UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2936

NICHOLAS EDWARDS,
Appellant

v.

SUPERINTENDENT FOREST SCI;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE STATE PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 2:15-cv-05615)
District Judge: Honorable Gerald A. McHugh

Submitted Under Third Circuit L.A.R. 34.1(a)
October 23, 2020

Before: CHAGARES, GREENAWAY, JR. and NYGAARD, *Circuit Judges.*

JUDGMENT

This cause came on to be considered on the record from the Eastern District Court of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on October 23, 2020.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court of the Eastern District of Pennsylvania

entered August 8, 2018, be and the same is hereby AFFIRMED. Costs shall not be taxed in this matter. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: March 5, 2021

Certified as a true copy and issued in lieu of a formal mandate on July 16, 2021

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

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v.

SUPERINTENDENT FOREST SCI; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE STATE OF PENNSYLVANIA

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil. No. 2-15-cv-05615)
District Judge: Honorable Gerald A. McHugh

SUR PETITION FOR REHEARING

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

ORDER

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.

*Judge Nygaard's vote is limited to panel rehearing only.

BY THE COURT,

s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: July 8, 2021
Tmm/cc: Nicholas Edwards
Jennifer O. Andress, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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SUPERINTENDENT FOREST SCI;
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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District Judge: Honorable Gerald A. McHugh

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October 23, 2020

Before: CHAGARES, GREENAWAY, JR. and NYGAARD, *Circuit Judges*.

(Opinion Filed: March 5, 2021)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

GREENAWAY, JR., *Circuit Judge*.

Appellant Nicholas Edwards appeals from the District Court's denial of his petition seeking the issuance of a writ of habeas corpus based on ineffective assistance of counsel. For the reasons that follow, we will affirm.

I. BACKGROUND

On the evening of July 4, 2003, while standing in front of a house in Philadelphia, Edwards shot Xavier Edmonds. Travis Hendrick and Walter Stanton—the witnesses the prosecution presented at trial—both identified Edwards by name to police within hours of the shooting. Both witnesses knew Edwards prior to the night of the shooting.

Edwards was arrested shortly thereafter. Following his arrest, Edwards went to trial by jury in Pennsylvania state court. Hendrick and Stanton testified during the trial. Hendrick testified that, a few days before the shooting, he was standing in front of a house with Edmonds when Edwards, in an effort to protect his drug territory, attacked Hendrick and Edmonds with a baseball bat and warned them to "stay off his block." J.A. 377. Hendrick further testified that on the day of the shooting, he was standing in front of the same house with Edmonds and several others, including Stanton. Hendrick left the group and started up the steps of the house to use the bathroom, when the sound of slamming brakes caused him to turn around. When he looked back, Hendrick saw Edwards climb out of the backseat of a silver car, with a gun, and walk towards the victim. Upon seeing

Edwards with the gun, Hendrick ran to the back exterior of the house. He heard gunshots and called the police.

Stanton, the prosecution's other witness, testified that he was standing outside of the house with a group of people, including Edmonds, when Edwards drove up in a car, pulled out a gun from his waistband, and yelled to Edmonds "You think I'm playing," before shooting Edmonds twice. J.A. 445. After the shooting, Stanton walked down the street, where he encountered police, who questioned him about the shooting.

The jury found Edwards guilty of first-degree murder, carrying a firearm without a license, possessing an instrument of crime, and criminal conspiracy.

Following an unsuccessful direct appeal, Edwards sought relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9524 *et seq.* Counsel was appointed for Edwards, and an amended PCRA petition was submitted on his behalf, limited to only two issues, neither of which are at issue on this appeal.[1] Following an evidentiary hearing on those issues, the PCRA Court dismissed the petition. The Superior Court affirmed, and the Pennsylvania Supreme Court denied the allowance of appeal.

Edwards filed a timely *pro se* petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, raising twenty-one claims, including

[1] In the amended PCRA petition, Edwards' PCRA counsel only raised two claims: (1) trial counsel was ineffective for failing to call an alibi witness at trial; and (2) his right to a prompt trial under Rule 600 of the Pennsylvania Rules of Criminal Procedure was violated.

that trial counsel was deficient for failing to impeach Stanton with two police reports that were produced during discovery. As relevant to this appeal, one police report recounted a police officer's conversation with Stanton at the scene just after the shooting. The report indicates that Stanton stated that he saw a man get out of a silver car with a gun and walk toward the victim. Stanton also stated that he had turned the corner of the block before he heard the shots. The report notes that Stanton recounted that, after the shots were fired, he returned to the house and found Edmonds on the ground. This account directly contradicts Stanton's testimony that he remained at the scene after the shooting and his statement, "I seen [the shooting] with my own eyes." J.A. 470.

Regarding the second police report Edwards objects to his counsel not introducing at trial details of an interview by a different officer. That report states that the officer found a can of beer in a brown paper bag near the Edmonds' body, which Stanton[2] claimed was his. This report casts doubt on Stanton's testimony that he was not drinking alcohol at the time of the shooting.

The District Court denied Edwards' petition, finding, in part, that this ineffective assistance of counsel claim was procedurally defaulted. Edwards appealed, and this Court granted a certificate of appealability, limited only to issues concerning Edwards' claim of ineffective assistance of counsel for failing to impeach Stanton as a witness using the police reports.

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[2] The police report refers to "Andre Stanton," which is the name Stanton falsely gave to police officers on the night of the shooting.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We exercise plenary review over the District Court's decision because it did not hold an evidentiary hearing. *Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 265 (3d Cir. 2018) (citing *Robinson v. Beard*, 762 F.3d 316, 323 (3d Cir. 2014)). Because the state court never reached the merits of Edwards' claims, we review the merits *de novo*. *Jacobs v. Horn*, 395 F.3d 92, 110–111 (3d Cir. 2005).

III. DISCUSSION

Edwards asserts that he is entitled to habeas relief because trial counsel was deficient for failing to cross-examine Stanton with prior inconsistent statements made to police officers on the night of the shooting.[3] Edwards contends that he suffered prejudice because the jury's verdict would have been different had it heard that Stanton told police officers that he did not see the victim being shot on the night of the crime. Edwards avers that if Stanton had been impeached in this manner, the jury would have rejected all of Stanton's testimony as not credible and reached a not guilty verdict.

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[3] The Government argues that this ineffective assistance of counsel claim has been waived; thus, procedural default applies, and such default is not excusable under *Martinez v. Ryan*, 566 U.S. 1 (2012). While we acknowledge this procedural default issue is a close one, because Appellant's claims fail on the merits, we do not need to reach this question. *See Bronshtein v. Horn*, 404 F.3d 700, 728 (3d Cir. 2005) (determining it unnecessary to determine whether there was procedural default because "the claims in question lack merit.").

To succeed on his claim that trial counsel's assistance fell below the standard guaranteed by the Sixth and Fourteenth Amendments, Edwards "must demonstrate (1) that counsel's performance was deficient, in that it failed to meet an objective standard of reasonableness, and (2) that the petitioner suffered prejudice as a result of the deficiency." *Blystone v. Horn*, 664 F.3d 397, 418 (3d Cir. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We conclude that Edwards' ineffective assistance of counsel claim fails because he can not satisfy the second prong of the *Strickland* two-part test. *See* 466 U.S. at 687.

To satisfy the second *Strickland* prong and ultimately prevail on his ineffective assistance claim, Edwards must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To meet this threshold, we must find that "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 122 (2011) (citing *Strickland*, 466 U.S. at 693). Additionally, "[i]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

Edwards argues that had the jury been presented with the impeachment evidence, the tenor of the trial would have changed, and he would have been acquitted. Nothing can be further from the reality of the situation. Edwards' trial counsel pursued an extensive

and fulsome cross-examination of both Stanton and Hendrick. Counsel highlighted the various discrepancies both during cross-examination and during closing.

Inconsistencies between Stanton's and Hendrick's testimony and other evidence were apparent. For instance, Stanton testified that Edwards pulled the gun from his waistband after exiting the car, while Hendrick testified that Edwards was waiving the gun from an open car window as the car approached the house. Hendrick testified that the car was silver, whereas Stanton initially claimed the car was a gray, before switching to metallic green. Stanton testified that the car "came up slow[ly], doing about five miles per hour," App. 449, in direct contradiction to Hendrick's claim that the slamming of the brakes caused him to turn around. Stanton also testified that the gun was pressed against Edmond when the shots were fired, while the medical examiner determined that the shots were fired from at least three feet away, Stanton testified that the victim was shot in the head, but, according to the medical examiner, the victim only had gunshot wounds to the neck, arm and torso.

Further undermining Stanton's testimony was the fact that he frequently contradicted himself and often claimed to be "confused" when these issues were brought out on cross-examination. For example, Stanton testified that he was merely four feet away from where the victim was shot, which was inconsistent with statement made to the police at the station that night, in which he said he was standing ten to twelve yards away. Stanton testified that he was "confused" about whether he witnessed two or three shots, even though he testified that he witnessed the shooting from a mere four feet away. Stanton also initially

claimed that he had seen Edwards come out of a gray car in his police statement, but then switched to claiming it was a metallic green car, before admitting, "I got my colors wrong." J.A. 474.

Edwards' trial counsel also presented a myriad of evidence undermining Stanton's credibility and showing that he was unreliable: Stanton was a drug dealer, with a criminal past; Stanton fled Philadelphia after the shooting; and Stanton gave his brother's name as his own on the night of the shooting. Edwards' counsel also insinuated that Stanton was testifying against Edwards to curry favor with law enforcement, especially in light of his active criminal charges and overdue child support obligations.

At closing, trial counsel reiterated many of these inconsistencies, and argued that there were "serious questions" as to "whether or not [Stanton] saw anything or whether or not he was really there, because his testimony [was] just so contradictory." J.A. 534.

Edwards now points to one inconsistency–whether Stanton saw the shooting occur–and claims that this discrepancy was the tipping point in convincing the jury that Stanton was not credible.[4] This argument is unpersuasive. Given the inconsistencies in Stanton's testimony, we cannot find that trial counsel's failure to impeach Stanton with this additional statement was prejudicial. Trial counsel thoroughly impeached Stanton at trial.

[4] Edwards' claims are based on statements made in two police reports, but Edwards focuses on the statement that Stanton did not see the shooting as the basis for prejudice.

The various contradictory statements certainly undermined Stanton's credibility with the jury.

Here, Stanton was also not the only witness to the shooting. While Edwards argues that Stanton is the only direct eyewitness to the actual shooting, Hendrick identified Edwards as the man who had previously attacked Edmond and got out of the car that night, gun-in-hand, shortly before he heard gunshots. As a result, even if counsel had cross-examined Stanton with the additional inconsistent statements, it is not reasonably probable that the outcome would have been different because of Hendrick's testimony and the other evidence presented during the trial (e.g., a 911 call and forensic evidence) was sufficient to allow the jury to conclude that Edwards committed the crimes he was accused of.

Edwards has not met his burden of showing that there was a reasonable probability that the outcome of his trial would have been different had trial counsel impeached Stanton with the police reports. Because we conclude that Edwards did not satisfy the prejudice prong of the *Strickland* standard, we need not address deficient performance prong. *See United States v. Travillion*, 759 F.3d 281, 294 (3d Cir. 2014) ("[T]here is no reason for a court deciding an ineffective assistance claim . . . even to address both components of the inquiry if the [petitioner] makes an insufficient showing on one." (quoting *Marshall v. Hendricks*, 307 F.3d 36, 86–87 (3d Cir. 2002) (first alteration in original)). Therefore, Edwards' ineffective assistance of counsel claim fails.

IV. CONCLUSION

For the foregoing reasons, we will affirm the District Court's order denying habeas relief.

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

NICHOLAS EDWARDS, Petitioner,	:	
	:	Civil Action
v.	:	
	:	No. 15-5615
SUPERINTENDENT OVERMYER, et al., Respondents.	:	

ORDER

This 7th day of August, 2018, pursuant to 28 U.S.C. § 636(b)(1)(C), following a comprehensive review of the exceptionally thorough Report and Recommendation ("R & R") issued by the Honorable Lynne A. Sitarski (ECF No. 29), it is hereby **ORDERED** that the R & R is adopted over Petitioner's objections (ECF No. 31). Nicholas Edwards's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF Nos. 1, 25) is **DISMISSED**, with prejudice and without issuance of a certificate of appealability.

Petitioner presented his objections in 16 separately numbered paragraphs, in which he primarily recasts some of his original claims in summary fashion, *see* Pet'r's Obj. ¶¶ 2, 4, 9, 10, 12, 13, 14, 15, 16, with a few paragraphs purporting to address the relevant legal principles. *See id.* ¶¶ 1, 3, 5–8. The R & R addressed each of these claims in great detail, taking them up on their merits even where severe procedural defects were identified. I thus adopt the well-founded bases for dismissal laid out in the R & R, and supplement the Report only as to the arguments advanced in paragraph 11 of Plaintiff's objection.

Specifically, in recommending dismissal because the claim was procedurally defaulted, the R & R construed Ground Fifteen of the Petition as speaking to trial counsel's failure to

challenge the lack of a written sentencing order. Petitioner conceded that the claims pertaining to Ground Fifteen are procedurally defaulted. But in an effort to establish cause and prejudice to overcome the procedural bar, he objects to the R & R's construction, summarily arguing that the basis for his claim under Ground Fifteen was also trial counsel's ineffectiveness in failing to object when the trial court did not sentence him in accordance with 42 Pa. Cons. Stat. § 9711.[1]

Assuming for purposes of analysis that was the case, Petitioner's claim is still without merit. He was convicted of first degree murder following an incident in which, in an effort to protect his drug territory, he publically shot another man in front of two eye witnesses. Section 9711 is the sentencing statute pertaining to that crime, and provides only two possible sentences: life imprisonment or the death penalty. *See* 18 Pa. Stat. and Cons. Stat. Ann. § 1102(a); *Com. v. Trivigno*, 750 A.2d 243, 255 (Pa. 2000) ("[L]ife imprisonment means that the defendant is not eligible for parole."). Petitioner was sentenced to a term of life imprisonment. Whatever trial counsel's ineffectiveness at sentencing, Petitioner cannot argue that it was prejudicial, as he avoided the death penalty, the only alternative sentence under Pennsylvania law. His Petition is denied accordingly.

/s/ Gerald Austin McHugh
United States District Judge

[1] In summary fashion and without any citation for legal support, Petitioner also appears to argue that trial counsel was ineffective for failing to challenge the legality of the sentencing statute as void for vagueness. That argument does not appear anywhere in the record, nor does it appear in the original Petition or Petitioner's lengthy "Traverse." Without more, it is properly dismissed on procedural default grounds.

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

NICHOLAS EDWARDS **Petitioner,**	:	**CIVIL ACTION**
v.	:	**NO. 15-cv-5615**
ROBERT MARSH, et al.[1] **Respondents.**	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **June 15, 2018**

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Nicholas Edwards ("Petitioner"), an individual currently incarcerated at the State Correctional Institution – Benner Township in Bellefonte, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED.

I. PROCEDURAL BACKGROUND[2]

The Court of Common Pleas of Philadelphia County provided the following recitation of

[1] I have substituted Robert Marsh, the Superintendent of SCI Benner Township, as the respondent in this case. *See* Rules Governing Section 2254 Cases, Rule 2 (requiring the current custodian to be named as respondent).

[2] Respondents have submitted the relevant transcripts and portions of the state court record ("SCR") in hard-copy format. Documents contained in the SCR will be cited as "SCR No. ___." The Court has also consulted the Court of Common Pleas criminal docket sheet for *Commonwealth v. Edwards*, CP-51-CR-1006311-2003, *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-1006311-2003 (last visited June 14, 2018) [hereinafter "Crim. Docket"] and the Pennsylvania Superior Court's appellate docket sheet for *Commonwealth v. Edwards*, 2760 EDA 2016, *available at* https://ujsportal.pacourts.us/DocketSheets/AppellateCourtReport.ashx?docketNumber=2760+EDA+2016 (last visited June 14, 2018) [hereinafter "App. Docket"].

the facts:

> On July 2, 2003, petitioner, in an effort to protect his drug territory, attacked the decedent, Xavier Edmunds, with a baseball bat and told him to stay off "his block."
>
> On July 4, 2003, at approximately 9:00 p.m., Edmunds was standing outside 2838 Jasper Street with Travis Hendrick, Walter Stanton and other friends. A car pulled up alongside them. Hendrick and Stanton observed petitioner exit the vehicle with a firearm and heard him shout "You think I'm playing." When Hendrick saw petitioner was armed, he went in the house and called the police. Petitioner then fired two shots at Edmunds, who fell to the ground. Petitioner got back into the vehicle and fled. Police arrived on the scene within minutes and transported Edmunds to the hospital, where he was later pronounced dead.
>
> Hendrick gave a written police statement immediately following the murder in which he positively identified petitioner as the shooter. Stanton also identified petitioner as the shooter in a written statement to police shortly after the incident. Both Hendrick and Stanton were acquainted with petitioner. Hendrick had known petitioner for about a year, and Stanton had seen petitioner approximately fifty times over the eight years preceding the shooting.

Commonwealth v. Edwards, No. CP-51-CR-1006311-2003, slip op. at 2-3 (Phila. Cnty. Com. Pl. Apr. 23, 2014) (citations omitted) [hereinafter "PCRA 1925(a) Op."].

