson's apartment was clearly erroneous, and that his trial counsel was ineffective for failing to investigate Simpson. [Petitioner] alleges that an investigation would have brought to light false averments contained in the affidavit of probable cause in support of his arrest warrant, thus the affidavit should have been suppressed; and

4. Trial counsel was ineffective for failing to attempt to suppress evidence obtained when police reentered Simpson's apartment without a warrant, and after conducting a protective sweep.

(Doc. No. 22 at 8.) In her Report and Recommendation, Magistrate Judge Mehalchick recommends that Ground Four be dismissed as procedurally defaulted "without justifiable cause to excuse such procedural default." (Doc. No. 22 at 11-21.) She recommended further that Petitioner's remaining grounds be dismissed as meritless, a certificate of appealability not issue, and that Petitioner's pending motions be dismissed as moot. (*Id.* at 21-30.)[1]

In his objections, Petitioner challenges Magistrate Judge Mehalchick's recommendations regarding Grounds Four and One in his § 2254 petition. (Doc. No. 23.) With respect to Ground Four, Petitioner objects to Magistrate Judge Mehalchick's conclusion "that this claim was not fairly presented to the Pennsylvania state court." (*Id.* at 1.) He claims further that Magistrate Judge Mehalchick incorrectly concluded that his reasonable expectation of privacy in the dwelling where he was an overnight guest dissolved when he fled the apartment. (*Id.* at 1-3.) With respect to Ground One, Petitioner argues that Magistrate Judge Mehalchick unreasonably applied *Illinois v. Gates*, 462 U.S. 213 (1983) and also

[1] Magistrate Judge Mehalchick also noted that Petitioner included a fifth ground for relief in his § 2254 petition, which was written on the back of the petition and inadvertently not scanned when the § 2254 petition was filed. (Doc. No. 22 at 21 n.22.) This claim was that "trail counsel was ineffective for not *consulting* with [Petitioner] about filing the motions to suppress evidence which are addressed herein." (*Id.*) Magistrate Judge Mehalchick concluded that because the motions to suppress would have been meritless, counsel could not be ineffective for failing to so consult, and therefore, the claim should be dismissed. (*Id.*) Petitioner has not challenged this recommendation in his objections. Accordingly, the Court will adopt the Report and Recommendation with respect to this fifth ground for relief.

unreasonably applied the facts. (*Id.* at 4.) Specifically, Petitioner maintains that affiant who prepared the affidavit of probable cause to issue a trace and tracking device for his cell phone did not corroborate the information provided by a parolee. (*Id.* at 4-5.)

II. LEGAL STANDARD

When objections are timely filed to a magistrate judge's report and recommendation, the district court must review *de novo* those portions of the report to which objections are made. 28 U.S.C. § 636(c); *Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011). Although the standard is *de novo*, the extent of review is committed to the sound discretion of the district judge, and the court may rely on the recommendations of the magistrate judge to the extent it deems proper. *Rieder v. Apfel*, 115 F. Supp. 2d 496, 499 (M.D. Pa. 2000) (citing *United States v. Raddatz*, 447 U.S. 667, 676 (1980)).

For those sections of the report and recommendation to which no objection is made, the court should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b), advisory committee notes; *see also Univac Dental Co. v. Dentsply Intern., Inc.*, 702 F. Supp. 2d 465, 469 (M.D. Pa. 2010) (citation omitted). Nonetheless, whether timely objections are made or not, the district court may

accept, not accept, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Local Rule 72.31.

III. DISCUSSION

As noted *supra*, Petitioner only objects to Magistrate Judge Mehalchick's recommendation to dismiss Grounds Four and One set forth in his § 2254 petition. He does not challenge her recommendations concerning Grounds Two and Three. Following an independent review of the record, the Court is satisfied that the Report and Recommendation contains no clear error with respect to Grounds Two and Three. Accordingly, the Court will adopt the Report and Recommendation with respect to these grounds for relief.

A. Ground Four

With respect to Ground Four, Petitioner avers that Magistrate Judge Mehalchick erroneously concluded that his claim was not fairly presented to the Pennsylvania state courts when he had raised it in his supplemental PCRA petition. (Doc. No. 23 at 1.) Petitioner maintains further that Magistrate Judge Mehalchick concluded that the procedural default of Petitioner's claim should not be excused because any expectation of privacy he had in the apartment dissolved when he fled and was subsequently arrested. (*Id.* at 2-3.)

In support of his claim, Petitioner cites *Payton v. New York*, 445 U.S. 573 (1980). (Doc. No. 23 at 2-3.) In *Payton*, the Supreme Court concluded that "an

arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603. Petitioner avers that pursuant to *Payton*, the police did not have authority to re-enter the apartment and conduct a search. (Doc. No. 23 at 3.) Upon review of the record, however, the Court concludes that Magistrate Judge Mehalchick correctly concluded that Petitioner's procedural default of Ground Four should not be excused. She correctly noted that as an overnight guest, Petitioner enjoyed a "legitimate expectation of privacy for as long as [he was] in the [apartment]." *United States v. Pettiway*, 429 F. App'x 132, 135 (3d Cir. 2011) (citing *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990)). That expectation, however, "fails when the overnight guest departs the home." *Id.* As Magistrate Judge Mehalchick correctly noted, Petitioner left the apartment and was arrested before police re-entered it. Accordingly, because Petitioner was not present when the re-entry occurred, he would have lacked standing to challenge the re-entry and subsequent search. *See United States v. Harris*, 884 F. Supp. 2d 383, 390 n.5 (W.D. Pa. 2012). Accordingly, Petitioner's objection will be overruled, and the Court will adopt Magistrate Judge Mehalchick's Report and Recommendation with respect to Ground Four.

B. Ground One

With respect to Ground One, Petitioner maintains that Magistrate Judge Mehalchick unreasonably applied *Illinois v. Gates*, 462 U.S. 213 (1983) and unreasonably applied the facts. (Doc. No. 23 at 4.) Petitioner asserts that the affiant who prepared the affidavit of probable cause to issue a trace and tracking device for Petitioner's cell phone never corroborated the information provided by parolee Steven Williams. (*Id.*) In making these arguments, Petitioner essentially reiterates the arguments previously advanced in his traverse. Having considered this challenge, the Court concludes that Magistrate Judge Mehalchick correctly and comprehensively addressed the substance of this objection in her Report and Recommendation. Accordingly, Petitioner's second objection will be overruled.