On November 21, 2005, a jury found Petitioner guilty of first degree murder, 18 Pa. Cons. Stat. § 2502(a), criminal conspiracy, *id.* § 903, possession of an instrument of crime, *id.* § 907, and carrying a firearm without a license, *id.* § 6106. PCRA 1925(a) Op. at 1; Crim. Docket at 4; (N.T. 11/21/05 at 17-18). On February 3, 2006, Petitioner was sentenced to life imprisonment, plus a term of twenty-one and a half to forty-four years' imprisonment. Crim. Docket at 16-17; (N.T. 02/03/06 at 18:2-14).

Petitioner filed a counseled, untimely post sentence motion, which was dismissed on March 1, 2006. (Order, SCR D9); Br. for Appellant, *Commonwealth v. Edwards*, No. 1267 EDA

2008, 2008 WL 7091262, at *8 (Pa. Super.) [hereinafter "Dir. App. Br."]. After having his appellate rights reinstated *nunc pro tunc*, Petitioner filed a counseled notice of appeal. Crim. Docket at 22; (Order, SCR No. D19; Notice of Appeal *Nunc Pro Tunc*, SCR No. D18). The Superior Court affirmed Petitioner's judgment of sentence on July 28, 2009. Crim. Docket at 23; *Commonwealth v. Edwards*, No. 1267 EDA 2008, slip op. at 1 (Pa. Super. July 28, 2009). Petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on February 5, 2010. Crim Docket at 23; (Order, SCR No. D27).

On June 28, 2010, Petitioner filed a *pro se* petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq*. ("PCRA"). Crim. Docket at 23; (Mot. for Post Conviction Collateral Relief, SCR No. D28). Counsel was appointed and submitted an amended PCRA petition on his behalf. Crim. Docket at 24-26; (Am. Pet., SCR No. D31; Corr. Am. Pet., SCR No. D33). Following an evidentiary hearing, on April 23, 2014, the PCRA Court dismissed the PCRA petition.[3] Crim. Docket at 30; (Order, SCR No. 41). Petitioner filed a timely counseled appeal, and on March 2, 2015, the Superior Court affirmed the denial of the PCRA petition. (Notice of Appeal, SCR No. 44); *Commonwealth v. Edwards*, No. 1508 EDA 2014, slip op. at 1 (Pa. Super. Mar. 2, 2015). Petitioner sought allowance of appeal in the Pennsylvania Supreme Court, which was denied on July 29, 2015. Crim. Docket at 32.

On October 12, 2015,[4] Petitioner filed a *pro se* petition for writ of habeas corpus, raising

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[3] Petitioner filed a *pro se* supplemental PCRA petition on June 4, 2013, requesting to assert sixteen additional claims. Crim. Docket at 27; (Supp. Mot. to Amend, SCR No. D37). The PCRA Court's 1925(a) Opinion only discusses the claims raised in the counseled amended petition. *See* PCRA 1925(a) Op. at 2. Pennsylvania law does not permit "hybrid" representation; thus, Petitioner's *pro se* filing could not be considered by the PCRA court. *See Commonwealth v. Jette*, 23 A.3d 1032, 1044 n.14 (Pa. 2011); Pa. R. App. P. 3304.

[4] Pennsylvania and federal courts employ the prisoner mailbox rule, pursuant to which the *pro se* petition is deemed filed when it is given to prison officials for mailing. *See Perry v.*

the following claims for relief (recited verbatim):

(1) Defendant was denied due process of law under the Fourteenth Amendment to the United States Constitution, when the trial court's ruling that precluded cross examination of commonwealth witness Travis Hendricks with regard to a recent arrest.

(2) Defendant was denied due process of law under the Fourteenth Amendment to the United States Constitution, when the trial court's ruling that precluded cross examination of commonwealth witness Travis Hendricks with regard to the fact underlying his prior conviction.

(3) Defendant was denied due process of law under the Fourteen Amendment to the United States Constitution, when the trial court's ruling that precluded cross examination of commonwealth witness Travis Hendrick with regard to his understanding of the nature of probation and his obligation not to violate his probation and the differences between aggravated assault[,] attempted murder[,] and malicious wounding.

(4) Defendant was denied due process of law under the Fourteen Amendment to the United States Constitution, when the trial court ruling that precluded cross examination of Commonwealth witness Walter Stanton concerning his use of aliases.

(5) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and was denied due process of law under the Fourteenth Amendment to the United States Constitution when the trial court's ruling that denied defendant motion for a mistrial for the hearsay statement made during the testimony of police [officer] Stephanie Flanders.

(6) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and was denied due process of law under the

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Diguglielmo, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. 1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Commonwealth v. Castro*, 766 A.2d 1283, 1287 (Pa. Super. 2001). Here, Petitioner certified that he gave his habeas petition to prison officials on October 12, 2015, and it will be deemed filed on that date. (Hab. Pet. 32, ECF No. 1).

Fourteenth Amendment to the United States Constitution, when the trial court ruling that defendant his request for a jury instruction as to the bias[,] currying favor with the commonwealth[,] and expectation of leniency with regard to the commonwealth's witnesses.

(7) Defendant was denied his right to effective assistance of counsel's under the Sixth Amendment to the United States Constitution and was denied due process of law under the Fourteenth Amendment to the United States Constitution when the trial court's ruling that allowed the jury to view a photo array of the defendant.

(8) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and was denied due process of law under the Fourteenth Amendment to the United States Constitution when trial counsel failed to call known alibi witnesses.

(9) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, when trial counsel failed to asset to move for dismissal of defendant charges pursuant to Rule 600 of the Pennsylvania Rule of Criminal Procedures.

(10) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment and the due process Clause under the Fourteenth Amendment to the United States Constitution when trial counsel failure to object to the improperly [vouching] and bolstering the credibility of Commonwealth witness Travis Hendricks.

(11) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution when trial counsel failed to impeach commonwealth witnesses by showing possible prejudice and bias.

(12) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment and was denied due process of law under the Fourteenth Amendment to the United States Constitution when Miranda warning were not given and trial counsel failed to [suppress] the defendant statement and defendant requested for counsel which was denied.

(13) Defendant was denied due process of law under the Fourteenth Amendment to the United States Constitution when the trial courts jury instruction were not read as a whole to the jury.

(14) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment and was denied due process of law under the Fourteenth Amendment to the United States Constitution when trial counsel failed to object to the trial court improper flight jury instruction 3.14.

(15) Defendant was denied his right to effective assistance of counsel's under the Sixth Amendment and was denied due process of law under the Fourteenth Amendment to the United States Constitution when all prior counsel's failed to challenge legality of defendant illegal sentence statute.

(16) Defendant was denied due process of law under the Fourteenth Amendment to the United States Constitution when the trial court failed to give a requested jury instruction on 4.08D impeachment prior conviction.

(17) Defendant was denied due process of law under the Fourteenth Amendment to the United States Constitution when the trial court failed to give a requested jury instruction on Inflammatory photographs (Crim. 3.18).

(18) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution when trial counsel rendered ineffectiveness for failing to obtain an expert to prepare defendant mental health history and social history amounted to ineffectiveness.

(19) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment and was denied due process of law under the Fourteenth Amendment to the United States Constitution when PCRA Counsel failed to adequately investigate the record and raise a layered claim of trial counsel and direct appeal counsel ineffectiveness.

(20) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution when trial counsel failed to conduct an independent interview of the police officer's in the

defendant discovery material.

(21) Defendant was denied his right to effective assistance of counsel under the Sixth Amendment and was denied due process of law under the Fourteenth Amendment to the United States Constitution when the Commonwealth committed a Brady violation that violated its discovery [obligation].

(Hab. Pet. 32-54, ECF No. 1).[5]

The petition was assigned to the Honorable Gerald A. McHugh, who referred it to me for a Report and Recommendation. (Order, ECF No. 3). The Commonwealth filed a response (Resp. to Pet. for Writ of Habeas Corpus, ECF No. 22 [hereinafter "Resp. to Pet."]), and Petitioner filed a reply (Pet'r's Traverse to Resp. to Order to Show Cause, ECF No. 25 [hereinafter "Traverse"]). The matter has been fully briefed, and is ripe for disposition.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA:

> 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective

[5] On December 29, 2015, Petitioner filed another *pro se* PCRA petition. Crim. Docket at 33. It was dismissed as untimely, and the Superior Court affirmed the dismissal on July 6, 2017. *Id.* at 35; *Commonwealth v. Edwards*, No. 2760 EDA 2016, 2017 WL 2875422, slip op. at *1 (Pa. Super. July 6, 2017). Petitioner filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on January 9, 2018. App. Docket at 4; (Not., ECF No. 27).

> process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would

clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557–59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739–40. A state rule is "adequate" for procedural default purposes if it is "firmly established and regularly followed." *Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802, 1804 (2016) (*per curiam*) (citation omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005), and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Id.* at 708.

Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman*, 501 U.S. at 750. To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts*, 228 F.3d at 196. Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication 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)(1)-(2). Factual issues determined

arise out of a variety of trial court rulings, such as: (1) precluding cross examination of Travis Hendrick about a recent arrest (Ground One), Hendrick's prior conviction (Ground Two), and Hendrick's understanding of probation, his obligation not to violate probation, and the differences between aggravated assault, attempted murder, and malicious wounding (Ground Three) (Hab. Pet. 33-35, ECF No. 1); (2) precluding cross examination of Walter Stanton concerning his reason for giving aliases (Ground Four) (*id.* at 36); (3) denying a motion for mistrial made during Officer Stephanie Flanders' testimony (Ground Five) (*id.* at 37); (4) denying Petitioner's request for a jury instruction regarding witness' bias, desire to curry favor with the Commonwealth, and expectation of leniency (Ground Six) (*id.* at 38); and (5) allowing the jury to view a photo array (Ground Seven) (*id.* at 39). Petitioner also raises a due process challenge in Ground Eight, regarding trial counsel's failure to call alibi witnesses. (*Id.* at 40).

These claims are unexhausted and procedurally defaulted. In state court, Petitioner challenged the trial court's rulings under state law and the Sixth Amendment right to confrontation, and he challenged counsel's failure to call alibi witnesses under the Sixth Amendment right to counsel. *See* Dir. App. Br. at *17-44; Br. for Appellant, *Commonwealth v. Edwards*, No. 1508 EDA 2014, 2014 WL 7641609, at *31-44 (Pa. Super.) [hereinafter "PCRA App. Br."]. Petitioner never presented a federal due process challenge to any of these claims. Because he did not fairly present these federal due process claims to the state courts, they are unexhausted. *See McCandless*, 172 F.3d at 261-63. They are procedurally defaulted because Petitioner cannot return to state court to exhaust them; any such petition would be time-barred by the PCRA's statute of limitations.[6] *See* 42 Pa. Cons. Stat. § 9545(b)(1); *Keller v. Larkins*, 251

[6] The PCRA requires collateral actions to be filed within one year of the date the conviction becomes final. 42 Pa. Cons. Stat. § 9545(b)(1). Petitioner's conviction became final on May 6, 2010, when the time expired to file a petition for writ of certiorari in the United States

F.3d 408, 415 (3d Cir. 2001).

To the extent Petitioner asserts ineffective assistance of appellate and PCRA counsel as cause to overcome the default of his due process claims, these arguments fail.[7] Petitioner's claims of ineffective assistance of appellate counsel are, themselves, unexhausted and defaulted. *See infra*. Thus, his allegations of ineffective assistance of appellate counsel cannot serve as cause. *See Edwards v. Carpenter*, 529 U.S. 446, 451-54 (2000) (ineffectiveness claims asserted as cause for procedural default are also subject to default); *Sandler v. Wynder*, No. 07-3876, 2008 WL 2433094, at *21 n.4 (E.D. Pa. June 21, 2008); *Grasty v. Wolfe*, No. 01-7312, 2003 WL 22247613, at *1 n.1 (E.D. Pa. Aug. 28, 2003). Moreover, Petitioner's claim of PCRA counsel's ineffectiveness for failure to assert appellate counsel's ineffectiveness cannot cure this issue. Although the Supreme Court in *Martinez v. Ryan* held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," 566 U.S. 1, 9 (2012), *Martinez* does not extend to procedurally defaulted claims of ineffective assistance of appellate counsel. *See Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2065 (2017) (declining to extend *Martinez* to defaulted claims of ineffective assistance of appellate counsel); *Greene v. Superintendent Smithfield SCI*, No. 16-3636, slip op. at 15-16 (3d Cir. Feb. 9, 2018).

Supreme Court. *Id.* § 9545(b)(3). Because Petitioner's conviction became final over eight years ago, the PCRA statute of limitations would preclude Petitioner from now presenting these federal due process claims in a PCRA petition. *Id.* § 9545(b)(1).

[7] For instance, in Grounds Six and Seven, Petitioner alleges appellate counsel was ineffective for failing to cite "federal case law," and that PCRA counsel was ineffective for failing to assert direct appeal counsel's ineffectiveness. (Hab. Pet. 38, 39, ECF No. 1). He does not specify what "federal case law" appellate counsel should have cited. However, the Court must liberally construe Petitioner's *pro se* pleadings. *See McNeil v. United States*, 508 U.S. 106, 113 (1993); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Given the procedural default of Petitioner's federal due process claims, the Court construes Petitioner's allegations of appellate and PCRA counsel ineffectiveness as an attempt to raise cause and prejudice.

The Court respectfully recommends that Petitioner's due process claims raised in Grounds One through Eight be dismissed as procedurally defaulted.[8]

B. Grounds One, Two, and Three: Ineffectiveness Claims Concerning Travis Hendrick

In Grounds One through Three, Petitioner raises ineffective assistance of trial and appellate counsel concerning Travis Hendrick. Petitioner asserts that trial counsel was ineffective for failing to investigate why Hendrick was recently arrested[9] (Ground One) and for failing to properly argue that Hendrick was biased and expected leniency from the Commonwealth in adjudicating an alleged probation violation (Ground Three), and that direct appeal counsel was ineffective for failing to adequately argue on appeal that the trial court erred in precluding cross examination of Hendrick on his prior conviction for malicious wounding with a gun (Ground Two). (Hab. Pet. 33-35, ECF No. 1). The Commonwealth does not address these claims. The Court concludes these claims are procedurally defaulted.

On direct appeal, Petitioner challenged the trial court's rulings limiting the scope of his cross examination of Hendrick regarding Hendrick's "recent arrest," the facts underlying Hendrick's prior convictions, and Hendrick's "understanding of the nature of probation and his obligation not to violate his probation, and, the differences between aggravated assault, attempted murder and malicious wounding." *See Edwards*, No. 1267 EDA 2008, slip op. at 3-9; Dir. App. Br. at *16-27. However, Petitioner did not raise the current ineffectiveness claims in state court, and thus, the ineffectiveness claims raised in Grounds One through Three are unexhausted. They are now procedurally defaulted pursuant to the PCRA's statute of

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[8] These defaulted due process claims will not be discussed further.

[9] Although Petitioner does not specify what he means by "recent arrest," on direct appeal, the Superior Court "glean[ed] from the record" that Petitioner was referencing Hendrick's December 9, 2003 arrest in Virginia. *Edwards*, No. 1267 EDA 2008, slip op. at 6.

limitations. *See supra* n.6. Petitioner does not acknowledge this default, nor does he allege cause and prejudice or a fundamental miscarriage of justice to permit review of these claims.

The Court respectfully recommends dismissing Grounds One through Three as procedurally defaulted.

C. Ground Five: Claims Concerning Motion for Mistrial and Officer Flanders' Testimony

In Ground Five, Petitioner raises a number of claims concerning his request for a mistrial and/or the testimony of Police Officer Stephanie Flanders, including: trial counsel was ineffective for failing to object during Officer Flanders' testimony, ineffective assistance of all prior counsel, a *Brady* violation, violations of Pennsylvania Rules of Criminal Procedure, and a violation of his right to confrontation. (Hab. Pet. 37, ECF No. 1). The Commonwealth responds that Petitioner's claims are procedurally defaulted. (Resp. to Pet. 19, ECF No. 22). The Court finds the confrontation claim is exhausted but meritless, and Petitioner's other claims are procedurally defaulted or not cognizable.

On direct appeal, Petitioner argued the trial court erred in denying his motion for mistrial made during Officer Flanders' testimony. *Edwards*, No. 1267 EDA 2008, slip op. at 10. The Superior Court explained that a mistrial is only required "when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial trial." *Id.* (citation and quotation marks omitted). "[A] mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice." *Id.* at 11 (citation and quotation marks omitted).