IV. CONCLUSION

For the foregoing reasons, the Court will overrule Petitioner's objections (Doc. No. 23) and adopt the Report and Recommendation (Doc. No. 22). The Court will, therefore, deny Petitioner's § 2254 petition (Doc. No. 1) and dismiss as moot his remaining motions (Doc. Nos. 7, 8). An appropriate Order follows.

s/ Sylvia H. Rambo
United States District Judge

Dated: March 12, 2020

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

NAFIS ANTUAN FAISON, Petitioner, v. JAMES LUTHER, Superintendent, et al., Respondents.	CIVIL ACTION NO. 1:18-CV-02440 (RAMBO, J.) (MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

In January 2015, Petitioner Nafis Faison ("Faison"), was convicted in the Lycoming County Court of Common Pleas of two misdemeanor counts of possession of a controlled substance, one misdemeanor count of possession of drug paraphernalia, one misdemeanor count of possession of a small amount of marijuana, and one felony count of possession with intent to deliver. Faison now brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asking this Court to set aside that conviction as it violates his rights guaranteed under the United States Constitution, and to grant him a new trial.[1] In particular, Faison argues that he was deprived of his Sixth Amendment right to effective assistance of counsel.

Having been fully briefed (Doc. 1; Doc. 19; Doc. 20), Faison's § 2254 petition is now ripe for review.

[1] Faison also request an evidentiary hearing in the matter, as well as appointment of counsel.

I. BACKGROUND AND PROCEDURAL HISTORY

In his petition, Lee challenges his January 21, 2015, judgment of sentence entered in the Court of Common Pleas of Lycoming County, sentencing him to a total of 5-10 years in prison.[2] (Doc. 1, at 1). On January 21, 2015, a jury found Faison guilty of four drug related offenses, including possession with intent to deliver a controlled substance,[3] two counts of possession of a controlled substance,[4] possession of drug paraphernalia,[5] and possession of marijuana – small amount for personal use.[6] (Doc. 19-1, at 12).

The Superior Court, on PCRA appeal, summarized the facts of the case as follows (Doc. 19-2, at 73). In November 2013, the Lycoming County Court of Common Pleas, following an application and affidavit of probable cause, issued an order authorizing the disclosure of tracking data on Faison's cell phone number. In the affidavit of probable cause, a member of the Pennsylvania State Police stated that a warrant existed for Faison's arrest on drug charges, and that attempts to locate him had been unsuccessful. The Trooper also stated that a confidential informant had made four controlled buys from Faison, whom his

---

[2] In addition to the petition, a federal habeas court may take judicial notice of state court records. *Minney v. Winstead*, No. 2:12-CV-1732, 2013 WL 3279793, at *2 (W.D. Pa. June 27, 2013); *see also Reynolds v. Ellingsworth*, 843 F.2d 712, 714 n.1 (3d Cir. 1988). Accordingly, in reviewing this petition, the Court takes judicial notice of the publicly-available dockets of Faison's criminal and collateral post-conviction proceedings in the Court of Common Pleas of Lycoming County, and the Superior Court of Pennsylvania. *See e.g. Commonwealth v. Faison*, No. MJ-29101-CR-514-2013 (Lycoming Cnty. C.C.P.); *Commonwealth v. Faison*, No. CP-41-CR-126-2014 (Lycoming Cnty. C.C.P.); *Commonwealth v. Faison*, No. 2037 MDA 2015 (Pa. Super. 2016); *Commonwealth v. Faison*, 1423 MDA 2017 (Pa. Super. 2018); *Commonwealth v. Faison*, 1982 MDA 2017 (Pa. Super. 2018).

[3] 35 Pa.C.S. § 780-113(a)(30).

[4] 35 Pa.C.S. § 780-113(a)(16).

[5] 35 Pa.C.S. § 780-113(a)(32).

[6] 35 Pa.C.S. § 780-113(a)(31)(i).

customers called "Mickey." The affidavit asserted that Faison could be located using the data from a telephone number that a parolee had provided to a parole agent.

The court issued the order authorizing disclosure of Faison's cellular data, and police determined that Faison was located at a particular residence in Williamsport, Pennsylvania. On December 12, 2013, law enforcement began surveilling the residence and observed several people visit the second-floor apartment and stay for a short period of time. As one of these people was leaving, police stopped and frisked him, and found a small amount of illegal drugs. During the arrest, this person told police that he had seen Faison inside the building's second-floor apartment. Soon thereafter, police spotted Faison standing outside the door to a third-floor apartment. Trial testimony later established that Faison's friend, Demetrius Simpson ("Simpson"), had allowed Faison to stay in the apartment overnight.

Later that evening, police approached the second-floor apartment and knocked on the door. As this happened, an unidentified individual, later identified as Faison, jumped out of a second-floor window and fled on foot. Police then entered and secured the apartment. While police were in a central room of the apartment, they observed an un-zipped backpack containing what appeared to be bags of cocaine.

Faison was soon caught by police, who found nearly $4,000 in cash and a small amount of illegal drugs on his person. Police filed for a search warrant of Simpson's apartment, and while they were waiting, took Simpson's nine-year-old son inside to retrieve warm clothing. In the process of retrieving the clothing, another trooper, Trooper Fishel, also saw the un-zipped backpack containing bags of cocaine.

The search warrant was granted, and police searched the apartment. They recovered the backpack which contained over 500 grams of cocaine and a scale; a box in a closet which

contained rubber bands, small plastic bags, a stamp pad, and a brown piece of paper with heroin residue on it; and a tan jacket with a bag of cocaine in its right pocket.

Police charged Faison with possession with intent to deliver a controlled substance, as well as other related drug offenses. Faison did not file any pre-trial motions to suppress evidence, and at the conclusion of the trial, a jury found him guilty and sentenced him to an aggregate of five to ten years incarceration. (Doc. 19-2, at 73).

After the guilty verdict, Faison filed post-sentence motions arguing lack of sufficient evidence and a verdict rendered contrary to the weight of the evidence. The court of common pleas denied these motions on July 10, 2015. (Doc. 19-1, at 17). Faison did not file a direct appeal. (Doc. 19, at 7).

On September 11, 2015, Faison filed a Post-Conviction Relief Act (PCRA) petition, followed by an amended PCRA petition on October 7, 2015, requesting reinstatement of his right to file a direct appeal with the Superior Court of Pennsylvania. (Doc. 19-1, at 37). This petition was granted, and Attorney Joshua Bower ("Attorney Bower") of the Lycoming County Public Defender's Office was reappointed to represent Faison. (Doc. 19-1, at 45).

On direct appeal, Faison, through Attorney Bower, presented the following claims to the Pennsylvania Superior Court:

> 1. Whether the Commonwealth failed to introduce sufficient evidence that [Appellant] constructively possessed the cocaine found in another's residence[?]
>
> 2. Whether the verdict rendered by the jury was contrary to the weight of the evidence presented at trial[?]
>
> (Doc. 19-1, at 49).