Here, Officer Flanders testified on direct examination that she transported Travis Hendrick from the crime scene to East Detectives, where she received a radio call that Xavier Edmonds died. *Id.* at 10. She informed Hendrick of Edmonds' death and heard him call someone and say, "My boy is dead, my boy is dead, I'm gonna [sic] talk." *Id.* She testified that

Hendrick was very upset and kept saying, "I can't believe he killed my boy." *Id.* Petitioner did not object to Officer Flanders' testimony. *Id.* Rather, on cross examination, defense counsel elicited an admission that Hendrick's comments were not included in Officer Flanders' police report. *Id.* at 10-11. During a sidebar discussion, the prosecutor stated that she had learned of Hendrick's statement to Officer Flanders a few days prior, and her failure to disclose it was inadvertent. *Id.* at 11. Defense counsel requested a mistrial, arguing the statement, "My boy is dead, my boy is dead, now I'm going to talk," was damaging to the defense. *Id.* The trial court denied the request for a mistrial, but agreed to strike Officer Flanders' testimony and provide a cautionary instruction. *Id.* at 11, 12. The Superior Court found the trial court "promptly provided an instruction in an attempt to cure any prejudice . . . ." *Id.* at 12. Thus, the Superior Court rejected Petitioner's claim. *Id.*

Here, Petitioner's allegations that he was "violated of Pa. Rule. of Crim. P. 605B and 573D" are based solely on violations of state law, and thus, are not cognizable habeas claims. Federal habeas review is restricted to claims alleging that the petitioner is in custody in violation of federal law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Petitioner's claims of ineffective assistance and a *Brady* violation were not presented to the Superior Court on direct or collateral appeal, and thus, they are unexhausted.[10] *See* Dir. App. Br. at *28-34; *see generally* PCRA App. Br. These claims are now procedurally defaulted

[10] Though Petitioner cited *Strickler v. Greene*, 527 U.S. 263 (1999) in his appellate brief, this was not sufficient to put the state court on notice that a federal claim was being asserted; he cited *Strickler* only to argue that the Commonwealth's inadvertence in violating Pennsylvania Rule of Criminal Procedure 573D did not matter. Dir. App. Br. at *33-34. Indeed, in evaluating this claim, the Superior Court discussed Rule 573's disclosure requirements, but did not mention *Brady* in its analysis. *See Edwards*, No. 1267 EDA 2008, slip op. at 12 n.5.

pursuant to the PCRA's statute of limitations. *See supra* n.6. Petitioner raises cause and prejudice, asserting ineffective assistance of trial counsel due to trial counsel's failure to object during Officer Flanders' testimony.[11] (Traverse 15-16, ECF No. 25). This argument lacks merit. Petitioner's claims are procedurally defaulted because Petitioner did not present them to the Superior Court; trial counsel's failure to object at trial is unrelated to Petitioner's failure to fairly present his current claims.

Finally, Petitioner alleges he was "denied his right to fully and fairly cross examin[e] . . . Hendricks and [O]fficer Flanders." (Hab. Pet. 37, ECF No. 1). This claim was exhausted on direct appeal. *See* Dir. App. Br. at *32. The Superior Court did not address this claim, so the Court will review it *de novo*. *See Breakiron v. Horn*, 642 F.3d 126, 131 (3d Cir. 2011).

The Sixth Amendment guarantees the right of an accused "to be confronted with the witnesses against him." This includes the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). The confrontation right is a trial right, "designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (citing *California v. Green*, 399 U.S. 149, 157 (1970); *Barber v. Page*, 390 U.S. 719, 725 (1968)).

Petitioner argues the Commonwealth's late disclosure of Hendrick's comments to Officer Flanders prevented him from fully and fairly cross examining Hendrick and Officer Flanders. (*See* Hab. Pet. 37, ECF No. 1); *see also* Dir. App. Br. at *32. This argument lacks merit. The

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[11] To the extent Petitioner's allegation that "[a]ll prior counsel's ineffective" could be construed to raise *Martinez*, it is insufficiently developed. He does not explain how PCRA counsel was ineffective, and thus, cannot establish cause under *Martinez*. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991), *cert denied*, 502 U.S. 902 (1991) (a petitioner cannot meet his burden of establishing ineffectiveness with vague and conclusory allegations); *Keys v. Attorney Gen.*, No. 12-2618, 2013 WL 8207554, at *17 (E.D. Pa. Feb. 15, 2013), *report and recommendation adopted sub nom. Keys v. Attorney Gen. of Pennsylvania*, No. 12-2618, 2014 WL 1383313 (E.D. Pa. Apr. 7, 2014).

Supreme Court has explained:

> The ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses.

Ritchie, 480 U.S. at 53 (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Petitioner's counsel was permitted to engage in extensive cross examination of Hendrick and Officer Flanders (*see* N.T. 11/14/05 at 147-213, 224-31; N.T. 11/16/05 at 57-69, 115-25, 140-41); therefore, Petitioner's confrontation right was not violated by the Commonwealth's late disclosure. *Cf. Ritchie*, 480 U.S. at 54 ("Because defense counsel was able to cross-examine all of the trial witnesses fully, we find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause."); *Fensterer*, 474 U.S. at 19 (petitioner's right to confrontation was not implicated when "the trial court did not limit the scope or nature of defense counsel's cross-examination in any way").

The Court respectfully recommends denying the confrontation claim as meritless and otherwise dismissing Ground Five as non-cognizable and procedurally defaulted.

D. Ground Six: Ineffective Assistance of Direct Appeal Counsel Concerning Jury Instructions

In Ground Six, Petitioner notes that the trial court denied his request for a jury instruction regarding witnesses' bias, desire to curry favor with the Commonwealth, and expectation of leniency for testifying. (Hab. Pet. 38, ECF No. 1). He argues appellate counsel was ineffective for failing to cite federal case law, and for presenting the wrong jury instruction issue on appeal, and PCRA counsel failed to raise appellate counsel's ineffectiveness. (*Id.*). The Commonwealth argues that Petitioner's claim is defaulted. (Resp. to Pet. 21-23, ECF No. 22). The Court agrees with the Commonwealth.

Petitioner's ineffective assistance of appellate counsel claim is unexhausted; Petitioner did not raise this claim before the Superior Court on collateral appeal. *See generally* PCRA App. Br. The claim is now procedurally defaulted.[12] *See supra* n.6. Moreover, PCRA counsel's alleged failure to assert appellate counsel's ineffectiveness cannot establish cause for the default of this ineffective assistance of appellate counsel claim.[13] *See Davila*, 137 S. Ct. at 2065 (2017).

The Court respectfully recommends Ground Six be dismissed as procedurally defaulted.

E. Ground Seven: Ineffectiveness Claims Concerning Photo Array

In Ground Seven, Petitioner raises a number of claims because the jury was permitted to view his photo array, including: ineffective assistance of trial counsel for failing to seek suppression of the photo array; ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness, failing to develop an argument on appeal, failing to send a copy of the photo array to the Superior Court, and failing to cite federal case law; and ineffective assistance of PCRA counsel for failing to raise prior counsel's ineffectiveness.[14] (Hab. Pet. 39, ECF No. 1). The Commonwealth responds that Petitioner's claim that all prior counsel were ineffective is defaulted and "patently meritless." (Resp. to Pet. 23, ECF No. 22). The Court finds these claims are procedurally defaulted.

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[12] As previously noted, this defaulted ineffective assistance of appellate counsel claim cannot establish cause to overcome the procedural default of Petitioner's federal due process claim. *See supra* Part III.A. To the extent Petitioner is raising appellate counsel's ineffectiveness as cause to overcome some other, unspecified procedural default, he similarly cannot do so because this claim is defaulted. *See Edwards*, 529 U.S. at 451-54; *Sandler*, 2008 WL 2433094, at *21; *Grasty*, 2003 WL 22247613, at *1 n.1.

[13] To the extent Petitioner asserts PCRA counsel's ineffectiveness as a substantive claim, such a claim is not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(i); *Martel v. Clair*, 565 U.S. 648, 662 n.3 (2012).

[14] Petitioner also alleges violations of Pennsylvania Rule of Evidence 105 and Pennsylvania Rules of Criminal Procedure 578 and 581. (Hab. Pet. 39, ECF No. 1). As discussed, *see supra* Part III.C, allegations that state procedural or evidentiary rules have been violated are not cognizable on federal habeas review. *See Estelle*, 502 U.S. at 67-68.

On direct appeal, Petitioner challenged the admission of the photo array as trial court error. *Edwards*, No. 1267 EDA 2008, slip op. at 14. The Superior Court noted that it was "unable to determine the prejudicial nature of the photograph as it has not been included in the certified record." *Id.* Nonetheless, "the trial court indicated on the record that there were no numbers or markings on the photograph which identified it as something associated with criminal activity." *Id.* at 14-15. Moreover, following Stanton's testimony and at the close of evidence, the trial court instructed the jury that it could not "draw any adverse inference against [Petitioner] merely because the police were in possession of [his] photograph" and it could not "consider it as evidence that [Petitioner] has been previously involved in any criminal activity." *Id.* at 15 (citing N.T. 11/17/05 at 105-06; N.T. 11/18/05 at 124). Given these instructions, the Superior Court found "no basis on which the jury could have inferred prior criminal activity on the part of [Petitioner]." *Id.*

Petitioner's ineffectiveness claims are unexhausted and procedurally defaulted because they were not raised before the Superior Court, and it is too late for Petitioner to return to state court to raise them. *See supra* n.6. He asserts cause, in the form of: (1) direct appeal counsel's ineffectiveness for failing to allege trial counsel's ineffectiveness, and (2) PCRA counsel's ineffectiveness for failing to raise all prior counsel's ineffectiveness. Both arguments fail.

First, Petitioner's allegation of ineffective assistance of appellate counsel cannot serve as cause because it is unexhausted and procedurally defaulted.[15] *See Edwards*, 529 U.S. at 451-54; *Sandler*, 2008 WL 2433094, at *21 n.4; *Grasty*, 2003 WL 22247613, at *1 n.1.

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[15] Moreover, when Petitioner's direct appeal was filed, it was a "general rule" in Pennsylvania that "a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." *See Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). Appellate counsel was not ineffective for failing to raise a claim properly deferred until PCRA proceedings.

Petitioner also argues that PCRA counsel was ineffective, invoking *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. To successfully invoke the *Martinez* exception, a petitioner must satisfy two factors: that the underlying, otherwise defaulted, claim of ineffective assistance of trial counsel is "substantial," meaning that it has "some merit," *id.* at 14; and that petitioner had "no counsel" or "ineffective" counsel during the initial phase of the state collateral review proceeding. *Id.* at 17; *see also Glenn v. Wynder*, 743 F.3d 402, 410 (3d Cir. 2014). Both prongs of *Martinez* implicate the controlling standard for ineffectiveness claims first stated in *Strickland v. Washington*: (1) that counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. 466 U.S.668, 687 (1984).

Petitioner's *Martinez* arguments lack merit. First, *Martinez* does not apply to defaulted claims of ineffective assistance of appellate counsel. *See Davila*, 137 S. Ct. at 2065 (2017). Thus, PCRA counsel's alleged ineffectiveness for failing to assert appellate counsel's ineffectiveness cannot establish cause. Additionally, Petitioner has not established cause for the default of his ineffective assistance of trial counsel claim because that underlying claim is not substantial. As the Superior Court noted on direct appeal, the trial court issued two curative instructions that eliminated any prejudice to Petitioner. The jury is presumed to have followed these instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). Because the photo array did not cause prejudice to Petitioner, trial counsel was not ineffective for failing to suppress it.

The Court respectfully recommends that Ground Seven be dismissed as procedurally defaulted.

F. Ground Eight: Ineffective Assistance for Failure to Investigate and Call Alibi Witnesses

In Ground Eight, Petitioner avers that trial counsel was ineffective for failing to investigate and call Dennis Edwards and Raheem Sloan as alibi witnesses. (Hab. Pet. 40, ECF No. 1). The Commonwealth responds the state courts reasonably found this claim lacked merit. (Resp. to Pet. 25, ECF No. 22).[16] The Court finds the state courts reasonably rejected this claim.

The PCRA Court explained that when evaluating an ineffectiveness claim, it must determine whether the issue has arguable merit, whether counsel's conduct had a reasonable basis, and whether counsel's conduct prejudiced the defendant. PCRA 1925(a) Op. at 6. The defendant bears the burden of establishing each prong. *Id.* Moreover, to prevail on a claim of ineffectiveness for failing to present a witness, the defendant must show that: (1) the witness existed; (2) counsel knew of, or should have known of, the witness; (3) the witness was willing and able to cooperate and appear; and (4) the necessity of the proposed testimony to avoid prejudice. *Id.* at 7.

The PCRA Court noted that at the evidentiary hearing, Raheem Sloan, Petitioner's best friend, testified that he was at a party with Petitioner at 9th Street and Hunting Park Avenue on the day of the shooting. *Id.* at 3-4. Sloan testified that he arrived at the party with [P]etitioner at

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[16] Petitioner also argues that "[t]here is a reasonable probability of a different outcome . . . had trial counsel not been on drugs of oxycotin [sic]," that counsel was ineffective for failing to interview Jamiel Martin as a potential alibi and/or eyewitness, and that counsel was ineffective for failing to hire an investigator to speak with Petitioner and the individuals on petitioner's "witnesses list." (Hab. Pet. 40, ECF No. 1; *see also* Traverse 21-24, ECF No. 25). These claims are unexhausted and procedurally defaulted. *See supra* n.6. Petitioner does not acknowledge this default, nor does he allege cause and prejudice or a fundamental miscarriage of justice to permit federal review.

approximately 12:00 p.m., and claimed that he never lost sight of Petitioner from noon to 10:00 p.m. *Id.* at 4. Sloan also testified that, although he knew Petitioner was charged with Edmunds' murder, he did not tell anyone that he was with Petitioner at the time of the murder until more than eight years later, when he gave an affidavit in connection with PCRA proceedings. *Id.*

Dennis Edwards, Petitioner's brother, testified that he also attended the party on July 4, 2003. *Id.* He testified that he arrived at approximately 12:30 p.m., with Petitioner and four others. *Id.* Contrary to Sloan's statement, Edwards testified that Sloan did not travel to the party with them. *Id.* Edwards testified that Petitioner was with him the entire time, until they left around 8:00 p.m. to attend an after-party, where they remained until 10:00 p.m. *Id.*

Petitioner testified that he sent trial counsel a letter, dated March 10, 2004, containing a list of thirteen potential witnesses, including Sloan and Edwards. *Id.* Petitioner claimed he sent letters to counsel on May 7, 2004 and November 1, 2004, instructing counsel to contact witnesses, and asking whether counsel had contacted any of the thirteen witnesses he previously identified. *Id.* at 4-5. Petitioner testified that he made copies of these letters, but he later retracted this testimony. *Id.* at 5.

Dennis Alva, Petitioner's trial counsel, testified that Petitioner did not mention an alibi until a prison visit on October 10, 2004, where Petitioner gave him a list of three proposed alibi witnesses: Joanne Lightly, Martina Fuller, and Anette Champion. *Id.* Petitioner did not mention Sloan or Edwards at that time, and counsel had no documentation in his file with those names. *Id.* In response to Petitioner's list, counsel informed Judge Lewis by letter dated October 11, 2004 that Petitioner had presented him with possible alibi evidence that counsel needed to investigate. *Id.* at 5. Counsel also requested a continuance. *Id.* at 8. Counsel contacted Ms. Lightly and Ms. Champion, but did not believe them to be credible witnesses. *Id.* at 5. Counsel

testified that he never saw the letters Petitioner claimed to have sent him identifying other witnesses, and that he had no such letters in his file. *Id.* at 6. He stated that if he had received those letters, he would have immediately acted, rather than waiting seven months to ask for a continuance. *Id.*

The PCRA Court "found [P]etitioner's testimony incredible and completely self-serving." *Id.* at 7. Counsel's file contained no documentation that Petitioner mentioned Sloan or Edwards as potential alibi witnesses, and Petitioner provided no proof that he mailed any such information to counsel. *Id.* Moreover, Petitioner told Judge Lewis at trial that he had no witnesses, and that he agreed with counsel's decision to rest without presenting witnesses. *Id.*

The PCRA Court "also found Mr. Sloan's and Mr. Edwards' testimony to be incredible." *Id.* at 8. Although both men were aware that Petitioner was arrested in August 2003, neither told anyone that Petitioner was with them on the night of the murder until 2012. *Id.* Their failure to come forward for nearly a decade "rendered their testimony particularly specious," especially in light of the fact that these witnesses were "people that were very close to [P]etitioner and undoubtedly aware of the importance of their 'alibi testimony.'" *Id.* Moreover, Sloan's testimony was inconsistent with Edwards' testimony on multiple points. *Id.*

Finally, the PCRA Court "found [counsel's] testimony credible." *Id.* The only letter from Petitioner that counsel's file contained was the October 4, 2010 letter, which mentioned witnesses, but not Sloan or Edwards. *Id.* This fact supported counsel's testimony that Petitioner did not provide him with a list of witnesses in March 2004, nor did Petitioner send counsel follow up letters in May 2004 or November 2004. *Id.* Indeed, immediately after he received Petitioner's list of potential alibi witnesses in October 2004, counsel contacted Judge Lewis and requested a continuance to investigate the potential alibi claim. *Id.*

The PCRA Court concluded that trial counsel was not ineffective "because he was unaware of the existence of Sloan and Edwards as potential alibi witnesses." *Id.* at 9. Moreover, Petitioner did not suffer prejudice from "the absence of these wholly incredible witnesses at trial." *Id.* On PCRA appeal, the Superior Court found the record supported the PCRA Court's credibility determination, and supported the conclusion that counsel was never informed of these potential alibi witnesses. *Edwards*, 1508 EDA 2014, slip op. at 6. Thus, Petitioner's claim failed. *Id.*

A claim for ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court established the following two-pronged test to obtain habeas relief on the basis of ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Thus . . . a defendant must overcome the 'presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

It is well settled that *Strickland* is "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to relief if the Pennsylvania court's rejection of his claims was: (1) "contrary to, or involved an unreasonable application of," that clearly established law; or (2) "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)(1)-(2).

Regarding the "contrary to" clause, the Superior Court addressed Petitioner's ineffective assistance claims using Pennsylvania's three-pronged ineffectiveness test. *Edwards*, No. 1508 EDA 2014, slip op. at 3. This test requires the petitioner to establish: (1) the underlying claim has arguable merit; (2) counsel lacked a reasonable basis for his or her conduct; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. *Id.* (citing *Commonwealth v. Bomar*, 104 A.3d 1179, 1188 (Pa. 2014)). The Third Circuit has found the Pennsylvania ineffectiveness test is not contrary to the *Strickland* standard. *See Werts* 228 F.3d at 204. Because the Superior Court did not apply law contrary to clearly established precedent, Petitioner is entitled to relief only if he can demonstrate that its adjudication involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts in light of the evidence.[17]

A state court's factual findings are presumed correct on habeas review, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This Court must accept the PCRA Court's factual findings and credibility determinations. *See Campbell v. Vaughn*, 209 F.3d 280,

[17] In considering a § 2254 petition, the federal courts examine the "last reasoned decision" of the state courts. *Simmons v. Beard*, 590 F.3d 223, 231-32 (3d Cir. 2009) (citing *Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008)).