The Superior Court affirmed Faison's judgement of sentence on May 17, 2016. As to the first issue, the court determined "there was ample evidence indicating Appellant's involvement in drug activity and connecting him to the specific room or areas where the drugs were kept." (Doc. 19-1, at 53). As to the second issue, "the evidence plainly reflected that the cocaine was in the area of the Apartment where Appellant stayed, in and next to his personal possessions, and that he fled from police with drugs and a significant amount of cash on his person," thus the trial court did not "palpably" abuse its discretion by denying Faison's claim of a verdict contrary to the weight of the evidence. (Doc. 19-1, at 54). The Supreme Court of Pennsylvania denied Faison's petition for allowance of appeal on October 25, 2016. (Doc. 19-2, at 1)

Upon the conclusion of direct review, Faison filed a *pro se* petition for collateral relief under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 *et seq.*, in the Court of Common Pleas of Lycoming County on December 1, 2016.[7] (Doc. 19-2, at 2). Faison's PCRA petition asserted that his counsel at trial was ineffective for failing to file motions to suppress that would have changed the verdict. (Doc. 19-2, at 2). The grounds stated for these motions to suppress were that the affidavit of probable cause giving the authority to install and use a pen register and trap and trace device on his telephone was wholly lacking probable cause existed; that the police had "no business" searching a third party's home (where Faison was an overnight guest) without a search warrant; and the

[7] The PCRA Court appointed attorney Ryan Gardner ("Attorney Gardner") as Faison's PCRA Counsel, but Attorney Gardner subsequently filed a "No Merit Letter" pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (1998) asking to withdraw, which was granted by the PCRA Court on June 22, 2017. (Doc. 19-2, at 48; Doc. 19-2, at 56).

affidavit [of probable cause] contained misstatements material to the probable cause determination. (Doc. 19-2, at 2).

Faison also submitted that his trial counsel was ineffective for failing to investigate the owner of the apartment where the cocaine was found and who testified against Faison at trial. (Doc. 19-2, at 2). The PCRA court declared that this claim was waived due to his failure to develop that claim or allege how it related to the failure to file a motion to suppress. (Doc. 19-2, at 56).

On June 22, 2017, the PCRA court notified Faison of its intent to dismiss his PCRA petition due to his claims lacking merit. (Doc. 19-2, at 56). The court gave Faison twenty days to object to its decision. (Doc. 19-2, at 56). Faison did not object, and the Court formally ordered his petition dismissed on July 13, 2017. (Doc. 19-2, at 65). On October 20, 2017, the PCRA court issued a supplemental opinion clarifying that it concluded that Faison directed his trial attorney not to file pre-trial motions – including motions to suppress – in order to focus on relief through Rule 600,[8] and that he should not be permitted to now seek the relief he consciously chose to forego. (Doc. 19-2, at 67).

Faison appealed the order denying him relief under the PCRA to the Superior Court of Pennsylvania, alleging (1) that trial counsel had no reasonable bases for its inactions; (2) deficient performance on the part of trial counsel for failing to file a motion to suppress evidence where the affidavit of probable cause to obtain a pen register and trace device was insufficient; (3) deficient performance on the part of trial counsel for failing to file a motion

[8] Rule 600 dictates that criminal defendants are not to be held in pre-trial incarceration for more than 180 days, and that trials are to be commenced within 365 days. Pa. R. Crim. P. 600(A), (B).

to suppress evidence seized in the apartment as a result of an illegal search without a warrant; and (4) deficient performance on the part of trial counsel for failing to file a motion to suppress the affidavit of probable cause to search due to false averments contained within. (Doc. 19-2, at 77).

The Superior Court initially explained that the PCRA court was correct in finding that Faison waived any post-conviction attempt to suppress evidence by failing to bring pre-trial motions to suppress, but that he could still bring a claim that his trial counsel was ineffective for failing to file pre-trial motions to suppress. (Doc. 19-2, at 79). Therefore, the Superior Court went on to address Faison's ineffectiveness claims.

The Superior Court upheld the PCRA court's decision, finding (1) that the PCRA court had a substantial basis to find probable cause existed to support the authorization of the disclosure of Faison's cell phone data; (2) that after observing an unidentified fleeing individual and in possession of an arrest warrant, police had the right to enter Simpson's apartment and perform a protective sweep; and (3) that Faison failed to establish any significant or material misstatement in the affidavit of probable cause in support of the search warrant on Simpson's apartment. (Doc. 19-2, at 73). The Superior Court concluded that because Faison did not establish merit behind the motions to suppress, the PCRA court was correct in not finding trial counsel ineffective for failing to file suppression motions on those grounds. (Doc. 19-2, at 73). The Superior Court entered its order on December 3, 2018. (Doc. 19-2, at 90).

On December 27, 2018, having exhausted his direct appeal and PCRA remedies, Faison filed the instant Petition for habeas corpus. (Doc. 1). Respondent filed its Response to

Faison's Petition on August 22, 2019, asserting that Faison's claims either lack merit or are procedurally defaulted. (Doc. 19). Faison filed a Traverse on September 16, 2019. (Doc. 20).

Having been fully briefed, this petition is now ripe for disposition.

II. HABEAS CLAIMS PRESENTED

Faison presents the following grounds for relief in his federal habeas Petition:

1) That the PCRA Court's conclusion that probable cause existed to support the authorization of the disclosure of Faison's cell phone data was clearly erroneous, thus Faison was denied effective assistance of counsel where trial counsel failed to file a motion to suppress evidence gleaned from Faison's cell phone data (Doc. 1, at 5);

2) That the PCRA Court's conclusion that police had the right to enter Simpson's apartment and perform a protective sweep without a search warrant was clearly erroneous, thus Faison was denied effective assistance of counsel where trial counsel failed to file a motion to suppress evidence seized from the apartment (Doc. 1, at 6);

3) That the PCRA Court's conclusion that Faison failed to establish any significant or material misstatement in the affidavit of probable cause in support of the search warrant on Simpson's apartment was clearly erroneous, and that his trial counsel was ineffective for failing to investigate Simpson. Faison alleges that an investigation would have brought to light false averments contained in the affidavit of probable cause in support of his arrest warrant, thus the affidavit should have been suppressed. (Doc. 1, at 8); and

4) That his trial counsel was ineffective for failing to attempt to suppress evidence obtained when police reentered Simpson's apartment without a warrant, and after conducting a protective sweep. (Doc. 1, at 9).