290 (3d Cir. 2000); *Dicker v. Glunt*, No. 10-5240, 2011 WL 286090, at *6 (E.D. Pa. May 25, 2011), *report and recommendation adopted*, No. 10-5240, 2011 WL 3862012 (E.D. Pa. Aug. 31, 2011). Here, the PCRA Court found Sloan's and Edwards' purported alibi testimony "incredible" and "specious." Moreover, the PCRA Court credited counsel's testimony that he was unaware of Sloan and Edwards as potential alibi witnesses and found Petitioner's testimony to the contrary "incredible and completely self-serving." In light of these credibility determinations, the state court's rejection of this claim was reasonable. *See Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.").

The Court respectfully recommends denying this claim as meritless.

G. Ground Nine: Ineffective Assistance for Failing to Move for Dismissal Under Pennsylvania Rule of Criminal Procedure 600

In Ground Nine, Petitioner avers that trial counsel was ineffective for failing to protect his speedy trial rights under Pennsylvania Rule of Criminal Procedure 600, and that "[a]ll prior counsel were ineffective." (Hab. Pet. 41, ECF No. 1). The Commonwealth responds that the state courts reasonably rejected this claim. (Resp. to Pet. 27-28, ECF No. 22). The Court finds this claim is procedurally defaulted under an independent and adequate state rule.

The PCRA Court explained:

> Rule 600 requires the Commonwealth to bring a defendant to trial within 365 days after the complaint is filed. Any periods of time during which the defendant or his attorney are unavailable or any continuances requested by the defense are excluded from the 365 day computation.

PCRA 1925(a) Op. at 9 (citing Pa. R. Crim. P. 600(C)(3)(a)(b)). When a defendant alleges a Rule 600 violation, the trial court shall conduct a hearing to determine whether the

Commonwealth exercised due diligence in bringing the case to trial. *Id.* If the Commonwealth failed to exercise due diligence, the court shall dismiss the charges. *Id.* If the Commonwealth exercised due diligence or the circumstances causing delay were beyond the Commonwealth's control, the court should deny the motion to dismiss. *Id.*

The PCRA Court explained that Petitioner was arrested on August 9, 2003, so the mechanical run date under Rule 600 was August 9, 2004.[18] *Id.* He was arraigned on October 29, 2003, and his case was continued to December 4, 2003. *Id.* It was again continued to January 7, 2004, for new counsel and pre-trial proceedings. *Id.* The period from December 4, 2003 to January 7, 2004 "was specially ruled excludable." *Id.* On January 16, 2004, defense counsel was unavailable, and the case was continued until March 18, 2004. *Id.* On that day, the defense requested another continuance, and the case was continued until April 14, 2004. *Id.* On October 12, 2004, the defense requested a continuance to investigate alleged alibi witnesses. *Id.* at 10. The case was continued until April 5, 2005. *Id.* On April 7, 2005, the defense requested another continuance, due to a medical emergency. *Id.* The case was continued until November 7, 2005, "the earliest possible date . . . ." *Id.* In all, "there were a total of 512 excludable days prior to the commencement of [P]etitioner's trial on November 9, 2005." *Id.* When added to the original mechanical run date, the adjusted run date became May of 2006. *Id.* Thus, there was no Rule 600 violation, and counsel was not ineffective. *Id.*

On PCRA appeal, the Superior Court determined this claim was waived because Petitioner failed to develop his claim on appeal. The Superior Court found:

> [A]lthough all of the continuances referenced by the PCRA court appear on the trial docket, few include notations as to who

[18] The mechanical run date runs 365 days from the filing of the complaint. *Commonwealth v. Berryhill*, No. 3506 EDA 2015, 2017 WL 3050118, at *2 (Pa. Super. July 19, 2017) (citing *Commonwealth v. Ramos*, 936 A.2d 1097, 1101 (Pa. Super. 2007)).

> requested the continuance. The record only contains one written motion for continuance – the request made by trial counsel on October 11, 2004, which resulted in a continuance until April 5, 2005. The docket otherwise only specifically states that the continuances from December 4, 2003 to January 7, 2004 and April 11, 2005 to October 26, 2005 were attributable to the defense.

Edwards, No. 1508 EDA 2014, slip op. at 10 (citations omitted). The Superior Court observed that in presenting his argument on appeal, Petitioner "state[d] only that April 11, 2005 through November 9, 2005 were excludable[.]" *Id.* He made no argument regarding the other dates identified by the PCRA Court, nor did he discuss the "dates that are clearly excludable as reflected in the criminal docket and in trial counsel's continuance letter[.]" *Id.* Thus, the Superior Court found the record was "insufficient" to determine whether Petitioner's ineffectiveness claim had "any merit." *Id.* at 10-11. The Superior Court explained:

> The law is clear: "[I]t is Appellant's responsibility to supply this Court with a complete record for purposes of review. A failure by Appellant to insure that the original record certified for appeal contains sufficient information to conduct a proper review constitutes waiver of the issue sought to be examined."

Id. at 11 (quoting *Commonwealth v. Martz*, 926 A.2d 514, 524-25 (Pa. Super. 2007)). Thus, the Superior Court found the claim waived.[19] *Id.*

The Superior Court's waiver finding precludes review of this claim. Although the Superior Court did not name the specific rule, its waiver finding was based on an independent and adequate state procedural rule articulated in *Martz*: that an appellant's failure to develop the record on appeal results in waiver. *See Martz*, 926 A.2d at 524-25 ("It is black letter law in this jurisdiction that an appellate court cannot consider anything which is not part of the record in the

[19] The Superior Court also explained that even if the claim was not waived, Petitioner was not entitled to relief "because he failed to present any argument in support of the other two prongs of the test for ineffective assistance of counsel. This failure is also fatal to his claim." *Edwards*, No. 1508 EDA 2014, slip op. at 11 (citing *Bomar*, 104 A.3d at 1188).

case. It is also well-settled in this jurisdiction that it is Appellant's responsibility to supply this Court with a complete record for purposes of review.") (citing *Commonwealth v. Young*, 317 A.2d 258 (Pa. 1974); *Commonwealth v. Hallock*, 722 A.2d 180, 181 (Pa. Super. 1998); *Commonwealth v. Boyd*, 679 A.2d 1284, 1290 (Pa. Super. 1996)). This rule has found to be independent and adequate. *See Martz v. Mooney*, No. 13-2570, 2016 WL 2347189, at *10 (M.D. Pa. May 4, 2016). This Court agrees with that assessment.

Because the Superior Court invoked an independent and adequate state law ground in finding waiver, Ground Nine is procedurally defaulted. The Court cannot review the merits of this claim unless Petitioner establishes cause and prejudice or a fundamental miscarriage of justice. He argues "[a]ll prior counsel were ineffective,"[20] (Hab. Pet. 41, ECF No. 1), PCRA counsel "failed to refute the state claim of this issue" (Traverse 25, ECF No. 25), and the PCRA Court's misrepresentation of the record was a "fundamental miscarriage of justice" (*id.*). These arguments fail.

PCRA counsel's purported ineffectiveness does not establish cause. The PCRA Court adjudicated the ineffective assistance of trial counsel claim on the merits, and the claim was not waived until collateral appeal. Because the claim was not waived until collateral appeal, PCRA counsel's alleged ineffectiveness cannot constitute cause; *Martinez* does not apply. *See Norris v. Brooks*, 794 F.3d 401, 404 (3d Cir. 2015) ("[T]he [*Martinez*] exception applies only to error in initial-review collateral proceedings, not appeals from those proceedings."); *see also id.* at 405; *Woodson v. Delbalso*, No. 14-558, 2016 WL 1242278, at *6 (M.D. Pa. Mar. 30, 2016), *certificate of appealability denied* (Oct. 13, 2016). Thus, Petitioner has not established cause.

[20] Petitioner has not explained how direct appeal counsel was ineffective in relation to this claim. (*See* Hab. Pet. 41, ECF No. 1; Traverse 25-35, ECF No. 25). To the extent he asserts that direct appeal counsel was ineffective as a substantive claim or as cause to overcome default, this claim is too insufficiently pled to warrant relief. *See Zettlemoyer*, 923 F.2d at 298.

Additionally, Petitioner's claim that the PCRA Court misrepresented the record does not establish a fundamental miscarriage of justice. To show a fundamental miscarriage of justice, a petitioner must generally demonstrate actual innocence by presenting new, reliable evidence of his innocence. *See Schlup v. Delo*, 513 U.S. 298, 326-28 (1995); *Cristin v. Brennan*, 281 F.3d 404, 412 (3d Cir. 2002) (citing *Keller*, 251 F.3d at 415-16). Petitioner has not met that burden.

The Court respectfully recommends this claim be dismissed as procedurally defaulted.

H. Grounds Ten through Twenty-One: Procedurally Defaulted Claims Not Presented to the State Courts Prior to Filing Habeas Petition

Grounds Ten through Twenty-One are procedurally defaulted. Prior to filing his habeas petition, Petitioner did not present these claims to the state court, so they were unexhausted and procedurally defaulted pursuant to the PCRA's one year statute of limitations.[21] *See supra* n.6. Even assuming, *arguendo*, that Petitioner raised these claims in his December 2015 PCRA petition, *see supra* n.5; (*see also* Traverse 36, ECF No. 25), that petition was found to be untimely filed by the state courts; thus, the claims raised therein are procedurally defaulted under an independent and adequate state rule. *Edwards*, 2017 WL 2875422, at *2 ("[W]e conclude [Petitioner's] petition fails to overcome the PCRA time-bar."); *see, e.g.*, *Teague v. Johnson*, No. 02-622, 2003 WL 25573367, at *4 (W.D. Pa. June 17, 2003) ("Petitioner has failed to comply with the state PCRA statutory requirement that his PCRA petition be filed within one year of his judgment becoming final . . . . The failure to timely file his PCRA petition constitutes a procedural default.").

Petitioner acknowledges that he did not present Grounds Ten through Twenty-One to the

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[21] Petitioner's attempt to raise these claims in a *pro se* supplemental filing on June 4, 2013, while represented by counsel, does not constitute fair presentation. As noted above, Pennsylvania does not permit hybrid representation. *See supra* n.3.

state courts. (Hab. Pet. ¶ 13(a), ECF No. 1). He raises cause and prejudice and a fundamental miscarriage of justice to overcome his default. As cause, he argues all prior counsel failed to raise his claims, and PCRA counsel abandoned him. (*Id.*). Additionally, Petitioner argues that "[t]he failure to consider the claims will result in a fundamental miscarriage of justice" because on or around August 5, 2015, he mailed a PCRA petition that was "separated from a parcel during hand[l]ing" due to prison officials "sabotaging" him.[22] (*Id.* at 18).

For the most part, Petitioner's allegations of cause and prejudice and a fundamental miscarriage of justice do not apply to his defaulted claims, and therefore, cannot overcome Petitioner's default. For instance, his argument that PCRA counsel failed to present his claims can only potentially establish cause for a defaulted claim of ineffective assistance of trial counsel, pursuant to *Martinez*. Petitioner's allegations that PCRA counsel ineffectively failed to present any other type of claim cannot establish cause. *See, e.g.*, *Murray v. Diguglielmo*, No. 09-4960, 2016 WL 3476255, at *4 (E.D. Pa. June 27, 2016) ("These claims do not involve ineffective assistance of [trial] counsel. *Martinez* does not apply."). Additionally, Petitioner's claims of ineffective assistance of direct appeal counsel, in addition to being underdeveloped, cannot establish cause because these claims are, themselves, defaulted. *See supra* Part III.A; *Edwards*, 529 U.S. at 451-54; *Sandler*, 2008 WL 2433094, at *21 n.4; *Grasty*, 2003 WL 22247613, at *1 n.1. Finally, Petitioner's allegations that prison officials "sabotag[ed]" him cannot establish a fundamental miscarriage of justice. *See supra* Part III.G; *Schlup*, 513 U.S. at 326-28; *Cristin*, 281 F.3d at 412 ("To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime . . . by presenting new evidence of innocence.") (citation and quotation marks omitted). Thus, Petitioner's arguments on these

[22] No such petition appears on the state criminal docket sheet.

points fail, and will not be addressed further.[23]

With the foregoing principles in mind, the Court will examine Grounds Ten through Twenty-One.

1. Ground Ten: Claims Regarding Improper Vouching and Bolstering of Commonwealth Witnesses

In Ground Ten, Petitioner raises a number of accusations:

> Ground 10: Defendant was denied the right to effective assistance of counsel under the Sixth Amendment and the due process Clause under the Fourteenth Amendment to the United States Constitution when trial counsel failure [sic] to object to the improperly voching [sic] and bolstering the credibility of Commonwealth witness Travis Hendricks [sic].
>
> Supporting Facts: Defendant was prejudice by the commonwealth improperly vouching and bolstering the credibility of police OFFICER Flanders about what Travis had seen and witness [sic] and what he didn't see and witness was bolstered at trial. By the Commonwealth withheld exculpatory and impeaching information that was helpful to the defense. This was prosecution misconduct. Trial counsel failed to make a timely objection to properly conduct a pretrial investigation and counsel failed to challenge the identification testimony was at a critical stage. Had trial counsel made a timely objection there is a reasonable probability of a different outcome absent this prosecution misconduct and counsel's error. PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness.

(Hab. Pet. 43, ECF No. 1; *see also* Traverse 36-44, ECF No. 25). The Commonwealth responds this claim is procedurally defaulted and is "so vague and disorganized that it is, candidly, impossible to decipher, let alone address." (Resp. to Pet. 29, ECF No. 22). The Court similarly cannot discern Petitioner's argument.

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[23] In Grounds Ten through Twenty-One, Petitioner alleges ineffective assistance of trial and/or appellate counsel (Ground 11, 18, and 20), due process violations (Ground 16 and 19), or both (Grounds 10, 12, 13, 14, 15, 17, and 21), in addition to other claims (Ground 10, 15, and 19). Petitioner's procedurally defaulted claims for which he has not asserted a viable cause and prejudice or fundamental miscarriage of justice argument will not be addressed.

As noted above, these claims are procedurally defaulted; Petitioner did not raise them in the state courts prior to filing his habeas petition, and to the extent he raised them in his December 2015 PCRA petition, that PCRA petition was found to be untimely by the state courts.[24] *See supra* Part III.H. Although Petitioner alleges PCRA counsel's ineffectiveness as cause to overcome his default, he cannot establish cause pursuant to *Martinez*. Petitioner's allegations are extremely vague, and preclude a finding that the defaulted ineffectiveness claims are substantial. *See Zettlemoyer*, 923 F.2d at 298; *Torres-Rivera v. Bickell*, No. 13-3292, 2014 WL 5843616, at *6 (E.D. Pa. Nov. 10, 2014) ("[V]ague allegations have no potential merit, [so] petitioner has not met the threshold showing *Martinez* required[.]") (citing *Palmer v. Hendricks*, 592 F.3d 386, 395 (3d Cir. 2010)). Thus, he has not established cause to overcome the default of his claims.

The Court respectfully recommends Ground Ten be dismissed as procedurally defaulted.

2. Ground Eleven: Ineffectiveness for Failing to Impeach Walter Stanton

In Ground Eleven, Petitioner avers trial counsel was ineffective for failing to impeach Walter Stanton regarding his possible bias, interest, corrupt motive, and personal grudge, and thus, he was deprived of "his right to inquire into Walter Stanton testify falsely." (Hab. Pet. 44, ECF No. 1). Additionally:

> Had trial counsel not filed a motion in limine and the trial court erred by not letting the jury here [sic] evidence that Walter Stanton filed false criminal charges against the defendant on 10-3-2002, and the defendant had to pay commonwitness [sic]. Walter Stanton to drope [sic] the charges that [Petitioner] did not do.

[24] Petitioner's Post Sentence Motion alleged that the Commonwealth withheld evidence and bolstered the credibility of Commonwealth witnesses. (*See* Traverse 42-43, ECF No. 25). This was not sufficient to fairly present Petitioner's claim to the state courts, as Petitioner's Post Sentence Motion was dismissed as untimely. (Order, SCR No. D9).

counsel never filed such a motion. The Commonwealth notes in its Response that it has been unable to locate this purported motion in limine (Resp. to Pet. 31, ECF No. 22), and the Court is similarly unable to locate such a motion. Indeed, the only citation Petitioner has provided points to a motion in limine filed by the Commonwealth. (Resp. to Pet. 31, ECF No. 22); (Traverse 45, ECF No. 25) (citing N.T. 11/14/05 at 9); (see also N.T. 11/14/05 at 8-9). Thus, Petitioner's claim that counsel was ineffective for filing a motion in limine is contradicted by the record.

Because Petitioner's underlying, defaulted ineffective assistance of trial counsel claim is not substantial, he has not established cause pursuant to *Martinez*. The Court respectfully recommends this claim be dismissed as procedurally defaulted.

3. **Ground Twelve: Claims Regarding Petitioner's Statement**

In Ground Twelve, Petitioner alleges trial counsel was ineffective for failing to suppress a statement he gave to Detective Michael Gross without being given a warning pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). (Mah. Pet. 45, ECF No. 1). The statement taken by Detective Gross concerned biographical information, including Petitioner's name, date of birth, height, weight, nickname, and residence; Petitioner did not say anything of substance in the statement. (N.T. 11/18-05 at 21-24). The Commonwealth responds this claim is defaulted and meritless. (Resp. to Pet. 31, ECF No. 22).

This claim is procedurally defaulted because it was not fairly or properly raised before the state courts. See *supra* Part III.H. Petitioner has not established cause under *Martinez* because his underlying ineffective assistance of trial counsel claim is not substantial. The questions asked by Detective Gross concerned only biographical information. Such "questions to secure the biographical data necessary to complete booking or pretrial services" fall within the "'routine booking question' exception" to *Miranda*. *Pennsylvania v. Muniz*, 496 U.S. 582, 601

(1990) (citation omitted). Under this exception, police officers may ask routine booking questions such as the suspect's "'name, address, height, weight, eye color, date of birth, current age, or [other] matters reasonably related to the police's administrative concerns' without obtaining a waiver of suspect's *Miranda* rights." *United States v. Barnes*, No. 05-134, 2005 WL 1899502, at *4 (E.D. Pa. Aug. 8, 2005) (citation omitted). These biographical questions asked by Detective Gross fell within the "routine booking question" exception, so there was no *Miranda* violation. Trial counsel was not ineffective for failing to raise a *Miranda* issue that did not exist. *See Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998) (counsel will not be considered ineffective for failing to raise a meritless argument). Thus, the underlying trial counsel ineffectiveness claim was not substantial, and Petitioner has not established cause.

The Court respectfully recommends this claim be dismissed as procedurally defaulted.

4. Ground Thirteen: Claims Regarding Jury Instructions

In Ground Thirteen, Petitioner alleges, *inter alia*, that trial counsel was ineffective for failing to object to jury instructions on reasonable doubt, first degree murder, firearm carried without a license, and direct and circumstantial evidence because "they were misleading and confusing to the jury." (Hab. Pet. 46, ECF No. 1). The Commonwealth responds that the claim is defaulted and "so cursory" as to preclude meaningful analysis. (Resp. to Pet. 33, ECF No. 22).

This claim is procedurally defaulted because it was not fairly or properly raised in the state courts. *See supra* Part III.H. Petitioner asserts cause pursuant to *Martinez*. However, he has not established that his underlying claim is substantial. As the Commonwealth points out, Petitioner does not specify what elements he believes were missing from the jury instruction, why he believes the jurors were confused, or what prejudice he suffered as a result. (Resp. to Pet. 33, ECF No. 22). The Court agrees with this assessment, and finds Petitioner's claim is too

vague to establish that his underlying trial counsel ineffectiveness claim is substantial. *See Zettlemoyer*, 923 F.2d at 298; *Torres-Rivera*, 2014 WL 5843616, at *6. Thus, Petitioner has not established cause to overcome the default of this claim.

The Court respectfully recommends this claim be dismissed as procedurally defaulted.

5. Ground Fourteen: Claims Regarding Flight Jury Instruction

In Ground Fourteen, Petitioner argues trial counsel was ineffective for failing to object to the trial court's "improper flight jury instruction 3.14," which "exposed facts not in evidence." (Hab. Pet. 47, ECF No. 1). He also argues counsel was ineffective for failing to investigate; he avers that he did not actually flee, but rather, he "was visiting his girl friend down south." (*Id.*; Traverse 51, ECF No. 25). The Commonwealth responds this claim is procedurally defaulted, "fatally underdeveloped," and meritless. (Resp. to Pet. 33-34, ECF No. 22).

Petitioner's claim is procedurally defaulted because it was not fairly or properly presented to the state courts. *See supra* Part III.H. Petitioner cannot establish cause to overcome that default because his underlying ineffective assistance of trial counsel claim is not substantial. The parties and the trial court extensively discussed the propriety of a flight instruction. (N.T. 11/17/05 at 110-22). Counsel objected to specific portions of the instruction, including those suggesting that Petitioner "hid from the police," and that Petitioner fled. (*Id.* at 112-13, 117). However, counsel did not object to the charge being narrowed to state that Petitioner *left* the jurisdiction because that was better than "the alternative" of the Commonwealth introducing evidence from the Fugitive Squad. (*Id.* at 115-16). The trial court held the issue under advisement, until Detective Michael Egenlauf testified that Petitioner's case was given to the Fugitive Squad after he was unable to apprehend Petitioner, and that Petitioner was found in South Carolina, where he waived extradition. (*Id.* at 122, 186-88). Thereafter, the trial court

revisited the flight instruction issue. (N.T. 11/18/05 at 30-39). Counsel again argued that "there's no evidence the defendant fled" and to use words like "fled" and "fleeing" has "a different connotation" than to say that Petitioner "left." (*Id.* at 34-35). After hearing argument on the issue, the trial court noted, "I think what we have here is what we're going to have before the jury, and that is, the argument with respect to what that leaving constituted." (*Id.* at 37). The trial court ultimately gave the following instruction:

> Ladies and gentlemen, there was evidence presented in this case, and I'm speaking of the testimony of Detective Egenlauf, which tended to show that the defendant left Philadelphia after this incident and was found in South Carolina. He waived extradition on or about July 21, 2003, and was returned to Philadelphia. The credibility, weight and effect of this evidence is for you to decide.
>
> Generally speaking, when a crime has been committed and a person thinks that he is or may be accused of committing it and leaves the jurisdiction, such evidence is circumstance tending to prove the person is conscious of guilt. Such evidence does not necessarily show consciousness of guilt in every case. A person may leave a jurisdiction for some other motive and may do so even though innocent.
>
> Whether the evidence of leaving the jurisdiction in this case should be looked at as tending to prove guilt depends upon the facts and circumstances of this case, and especially upon the motives which may have prompted the person to leave the jurisdiction. You may not find the defendant guilty solely on the basis of evidence that he left the jurisdiction.

(N.T. 11/18/05 at 30-39, 125-26).

This instruction only referenced evidence introduced through Detective Egenlauf's testimony, and thus, did not "expose" the jury to facts not in evidence. Moreover, trial counsel pursued a reasonable strategy of narrowing the instruction, in lieu of the Commonwealth presenting more harmful evidence from the Fugitive Squad. While counsel did not present the specific allegation that Petitioner left the jurisdiction to visit his girlfriend, he presented the very

argument that Petitioner presents now: that Petitioner did not flee, but simply left the jurisdiction. Because trial counsel acted reasonably, Petitioner has not established that his underlying ineffectiveness claim is substantial.

The Court respectfully recommends this claim be dismissed as procedurally defaulted.

6. Ground Fifteen: Ineffectiveness for Failing to Challenge Legality of Sentencing Statute

In Ground Fifteen, Petitioner argues trial counsel was ineffective for failing to challenge the legality of "defendant illegal sentence statute" for first degree murder.[25] (Hab. Pet. 48, ECF No. 1; Traverse 52, ECF No. 25). He appears to argue counsel should have challenged the lack of a written sentencing order in contravention of 42 Pa. Cons. Stat. § 9764. (*See* Traverse 56, ECF No. 25); Crim. Docket at 34. The Commonwealth responds that Petitioner's claim is procedurally defaulted and meritless. (Resp. to Pet. 35, ECF No. 22):

Petitioner's ineffectiveness claim is procedurally defaulted. *See supra* Part III.H. Petitioner has not established cause under *Martinez* because he has not established that his underlying ineffectiveness claim is substantial. Petitioner's state court docket reflects that Petitioner filed a state writ of habeas corpus alleging that he was unlawfully detained due to the

[25] Petitioner also asserts all prior counsel violated Pennsylvania Rules of Professional Conduct 3.8, 5.3, and 8.4 and that the trial court imposed an illegal sentence because his file does not contain "statutory authorization." (Hab. Pet. 48, ECF No. 1; *see also* Traverse 52, ECF No. 25). His first allegation, in addition to being defaulted, is not cognizable. *See supra* Part III.C; *Estelle*, 502 U.S. at 67-68. The second allegation lacks merit. *See Roman v. DiGuglielmo*, 675 F.3d 204, 209 (3d Cir. 2012) ("[W]e may bypass the exhaustion issue altogether should we decide that the petitioner's habeas claim fails on the merits."). The Pennsylvania Superior Court has found that "[t]he lack of a particular written sentencing order form does not invalidate an otherwise clearly valid sentence." *Stultz v. Giroux*, No. 14-4570, 2015 WL 9273429, at *2 (E.D. Pa. Dec. 21, 2015), *certificate of appealability denied* (July 21, 2016) (citing *Joseph v. Glunt*, 96 A.3d 365, 371-73 (Pa. Super. 2014)). Petitioner's sentencing hearing transcripts and criminal docket sheet confirm the imposition of his sentence. (*See* N.T. 02/03/06 at 17:8-25, 18:2-14; Crim. Docket at 4, 34). Moreover, Petitioner has not established that the Federal Constitution requires a written and signed sentencing order form. *Stultz*, 2015 WL 9273429, at *2.

lack of a written sentencing order, in violation of 42 Pa. Cons. Stat. § 9764(a)(8). Crim. Docket at 34. In its Notice of Intent to Dismiss that writ of habeas corpus, the PCRA Court explained:

> The Honorable Kathyrn Lewis entered a sentencing order in this matter on February 3, 2006. The Superior Court of Pennsylvania has held that even when the Department lacks possession of a written sentencing order, it has continuing authority to detain a prisoner where a criminal docket provided by trial court and a transcript of the sentencing hearing confirm the imposition, and legitimacy, of the prisoner's sentence. *Joseph v. Glunt*, 96 A.3d 365, 372 (Pa. Super. 2014). Thus, even in the absence of a written sentencing order, the DOC retains detention authority. *Id.*

Crim. Docket at 34. The Superior Court also rejected Petitioner's § 9764 argument. *Edwards*, 2017 WL 2875422, at *4 (citing *Joseph*, 96 A.2d at 371-72). The state courts' finding on this point is a determination of state law to which this Court must defer. *See Estelle*, 502 U.S. at 67-68. Accordingly, the § 9764 argument Petitioner avers counsel should have raised lacks merit. Because counsel cannot be ineffective for failing to raise a meritless argument, Petitioner has not established that this trial counsel ineffectiveness claim is substantial. *See Parrish*, 150 F.3d at 328.

The Court respectfully recommends this claim be dismissed as procedurally defaulted.

7. Ground Seventeen: Ineffectiveness for Failing to Ask for an Inflammatory Photograph Instruction

In Ground Seventeen, Petitioner avers that trial counsel was ineffective for failing to ask for a jury instruction on inflammatory photographs that the trial court previously agreed to give. (Hab. Pet. 50, ECF No. 1). Petitioner clarifies in his Traverse that he wanted the instruction for Commonwealth Exhibits C9-A and C9-B, which were autopsy photographs showing entrance wounds to the victim's arm and neck. (Traverse 60, ECF No. 25) (citing N.T. 11/16/05 at 30-32); (*see also* N.T. 11/16/05 at 16, 20). The Commonwealth responds this claim is defaulted, unreviewable, and internally contradictory. (Resp. to Pet. 36-37, ECF No. 22).

This claim is procedurally defaulted because it was not fairly or properly presented to the state courts. *See supra* Part III.H. Petitioner has not established cause to overcome the default pursuant to *Martinez* because his underlying ineffectiveness claim is not substantial. Under Pennsylvania law, for a photograph to be considered inflammatory, "the depiction must be of such a gruesome nature or be cast in such an unfair light that it would tend to cloud an objective assessment of the guilt or innocence of the defendant." *Commonwealth v. Dones*, No. 597 MDA 2016, 2017 WL 57156, at *3 (Pa. Super. Jan. 5, 2017) (citing *Commonwealth v. Hubbard*, 372 A.2d 687, 697 (Pa. 1977)). Additionally, the trial judge must assure the defendant has a fair trial, and has discretion to give curative instructions, which "'are not always necessary, or even desirable.'" *Id.* (quoting *Commonwealth v. Pezzeca*, 749 A.2d 968, 971 (Pa. Super. 2000)). During Petitioner's trial, the trial court described the autopsy photographs as "not inflammatory" and "pretty well sanitized." (N.T. 11/17/05 at 5). Petitioner has not explained how the photographs were inflammatory, and has not identified how the lack of a curative instruction denied him a fair trial, beyond conclusory allegations that the photographs had a "possibly inflammatory, passion and prejudice effect on the jury." (Hab. Pet. 50, ECF No. 1; Traverse 60, ECF No. 25). Thus, Petitioner has not established that the trial court erred in declining to give a curative instruction, or that counsel was ineffective for failing to ask for a curative instruction. *See Parrish*, 150 F.3d at 328 (counsel will not be found ineffective for failing to pursue a meritless argument). Because the underlying ineffectiveness claim is not substantial, Petitioner has not established cause pursuant to *Martinez*.

The Court respectfully recommends this claim be dismissed as procedurally defaulted.

8. Ground Eighteen: Ineffectiveness for Failure to Obtain an Expert Report Regarding Petitioner's Mental Health and Social History

In Ground Eighteen, Petitioner argues trial counsel was ineffective for failing to "obtain

an expert to prepare defendant mental health history and social history," and "conduct a pretrial investigation because this was a death penalty case at first." (Hab. Pet. 51, ECF No. 1). The Commonwealth responds this claim is defaulted and meritless. (Resp. to Pet. 37, ECF No. 22).

These claims are procedurally defaulted because they were not fairly or properly presented to the state courts. *See supra* Part III.H. Petitioner has not established cause to overcome his default. He has not established that his underlying claims are substantial, and thus, is not entitled to review under *Martinez*' narrow exception.

First, Petitioner has not provided the name of an expert, an affidavit, or an expert report to support his claim that counsel was ineffective for failing to obtain an expert. Prejudice resulting from counsel's ineffectiveness "cannot be based on mere speculation about the possibility of finding an expert witness, nor can it be based on mere speculation about the possible testimony." *Dobson v. United States*, No. 13-1711, 2016 WL 4941994, at *4 (D.N.J. Sept. 15, 2016) (citing *Duncan v. Morton*, 256 F.3d 189, 201-02 (3d Cir. 2001)).

Petitioner also suggests that counsel's purported failure to conduct a pre-trial investigation caused him prejudice at sentencing. However, Petitioner was convicted of first degree murder, and under Pennsylvania law, the *only* available sentences for a first degree murder conviction are "death or life imprisonment." 42 Pa. Cons. Stat. § 9711(a)(1); *see also* 18 Pa. Cons. Stat. § 1102(a)(1) ("[A] person who has been convicted of murder of the first degree . . . shall be sentenced to death or to a term of life imprisonment in accordance with 42 Pa. Cons. Stat. § 9711[.]"); *Commonwealth v. Palermo*, No. 247 EDA 2017, 2018 WL 2728881, at *2 (Pa. Super. June 7, 2018) ("Our legislature has determined that only two sentences are permissible for an adult convicted of first-degree murder: death or life imprisonment."). Contrary to Petitioner's assertion that "this was a death penalty case at first," by the time trial started, he was not facing a

capital sentence. (*See* N.T. 11/09/05 at 51). Thus, trial counsel's alleged failure to conduct a pre-trial investigation could not have affected the imposition of Petitioner's life sentence under Pennsylvania law, and Petitioner has not established prejudice.

Because Petitioner's underlying claims are not substantial, Petitioner has not established cause under *Martinez*. The Court respectfully recommends these claims be dismissed as procedurally defaulted.

9. Ground Nineteen: PCRA Counsel's Ineffectiveness

In Ground Nineteen, Petitioner asserts PCRA counsel was ineffective for failing to investigate the record and raise trial and appellate counsel's ineffectiveness. (Hab. Pet. 52, ECF No. 1). The Commonwealth responds this claim is defaulted and unreviewable. (Resp. to Pet. 38, ECF No. 22). The Court finds that in addition to being procedurally defaulted, this claim is not cognizable. *See supra* Part III.H and *supra* n.13; *see also* 28 U.S.C. § 2254(i); *Martel*, 565 U.S. at 662 n.3 (2012). The Court respectfully recommends this claim be dismissed.

10. Ground Twenty: Ineffectiveness Regarding Discovery and Police Reports by Officer Walsh and Sergeant Przepiorka

In Ground Twenty, Petitioner makes a number of ineffectiveness claims: (1) trial counsel was ineffective for failing to file a motion to suppress and challenge the reliability and/or suggestiveness of identification procedures ("identification procedure claims"); and (2) trial counsel was ineffective for failing to adequately review, investigate, and use discovery materials to impeach eyewitnesses ("discovery claims").[26] (Hab. Pet. 53, ECF No. 1; Traverse 67-74, ECF No. 25). The Commonwealth responds this claim is procedurally defaulted, and "so cursory,

[26] Petitioner also alleges that all prior counsel were ineffective, but he fails to explain how appellate counsel was ineffective in any way. (*See* Hab. Pet. 53, ECF No. 1). To the extent he asserts that appellate counsel was ineffective as a substantive claim or as cause to overcome default, this claim is too insufficiently pled to warrant relief. *See Zettlemoyer*, 923 F.2d at 298.

underdeveloped, and incoherent as to defy review." (Resp. to Pet. 38, ECF No. 22).

Ground Twenty is procedurally defaulted because it was not fairly presented to the state courts prior to the filing of the instant habeas petition, and it was not properly presented to the state courts after the filing of the instant habeas petition. *See supra* Part III.H. Petitioner raises cause and prejudice and a fundamental miscarriage of justice to overcome the default of his claims. Specifically, Petitioner argues that PCRA counsel was ineffective, and that the statements taken by Officer Walsh and Sergeant Przepiorka qualify as new evidence under *Schlup*. *See supra* Part III.H; (Traverse 74, ECF No. 25). Both of his arguments to overcome default lack merit.