The Court addresses each of these grounds for relief in turn.[9]

[9] The Court notes that Faison included a fifth ground for relief in his Petition, noted that it was on the "back page" of page 10 of his petition (Doc. 1, at 10), and which for unknown reasons, was not originally scanned into ECF. This page has now been scanned and is docketed at Doc. 1-1. This ground was not mentioned again by Faison, either elsewhere in his Petition or in his Traverse, and was not briefed or argued in any way by Respondents. The

III. DISCUSSION

A. HABEAS RELIEF UNDER 28 U.S.C. § 2254

Faison brings his Petition pursuant to 28 U.S.C. § 2254,[10] which permits federal courts to issue habeas corpus relief for persons in state custody. While a prisoner may properly challenge the "fact or duration" of his confinement through a § 2254 petition, *see Preiser v. Rodriguez*, 411 U.S. 475 498-99 (1973), the statute sets "several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Further, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see also* Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Engle v. Isaac*, 456 U.S. 107, 120 n.19 (1982) ("If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable."). Rather, federal habeas review is limited to claims based "on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Estelle*, 502 U.S. at 68. As such, a writ of habeas corpus is an "'extraordinary remedy' reserved for defendants who were 'grievously wronged' by the

---

claim, that trial counsel was ineffective for not *consulting* with Faison about filing the motions to suppress evidence otherwise addressed herein, and as further discussed *infra*, is without merit, as the motions to suppress would have been meritless. *See Hartey v. Vaughn*, 186 F.3d 367, 372 (3d Cir. 1999) (explaining that counsel cannot be deemed ineffective for not pursuing a meritless claim). Accordingly, the Court respectfully recommends this claim be DISMISSED.

[10] Faison's § 2254 petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

criminal proceedings." *See Dunn v. Colleran*, 247 F.3d 450, 468 (3d Cir. 2001) (quoting *Calderon v. Coleman*, 525 U.S. 141, 146 (1998)).

The statutory text of § 2254 additionally requires that federal courts give the appropriate deference to the legal rulings and factual findings of state courts made during criminal proceedings, and provides in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;[11] [12] 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).

Thus, given these deferential standards of review, federal courts frequently decline invitations by habeas petitioners to disturb the considered views of state courts. *See Rice v. Collins*, 546 U.S. 333, 338-39 (2006); *see also Warren v. Kyler*, 422 F.3d 132, 139-40 (3d Cir. 2006); *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002).

---

[11] A state court decision is "contrary" to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law or if the state court decides a case differently than th[e Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413.

[12] A state court decision is an "unreasonable application" of clearly established federal law if "(1) 'the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular ... case;' or (2) 'the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Appel v. Horn*, 250 F.3d 203, 209 (3d Cir. 2001) (quoting *Williams*, 529 U.S. at 407).

Nonetheless, with respect to § 2254(d)(1), the Supreme Court defines "clearly established federal law" as "holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Further, to warrant relief under § 2254(d)(1), a state court's "unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). Regarding 28 U.S.C. § 2254(d)(2), "a determination of a factual issue made by a State court shall be presumed to be correct" unless a petitioner can show, by clear and convincing evidence, that the finding was erroneous. 28 U.S.C. § 2254(e)(1); *see also Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009) ("Under the § 2254 standard, a district court is bound to presume that the state court's factual findings are correct, with the burden on the petitioner to rebut those findings by clear and convincing evidence."). Moreover, habeas relief will not be granted pursuant to § 2254(d)(2) if a reasonable basis existed for the state court to make its factual finding. *See Burt v. Titlow*, 571 U.S. 12, 18 (2013).

B. EXHAUSTION AND PROCEDURAL DEFAULT

Respondent submits that one of Faison's claims is procedurally defaulted, and thus barred from habeas review. (Doc. 19, at 13). Generally, a federal district court may not consider the merits of a habeas petition unless the petitioner has "exhausted the remedies available" in state court. *See* 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). "The exhaustion requirement is satisfied only if the petitioner can show that he fairly presented the federal claim at each level of the established state-court system for review." *Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004); *see also O'Sullivan*, 526 U.S. at 845 ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity

to resolve federal constitutional claims before those claims are presented to the federal courts . . . by invoking one complete round of the State's established appellate review process."). The United States Court of Appeals for the Third Circuit has further explained that, to "fairly present" a claim for exhaustion purposes, the petitioner must advance "a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 280 (3d Cir. 2018) (quoting *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999)). Such notice may be conveyed through a petitioner's:

> "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation."
>
> *McCandless v. Vaughn*, 172 F.3d 255, 261–62 (3d Cir. 1999) (citing *Evans v. Court of Common Pleas, Del. County, Pa.*, 959 F.2d 1227 (3d Cir.1992))

Exhaustion under the AEDPA also "turns on an inquiry into what procedures are 'available' under state law." *O'Sullivan*, 526 U.S. at 847. In Pennsylvania, a federal claim is deemed exhausted once it is presented to the Superior Court of Pennsylvania—either on direct appeal from a state criminal conviction or on appeal from a PCRA court's denial of post-conviction relief—because the Pennsylvania Supreme Court is not considered an "available" state court remedy. *See Lambert v. Blackwell*, 387 F.3d 210, 233 (3d Cir. 2004) (declaring review from the Pennsylvania Supreme Court to be "unavailable" for purposes of exhausting state court remedies). However, "a claim will be deemed unexhausted if the petitioner 'has the right under the law of the State to raise, by any available procedure, the question presented,' but has failed to do so." *Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221, 227 (3d Cir.

2017), *cert. denied sub nom. Wilkerson v. Lane*, 138 S. Ct. 1170, 200 L. Ed. 2d 319 (2018) (citing 28 U.S.C. § 2254(c)).

On the other hand, "[w]hen a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'" *McCandless*, 172 F.3d at 260 (quoting 28 U.S.C. § 2254(b)(1)(B)(i)); *see also Coleman v. Thompson*, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him."). In such situations, a claim is deemed "procedurally defaulted,[13] not unexhausted, and ... may be entertained in a federal habeas petition only if there is a basis for excusing the procedural default." *Wenger v. Frank*, 266 F.3d 218, 223–24 (3d Cir. 2001); *see also Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000); *Wilkerson*, 871 F.3d at 228 ("If a petitioner's federal claim was not 'fairly presented,' and further state-court review is no longer available under state law, the claim is 'procedurally defaulted' ...") (quotations omitted). Specifically, procedural default may be excused if a petitioner can demonstrate "cause" for the defaulted claim, and "prejudice therefrom," or that a "failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *see also Coleman*, 501 U.S. at 750.

[13] "The doctrine of procedural default prohibits federal courts from reviewing a state court decision involving a federal question if the state court decision is based on a rule of state law that is independent of the federal question and adequate to support the judgment." *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 281 (3d Cir. 2018) (citing *Bey v. Superintendent*, 856 F.3d 230, 236 (3d Cir. 2017)).