Petitioner has not established cause and prejudice because his underlying ineffective assistance of trial counsel claims are not substantial.

Petitioner's identification procedure claims are too vague to be substantial. *See Zettlemoyer*, 923 F.2d at 298; *Torres-Rivera*, 2014 WL 5843616, at *6. Petitioner has not explained what identification procedures he finds unreliable and/or suggestive, how the eyewitnesses were allegedly influenced by these procedures, or what evidence counsel should have moved to suppress via Pa. Rule of Crim. P. 581. Therefore, Petitioner's ineffectiveness claims concerning the identification procedures are not substantial.

Petitioner's discovery claims are likewise not substantial. Petitioner alleges counsel failed to review the discovery materials, interview police officers named therein, and use reports by Officer Michael Walsh and Sergeant John Przepiorka to impeach two eyewitnesses.[27] (Hab.

[27] Petitioner does not identify Officer Walsh and Sergeant Przepiorka by their full names until his Traverse; he simply refers to them as "[O]fficer Michael" and "Sgt. John" in his habeas petition. (*See* Hab. Pet. 53, ECF No. 1). Additionally, the police reports to which Petitioner refers were, in fact, interviews of Sergeant Przepiorka and Officer Walsh, authored by Detective Cummings and Detective Cannon, respectively. (*See* Traverse 68-70, ECF No. 25).

Pet. 53, ECF No. 1). Petitioner elaborates in his Traverse that if trial counsel had reviewed the discovery materials, he would have learned that neither Stanton nor Hendrick saw the actual shooting. (Traverse 67, ECF No. 25).

Specifically, Petitioner claims that if trial counsel had reviewed the discovery materials, counsel would have learned that Stanton told officers that he "was around the corner and did not in fact see the shooting" (Traverse 67, ECF No. 25), and that counsel should have impeached Stanton with these discovery materials (Hab. Pet. 53, ECF No. 1). This claim is not substantial because Petitioner did not suffer prejudice; other evidence supported Petitioner's identification as the shooter. For instance, Hendrick testified that he saw Petitioner with "a gun out the back of the [car] window," pointed toward the victim. (N.T. 11/14/05 at 116, 118). When Hendrick saw Petitioner get out of the car with the gun, Hendrick ran out back and called 911. (*Id.* at 123). About five minutes after hearing gunshots, Hendrick returned to the front of the house and saw the victim "laying like right beside the steps with blood on his back." (*Id.* at 124, 128-29). Thus, even absent Stanton's testimony that he saw Petitioner shoot the victim, there was adequate evidence to support the contention that Petitioner was the shooter. Accordingly, Petitioner did not suffer prejudice from counsel's failure to impeach Stanton. *See, e.g., Cox v. Horn*, 174 F. App'x 84, 88 (3d Cir. 2012) (petitioner did not suffer prejudice from counsel's failure to impeach a witness when other evidence supported the verdict); *Alexander v. Shannon*, 163 F. App'x 167, 173 (3d Cir. 2006) (failure to impeach witness regarding mistake of age defense not prejudicial when evidence showed that petitioner knew victim was underage); *Moore v. McGrady*, No. 11-6285, 2012 WL 6853243, at *12 (E.D. Pa. Dec. 21, 2012), *report and recommendation adopted*, No. 11-6285, 2013 WL 1092707 (E.D. Pa. Mar. 14, 2013).

Petitioner also claims that if counsel had reviewed the discovery materials, he would have

learned that Hendrick told Officer Flanders that "he did not see anything because he was inside the house," and thus, Hendrick "could not" have observed Petitioner with a gun. (Traverse 67, ECF No. 25). Petitioner argues that trial counsel should have impeached Hendrick's testimony with this information. (Hab. Pet. 53, ECF No. 1). Petitioner's claim is not substantial because the fact that Hendrick was inside the house at the time of the shooting was introduced at trial. Officer Flanders testified that Hendrick told her "he was at the front door of the location, he heard gunfire, ran into the house and dialed 911," but he "[d]id not see it." (N.T. 11/16/05 at 53-54; *id.* at 121-22). Although counsel did not impeach Hendrick with this information, the jury still heard testimony that Hendrick told Officer Flanders that he did not see the shooting. Thus, Petitioner has not established prejudice from counsel's failure to impeach Hendrick.

Additionally, Petitioner has not established a fundamental miscarriage of justice. Under *Schlup*, a gateway claim of actual innocence claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." 513 U.S. at 324. For evidence to be "new," it must not have been available at trial. *See Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004); *see also Teagle v. Diguglielmo*, 336 F. App'x.209, 213 (3d Cir. 2009) (not precedential). However, in *Houck v. Stickman* the Third Circuit explained "new evidence" can include evidence that "was not *discovered* for use at trial because trial counsel was ineffective . . . [if] it is the very evidence that the petitioner claims demonstrates his innocence." 625 F.3d 88, 94 (3d Cir. 2010) (emphasis added). Courts in this circuit have read *Houck* narrowly to exclude evidence that counsel discovered prior to trial, but failed to present at trial. *See, e.g., Shoulders v. Eckard*, No. 14-1753, 2016 WL 1237798, at *4 n.5 (W.D. Pa. Feb. 29, 2016), *report and recommendation adopted*, No. 14-1753, 2016 WL 1213627 (W.D. Pa. Mar. 29, 2016), *certificate of appealability*

denied (Sept. 6, 2016) (evidence was not new under *Houck* when it was known to trial counsel at the time of trial).

The documents Petitioner presents may not be new under *Hubbard*, as trial counsel obtained them in discovery. *See Reeves v. Coleman*, No. 14-1500, 2016 WL 7424265, at *18 (M.D. Pa. Oct. 17, 2016), *report and recommendation adopted*, No. 14-1500, 2016 WL 7411130 (M.D. Pa. Dec. 22, 2016) (evidence was not new when "trial counsel had that evidence in her possession at the time of trial"). However, because Petitioner alleges that trial counsel failed to "adequately review" the discovery materials, the Court assumes *arguendo* that this evidence is "new." Even so, Petitioner has not established that it is more likely than not that no reasonable juror would have convicted him in light of this "new" evidence. The police statements Petitioner presents establish that Stanton told Sergeant Przepiorka that he saw a black male "carrying a black handgun," and told Officer Walsh that after seeing a black male "carrying a gun," he "turned around and ran" and "by the time he got around the corner . . . he heard shots." (Traverse 68-70, ECF No. 25). As discussed above, even absent Stanton's testimony that he saw Petitioner shoot the victim, Hendrick's testimony provides sufficient evidence that Petitioner shot the victim. Thus, Petitioner has not established a fundamental miscarriage of justice under *Schlup*.

The Court respectfully recommends that Ground Twenty be dismissed as procedurally defaulted.

11. Ground Twenty-One: Claims Regarding Alleged *Brady* Violation

In Ground Twenty-One, Petitioner avers "[T]ravis [Hendrick] admitted to police officer Flanders that he did not see any crime happen in view of officer Flanders[']s whole testimony and his Travis [sic] testimony at trial." (Hab. Pet. 54, ECF No. 1). Accordingly, he argues counsel

was ineffective for failing to seek a continuance to investigate.[28] (*Id.*). He elaborates in his Traverse that counsel should have hired an investigator to go to the scene of the murder to reveal that when Hendrick "said he was half-way up the step at trial there is [no] way he saw the petitioner." (Traverse 76, ECF No. 25). The Commonwealth does not address this ineffectiveness claim. (*See* Resp. to Pet. 39, ECF No. 22).

Petitioner's claim is procedurally defaulted because it was not fairly or properly presented to the state courts. *See supra* Part III.H. Petitioner raises PCRA counsel's ineffectiveness as cause, and alleges Officer Flanders' testimony constituted "newly after discovered new facts that was unknown to the petitioner when the trial first started[,]" which the Court construes as raising a fundamental miscarriage of justice. *See supra* Part III.H; (Traverse, 76-77, ECF No. 25). Both arguments lack merit.

Petitioner has not established cause and prejudice because his underlying ineffective assistance of trial counsel claim is not substantial. Petitioner argues that counsel should have requested a continuance to investigate the scene of the murder, in light of: (1) Officer Flanders' testimony that Hendrick said he did not see the shooting; and (2) Hendrick's testimony that he was halfway up the step when he saw Petitioner pull up in a car. (Hab. Pet. 54, ECF No. 1); (Traverse 76, ECF No. 25) (citing N.T. 11/14/05 at 116-17). He avers that an investigation would reveal that if Hendrick was halfway up the step, "there is [no] way that he saw the petitioner." (Traverse 76, ECF No. 25). However, there was no need to request a continuance because trial counsel challenged Hendrick's vantage point on cross examination:

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[28] Petitioner also reasserts the *Brady* violation from Ground Five, asserts trial counsel was ineffective for failing to object during Officer Flanders' testimony, and asserts trial counsel failed to seek suppression of "the in court unreliable identification." These claims are duplicative of Grounds Five and Twenty and will not be addressed. (*Compare* Hab. Pet. 37, 53, ECF No. 1 *with id.* at 54).

Q: Now, the steps that you are referring to, am I correct they're not the outside steps leading into the house?

A: No.

Q: They're the steps that are inside the house?

A: Yes.

Q: So you had already gone up the outside steps?

A: No – oh, yeah, I went up the outside steps.

. . .

Q: Opened the screen door, storm door; is that right?

A: Yeah.

Q: Gone into the house; is that correct?

A: Yes.

Q: Now, sir, I've never had the pleasure of visiting your cousin's home. If someone is to open the door and go in, how far do they have to go before they come to these steps to go upstairs to the bathroom?

A: Not far at all.

Q: Sir, point to something and show the jury how far you have to go before you'd come to the steps.

A: Right to that computer right there (indicating).

. . .

Q: Four to five feet away?

A: Yeah.

. . .

Q: Now, the front door is only three to four feet wide, right?

. . .

A: I guess you could say that.

Q: How did you see around the brick and stone [exterior of the house]?

A: I didn't have to look around the brick and the stone. I could look straight through the door.

Q: You looked straight out the door, and you saw . . . your friend standing right there?

A: I didn't see him. I could see the car and [Petitioner] hopping up right here.

. . .

Q: The man that had the gun was moving quickly, right?

A: Yeah.

Q: He wasn't just strolling up to your cousin, was he?

A: No.

. . .

Q: And you got from the middle of the steps[,] down the steps, through the living room, through the kitchen and out the back door and were in the backyard when the shots were fired; is that right?

A: Yes.

Q: Sir, under those circumstances, you really didn't see who came out of the car, did you?

A: Yes, I seen him.

Q: You didn't have time?

A: Yeah, I seen him.

(N.T. 11/14/05 at 186-91, 198). Although Hendrick still testified that he saw Petitioner, trial counsel continuously challenged Hendrick's viewpoint. Thus, trial counsel questioned

Hendrick's testimony on the very point Petitioner avers counsel was ineffective for failing to challenge. Trial counsel was not ineffective for failing to request a continuance to investigate in the middle of trial, and Petitioner's claim is not substantial.

Additionally, Petitioner has not demonstrated a fundamental miscarriage of justice. Petitioner has not demonstrated that Officer Flanders' testimony is new, reliable evidence under *Schlup*. Officer Flanders testified at trial, so her statements are not "new" evidence. *See Hubbard*, 378 F.3d at 340; *id.* at 341 (petitioner did not satisfy new evidence standard when his allegedly new evidence was "nothing more than a repackaging of the record as presented at trial"); *Reeves*, 2016 WL 7424265, at *17 ("[T]he video of the murder and [petitioner's] confession are not new evidence, as they were the focus of [petitioner's] trial.").

The Court respectfully recommends that Ground Twenty-One be dismissed as procedurally defaulted.

I. New Claims Asserted in Traverse

In Petitioner's Traverse, he asserts multiple new claims. These newly-asserted claims are barred by the statute of limitations. Permitting amendment of the newly-asserted non-cognizable claims would be futile, and the remainder of Petitioner's claims are not subject to equitable tolling and do not relate back to his timely-filed habeas petition.

1. Statute of Limitations

Petitioner's newly-asserted claims are barred by the statute of limitations. AEDPA imposes a strict one-year time limitation for the filing of any habeas petition. *See* 28 U.S.C. § 2244(d)(1)(A)-(D). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." *Id.* § 2244(d)(2).

In this case, the applicable starting point for the statute of limitations is the "conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal on February 5, 2010, and Petitioner's judgment of sentence became final on May 6, 2010, when the time expired to file a petition for writ of certiorari in the United States Supreme Court. *See* S. Ct. R. 13(2); *Morris v. Horn*, 187 F.3d 333, 337 n.1 (3d Cir. 1999). Therefore, Petitioner had one year from that date, or until May 6, 2011, to timely file a habeas petition.

With 312 days remaining on the AEDPA clock, petitioner tolled his AEDPA limitations period from June 28, 2010, when he properly filed his PCRA petition, until July 29, 2015, when the Pennsylvania Supreme Court denied relief. *See* 28 U.S.C. § 2244(d)(2). Petitioner filed the instant habeas petition 75 days later, on October 12, 2015. However, filing a habeas petition does not operate as an open-ended placeholder for later-asserted claims. *See Rhines v. Weber*, 544 U.S. 269, 274-75 (2005). Thus, the statute of limitations continued to run after Petitioner filed his petition, leaving 237 days, or until June 6, 2016, for Petitioner to file amendments or timely raise new claims. He did not file his Traverse raising his additional claims until July 8, 2016, thirty-two days after the AEDPA statutory period had expired.

2. Futility

The Federal Rules of Civil Procedure apply to motions to amend habeas corpus petitions. *United States v. Duffus,* 174 F.3d 333, 336 (3d Cir.1999), *cert. denied,* 528 U.S. 866, (1999) (citing *Riley v. Taylor,* 62 F.3d 86, 89 (3d Cir.1995)). Rule 15(a) prescribes that leave to amend "shall be freely given when justice so requires." *See Foman v. Petitioner*, 371 U.S. 178, 182 (1962). Such leave should be denied only in limited circumstances, when, for example, amendment would be futile. *Baker v. Diguglielmo*, No. 08-3155, 2009 WL 2973041, at *2 (E.D.

Pa. Sept. 15, 2009); *Adams v. Lawler*, No. 08-3134, 2009 WL 2973038, at *6 n.15 (E.D. Pa. Sept. 15, 2009). In this context, futility means the petition, as amended, would fail to state a claim upon which relief could be granted. *Baker*, 2009 WL 2973041, at *2.

In the instance case, allowing amendment for some of Petitioner's claims would be futile. A number of Petitioner's newly-asserted claims are not cognizable, including: violations of Pennsylvania Rules of Professional Conduct 1.1, 3.3, 3.8, 5.3, and 8.4 (Traverse Grounds Twelve, Fifteen, Twenty); a violation of Pennsylvania Rule of Criminal Procedure 573 (Traverse Ground Seventeen); and a violation of Pennsylvania Rule of Evidence 702 (Traverse Ground Twenty). (*See* Traverse 49, 58, 60, 74, ECF No. 25). Thus, the Court respectfully recommends amendment should not be permitted for these non-cognizable claims.

3. Equitable Tolling and Relation Back

The timeliness provision in the federal habeas corpus statute is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 648 (2010). Equitable tolling should be used sparingly, "'only when the principle of equity would make the rigid application of a limitation period unfair.'" *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003) (quoting *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001)). A litigant invoking the doctrine of equitable tolling bears the burden of establishing two elements: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Petitioner has not argued, and the Court does not find any evidence, that extraordinary circumstances prevented the timely filing of the claims he newly asserts in his Traverse. Thus, Petitioner has not established that he is entitled to equitable tolling.

Because Petitioner's claims are barred by the AEDPA statute of limitations and are not

subject to equitable tolling, the only way the claims may be reviewed is if they "relate back" to Petitioner's timely habeas petition. Under Federal Rule of Civil Procedure 15(c)(1)(B), a party may raise a new, time-barred claim if the claim "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[29] *See* Fed. R. Civ. P. 15(c)(1)(B). In discussing what constitutes "conduct, transaction, or occurrence" in the context of a habeas petition, the Supreme Court has stated that relation back is in order if "the original and amended petitions state claims that are tied to a common core of operative fact." *Mayle*, 545 U.S. at 664; *Hodge v. United States*, 554 F.3d 372, 378 (3d Cir. 2009). An amended petition "does not relate back (and therefore escape the AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S at 650; *Hodge*, 554 F.3d at 378.

The Court finds Petitioner's claims do not relate back because each claim requires a distinct legal and factual analysis:

- In Traverse Grounds One and Three, Petitioner alleges confrontation violations from trial court rulings limiting cross examination of Hendrick. (Traverse 11, 13, ECF No. 25). These claims do not relate back to the due process claims in Grounds One through Three of the habeas petition; the claims require different legal analyses. Traverse Grounds One and Three examine whether Petitioner's Fifth Amendment rights were violated, while the due process claims challenge evidentiary rulings. *See United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (petitioner cannot amend petition to add "entirely new claim or new theory of relief"). Additionally, the newly-asserted claims do not relate back to the confrontation claim raised in Ground Five of the habeas petition; that claim challenges the Commonwealth's failure to disclose a statement, and raises a confrontation claim based on different facts.