Respondent avers that Faison's fourth ground for relief – that trial counsel was ineffective for failing to file a motion to suppress evidence found when an officer reentered Simpson's apartment after conducting a protective sweep and without a search warrant – is procedurally defaulted, and thus ineligible for federal habeas review. (Doc. 19, at 13). In particular, Respondent asserts that Faison failed to present this issue in his PCRA petition, and that the Superior Court found the issue waived, and further, that Faison has failed to demonstrate any cause and prejudice that would excuse his procedural default of these claims. (Doc. 19, at 13).

In his petition, Faison asserts that: "Trial counsel was ineffective for failing to file a motion to suppress evidence obtained in [Simpson's apartment] where apartment was already secured from "protective sweep" and police went back into apartment without warrant and searched and found drugs." (Doc. 1, at 10); (Doc. 19, at 13). Faison expands on this claim by describing that Trooper Thomas, after the premises had been secured, re-entered and searched the apartment. It was then that he discovered the backpack containing cocaine. "Trooper Thomas nor the police had a search warrant to search Simpson (third party) apartment." (Doc. 1, at 10). The Superior Court did not address this claim, finding that Faison had not included it in his PCRA petition, so had waived it. (Doc. 19, Ex. 15, at 16). As such, Respondent now asserts that this claim is procedurally defaulted.

Faison submits that he did raise this issue via a supplemental PCRA petition filed May 15, 2017. (Doc. 20, at 18). He states that the PCRA court addressed this claim (denying it) in its October 20, 2017, opinion. (Doc. 20, at 18). Therefore, the claim was properly raised in

his petition and the Pennsylvania Superior Court made an error of fact in declaring it waived because of its absence from his petition. (Doc. 20, at 18).[14]

A review of the record before the Court does not reveal any point where Faison raises this claim in a petition presented to the PCRA court. His supplemental PCRA petition filed May 15, 2017, in which he claims he raised this issue, has not been submitted as an exhibit and has not been made a part of the record. In its June 22, 2017, opinion, the PCRA court mentions in a footnote that Faison filed a supplemental PCRA petition on May 15, 2017, and that it "essentially raised the same issues" as his original. (Doc. 19-2, at 58). In his original petition, Faison listed only three grounds for relief, and titled the only potential claim,[15] "Trial counsel was constitutionally defective for failing to investigate and file a motion to suppress evidence seized in second floor apartment as it was procured as result of illegal search without search warrant." (Doc. 19-2, at 2). Faison's argument for this claim centered around the police entering Simpson's apartment with only an arrest warrant after Faison – who the arrest warrant was for – exited the building. (Doc. 19-2, at 2). This section was dominated by whether it was proper for police to conduct a protective sweep in the first place. (Doc. 19-2, at 2). At no point did Faison distinguish between the protective sweep, and the re-entry after the protective sweep. (Doc. 19-2, at 2). Further, in his 'Factual Background,' Faison did not mention police re-entering the apartment after the protective sweep. (Doc. 19-2, at 2). In its supplemental opinion dated October 20, 2017, the PCRA court made mention of Trooper

[14] Faison argues that if this claim was procedurally defaulted, that it should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012) (holding that an attorney's errors during a collateral proceeding may excuse procedural default).

[15] Faison's other two claims centered around the state's ability to obtain Faison's phone records and alleged falsities in Faison's arrest warrant. (Doc. 19-2, at 2).

Thomas re-entering the apartment after the apartment was secure. This was mentioned, though, as part of its discussion of the need for a search warrant *prior* to police performing a protective sweep, indicating that Faison did not raise the post-protective sweep entry as a separate claim. (Doc. 19-2, at 67). Furthermore, it is not enough for the PCRA court to mention the officer's re-entry; Faison must have 'fairly presented' those facts along with the accompanying legal argument to the PCRA court as part of an individual claim. *See Holloway*, 355 F.3d at 714.

Faison did not 'fairly present' to the PCRA Court his claim of ineffective assistance of counsel for failure to suppress evidence obtained from the post-protective-sweep-entry of Simpson's apartment. *See Holloway*, 355 F.3d at 714. To fairly present the claim, Faison must have presented the factual and legal substance in a manner so as to put the state on notice. *See Holloway*, 355 F.3d at 714. In his PCRA petition, Faison did not mention Trooper Thomas's name, did not describe police re-entering the apartment after the protective sweep in his 'Factual Background,' and did not distinguish his argument between the protective sweep itself, and the re-entry after the protective sweep. (Doc. 19-2, at 2). In support of his argument that he fairly presented the claim, Faison directs the Court to the PCRA court's June 22, 2017, order mentioning that an amended PCRA petition had been filed, but that it raised 'essentially the same issues' as the original.[16] (Doc. 20, at 18 n. 12). The facts and arguments Faison alleged in his PCRA petition were insufficient to put the state on notice that he was challenging the constitutionality of the re-entry of Simpson's apartment *after* the protective sweep. *See Holloway*, 355 F.3d at 714. The Superior Court was correct in finding that Faison

[16] The undersigned is unable to consider the amended PCRA petition which Faison refers to, as it has not been presented to the Court.

did not raise this claim in any of his PCRA petitions, and Faison bears the burden of rebutting that finding with clear and convincing evidence. *See Simmons*, 590 F.3d at 231. Having determined that Faison did not meet this burden, the Court finds that his claim of ineffective assistance of counsel due to failure to suppress evidence obtained after the protective sweep was not exhausted.

If Faison now attempted to present this unexhausted claim in state court, review would no longer be available to him under Pennsylvania law.[17] As such, while the claim may be *technically* exhausted, it is procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *see also Wilkerson*, 871 F.3d at 228; *see also Bender v. Wynder*, No. CIV A. 05-998, 2006 WL 1788350, at *11 (W.D. Pa. June 5, 2006), *report and recommendation adopted*, No. CIV A. 05-998, 2006 WL 1788312 (W.D. Pa. June 28, 2006) ("To the extent that [Petitioner] is attempting to raise the purported constitutional violations that provide the basis for his ineffective assistance of counsel claims as independent claims that entitle him to federal habeas relief, those independent claims of constitutional error were not exhausted and are therefore procedurally defaulted."); *Mattis v. Vaughn*, 80 F. App'x 154, 157 (3d Cir. 2003) ("[T]he underlying *Brady* claim in Mattis's habeas petition was procedurally defaulted; he did not present the claim to the Pennsylvania Supreme Court on direct appeal, and he no