- In Traverse Ground Two, Petitioner raises trial and appellate counsel ineffectiveness for failing to investigate facts underlying Hendrick's prior conviction. (Traverse 12, ECF No. 25). This does not relate back to the claim of appellate counsel ineffectiveness for

[29] The Court construes Petitioner's "Traverse" as an attempt to amend the initial habeas petition. Courts have considered additional "supplemental" filings by habeas petitioners under the relation back framework. *See, e.g.*, *Reid v. Beard*, No. 04-2924, 2009 WL 2876206, at *21 (E.D. Pa. Sept. 2, 2009), *aff'd*, 420 F. App'x 156 (3d Cir. 2011).

failing to develop the argument on appeal that the trial court erred in precluding cross examination of Hendrick regarding his prior conviction. Although both claims concern Hendrick's prior conviction, the newly-raised claims concern trial and appellate counsel's failure to investigate, and the timely-raised claim in the habeas petition concerns appellate counsel's failure to develop an argument on appeal. These claims differ in time and type.

- In Traverse Ground Four, Petitioner alleges a confrontation violation from the trial court's ruling limiting cross examination of Stanton. (Traverse 14, ECF No. 25). This does not relate back to the due process claim raised in Ground Four of the habeas petition; the claims require different legal analyses. The confrontation claim alleges Petitioner's Fifth Amendment rights were violated, while the due process claim challenges the trial court's evidentiary ruling.

- In Traverse Grounds Seven, Eight, and Twenty, Petitioner alleges trial counsel was ineffective for failing to call an expert to testify about the unreliability of eyewitness testimony. (Traverse 18-20, 22, 74, ECF No. 25). This claim does not relate back to the habeas petition. For instance, Ground Seven of the habeas petition challenges counsel's failure to suppress a photo array, and Ground Twenty avers counsel failed to challenge the unreliability of identification procedures. Although each of these claims challenge counsel's conduct, each claim requires a distinct factual analysis. The newly-raised claim concerns whether counsel ineffectively failed to hire an expert, while the timely-raised claims examine whether counsel failed to challenge various identification procedures.

- In Traverse Ground Seven, Petitioner alleges the "[i]dentification was a suggestive procedure." (Traverse 20, ECF No. 25). This does not relate back to any claim asserted in the habeas petition. Ground Seven of the habeas petition alleges trial court error in admitting a photo array, and that prior counsel were ineffective for failing to challenge the photo array. These claims require different legal and factual analyses; the newly-asserted claim avers Petitioner's due process rights were violated by a suggestive identification procedure, while the timely-asserted claims concern the trial court's ruling that the photo array was admissible and prior counsel's conduct. Moreover, Traverse Ground Seven does not relate back to Grounds Twenty or Twenty-One of the habeas petition, which allege counsel was ineffective for failing to challenge the identification procedure and for failing to suppress the identification. The newly asserted claim alleges a due process violation, while Grounds Twenty and Twenty-One examine counsel's conduct.

- In Traverse Ground Eight, Petitioner raises new ineffectiveness claims, including that counsel failed to: review a video tape, interview witnesses who could corroborate the tape, and file a timely notice of an alibi defense. (Traverse 21-24, ECF No. 25). He also alleges counsel's failure to prepare prevented him from testifying. (*Id.* at 24). None of these new claims relate back to Ground Eight of Petitioner's habeas petition, which alleges trial counsel was ineffective for failing to investigate and call Dennis Edwards and Raheem Sloan as alibi witnesses. The new claims challenge different conduct by counsel and are based on different facts.

- In Traverse Ground Nine, Petitioner alleges he was denied his Sixth Amendment right to a speedy trial. (Traverse 25, ECF No. 25). This does not relate back to the claim that counsel was ineffective for failing to file a Rule 600 motion. The former raises a speedy trial claim based on *Barker v. Wingo*, 407 U.S. 514 (1972), while the latter alleges counsel was ineffective for failing to assert Petitioner's speedy trial rights under Pennsylvania law. Each claim requires a distinct legal theory and factual analysis.

- In Traverse Ground Twelve, Petitioner raises a *Miranda* violation and a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) regarding the statement taken by Detective Gross. (Traverse 49, ECF No. 25). These do not relate back to the claims that counsel failed to suppress the statement taken by Detective Gross or that Petitioner was generally denied due process. The claims require different legal and factual analyses. The newly-raised claims allege that Detective Gross committed a violation under the Fifth Amendment, and that the prosecution failed to disclose the statement in violation of the dictates of *Brady*, while the timely-raised claims examine counsel's conduct and generally raise a vague due process violation.[30]

- In Traverse Ground Fifteen, Petitioner alleges appellate counsel was ineffective for failing to raise an illegal sentencing claim and/or challenge the constitutionality of the sentencing statute. (*See* Traverse 58, ECF No. 25). This does not relate back to Petitioner's claims that the trial court lacked authority to impose the sentence, or that trial counsel was ineffective for failing to challenge the sentencing statute's legality. The former claim challenges appellate counsel's conduct on appeal, while the latter claims challenge the court's jurisdiction and trial counsel's conduct during trial.

- In Traverse Ground Sixteen, Petitioner alleges appellate counsel failed to properly raise an issue regarding jury instruction 4.08D on appeal. (Traverse 59, ECF No. 25). This does not relate back to Ground Sixteen of the habeas petition, which alleges a due process violation from the trial court's failure to give jury instruction 4.08D. The former examines appellate counsel's performance, while the latter challenges the fact that the trial court did not give a jury instruction during trial. These claims differ in time and type.

- In Traverse Ground Nineteen, Petitioner asserts all prior counsel were ineffective for failing to challenge the sufficiency of evidence. (Traverse 66, ECF No. 25). This does not relate back to any claim raised in the habeas petition; no claim raised in the habeas

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[30] To the extent the *Brady* claim does, indeed, relate back to Petitioner's general allegation of a due process violation, the *Brady* claim lacks merit. *See* 28 U.S.C. § 2254(b)(2). A petitioner alleging a *Brady* violation must establish that: (1) evidence was suppressed by the prosecution, either willfully or inadvertently; (2) the evidence was favorable to the defense, because it was either exculpatory or impeaching; and (3) the evidence was material, *i.e.*, the omission was prejudicial. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady*, 373 U.S. at 87. Petitioner's statement to Detective Gross, containing only biographic information, was neither favorable to the defense, nor was it material.

petition mentions the sufficiency of evidence, let alone challenges counsel's failure to challenge the sufficiency of the evidence.

- In Traverse Ground Twenty, Petitioner asserts trial counsel was ineffective for failing to call Officer Walsh and Sergeant Prezepiorka as witnesses. (Traverse 67, 74, ECF No. 25). This does not relate back to his claim that counsel failed to impeach eyewitnesses with police reports. A failure to call witnesses differs from a failure to impeach witnesses who were called at trial.

- To the extent Petitioner attempts to raise cumulative error by discussing cumulative prejudice (Traverse 78, ECF No. 25), this does not relate back to any claim. Cumulative error is a freestanding claim requiring a distinct analysis. *See Collins v. Sec'y of Pennsylvania Dep't of Corr.*, 742 F.3d 528, 541-42 (3d Cir. 2014). Cumulative error was not asserted in the habeas petition, and does not relate back to any claim raised therein.

Thus, I respectfully recommend these newly asserted claims raised in Petitioner's Traverse be dismissed as time-barred.[31]

IV. CONCLUSION

For the foregoing reasons, I respectfully RECOMMEND that the petition for writ of habeas corpus be denied without the issuance of a certificate of appealability.

Therefore, I respectfully make the following:

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[31] Allowing amendment for many of the claims would also be futile. Before filing his habeas petition, Petitioner did not present most of these claims in state court. Even if Petitioner presented these claims in his December 2015 PCRA petition, the claims are defaulted pursuant to an independent and adequate state rule. *See supra* Part III.H. However, because Petitioner argues cause and prejudice and a fundamental miscarriage of justice throughout his pleadings, and out of an abundance of caution, the Court engaged in relation back analysis.

RECOMMENDATION

AND NOW this 15th day of June, 2018, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without the issuance of a certificate of appealability.

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

BY THE COURT:

Lynne A. Sitarski

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 406 EAL 2017
Respondent	:	
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
NICHOLAS EDWARDS,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 9th day of January, 2018, the Petition for Allowance of Appeal is **DENIED**.

A True Copy
As Of 1/9/2018

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

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NICHOLAS EDWARDS	:	
Appellant	:	No. 2760 EDA 2016

Appeal from the PCRA Order August 9, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1006311-2003

BEFORE: OTT, DUBOW, JJ., and STEVENS, P.J.E.*

MEMORANDUM BY OTT, J.: **FILED JULY 06, 2017**

Nicholas Edwards appeals *pro se* from the order entered August 9, 2016, in the Court of Common Pleas of Philadelphia County, that dismissed his second petition under the Post-Conviction Relief Act (PCRA).[1] A jury convicted Edwards of murder of the first degree,[2] conspiracy,[3] and related crimes, and Edwards received a mandatory sentence of life imprisonment. In this appeal, Edwards raises 10 issues, including whether the petition is untimely, whether he is entitled to *habeas corpus* relief, whether prior

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* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541–9546.

[2] 18 Pa.C.S. § 2502.

[3] 18 Pa.C.S. § 903.

counsel were ineffective for various reasons, and whether the trial court committed reversible error. Based upon the following, we affirm.

The facts of this case are fully summarized in this Court's decision affirming the judgment of sentence. ***See Commonwealth v. Edwards***, 981 A.2d 917 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 989 A.2d 7 (Pa. February 5, 2010). The procedural history of this case is set forth in this Court's decision regarding Edwards' appeal from the denial of relief on his first PCRA petition. ***See Commonwealth v. Edwards***, 120 A.3d 1043 (Pa. Super. 2015) (unpublished memorandum), *appeal denied*, 119 A.3d 350 (Pa. July 29, 2015).

On August 21, 2014, while Edwards' appeal from the denial of relief on his first PCRA petition was pending in this Court, Edwards filed a *habeas corpus* petition, alleging that he was being unlawfully detained due to the lack of a written sentencing order in contravention of 42 Pa.C.S. § 9764(a)(8). On March 2, 2015, this Court affirmed the denial of relief on Edwards' first PCRA petition and, on July 29, 2015, the Pennsylvania Supreme Court denied Edwards' petition for allowance of appeal.[4]

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[4] ***Commonwealth v. Edwards***, 120 A.3d 1043 (Pa. Super. 2015) (unpublished memorandum), *appeal denied*, 119 A.3d 350 (Pa. July 29, 2015).

On December 29, 2015, Edwards filed *pro se* the instant PCRA petition – his second. On April 26, 2016, the PCRA court issued a Pa.R.Crim.P. 907 notice of intent to dismiss, explaining the PCRA petition was untimely and Edwards' claim for *habeas corpus* relief also failed. On May 10, 2016, Edwards filed a *pro se* response to the Rule 907 notice, contending that PCRA statutory exceptions applied to his petition. On August 9, 2016, the PCRA court dismissed Edwards' PCRA petition and denied the *habeas corpus* petition. This appeal followed.[5]

In the first issue raised in this appeal, Edwards challenges the PCRA court's determination that the instant petition is untimely.

> Our standard of review over the denial of a PCRA petition is well-settled. "In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination 'is supported by the record and free of legal error.'" ***Commonwealth v. Taylor***, 620 Pa. 429, 67 A.3d 1245, 1248 (Pa. 2013) (quoting ***Commonwealth v. Rainey***, 593 Pa. 67, 928 A.2d 215, 223 (Pa. 2007)).

Commonwealth v. Mitchell, 141 A.3d 1277, 1283-84 (Pa. 2016).

"It is well-settled that the PCRA's time restrictions are jurisdictional in nature." ***Commonwealth v. Robinson***, 139 A.3d 178, 185 (Pa. 2016). Under the PCRA, any petition for post-conviction relief, including a second or subsequent one, must be filed within one year of the date the judgment of

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[5] The PCRA court did not order Edwards to filed a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

sentence becomes final, unless one of the following exceptions set forth in 42 Pa.C.S. § 9545(b)(1)(i)-(iii) applies:

> (b) Time for filing petition.--
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i)-(iii). Any petition attempting to invoke one of these exceptions "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2).

Here, Edwards' judgment of sentence became final for PCRA purposes on May 6, 2010, ninety days after the Pennsylvania Supreme Court's

February 5, 2010 denial of allowance of appeal in his direct appeal,[6] when the time for filing a petition for writ of *certiorari* in the United States Supreme Court expired. ***See*** 42 Pa.C.S. 9545(b)(3) ("[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review."). U.S. Sup. Ct. R. 13. Therefore, Edwards had until May 6, 2011, to file a timely petition. Since the instant petition was filed on December 29, 2015, it is patently untimely and cannot be reviewed unless one of the statutory exceptions applies.

Edwards, in his response to the PCRA court's Rule 907 notice and in his brief to this Court, cites the PCRA exceptions set forth at 42 Pa.C.S. § 9545(b)(1)(i) and (ii). The PCRA court analyzed Edwards' petition in light of these statutory exceptions, as follows:

> Although [Edwards'] instant petition contains language reciting portions of the PCRA's statutory time-bar, he failed to meaningfully plead any of the exceptions enumerated within it. Instead, [Edwards] primarily presented allegations of counsel malfeasance sparsely interwoven with fragmented, undeveloped references to the time-bar. [Edwards'] attempt to raise layered claims of ineffectiveness was therefore insufficient to satisfy his burden of proof under section 9545(b)(1). ***See Commonwealth v. Wharton***, 886 A.2d 1120, 1127 (Pa. 2005) ("[I]t is well settled that allegations of ineffective assistance of

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[6] ***See Commonwealth v. Edwards***, 981 A.2d 917 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 989 A.2d 7 (Pa. February 5, 2010).

> counsel will not overcome the jurisdictional timeliness requirements of the PCRA.").
>
> Moreover, despite accurately echoing our Supreme Court's uneasiness regarding the difficulty of challenging PCRA counsel's performance in practice, [Edwards'] contention that his petition should be deemed timely filed because he is challenging the effectiveness of his original post-conviction counsel has been unequivocally rejected. ***See Commonwealth v. Robinson***, 139 A.3d 178, 186 (Pa. 2016) ("This Court has never suggested that the right to effective PCRA counsel can be enforced via an untimely filed PCRA petition.").
>
> Finally, even if counsel malfeasance composed the timeliness exception, [Edwards] failed to file his instant petition within sixty days from the conclusion of appellate review on July 29, 2015.[7] ***See*** 42 Pa. Cons. Stat. § 9545(b)(2) (requiring any petition invoking one or more of these exceptions must be filed within 60 days from the date that the claim could have been presented). [Edwards] therefore failed to sufficiently invoke an exception to the PCRA's statutory time-bar.

PCRA Court Opinion, 11/10/2016, at 4–5 (footnotes omitted).

Based on our review of the record and the arguments of Edwards, we agree with the PCRA court's well-reasoned assessment. Accordingly, we conclude Edwards' petition fails to overcome the PCRA time-bar.

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[7] Edwards claims that on August 4, 2015 — within 60 days of the Pennsylvania Supreme Court's July 29, 2015 denial of allowance of appeal on his first PCRA petition — he mailed a second PCRA petition that was lost in the mail. Edwards relies on the "prisoner mail box rule" to argue his petition "is deemed timely regardless if it reaches the court." Edwards' Brief at 5. This assertion, however, does not help Edwards since he failed to satisfy any PCRA statutory exception.

In his second issue, Edwards maintains the PCRA court erred in denying him *habeas corpus* relief.[8] Our standard of review regarding a writ of *habeas corpus* is well-settled:

> Our standard of review of a trial court's order denying a petition for writ of *habeas corpus* is limited to abuse of discretion. Thus, we may reverse the court's order where the court has misapplied the law or exercised its discretion in a manner lacking reason. As in all matters on appeal, the appellant bears the burden of persuasion to demonstrate his entitlement to the relief he requests.

Rivera v. Pa. Dep't of Corr., 837 A.2d 525, 528 (Pa. Super. 2003) (citations omitted).

Edwards claims his detention is unlawful because "there [are] no records that exist relating to a lawful [] sentencing order[.]" Edwards' Brief at 8. ***See also*** Edwards' Petition for Writ of *Habeas Corpus*, 8/21/2014, at ¶8. Edwards cites 42 Pa.C.S. § 9764(a)(8), which provides:

> § 9764. **Information required upon commitment and subsequent disposition**
>
> **(a) General rule.** -- Upon commitment of an inmate to the custody of the Department of Corrections, the sheriff or transporting official shall provide to the institution's records officer or duty officer, in addition to a copy of the court commitment form DC-300B generated from the Common Pleas

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[8] Contrary to the claim in Edwards' brief that the PCRA court "changed" his petition for writ of *habeas corpus* "to a post-conviction relief act petition," the PCRA court's orders and opinion reflect the PCRA court treated the *habeas corpus* petition as the proper vehicle for Edwards' illegal detention claim. Edwards' Brief at 8.

> Criminal Court Case Management System of the unified judicial system, the following information:
>
> ...
>
> (8) A copy of the sentencing order and any detainers filed against the inmate which the county has notice.

42 Pa.C.S. § 9764(a)(8).

In ***Joseph v. Glunt***, 96 A.3d 365 (Pa. Super. 2014), this Court rejected the very same argument:

> The language and structure of section 9764, viewed in context, make clear that the statute pertains not to the DOC's authority to detain a duly-sentenced prisoner, but, rather, sets forth the procedures and prerogatives associated with the transfer of an inmate from county to state detention. None of the provisions of section 9764 indicate an affirmative obligation on the part of the DOC to maintain and produce the documents enumerated in subsection 9764(a) upon the request of the incarcerated person. **Moreover, section 9764 neither expressly vests, nor implies the vestiture, in a prisoner of any remedy for deviation from the procedures prescribed within.**

Id. at 371 (emphasis added). The ***Joseph*** Court found persuasive cases that "deemed a record of the valid imposition of a sentence as sufficient authority to maintain a prisoner's detention notwithstanding the absence of a written sentencing order under 42 Pa.C.S. § 9764(a)(8)." ***Id.*** at 372. In ***Joseph***, the criminal docket of the trial court and the transcript of the sentencing hearing confirmed the appellant's sentence. ***Id.*** at 372.