[17]Judgment becomes final at the conclusion of direct review, which includes discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of the time for seeking that review. 42 Pa.C.S.A. § 9545(b)(3); *Commonwealth v. Owens*, 718 A.2d 330 (Pa. Super. Ct. 1998). Here, because Faison's conviction became final well over a year ago, any attempt to now go back and file a new PCRA petition would be barred as untimely under 42 Pa.C.S.A. § 9545(b). Further, Faison may also be barred from raising these unexhausted claims under the PCRA's waiver provision. *See* 42 Pa.C.S.A. § 9544(b) (barring a petitioner from filing a claim under the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, ... on appeal or in a prior state postconviction proceeding.").

longer has a state remedy available."). As mentioned *supra*, federal courts generally may not consider the merits of procedurally defaulted claims unless the petitioner can demonstrate either cause[18] for the procedural default and actual prejudice[19] resulting therefrom, or that a fundamental miscarriage of justice will result[20] if the court does not review the claims. *See McCandless v. Vaughn,* 172 F.3d 255, 260 (3d Cir. 1999); *Coleman,* 501 U.S. at 750-51. Accordingly, the Court considers whether any basis exists to excuse Faison's procedural default. *See Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244-46 (3d Cir. 2013) (noting a court's obligation to liberally construe the filings of incarcerated *pro se* litigants).

Relying on the United States Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), Faison argues that any procedural default should be excused on the basis of his PCRA Counsel's ineffectiveness. (Doc. 20, at 18). In *Martinez*, the Supreme Court recognized that, under certain circumstances, the procedural default of an ineffective assistance of trial counsel claim may be excused where the default was caused, in turn, by ineffective assistance of counsel, or by lack of having counsel, in initial post-conviction collateral proceedings. *See Martinez v. Ryan*, 566 U.S. 1, 8–18 (2012). Specifically, the Supreme Court held that:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not

---

[18] To show "cause," a petitioner must establish "that some objective factor external to the defense impeded [the petitioner's] efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[19] A petitioner satisfies the "prejudice" prong by showing that the proceeding was "unreliable or ... fundamentally unfair" because of a violation of federal law.[19] *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

[20] In order to demonstrate a "fundamental miscarriage of justice," a petitioner must present new evidence to show "that constitutional error has resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

> bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [state] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.
>
> *Martinez*, 566 U.S. at 17.

For *Martinez* to apply, Faison must show that his ineffective assistance of trial counsel claim has 'some merit,' and that he had ineffective counsel or no counsel at the initial-review stage of the state collateral proceeding.[21] *See Workman v. Superintendant Albion SCI*, 915 F.3d 928, 937 (3d Cir. 2019). Faison's state-appointed attorney at the initial-review stage of PCRA proceedings withdrew pursuant to *Finley* and filed with the court a letter of no-merit. The Third Circuit has held that a *Martinez* inquiry "focuses on whether *counsel*, not the prisoner, raised the ineffective assistance of counsel claim at the initial review collateral proceeding." *Mack v. Superintendent Mahanoy SCI*, 714 F. App'x 151, 153 (3d Cir. 2017) (emphasis in original). In *Mack*, the court also held that where a petitioner fails to raise an ineffective assistance of counsel claim in responding to a letter of no-merit, the claim may still be excused by *Martinez* "if PCRA counsel was ineffective for filing a no-merit letter and not raising [the petitioner's] ineffective assistance claim." *Mack*, 714 F. App'x at 154. Therefore, if Faison's PCRA counsel was ineffective for not raising this claim of ineffective trial counsel in his no-merit letter, and if Faison's ineffective assistance of trial counsel claim is 'substantial,' or has 'some merit,' then *Martinez* would apply, and Faison could go on with the claim. *See Workman*, 915 F.3d at 937. The Court will examine the merit of Faison's ineffective assistance

[21] It is also required that state law mandates ineffective assistance of trial counsel claims be raised only in collateral proceedings, which Pennsylvania state law does. *See Martinez*, 566 U.S. at 17; *see also Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002).

of trial counsel claim first, and then, if merit is found, determine whether PCRA counsel was ineffective for not raising that claim in his no-merit letter.

To demonstrate that a claim has some merit, a petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Workman*, 915 F.3d at 938 (quotation omitted). Therefore, Faison's claim that his trial counsel was ineffective for failing to file a motion to suppress evidence obtained from the warrantless re-entry of Simpson's home must have enough merit such that reasonable jurists could encourage it to proceed. *See Workman*, 915 F.3d at 938. The Court finds that it does not.

To attack the legality of a search of an apartment, and the ensuing collection of evidence, an individual must have a reasonable expectation of privacy in that apartment. *Commonwealth v. Bostick*, 958 A.2d 543, 552 (Pa. Super. Ct. 2008). As an overnight guest of Simpson's, Faison initially enjoyed such reasonable expectation of privacy. *See Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (holding that overnight houseguests have a legitimate expectation of privacy in their hosts' home). That reasonable expectation of privacy, though, dissolved when Faison fled the apartment and was subsequently arrested. *See United States v. Harris*, 884 F.Supp.2d 383, 390 n. 5 (W.D. Pa. 2012) (explaining that a Defendant did not have standing to challenge the search of a home where he was an overnight guest because he was not present when the search was conducted due to being detained) (citing *United States v. Pettiway*, 429 F. App'x 132, 135 (3d Cir. 2011)). Because police performed the search in question after Faison had left the apartment and had been arrested, thus when he no longer possessed a reasonable expectation of privacy, Faison's claim that trial counsel was ineffective

for not filing a motion to suppress evidence obtained from the search lacks any merit and *Martinez* does not allow Faison to escape procedural default.

Therefore, it is recommended that Faison's fourth ground for relief, that his trial counsel was ineffective for not filing a motion to suppress evidence obtained when police re-entered the apartment after performing the protective sweep, insofar as Faison asserts it as a separate claim from his other ineffectiveness claims, be **DISMISSED** as procedurally defaulted, without justifiable cause to excuse such procedural default.

C. CLAIMS ON THE MERITS[22]

It is not disputed that Faison's remaining claims were properly exhausted, and thus warrant consideration on the merits. In those grounds, Faison argues that his Sixth Amendment right to effective counsel was violated because of his trial counsel's failure to file motions to suppress (1) evidence of Faison's cell phone data, (2) evidence obtained when police entered Simpson's apartment without a search warrant and performed a protective sweep, and (3) the affidavit of probable cause in support of the search warrant on Simpson's apartment. (Doc. 1).