Here, as in ***Joseph***, the certified record confirms Edwards' judgment of sentence. As the PCRA court explained: "Upon reviewing the criminal docket through the Common Pleas Case Management System, the sentence

imposed by the Honorable Kathryn Lewis on February 3, 2006 was accurately docketed by the Clerk of Courts of [the Court of Common Pleas of Philadelphia County.]. PCRA Court Opinion, 11/10/2016, at 6. Therefore, Edwards' argument fails to warrant *habeas corpus* relief.

Having concluded the PCRA petition is untimely, and that no exception applies to overcome the PCRA time-bar, there is no jurisdiction to address Edwards' remaining claims. Accordingly, we affirm.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/6/2017

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

NICHOLAS EDWARDS

CP-51-CR-1006311-2003
2760 EDA 2016

OPINION

LEON W. TUCKER, J.

This appeal comes before the Superior Court following the dismissal of a Post-Conviction Relief Act ("PCRA")[1] petition filed on December 29, 2015 and prior petition for writ of habeas corpus.[2] On August 9, 2016, this court dismissed the PCRA petition and denied habeas corpus relief for the reasons set forth below.

I. PROCEDURAL HISTORY

On November 21, 2005, following a jury trial presided over by the Honorable Kathryn S. Lewis, Nicholas Edwards (hereinafter referred to as "Petitioner") was convicted of first-degree murder, conspiracy, carrying a firearm without a license, and possessing an instrument of crime. On February 3, 2006, Petitioner was sentenced to life imprisonment on the murder conviction and lesser terms of incarceration on the remaining charges. On July 28, 2009, following the reinstatement of appellate rights *nunc pro tunc*, the Superior Court affirmed the judgment of sentence.[3] The Pennsylvania Supreme Court denied *allocatur* on February 5, 2010.[4]

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[1] 42 Pa. Cons. Stat. §§ 9541-9546.
[2] Petitioner's "Petition for Writ of Habeas Corpus," filed August 21, 2014, predated his PCRA petition.
[3] *Commonwealth v. Edwards*, 981 A.2d 917 (Pa. Super. 2009) (unpublished memorandum).
[4] *Commonwealth v. Edwards*, 989 A.2d 7 (Pa. 2010).

On July 28, 2010, Petitioner timely filed his first *pro se* PCRA petition. Counsel was appointed and subsequently filed an amended petition. After conducting evidentiary hearings, the PCRA court denied the petition on April 23, 2014. The Superior Court affirmed the order denying relief on March 2, 2015.[5] The Pennsylvania Supreme Court denied *allocatur* on July 29, 2015.[6]

On December 29, 2015, Petitioner filed the instant *pro se* PCRA petition, his second. Pursuant to Pennsylvania Rule of Criminal Procedure 907, Petitioner was served notice of the lower court's intention to dismiss his petition on April 26, 2016. Petitioner filed a response to the Rule 907 notice on May 10, 2016. On August 9, 2016, this court dismissed his PCRA petition as untimely and denied habeas corpus relief.[7] On August 24, 2016, the instant notice of appeal was timely filed to the Superior Court.

II. FACTS

At trial, testimony showed that on July 2, 2003, Travis Hendrick and the decedent, Xavier Edmunds were standing outside 2838 Jasper Street in Philadelphia when Petitioner attacked Hendrick with a baseball bat, warning the two avoid traveling on his block. As a result of that assault, Hendrick's elbow had to be surgically replaced. N.T. 11/14/05 at 132-37, 218, 226; 11/15/03 at 153.

Two days later, on July 4, 2003, at about 9:00 p.m., Edmunds was standing outside 2838 Jasper Street with several friends, including Hendrick and Walter Stanton. A vehicle pulled up with Petitioner, pointing a gun at the group through an open window, seated in the rear on the

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[5] *Commonwealth v. Edwards*, 120 A.3d 1043 (Pa. Super. 2015) (unpublished memorandum).
[6] *Commonwealth v. Edwards*, 119 A.3d 350 (Pa. 2015).
[7] The Honorable Leon W. Tucker issued the order and opinion in this matter in his capacity as Supervising Judge of the Criminal Section of the Court of Common Pleas of Philadelphia – Trial Division, as of March 7, 2016, as the trial judge is no longer sitting.

driver's side. Petitioner exited the vehicle and fired two shots at Edmunds, who collapsed to the pavement. Petitioner returned to the vehicle which then drove away. When Hendrick saw Petitioner arrive and noticed that he was armed, he immediately went into the house and called the police. N.T. 11/14/95 at 113-16, 233-34; 11/16/05 at 159-63, 172.

Police arrived at the scene within several minutes. They drove Edmunds to a local hospital where efforts to save his life failed. He was pronounced dead at 9:21 p.m. Based upon information provided by Hendrick and Stanton, police obtained a warrant for Petitioner's arrest. He was located in South Carolina several weeks later and extradited to Philadelphia. N.T. 11/14/05 at 239; 11/16/05 at 12, 157-76; 11/17/05 at 152, 158, 165, 187-88.

III. DISCUSSION

A. Petitioner's current PCRA petition was manifestly untimely.

Petitioner's instant petition raising claims of trial court error, prosecutorial misconduct, and ineffective assistance of counsel was facially untimely. As a prefatory matter, the timeliness of a PCRA petition is a jurisdictional requisite. *Commonwealth v. Robinson,* 12 A.3d 477 (Pa. Super. 2011). A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa. Cons. Stat. § 9545(b)(1). A judgment is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." *Id.* § 9545(b)(3).

Petitioner's judgment of sentence became final for PCRA purposes on April 5, 2010, ninety days after the Pennsylvania Supreme Court denied *allocatur* and time period for filing a petition for writ of *certiorari* in the United States Supreme Court expired. *See id.*; U.S. Sup. Ct.

R. 13 (effective January 1, 1990). Petitioner's petition, filed on December 29, 2015 was therefore untimely by approximately four years. *See* 42 Pa. Cons. Stat. § 9545(b)(1).

B. Petitioner was not eligible for a limited timeliness exception found in 42 Pa. Cons. Stat. § 9545(b)(1)(i)-(iii).

Despite the one-year deadline, the PCRA permits the late filing of a petition where a petitioner alleges and proves one of the three narrow exceptions to the mandatory time-bar found in subsections 9545(b)(1)(i)-(iii). To invoke an exception, a petition must allege and the petitioner must prove:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Id. § 9545(b)(1)(i)-(iii).

Although Petitioner's instant petition contains language reciting portions of the PCRA's statutory time-bar, he failed to meaningfully plead any of the exceptions enumerated within it. Instead, Petitioner primarily presented allegations of counsel malfeasance sparsely interwoven with fragmented, undeveloped references to the time-bar. Petitioner's attempt to raise layered claims of ineffectiveness was therefore insufficient to satisfy his burden of proof under section 9545(b)(1). *See Commonwealth v. Wharton*, 886 A.2d 1120, 1127 (Pa. 2005) ("it is well settled that allegations of ineffective assistance of counsel will not overcome the jurisdictional timeliness requirements of the PCRA.").

Moreover, despite accurately echoing our Supreme Court's uneasiness regarding the difficulty of challenging PCRA counsel's performance in practice,[8] Petitioner's contention that his petition should be deemed timely filed because he is challenging the effectiveness of his original post-conviction counsel has been unequivocally rejected.[9] *See Commonwealth v. Robinson*, 139 A.3d 178, 186 (Pa. 2016) ("This Court has never suggested that the right to effective PCRA counsel can be enforced via an untimely filed PCRA petition.").

Finally, even if counsel malfeasance composed the timeliness exception, Petitioner failed to file his instant petition within sixty days from the conclusion of appellate review on July 29, 2015. *See* 42 Pa. Cons. Stat. § 9545(b)(2) (requiring any petition invoking one or more of these exceptions must be filed within 60 days from the date that the claim could have been presented). Petitioner therefore failed to sufficiently invoke an exception to the PCRA's statutory time-bar.

C. Petitioner was not entitled to habeas corpus relief based upon the Department of Corrections' lack of a written sentencing order.

This court did, however, evaluate Petitioner's claim that the Department of Corrections ("DOC") lacked legal authority for his continued detention due to the lack of a written sentencing order, in contravention of 42 Pa. Cons. Stat. § 9764(a)(8) (relating to information required upon commitment and subsequent disposition), and 37 Pa. Code § 91.3 (reception of inmates). *See Joseph v. Glunt*, 96 A.3d 365 (Pa. Super. 2014) (concluding that the PCRA did not subsume an illegal-sentence claim based on the inability of the DOC to produce a written

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[8] In *Commonwealth v. Holmes*, 79 A.3d 562 (Pa. 2013), our Supreme Court opined that "there is no formal mechanism in the PCRA for a second round of collateral attack focusing upon the performance of PCRA counsel, much less is there a formal mechanism designed to specifically capture claims of trial counsel ineffectiveness defaulted by initial-review PCRA counsel." *Holmes*, 79 A.3d at 583–584. The *Holmes* Court continued that it "has struggled with the question of how to enforce the 'enforceable' right to effective PCRA counsel within the strictures of the PCRA, as the statute was amended in 1995." *Id.* at 584.

[9] *See* PCRA petition, 12/29/15 at 21.

sentencing order). Upon reviewing the criminal docket through the Common Pleas Case Management System, the sentence imposed by the Honorable Kathryn Lewis on February 3, 2006 was accurately docketed by the Clerk of Courts of this court. The Superior Court of Pennsylvania has held that even when the DOC lacks possession of a written sentencing order, it has continuing authority to detain a prisoner. *Id.* at 372.

IV. CONCLUSION

Mr. Edwards' renewed efforts to obtain collateral relief were unavailing. Petitioner failed to demonstrate that his PCRA petition satisfied an exception to the PCRA's statutory time-bar. Petitioner's alternative challenge to the legality of his detention, although reviewed outside the framework of the PCRA, was nevertheless meritless. Accordingly, for the reasons stated herein, the decision of the court dismissing the PCRA petition and denying habeas corpus relief should be affirmed.

BY THE COURT:

LEON W. TUCKER, J. /NV

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
THE HONORABLE LEON W. TUCKER
POST CONVICTION RELIEF ACT UNIT
THE JUANITA KIDD STOUT CENTER FOR CRIMINAL JUSTICE
1301 FILBERT STREET
PHILADELPHIA, PA 19107

TO: Nicholas Edwards CP-51-CR-1006311-2003
GM8660
SCI Forest
P.O. Box 945
Marienville, PA 16239

NOTICE PURSUANT TO PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 907

DATE: April 26, 2016

You are hereby advised that in twenty (20) days from the date of this NOTICE, your request for post conviction relief will be denied / dismissed without further proceedings. No response to this Notice is required. If, however, you choose to respond, your response is due within twenty calendar days of the above date. The reason for denial/dismissal is as follows:

X **Your petition is untimely filed and does not invoke an exception to the timeliness provision of the Post-Conviction Relief Act. *42 Pa.C.S.A. §9545 (b)(1)(i)-(iii).***

The court has reviewed your PCRA petition raising various issues including trial error and ineffective assistance of counsel. Preliminarily, your judgment of sentence became final for PCRA purposes on May 5, 2010, ninety days after the Pennsylvania Supreme Court denied your petition for allowance of appeal and the time for filing a petition for writ of *certiorari* to the United States Supreme Court expired. *See* 42 Pa.C.S.A. § 9545(b)(3); U.S. Supreme Court Rule 13 (effective January 1, 1990). Thus, in order to satisfy the timeliness requirement of the PCRA, you were required to file your petition within one year from May 5, 2010. Your petition, filed on December 29, 2015, was therefore untimely by approximately four years.

Your attempt to raise layered claims of ineffectiveness was insufficient to satisfy your burden of proof under 42 Pa.C.S.A. § 9545(b)(1). *See Commonwealth v. Wharton*, 886 A.2d 1120, 1127 (Pa. 2005)("it is well settled that allegations of ineffective assistance of counsel will not overcome the jurisdictional timeliness requirements of the PCRA."). In order to have properly challenged PCRA counsel's stewardship, you needed to raise her ineffectiveness in the PCRA court during the pendency of your first collateral petition. *See Commonwealth v. Henkel*, 90 A.3d 16, 26 (Pa. Super. 2014) *appeal denied*, 101 A.3d 785 (Pa. 2014)(citing *Commonwealth v. Pitts*, 981 A.2d 875, 880 (Pa. 2009)(finding failure to argue PCRA counsel's ineffectiveness prior to the PCRA appeal results in waiver of the issue of PCRA counsel's ineffectiveness). Your purported letters to counsel did not constitute a challenge in the court. Thus in addition to your petition being untimely, your substantive claims were waived. *See* 42 Pa.C.S.A. § 9543(a)(3).

You also filed a separate writ of *habeas corpus* contending that you are being unlawfully detained due to the lack of a written sentencing order in contravention of 42 Pa.C.S.A. § 9764(a)(8). Your claim is false. The Honorable Kathryn Lewis entered a sentencing order in this matter on February 3, 2006. The Superior Court of Pennsylvania has held that even when the Department lacks possession of a written sentencing order, it has continuing authority to detain a prisoner where a criminal docket provided by trial court and a transcript of the sentencing hearing confirm the imposition, and legitimacy, of the prisoner's sentence. *Joseph v. Glunt*, 96 A.3d 365, 372 (Pa. Super. 2014). Thus, even in the absence of a written sentencing order, the DOC retains detention authority. *Id.*

cc: Robin Godfrey, Esquire, District Attorney's Office
Counsel of Record (if applicable)

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY PENNSYLVANIA CRIMINAL DIVISON

Commonwealth of pennsylvania : No. CP-51-CR-1006311-2003
VS. :
Nicholas Edwards :
petitioner :

NOTICE TO RESPONSE PURSUANT TO PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 907

TO THE HONORABLE LEON W. TUCKER, THE JUDGE OF THE SAID COURT:

Petitioner, Nicholas Edwards, pro se files this response pursuant to 42 pa. c.s. 9541-9546.

AND NOW, this 9th day of may, 2016 after due consideration and review petitioner petition for Post Conviction Relief Act (PCRA) and the notice to denied/dismissed without further proceedings by The Honorable Leon W. Tucker.

1. All Prior counsel, Trial counsel, direct appeal counsel and PCRA counsel were all ineffective and failed to delovpe the defendant issues.

2. There is a genuine issue concerning any material of the facts and that the petitioner is entitled to relief as a matter of law.

3. The petitioner trial and appeal proceeding resulting in his conviction were so unfair that a miscarriage of justice occured which no civilized society can tolerate, and the the petitioner is innocent of the crime. SEE; COM V. LAWSON, 549 A.2D 107, 112 (PA. 1988)

4. The timeliness exceptions are as follows; 9545 (b)(i)(ii).

(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the constitution or laws of this commonwealth or the constitution or laws of the united states.

(ii) The facts upon which the claims is predicated were unknown to the petitioner and could not have been ascertained by the execrcise of due diligence.

5. Petitioner makes his objection to the notice to dismissed.
6. Petitioner is raising these three and seven more issues.
7. Defendant/ Petitioner is in custody in violation of the Constitution or laws or treaties of the United States Constitution. See; Withrow v. williams, 507 U.S. 680, 715 (1993), and defendant was denied his right to effective assistance of counsel under the Sixth Amendment and was denied due process of law under the Fourteenth Amendment when all prior counsel's failed to challenge legality of the sentening statutes, trial counsel was unfamiliar with the first degree murder statute he was ineffective an illegal sentence is never wavied. Counsel failed to investigated See; Strickland v. Washington, 466 U.S. 668 (1984).
8. Defendant / Petitioner was denied his right to effective assistance of counsel's under the Sixth Amendment and was denied due process of law under the Fourteenth Amendment to the United States Constitution when PCRA Counsel failed to raise and develop the issues and adequately investigate the record and raise a layered claim of trial ans appellate counsel's ineffectiveness. This issue have arguable merit, defendant was prejudice resulting from trial counsel's action or inaction, counsel han no reasonable basis for not leveling this issue. See; Com v. McGill, 832 A.2D 1014 (Pa. 2003).
9. Defendant / Petitioner was denied his rights to effective assistance of PCRA counsel and trial counsel and appellate counsel's under the Sixth Amendment and was denied due process os law under the Fourteenth Amendment to the United States Constitution, When the commonwealth comitted a brady violation was prosecutorial misconduct. The prosecutorial suppression of the evidence that is material to guilt or punishment, the evidence was exculpatory or impeaching, it was favorable to the defendant, and defendant was prejudice. All counsel failed to argue this issues on appeal. There is a reasonable probability that had the evidence been disclose to the defense that the result of the proceeding would have been didderent. See; Brady v. Maryland, 373 U.S. 83 (1963).
10. The court lack authority to misconstrue defendant petition by the state stutates.
11. This is a violation of the separation of powers.

WHEREFORE, for the foregoing reasons, petitioner prays that this Honorable court enter an order reverse the PCRA notice to denied / dismissed. or in alternative grant petitioner a evidentiary hearing ; or in the alternative grant the proceeding to contince; or in the alternative grant a new sentencing hearing; or in the alternative grant a new trial.

Respectfully Submitted,
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Date; 5-9-2016