"Under *Strickland*, courts are precluded from finding that counsel was ineffective unless they find both that counsel's performance fell below an objectively unreasonable

[22] As noted above, Faison included a fifth ground for relief in his Petition, written on the back of the petition (Doc. 1-1), and inadvertently not scanned into ECF when the Petition was originally filed. This claim was that trial counsel was ineffective for not *consulting* with Faison about filing the motions to suppress evidence which are addressed herein. As discussed *infra*, the Court finds that these motions to suppress would have been meritless, therefore trial counsel cannot be found ineffective for failing to pursue them. *See Hartey v. Vaughn*, 186 F.3d 367, 372 (3d Cir. 1999) (explaining that counsel cannot be deemed ineffective for not pursuing a meritless claim). Accordingly, the Court respectfully recommends this claim be DISMISSED.

standard, and that the defendant was prejudiced by that performance." *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002). For a petitioner to claim ineffective assistance of counsel under the PCRA he or she must show that "(1) the underlying claim is of arguable merit; (2) counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) he was prejudiced by counsel's ineffectiveness." *Commonwealth v. Timchak*, 69 A.3d 765, 769 (Pa. Super. 2013). A review of counsel's performance must be "highly deferential," as the petitioner has the burden of overcoming the strong presumption that his counsel's conduct fell "within the wide range of reasonable professional assistance" and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. Even if a petitioner demonstrates that his attorney's performance fell below prevailing professional norms, habeas relief will only be available if the petitioner further demonstrates that this deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 691-92. To demonstrate that he was prejudiced by counsel's ineffective performance, a petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Courts properly deny an ineffective assistance of counsel claim upon determining that a petitioner fails to make a sufficient showing under either the performance component or the prejudice component of the *Strickland* two-part test. *Strickland*, 466 U.S. at 697.

Accordingly, under the deferential standard mandated by 28 U.S.C. § 2254(d)(1), the Court may only grant Faison habeas relief upon finding that the state court decisions involved an unreasonable application of *Strickland*. Further, because Faison's ineffective assistance of counsel claims were adjudicated on the merits in state court, this Court's "review is 'doubly

deferential:' the state PCRA court was obligated to conduct deferential review of Faison's trial counsel's performance and [this Court] must give deference to the state PCRA court rulings under AEDPA." *Showers v. Beard*, 635 F.3d 625, 629 (3d Cir. 2011).

1. Ground One (Probable Cause to Collect Cell Phone Data)

In his first ground for relief, Faison argues that his trial counsel was ineffective in failing to file a motion to suppress evidence obtained from a 'trap and trace device.' (Doc. 1). Specifically, he argues that the warrant establishing probable cause to authorize disclosure of tracking data on his cell phone number was insufficient as a matter of law, and that without the tracking data police would not have arrived at Simpson's apartment where Faison, and the drugs, were found. (Doc. 1). He claims that the Pennsylvania Superior Court, acting under the PCRA, unreasonably applied *Illinois v. Gates*, 462 U.S. 213 (1983) in determining that the averments in the affidavit of probable cause provided enough bases for the issuing court to conclude that probable cause existed to support the authorization of the warrant. (Doc. 20, at 12).

In support of his claim, Faison first points to the fact that the affidavit does not establish the credibility nor reliability of Steven Williams, the parolee, who disclosed Faison's telephone number to the parole agent, nor that the information obtained from Williams was corroborated. (Doc. 20, at 13). Without establishing Williams as a reliable source, the affidavit lacked sufficient information to establish probable cause for a warrant. (Doc. 20, at 13). Second, Faison states that, because Williams gave the parole agent the phone number, who then gave it to the affiant, the affidavit contained uncorroborated double hearsay rendering it unreliable. (Doc. 20, at 13).

Respondent contends that the Pennsylvania Superior Court's determination was not contrary to *Gates*, and that *Gates* was not unreasonably applied to the facts of this case. (Doc. 19, at 11). The Pennsylvania Superior Court, in examining the affidavit in support of probable cause, noted that the parolee who supplied the number was "specifically identified and known to law enforcement, and could be held accountable for false information provided," and also that the affidavit provided the name of the parole agent, the date and time of the interview between the parole agent and the parolee, and stated that the parolee informed the agent that Faison was in the area and using the street name of 'Mike' which was similar to the name 'Mickey' Faison had used during controlled buys that had been conducted. (Doc. 19-2, at 73). The Superior Court, citing *Gates*, determined that the totality of the circumstances provided a substantial basis for the issuing court to conclude that probable cause existed to support authorizing disclosure of the cell phone data, and that a motion to suppress on that basis would have lacked merit. (Doc. 19-2, at 73).

Under *Gates*, probable cause determinations must be made according to the totality of the circumstances. *Gates*, 462 U.S. at 238. If the circumstances, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information," establish a fair probability that evidence of a crime will be found in a particular place, then probable cause is established. *Gates*, 462 U.S. at 238. The Court makes clear that an affidavit relying on hearsay is sufficient, as long as a "substantial basis for crediting the hearsay is presented." *Gates*, 462 U.S. at 238 (quotation omitted).

In *Gates*, the court issuing the warrant relied on an anonymous letter in establishing probable cause. *Gates*, 462 U.S. at 245. The letter could be relied upon because the information within, describing the defendants' travel plans, could be corroborated. *Gates*, 462 U.S. at 245.

Here, it was not unreasonable for the Superior Court to conclude that the information provided by the parolee could be, and was, corroborated. The parolee communicated that the number belonged to Faison, who was in town, and going by the street name 'Mike.' (Doc. 19-2, at 73) The affiant had direct knowledge from controlled buys that Faison had used the street name 'Mickey.' (Doc. 19-2, at 73). Further, while the letter supporting probable cause in *Gates* was anonymous, probable cause in this case was established by a parolee whose identity was known to police and who could be held accountable for incorrect information. (Doc. 19-2, at 73). Given these facts, the Superior Court acting under the PCRA did not unreasonably determine that there was a substantial basis for the issuing court to conclude that probable cause existed, and that a motion to suppress on that basis would have lacked merit.

Given that Faison's underlying claim is not of arguable merit, the undersigned finds that the state court did not unreasonably apply *Strickland.* Therefore, the Court recommends that Faison's claim alleging ineffective assistance of counsel for failing to move to suppress evidence obtained as a result of the search of Faison's cell phone data (ground one) be **DISMISSED** for lack of merit.

2. Ground Two (Warrantless Entry of Simpson's Apartment)[23]

Next, Faison argues that his trial counsel was ineffective in failing to file a motion to suppress evidence obtained when police entered Simpson's apartment with only an arrest

[23] The Court notes that, as discussed *supra*, Faison abandoned his reasonable expectation of privacy in the apartment when he fled before police entered. The Superior Court, on PCRA appeal, did not address this issue and performed its analysis as if Faison kept an expectation of privacy. The Court now examines whether the Superior Court's analysis is in accordance with Federal law.

warrant for Faison, and not a search warrant. (Doc. 1, at 7). Specifically, Faison claims that police had ample time to obtain a search warrant, and that approaching the apartment and knocking on the door without a search warrant created exigent circumstances. (Doc. 20, at 15-16). Faison argues that "the Third Circuit has declared it illegal for officers to execute an arrest warrant on a third party's residence without first obtaining a search warrant based on their belief that the suspect may be a guest there." (Doc. 20, at 15). Faison goes on to argue that officers cannot cite exigent circumstances as grounds for warrantless entry when those circumstances are of their own creation. (Doc. 20, at 15-16).

Respondent argues that Faison lacked sufficient contact with Simpson, and Simpson's apartment, to afford him a reasonable expectation of privacy. (Doc. 19, at 11). In support, Respondent states that, "while the defendant had spent the night at the apartment on prior occasions, Mr. Simpson had not seen the petitioner for a substantial period of time and had only spoken to him on the phone three times in the past several months." (Doc. 19, at 11). Further, when Simpson's front door was opened, an individual later identified as Faison jumped out the window of the apartment and fled. (Doc. 19, at 12). In doing so, Respondent asserts, Faison "abandoned any property he had and should be found to have no reasonable expectation of privacy in any property he left behind in the third party residence." (Doc. 19, at 12).

On PCRA appeal, the Superior Court stated that police do not violate the privacy rights of the subject of an arrest warrant when they enter the home of a third party without a search warrant in order to execute the arrest warrant of an individual whom they have reasonable belief is inside or is living there. (Doc. 19-2, at 73) (citing *Commonwealth v. Muniz*, 5 A.3d 345, 350-52 (Pa. Super. 2010). "Cell data had led [police] to that location, Colley told

Trooper Lombardo that Faison was in the second floor apartment, and Trooper Fishel saw Faison standing outside a door of the apartment building." (Doc. 19-2, at 73). These facts, not unreasonably, gave police reasonable belief that Faison was in the apartment. There was nothing to suggest that the individual fleeing the apartment was Faison, therefore the police had reason to believe Faison was still in the apartment and had the power to enter and execute the arrest warrant. (Doc. 19-2, at 73). The Superior Court went on to find that Faison offered no facts to contradict the PCRA court's conclusion that officers performed a protective sweep of Simpson's apartment, rather than a full search. (Doc. 19-2, at 73).

The Superior Court's decision, on PCRA appeal, was not contrary to clearly established Federal law. In support of his claim, Faison submits that the Superior Court's decision was contrary to *Steagald v. United States*, 451 U.S. 204 (1981) and that officers must obtain a search warrant before entering a third party's residence to effectuate an arrest warrant. (Doc. 20, at 15). In *Steagald*, the Court stated that "the narrow issue before us is whether an arrest warrant – as opposed to a search warrant – is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances." The Court makes clear that this case only addresses the rights of individuals who are not named in the arrest warrant. Faison *was* named in the arrest warrant, therefore *Steagald* does not apply.[24]

[24] The Fourth Amendment rights of an overnight guest who is the subject of an arrest warrant are governed by *Payton v. New York*, 445 U.S. 573 (1980), which holds that police may enter a home with only an arrest warrant if they have reason to believe the arrestee is within the entered premises. *United States v. Agnew*, 407 F.3d 193, 196 (3d Cir. 2005); see *United States v. Bohannon*, 824 F.3d 242, 250 (2d Cir. 2016).

Faison fails to identify any clearly established Federal law holding that officers acted in violation of his Fourth Amendment rights as an overnight guest in entering Simpson's apartment when they did.[25] Therefore, the Court does not find that the state court's decision was clearly contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *Showers v. Beard*, 635 F.3d 625, 629 (3d Cir. 2011). Further, Faison does not present clear and convincing evidence showing that police performed a full search of Simpson's apartment, rather than a protective sweep. The Superior Court, on PCRA appeal, determined that police, not knowing who was in the apartment, 'secured' it for officer safety. (Doc. 19-2, at 73). Faison does not present clear and convincing evidence that police exceeded that scope. For these reasons, the Court respectfully recommends that Faison's claim that his trial counsel was ineffective for not attempting to suppress evidence obtained when police entered Simpson's apartment with only an arrest warrant (ground two) be **DISMISSED** as without merit.

3. Ground Three (False Averments in Arrest Warrant)

In his third ground for relief, Faison argues that his trial counsel was ineffective for not investigating and not filing to suppress the affidavit of probable cause in support of the warrant for his arrest. (Doc. 1, at 9). Faison appears to allege that if trial counsel had investigated Simpson, it would have been realized that the affidavit of probable cause contained false averments and that the arrest warrant was invalid. (Doc. 1, at 9).

[25] Faison also cites to *United States v. Coles*, 437 F.3d 361 (3d Cir. 2006), which addresses the Fourth Amendment rights of an individual when police do not have an arrest or search warrant. Police had a warrant for Faison's arrest, therefore Coles does not apply.

The Superior Court, acting on PCRA appeal, indicates that it understood Faison's argument to be that he was challenging the averments contained in the affidavit of probable cause in support of the *search* warrant of Simpson's apartment. (Doc. 19-2, at 73). The court found this claim to be without merit, as Faison failed to indicate how any material statements in the affidavit supporting the search warrant were false. (Doc. 19-2, at 73).

The undersigned finds that the Superior Court did not reach an unreasonable determination of the facts. In his petition and traverse, Faison does not submit any factual support for his assertion that the affidavits of probable cause in support of the warrants – search nor arrest – contained false averments, and he fails to allege what an investigation of Simpson would have revealed. *See* (Doc. 1); (Doc. 20).

For these reasons, the Court recommends that Faison's claim that his trial counsel was ineffective for not attempting to investigate Simpson or suppress the affidavits of probable cause (ground three) be **DISMISSED** as without merit.

IV. PENDING MOTIONS

Also pending before the Court are two motions by Faison – a motion to compel discovery (Doc. 7) and a motion for clarification/status of case (Doc. 8). The undersigned having recommended that this petition be dismissed, these motions are now moot, and it is recommended that they be denied as such. Further, Faison failed to file briefs in support of either motion in accordance with Local Rule 7.5, which mandates that a brief in support of a motion shall be filed within 14 days of filing of the motion or be deemed withdrawn.

V. RECOMMENDATION

Based on the foregoing, it is recommended that Faison's petition (Doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court further recommends against the issuance

of a certificate of appealability, as Faison has failed to demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Finally, it is recommended that the remaining motions pending in this matter be dismissed as moot.

Dated: October 31, 2019

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge