

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2251

EDWARD N. DANIELS,
Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI, et al.

(D.C. Civ. No. 2:18-cv-00687)

ORDER

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

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

BY THE COURT,

s/ David J. Porter
Circuit Judge

Dated: September 27, 2021

Cc: All counsel of record

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

EDWARD N. DANIELS,
Petitioner,

v.

MARK GARMAN, et al.,
Respondents.

CIVIL ACTION
NO. 18-00687

PAPPERT, J.

May 5, 2020

MEMORANDUM

Edward N. Daniels filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) Respondents filed a response (ECF No. 13) and Daniels filed a reply. (ECF No. 22.) Magistrate Judge Marilyn Heffley issued a Report and Recommendation recommending denial of the petition. (ECF No. 23.) Daniels asserted objections (ECF No. 30) to which no response was filed. After filing his objections, Daniels also filed a motion seeking to expand the record. (ECF No. 32.) The Court overrules Daniels's objections, adopts the R&R, denies Daniels's petition and denies the motion to expand the record.

I

Following a jury trial in the Philadelphia County Court of Common Pleas, Daniels was convicted of two counts each of second-degree murder, robbery and criminal conspiracy and one count of carrying a firearm on a public street or public property. See *Commonwealth v. Daniels*, Nos. CP-51-CR-0012194-2009, CP-51-CR-0012199-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Apr. 3, 2012)¹ (Resp't Br., ECF No. 113, Ex.

¹ The two sets of charges against Daniels were consolidated through the proceedings from trial through the denial of his PCRA petitions. Citations to the Court of Common Pleas Docket in this

A.) (hereinafter "Trial Ct. Op.") The trial court imposed two consecutive mandatory sentences of life imprisonment on the murder convictions as well as concurrent sentences of 10 to 20 years' imprisonment for the firearms offense. Transcript of Record at 1-2, *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009, (Pa. Ct. Com. Pl. Phila. Cnty. Dec. 1, 2011).

A

Daniels's conviction arises from the following circumstances. Keith Epps planned to rob Rian Thal, a party promoter who was involved in selling powder cocaine, and Timothy Gilmore, a drug courier, with the help of Daniels, Donnell Murchison and Langdon Scott. On June 27, 2009, armed with semi-automatic weapons, Daniels, Murchison and Scott entered the Philadelphia apartment building where Thal lived while Epps waited in a van outside. Epps's plan went awry, as captured in part by surveillance cameras installed at the apartment complex. (See Trial Ct. Op. at 2-4.)

At trial, Scott explained he thought the plan was to purchase \$4,500 of powder cocaine, but while they were in the elevator, Murchison announced that while Scott was buying drugs, Murchison and Daniels were going to rob Thal and Gilmore. At that point, Scott declined to participate in the venture and the three men left the apartment building. Scott and Daniels entered the waiting van to talk to Epps while Murchison waited outside. Scott left and co-defendant Antonio Wright arrived at the building to take his place. Daniels and Murchison reentered the apartment building with Wright around 5:00 p.m. and went to the seventh floor to wait for Thal and Gilmore. Wright

Opinions are to the Docket for case number CP-51-CR-0012194-2009 and not to the docket for case number CP-51-CR-0012199-2009.

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and Daniels waited at one end of the hallway while Murchison waited on the other end. Epps called Murchison as Thal and Gilmore entered the building and, when they got off the elevator, Daniels, Murchison and Wright pulled out guns and announced a robbery. Gilmore resisted and Wright shot him. Murchison then shot Thal in the back of the head, killing her. Murchison saw that Gilmore was still alive and shot him twice in the head, killing him. Daniels, Murchison and Wright fled to Epps's van and they all left the scene without money or drugs. (Trial Ct. Op. at 2-4.)

During their investigation, Philadelphia Police obtained Epps's cell phone records, which showed numerous phone calls to individuals involved, including Wright, Scott and Murchison. Detective Ron Dove of the Homicide Unit, however, was unable to verify that any calls were placed between Epps and Daniels. Ballistic tests revealed that the bullets lodged in Gilmore and Thal's heads belonged to Murchison's weapon. Detectives arrested Wright. Wright confessed to shooting Gilmore and being involved in the robbery conspiracy, but he did not mention anyone else involved in the murders. (*Id.* at 5.)

Scott, who also had been arrested, testified at a preliminary hearing about his involvement in the crimes and was later stabbed numerous times in prison after being moved to a cell block where Daniels was being held. When Scott was shown surveillance tapes during the trial, he identified Murchison and Daniels as the men with whom he had entered the building on the day of the murders. Murchison testified at trial, but the court struck his testimony after he refused to undergo cross-examination. (*Id.* at 5-6.)

Daniels's federal probation officer Akaga Campbell also testified and identified

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Daniels as one of the men shown on surveillance video from the apartments and in still photographs captured from the video. Campbell stated her opinion was based on Daniels's recognizable facial features and his choice of clothing. Under cross-examination, she testified that she saw Daniels four to six times a month from February 2009 until his arrest on July 10, 2009. (*Id.* at 6.)

B

Daniels appealed his conviction, raising: (1) the trial court's decision to not grant a mistrial when Murchison, appearing as a Commonwealth witness, testified to Daniels's participation in the double murder on direct examination, but refused to answer any questions on cross examination; and (2) the court's decision to allow his probation officer to identify him as a person depicted in the surveillance video of the murder and accompanying still photographs. Statement of Matters Complained of on Appeal Filed Pursuant to Pa. R. App. P. 1925(b) at ¶¶ 1-2, *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Feb 21, 2012) (hereinafter "Matters Complained of on Direct Appeal.") The Superior Court vacated one of Daniels's conspiracy convictions and affirmed all other aspects of the judgment of sentence. *Commonwealth v. Daniels*, No. 188 EDA 2021, 2013 WL 11253764 (Pa. Super. Ct. Sept. 27, 2013) (see also Resp't Br., Ex. B.) (hereinafter "Super. Ct. Op."). His request for allowance of appeal to the Pennsylvania Supreme Court was denied. *Commonwealth v. Daniels*, 537 EAL 2013 (Pa. 2014).

Daniels filed a timely *pro se* petition under Pennsylvania's Post Conviction Relief Act. *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Apr. 14, 2014.) After counsel was appointed to represent him, Daniels filed an

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amended PCRA petition. *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009, Dkt. at 14 (Pa. Ct. Com. Pl. Phila. Cnty. May 25, 2015.) In his amended petition, Daniels claimed his trial counsel was ineffective for failing to object to: (1) 17 comments in the prosecutor's opening statement; (2) 17 instances of alleged prosecutorial misconduct during the trial; and (3) 32 alleged instances of judicial error. Am. Pet'r PCRA Br., *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009 (May 25, 2015). Neither Daniels's *pro se* PCRA petition nor his counseled amended petition alleged ineffectiveness of his direct appeal counsel. The PCRA court filed a notice of its intention to dismiss Daniels's petition pursuant to Pennsylvania Rule of Criminal Procedure 907 and, after he failed to respond to the notice, dismissed it without a hearing. Opinion at 2 n.4, 7, *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Mar. 8, 2016) (Resp't Br., Ex. C.) (hereinafter "First PCRA Trial Ct. Op."). Daniels appealed to the Superior Court, which affirmed the dismissal, finding that his PCRA claims were without merit. *Commonwealth v. Daniels*, No. 539 EDA 2016, 2016 WL 6124110, at *3-4 (Pa. Super. Ct. Oct. 20, 2016) (see also Resp't Br., Ex. D.) The Pennsylvania Supreme Court denied his petition for allowance of appeal. *Commonwealth v. Daniels*, 169 A.3d 3 (Pa. 2017).

Daniels filed a second PCRA petition which the court dismissed as untimely. *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009, Dkt. at 16 (Pa. Ct. Com. Pl. Phila. Cnty. June 2, 2017 to July 11, 2017); see also *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009 (Pa. Ct. Com. Pl. Phila. Cnty. July 11, 2017) (Resp't Br., Ex. E) (hereinafter "Second PCRA Trial Ct. Op."), at 3. Daniels appealed that Order, but the Superior Court affirmed the lower court's opinion and denied Daniels' appeal.

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Commonwealth v. Daniels, No. 2525 EDA 2017, 2018 WL 3469857, at *8 (Pa. Super. Ct. July 9, 2018) (hereinafter “Second PCRA Super. Ct. Op.”).

Daniels then filed a third PCRA petition which the court dismissed again as untimely. *Commonwealth v. Daniels*, No. CP-51-CR-0012194-2009, Dkt. at 17-18 (Pa. Ct. Com. Pl. Phila. Cnty. Aug. 28, 2018, Sept. 18, 2018, and Oct. 16, 2018.). Daniels appealed that decision to the Superior Court and the appeal remains pending. *Id.* (Dec. 16, 2018); *see also Commonwealth v. Daniels*, 35 EDA 2019 (Pa. Super. Ct.).

Daniels filed his habeas petition in this Court on February 16, 2018 (ECF No. 1), after the PCRA court determined that his second PCRA petition was untimely, before the Superior Court acted on his appeal from that determination, and before he filed his third PCRA petition. Judge Heffley recommended that Daniels’s petition be denied. (ECF No. 23.)

II

Daniels raises five broad objections to Judge Heffley’s R&R, arguing that: (1) his Sixth Amendment right to confront witnesses against him was violated when Murchison refused to testify on cross-examination (Pet’r Obj., ECF No. 30 at 2-5); (2) the trial court erred in admitting the probation officer’s testimony identifying him (*id.* at 5-7); (3) his trial counsel was ineffective for nine different reasons (*id.* at 7-14); (4) he is entitled to a new trial based on newly discovered evidence (*id.* at 14-17); and (5) his appellate counsel was ineffective. (*Id.* at 17-18.) Daniels further breaks his objections into multiple sub-arguments. The Court reviews *de novo* the specific portions of the R&R to which he objects.² See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P.

² “[F]or the portion of the R&R to which no objection [is] made, the Court reviews the R&R for clear error.” *Harris v. Mahally*, No. 14-2879, 2016 WL 4440337, at *4 (E.D. Pa. Aug. 22, 2016).

72(b)(3). The Court “may accept, reject, or modify” Judge Heffley’s conclusions “in whole or in part.” 28 U.S.C. § 636(b)(1)(c).

Courts give “a liberal construction to *pro se* habeas petitions.” *Rainey v. Varner*, 603 F.3d 189, 198 (3d Cir. 2010) (quoting *United States ex rel. Montgomery v. Brierley*, 414 F.2d 552, 555 (3d Cir. 1969) (citation omitted)). Pursuant to 28 U.S.C. § 2254, a petition for writ of habeas corpus may be granted only if (1) the state court’s adjudication of the claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;” or if (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).

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). In order to determine whether a state court’s application of federal law is “unreasonable,” the Court must apply an objective standard, such that the relevant application “may be incorrect but still not unreasonable.” *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001) (quoting *Williams* 529 U.S. at 409-10). The test is whether the state court decision “resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.”

Since the Court liberally construes Daniels’s objections and applies them to the R&R in its entirety, the Court reviews all of the R&R’s findings and recommendations *de novo*.

Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 890 (3d Cir. 1999) (en banc).

“Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence.” *Dellaveccchia v. Sec'y Pa. Dep't of Corrs.*, 819 F.3d 682, 692 (3d Cir. 2016) (alteration in original) (quoting *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000)). State court factual determinations are not unreasonable “merely because the federal habeas court would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citing *Williams*, 529 U.S. at 411). Rather, § 2254(d)(2) requires “substantial deference” to the state trial court. *Brumfield v. Cain*, 576 U.S. 305, 135 S. Ct. 2269, 2277 (2015). If “[r]easonable minds reviewing the record might disagree’ about the finding in question, ‘on habeas review that does not suffice to supersede the trial court’s . . . determination.’” *Wood*, 558 U.S. at 301 (quoting *Rice v. Collins*, 546 U.S. 333, 341-342 (2006) (alteration in original)). However, “[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,” and “does not by definition preclude relief.” *Brumfield*, 135 S. Ct. 2269 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

III

A

Daniels argues he is entitled to *habeas* relief because he was deprived of his right to confront Murchison when Murchison refused to answer questions on cross-examination and the trial court declined to declare a mistrial. (Pet'r Mem., ECF No. 1, at 3-10.) Judge Heffley found the trial court did not make a decision contrary to or involving an unreasonable application of clearly established federal law where it struck

Murchison's testimony and issued a curative instruction telling the jury to disregard everything Murchison said. (R&R at 14.) Daniels objects and contends that the trial court's action was not enough to remedy the violation of his Sixth Amendment right to confrontation. (Pet'r Obj., ECF 30, at 2.) He complains that Murchison's testimony, delivered on a Friday, implicated him and the curative instruction, not delivered until Monday, was "brief" and "simple" and not sufficient "to dispel the impact" of the testimony. (*Id.* at 3-4.)

Delivering the curative instruction to jurors, the trial court explained:

[Y]ou observed on Friday the fact that [Murchison] did not answer questions, the majority of the questions. He had some difficulty with the Commonwealth's questions and he did not answer a majority of [Epps's] attorney's questions and as such, he did not sit for cross-examination, so I am striking his testimony.

Now, what that means is you have to strike him from your memory bank as if this witness didn't testify. The fact that he testified to giving a statement, you strike that out. The fact that he testified to certain portions of that statement or the majority of the statement or the whole statement, you strike it out. You are not to consider that when you go back to deliberate.

You are not to consider his demeanor. You are not to consider anything about him. The witness' testimony has been stricken and I can't emphasize that enough. It is something that under the law, someone has to sit for cross-examination and I have made the determination this witness will not sit for cross-examination and as such, the testimony, it is as if it never happened. Just put it right out of your minds and we will move on from there.

(Nov. 21, 2013 Trial Tr. at 25-26.)

Daniels faults the trial court for letting the jurors "contemplate, or ponder, Murchison's testimony all weekend." (Pet'r Reply, ECF No. 22, at 5.) The timing of the trial court's curative instruction, while not ideal, was not unreasonable given that Murchison testified on Friday afternoon and his resistance to answering questions

could not have been known prior to his cross-examination. The court required time to entertain argument about Defendants' motion for a mistrial before determining that a curative instruction was sufficient.

Daniels argues *Bruton v. United States*, 391 U.S. 123, 136 (1968), required a mistrial when Murchison became uncooperative, but it does not apply here. As the Superior Court explained in its opinion on direct appeal,³ "*Bruton* involved the admission of a co-defendant's confession that also implicated the non-testifying defendant," here "Murchison was not a co-defendant at trial," as he had already pled guilty.⁴ (Super. Ct. Op. at 11.) And here, unlike in *Bruton*, Murchison's testimony was not admitted for any purpose against anyone, it was stricken. The jurors were instructed not to consider it for any reason. The state court's decision was not an unreasonable application of United States Supreme Court precedent.

Further, "to be addressable on a writ of habeas corpus, the 'inferences from a witness' refusal to answer [must have] added *critical weight* to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." *Todaro v. Fulcomer*, 944 F.2d 1079, 1084-85 (3d Cir. 1991) (emphasis added) (quoting *Douglas v. Alabama*, 380 U.S. 415, 420 (1965) (further citations omitted)). Murchison's stricken testimony was not the only evidence against Daniels at trial and did not add critical weight to the case against him. Other independent evidence of Daniels's

³ The trial court also considered argument regarding whether *Bruton* required a mistrial, ultimately deciding that it was not applicable before giving the curative instruction to jurors. (November 21, 2013 Trial Tr. at 3-23.)

⁴ Daniels acknowledges this in his habeas petition. (See Pet'r Mem., at 5 ("Murchison was not tried along with Daniels, but pled guilty the week before trial.").)

involvement included Langdon Scott's testimony that Daniels and Murchison were with him during the initial, aborted trip into the apartment building and that Daniels remained in Epps's van when Scott left the area before the murders. (Nov. 15, 2011 Trial Tr. at 11-22, 29; Nov. 16, 2011 Trial Tr. at 55, 83.) Scott also identified Daniels on video surveillance footage from the apartment building on the day of the crime. (*Id.* at 33-35.) In addition, Daniels's probation officer identified him in the surveillance video captured from the crime scene. (Nov. 17, 2013 Trial Tr. at 39-43.) Under the circumstances, it was not unreasonable for the trial court to find that it was appropriate to strike Murchison's testimony in lieu of granting a mistrial. "Prejudicial testimony will not mandate a mistrial when there is other significant evidence of guilt which reduces the likelihood that the otherwise improper testimony had a substantial impact upon the verdict of the jury." *McGlory*, 968 F.2d at 344 (citation omitted).

Daniels has not shown that the stricken testimony had "a substantial and injurious effect or influence in determining the jury's verdict . . ." and has not demonstrated that the circumstances surrounding Murchison's stricken testimony support a grant of *habeas* relief pursuant to 28 U.S.C. § 2254. *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 2198 (2015).

B

Daniels claims "the trial court erred in admitting the lay opinion testimony of a probation officer to identify [him], in violation of the due process clause." (Pet'r Mem. at 32; see also *id.* at 10-15.) It allowed the prosecution to call Campbell as a witness and she testified she was a federal probation and parole officer assigned to supervise Daniels from February until July 2009. (Nov. 17, 2013 Trial Tr. at 37-38.) She then

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identified Daniels as one of three men who were present in surveillance video and still photos captured from the hallway of the crime scene. (*Id.* at 39-43.)

Judge Heffley concluded Daniels's claim about his probation officer's identification testimony was: (1) non-cognizable to the extent he claimed state court error in the admission of evidence; (2) procedurally defaulted because it was not raised as a federal due process violation in state court; and (3) even if it were cognizable and not procedurally defaulted, meritless. (R&R at 14-18.)

Daniels objects to the R&R, arguing that: (1) his federal due process claim was not procedurally defaulted because in state court he relied on a case premised on the federal constitutional standards set forth in *Stovall v. Denno*, 388 U.S. 293 (1967) (Pet'r Obj. at 5-6); (2) the claim he raised in state court was a federal due process claim because Pennsylvania Rule of Evidence 701 is "so interwoven with federal law that it cannot be said to be independent of the merits of" such a claim (*id.* at 6-7); and (3) the R&R erroneously failed to consider the merits of his arguments under *Stovall*, *Manson v. Braithwaite*, 432 U.S. 98 (1977) and *Simmons v. United States*, 390 U.S. 377 (1968). (*Id.* at 7.)

To "fairly present" a claim in state court, a habeas petitioner must "present a federal claim's factual *and* legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001) (emphasis added, citation omitted). It is not enough that the facts required to support the federal claim were available to the state courts. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). On appeal from his judgment of sentence, Daniels asserted unsuccessfully that the trial court

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erred as a matter of law and abused its discretion when it erroneously permitted a Federal Probation Officer to identify defendant as the person depicted in a surveillance video of the murder (and still photographs from said video) *in violation of Pennsylvania Rule of Evidence 701* as the Officer's lay opinion was not 'helpful' and invaded the province of the jury.

(Matters Complained of on Direct Appeal at 1-2; *see also* Trial Ct. Op. at 11 (emphasis added).) In his appeal to the Superior Court, Daniels argued that "[t]he Trial Court erred in admitting a probation officer's lay opinion testimony that [he] was the person depicted in the surveillance camera video recording of the crime." (Super. Ct. Op. at 7 (quoting Br. for Appellant, *14, *Commonwealth v. Daniels*, No. 188 EDA 2012, 2013 WL 3859240 (Pa. Super. Ct. Apr. 15, 2013).) Rejecting Daniels's argument, the Superior Court held that "the trial court did not err in permitting" the probation officer's identification testimony because it "was admissible to aid the jury in deciding a material fact in issue." (Super. Ct. Op. at 13.)

There is no doubt that Daniels challenged the admission of his probation officer's testimony in state court. But the arguments Daniels made in state court bear little resemblance to those he now asserts. Despite his insistence that his state court pleadings relied on Supreme Court precedent, a review of the brief he filed with the Superior Court reveals the opposite. The argument presented there was exclusively based on state evidentiary rules relating to the admissibility of lay opinion testimony. Daniels's brief contained no reference to any of the Supreme Court cases that he cites on habeas review, nor any discussion of the reliability of identification evidence.

Daniels objects to this conclusion, pointing to his citation in his Superior Court brief to *Commonwealth v. Austin*, 657 N.E.2d 458 (Mass. 1995). He argues that *Austin* "was explicitly based on the Supreme Court decision in *Stovall* . . ." and implies he

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raised a federal due process claim by relying on the Massachusetts decision. (Pet'r Mem. at 10-15; see also Pet'r Obj. at 7.) Daniels is wrong. He cited *Austin* exclusively for its discussion of the improper admission of lay testimony under state rules of evidence. *Austin* did mention *Stovall* in its discussion of a different claim, but that is certainly not a fair presentation of the entirely separate *Stovall* analysis.

As Judge Heffley properly recognized, a habeas court may only review the challenge actually raised in state court. Focusing first on the claim Daniels clearly raised in state court – the legal challenge under Pennsylvania Rule of Evidence 701 – the Court agrees it is not cognizable here. Daniels may not raise claims alleging state court error in the admission of evidence in the habeas context. See *Keller v. Larkins*, 251 F.3d 408, 416 n.2 (3d Cir. 2001.) “A federal habeas court is limited to deciding whether the admission of the evidence rose to the level of a due process violation.” *Id.* Thus, the Court cannot decide whether it was appropriate for the trial court to admit Daniels’s probation officer’s identification testimony under Pennsylvania Rule of Evidence 701.

Daniels argues the claim he presents in his habeas petition is “so interwoven with federal law that it cannot be said to be independent of the merits of a petitioner’s federal claims.” (Pet'r Obj. at 6-7.) However, the rule he cites is inapplicable. When a state court denies a claim based on a rule of procedure, such a ruling only bars review of the merits of a federal claim if the state’s procedural rule is independent and adequate of the merits of the underlying federal rule. *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011). That is not what happened to Daniels. The Pennsylvania Superior Court reviewed the claim he presented and rejected it on a substantive basis. The

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question is whether Daniels put the state courts on notice that he was asserting a federal due process claim instead of a claim that the trial court violated Pennsylvania Rule of Evidence 701. He cannot transform his prior challenges to the state evidentiary rulings into a due process claim that avoids procedural default by mentioning the Due Process Clause in his habeas petition. See e.g., *Johnson v. Rosemeyer*, 117 F.3d 104, 110 (3d Cir. 1997) (“[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.”) “If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.” *Duncan v. Henry*, 513 U.S. 364, 366 (1995). Daniels’s failure to reference his right to a “fair trial,” the Due Process Clause or any cases relying on these standards in his state court proceedings forecloses his argument.⁵ (See Br. for Appellant, *15-23, *Commonwealth of Pennsylvania v. Daniels*, 2013 WL 3859240.)

In giving Daniels every benefit of the doubt, Judge Heffley also reviewed his challenge under Pennsylvania Rule 701, assuming for the sake of argument that he had raised it as a federal due process claim. Even if he had, Daniels still has not shown that the state court’s determination to permit the probation officer’s identification testimony “by itself so infected the entire trial that the resulting conviction violates due

⁵ His unexhausted claim is also procedurally defaulted since the time to seek further review in state court has expired. Daniels has not shown that any procedural default should be excused. Federal courts may not consider procedurally defaulted claims unless the petitioner “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[s] will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In his reply brief, Daniels argues that there is cause for his default because his appellate counsel’s performance was deficient. (Pet’r Reply, ECF No. 22, at 10-11.) However, “[t]o show cause, a petitioner must demonstrate some objective factor *external to the defense* that prevented compliance with the state’s procedural requirements.” *Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001) (emphasis added). Daniels has not done this.

process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *see also Bianca v. Attorney Gen. of New Jersey*, 623 F.2d 307, 312 (3d Cir. 1980) ("[E]videntiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial."). Campbell was not the only witness who identified Daniels; Scott also identified him during the trial. In addition, members of the jury were capable of drawing their own conclusions from the surveillance video from the apartment building which "they were shown . . . several times," as Daniels himself concedes. (Pet'r Mem. at 13.) Ultimately, Daniels has not shown that the admission of his probation officer's identification testimony was "of such magnitude as to undermine the fundamental fairness of the entire trial" such that habeas relief would be warranted based on Daniels's due process argument.

Finally, Daniels argues that Judge Heffley's review of the merits of his claim improperly failed to consider his arguments under *Stovall*, *Manson*, and *Simmons*. (*Id.* at 7.) The Court disagrees. The claim Daniels brought in state court was exclusively a challenge to the admissibility of lay opinion testimony under the Pennsylvania Rules of Evidence. Judge Heffley chose to address the merits of his claim in the alternative, but she restricted her review to a constitutional challenge relating to the admissibility of lay opinion testimony, as opposed to considering Daniels's argument that the testimony was inadmissible unreliable identification testimony. In state court, Daniels did not challenge the probation officer's testimony as unreliable; he challenged it as improper opinion testimony. Those are two completely distinct legal theories. Judge Heffley was under no obligation to review the reliability argument in the alternative.

C

Daniels also asserts nine ineffective assistance of trial counsel claims.⁶ He argues his trial attorneys were ineffective for not objecting or moving for a mistrial in response to the admission of certain testimony, evidence and statements made during opening and closing arguments. (Pet'r Mem. at 15-38.) Judge Heffley concluded that each of Daniels' ineffective assistance claims is meritless. (R&R at 19-29, 35-37.) Daniels objects to all of her findings. (Pet'r Obj. at 7-14.)

To establish an ineffective assistance of counsel claim, Daniels must satisfy the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). He must show (1) that his counsel's performance "fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." *Id.* at 687. 88, 694. Counsel cannot be found to be ineffective for failing to pursue a meritless claim. See *United States v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015) ("[T]here can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." (quoting *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999)). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689 (explaining that courts should not second-guess counsel's assistance and engage in "hindsight, to reconstruct the circumstances of counsel's challenged conduct").

Daniels argues his ineffective assistance of counsel claim was not adjudicated on

⁶ In his memorandum of law, Daniels merged his first two claims into one claim.

the merits during his PCRA proceedings. (Pet'r Mem. at 34.) In his objections, he contends that the R&R incorrectly concluded that the state courts adjudicated his ineffective assistance of counsel claims on the merits because his PCRA counsel did not provide a legal basis or factual support for those claims in his PCRA petition. (Pet'r Obj. at 7-8.)

On review, the Superior Court acknowledged inadequacies in the ineffectiveness claims in Daniels's PCRA petition, but "reviewed each of his claims carefully to determine whether any merit relief" and "found none that call the PCRA court's holding into question." See PCRA Super. Ct. Op. at 9 n.6. From this statement, Judge Heffley concluded the Superior Court reviewed the claims on the merits in the alternative. Daniels objects to this conclusion, arguing that the state court did not have the benefit of his detailed pleading on each issue. Any distinction is without a difference; Judge Heffley's rejection of Daniels's ineffectiveness claims was not dependent on Section 2254's deferential standard of review. Since the Court concludes that these claims are meritless even if reviewed under a *de novo* standard, it need not consider this objection.

2

Daniels contends his trial counsel should have requested a cautionary instruction during Scott's trial testimony to dispel any inference that Daniels was responsible for Scott having been stabbed in prison after his preliminary hearing testimony. (Pet'r Mem. at 15-17.) He argues the prosecutor's questions, which raised prior physical altercations between them, impermissibly implied that Daniels was motivated to stab Scott. (*Id.*)

Counsel for other defendants objected to this line of questioning and Daniels's

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counsel later asserted that Scott's testimony was not admissible to show that Daniels had a motive to attack him. (Nov. 16, 2011 Trial Tr. at 97 ("At the time [Scott] is attacked . . . , he has not entered into a plea agreement, there is no suggestion that he would cooperate or testify [T]he Commonwealth is trying to show motive for this attack and therefore, it has some indicia of guilt. That is inaccurate.") The trial court allowed the testimony, but with a cautionary instruction. (*Id.* at 101.) After closing arguments and before jury deliberations began, the court told the jurors:

Ladies and gentlemen, just one point I want to make. There was some testimony about the one witness, Langdon Scott, being stabbed at the time he was held in custody. There was no evidence presented that any of these three Defendants had any involvement at all in that stabbing and you must not draw an inference from the argument that they did.

(Nov. 29, 2011 Trial Tr. at 181.)

Considering these facts, Judge Heffley held that "[t]rial counsel cannot be ineffective for failing to request an instruction . . . that was eventually given." (R&R at 20-21.) Daniels feels that the cautionary instruction was insufficient because it was not given until thirteen days after Scott's testimony and because it "was given after closing arguments, during which the prosecutor again raised the inference that Scott was stabbed because of Daniels, or another codefendant . . ." (Pet'r Mem. at 8-9.)

To prevail on this claim, Daniels must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687). Daniels has not met this burden: his counsel argued against the introduction of this portion of Scott's testimony and, although the testimony was permitted, the court ultimately delivered a limiting instruction requiring jurors not to

consider it as evidence of Daniels's involvement in Scott's stabbing. His counsel's performance was objectively reasonable. Even if it was not, Daniels has not shown that but for any errors, the result of the proceeding would have been different considering the totality of the evidence presented to the jury – evidence which included video surveillance footage from the scene of the crime.

3

Daniels claims his trial counsel was ineffective for not objecting to Murchison's assertions that he did not want to testify because his family had been threatened. (Pet'r Mem. at 17-19.) The R&R found this claim relied on inaccurate facts and was not a ground for habeas relief. (R&R at 21.) Daniels states that the R&R "assumed the jury followed the trial court's instructions" striking Murchison's testimony, and contends this assumption "is a convenient, and illogical, legal fiction." (Pet'r. Obj. at 9.)

For the reasons set forth above, the trial court's determination to strike Murchison's testimony and issue a curative instruction was not unreasonable. Daniels has not shown his lawyers were ineffective where the jury is presumed to follow the trial court's curative instruction. *See Shannon v. United States*, 512 U.S. 573, 584-85 (1994); *see also Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (noting "the almost invariable assumption of the law that jurors follow their instructions").

4

Daniels argues his attorneys should have requested a mistrial after a chart – Trial Exhibit C-47 – was introduced showing unverified phone calls attributed to him. (Pet'r Mem. at 19-22.) Judge Heffley found this argument to be meritless. (R&R at 21-23.) Daniels believes the Commonwealth's witness made an impermissible "suggestion"

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to the jury that the number may have been attributed to [him]." He asserts trial counsel should have requested a mistrial based on this misrepresentation. (Pet'r Obj. at 10.) His argument about exhibit C-47 is not sufficient to demonstrate ineffective assistance of counsel warranting habeas relief.

Daniels's lawyers prepared a motion to suppress Daniels's purported phone records and flagged the issue during the November 8, 2011 pretrial conference but did not file the motion because the prosecutor responded that no such records existed. (Nov. 8, 2011 Pretrial Conf. Tr. at 3.) When the Commonwealth sought to introduce Exhibit C-47 at trial, Daniels's counsel requested a sidebar conference where he argued: "That shows my client, a number of calls he allegedly made and there is no verification of any calls by my client or to my client. The chart says that there is." (Nov. 21, 2011 Trial Tr. at 30-31.) The prosecutor acknowledged a phone number on the poster was attributed to Daniels, but stated

and since that poster was made, we had a discussion about it where I said we were unable to verify it was his and he is never on the phone. So I am going to actually ask Detective Dove and he will testify he was unable to verify it. . . . I am not arguing that it is attributed to Mr. Daniels.

(*Id.* at 31.) The court asked the prosecution to "[c]larify that." (*Id.*) It did during the following exchange at the close of direct examination: "On this chart, you have calls from between Mr. Epps and Edward Daniels. Now you never got verification of a number that for sure belonged to Edward Daniels, is that correct?" (Nov. 21, 2011 Trial Tr. at 70.) Dove responded, "[n]o. We did receive a number that was suggested that it was his number. We were unable to verify that was his number." (*Id.*) He was then asked if that was "why [he was not asked to] talk about Mr. Daniels in looking at the graphs in terms of conversations between Mr. Epps and Mr. Daniels," and he responded

affirmatively. (*Id.*)

Daniels has not shown trial counsel's conduct related to the exhibit was objectively unreasonable. To the contrary, counsel flagged for the court the poster's incorrect attribution of a phone number to Daniels which led to Dove's testimony that the police had been unable to verify the phone number as one belonging to Daniels. In his closing argument, Daniels's lawyers showed Exhibit C-47 to the jury and reminded them that

there is one mistake which the Commonwealth did get up and concede, which is when Detective Dove was testifying, there is no phone that has been connected to Edward Daniels. They conceded that. What Detective Dove said was there was a number there that we suspected or thought might be his but we were unable to confirm it. Well, guess what, there is a reason why they were unable to confirm it because it was not his . . . If there was a phone that called anybody on this chart, all the names that you heard that in any way was associated with Mr. Daniels, you would have heard about it.

(Nov. 28, 2011 Trial Tr. at 43-44.) No testimony tied Daniels to the number listed on the exhibit and Daniels has not shown the verdict would have been different but for his trial counsel's conduct.

5

Daniels feels his attorneys were ineffective for failing to object to the jury being told that Campbell was a federal probation officer because revealing this information "indicated . . . Daniels was guilty of prior criminal conduct." (Pet'r Mem. at 22-24.) Judge Heffley found this argument did not warrant habeas relief. (R&R at 23-24.) The Court concurs.

Before Campbell's testimony, the prosecution told the court it "didn't have a problem with her not identifying herself as a probation officer because that could be

prejudicial to the Defendant but she still has to say what period of time she knew him, how frequently she would see him." (Nov. 17, 2011 Trial Tr. at 3-4.) The court nevertheless told Campbell she would be identified as a federal probation officer. (*Id.* at 6.) The prosecution then told her no one would ask her "what [Daniels] was arrested for or convicted of, what he was on probation for" but she could testify "he was under [her] supervision. (*Id.* at 7.) Daniels's counsel did not object, deciding instead to attempt to cast doubt on the probation officer's ability to accurately identify Daniels on the video. (*Id.* at 31-32.) Counsel's strategy was not unreasonable under *Strickland*. And Daniels has not shown there is a reasonable probability that the outcome of his trial would have been different if Campbell had not been identified as a probation officer.

6

Daniels claims his lawyers were ineffective for not requesting a cautionary instruction about a hypothetical question the prosecutor asked the medical examiner. (Pet'r Mem. at 24-26.) Judge Heffley found he was not entitled to habeas relief on this claim. (R&R at 25-26.)

The question was based on Murchison's previously stricken testimony that Thal may have been held in a headlock before she was shot. (Nov. 18, 2011 Trial Tr. at 43-44.) The prosecutor asked:

When she received this gunshot wound, if you would explain to me, there was testimony that maybe she was held in a headlock when the gun was fired or maybe someone was behind her holding her by her hair because you see she has long hair or by the neck, that she is near the door, someone forced her to open the door. In those scenarios of either a headlock, grabbing her by the hair, manipulating her or by the neck, in looking at that wound and the path, could you tell or you could not tell how her body was or how the person who did the shooting was positioned when she gets

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this wound?

(Nov. 23, 2011 Trial Tr. at 72-73.) Daniels's counsel waited until jurors had been excused for lunch and then moved for a mistrial, explaining that he did not object during the testimony because he did not "want to draw undue attention to" the question. (*Id.* at 101.) He sought a mistrial because the "only source" of information that Thal was held in a headlock before she was shot was Murchison's statement that had been read into the record during his direct examination. (*Id.* at 101-02.) The court denied the motion, explaining "I will give a cautionary instruction though, that it is strictly a speculative hypothetical . . ." (*Id.* at 102-03.) The court, however, never gave the cautionary instruction. (*Id.* at 103-117).

After the court denied the motion for a mistrial, Daniels's counsel asked the prosecution to make sure that nothing referenced in its closing argument would have Murchison as its "single source" of evidence. (Nov. 23, 2011 Trial Tr. at 103.) The prosecution complied. (See Nov. 28, 2011 Trial Tr. at 35-66.) To the extent Daniels's counsel forgot to ask the court to give the cautionary instruction, Daniels suffered no prejudice because the prosecution's closing did not rely on Murchison's testimony. To the extent that his counsel made a strategic decision to waive the cautionary instruction, it was not objectively unreasonable where the instruction might have reminded the jurors about the circumstances the medical examiner had been asked to consider. *See Rolan v. Vaughn*, 445 F.3d 671, 681-82 (3d Cir. 2006) ("[C]ounsel's strategic choices will not be second-guessed by post-hoc determinations that a different trial strategy would have fared better.")

Daniels claims his counsel was ineffective for not objecting when Scott identified him in court. Judge Heffley concluded Daniels had not met his burden under *Strickland* because it was "clear that counsel's strategy to undermine Scott's credibility, rather than merely to attempt to suppress the statement, was a reasonable strategic decision" and Daniels did not "demonstrate that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . ." (R&R at 27.) Daniels believes "cross-examination is not a substitute for suppressing inadmissible evidence." (Pet'r Obj. at 12.)

Daniels claims that Scott only learned his identity when the two of them were both present during a September 23, 2009 preliminary hearing. (Pet'r Br. at 26.) He contends that Scott did not identify him until after the preliminary hearing and seeing "each other regularly while in the county prison for two years." (*Id.*) He asserts that when Scott testified at the preliminary hearing, "he did not know Daniels's name and could only describe him as 'short, bald-headed guy, kind of chubby.'" (*Id.*) Because Scott had not previously identified him, Daniels argues the in-court identification had no independent basis and was made under highly suggestive circumstances that should have barred its admission. (*Id.* at 27-28.)

Instead of moving to suppress Scott's identification, trial counsel cross-examined him about his testimony at the pretrial hearing. He explained that Scott had been asked "What does he look like" and answered "I can't tell you what he looked like. He was short, bald-headed guy, kind of chubby." (Nov. 15, 2011 Trial Tr. at 264.) Scott confirmed that when asked who the person was, he did not say Edward Daniels and

that when he had been asked to describe someone who was part of a robbery, Scott could only say that "he was short and bald-headed." (*Id.* at 264-65.) Daniels has not shown that his counsel made an unreasonable strategic decision when he asked questions that might cast doubt on Scott's ability to identify him instead of moving to suppress the identification. Even if this choice was unreasonable, Daniels has not shown that there is a reasonable probability that, but for the error, the result of the trial would have been different. There was video surveillance footage from the scene of the crime and even without Scott's identification testimony, jurors would have seen the video and had an opportunity to consider whether Daniels was depicted in it.

8

Daniels also seeks habeas relief based on his counsel's failure to object to what he claims were instances of prosecutorial misconduct during opening statements and closing arguments. (Pet'r Mem. at 30-38.) Judge Heffley found these claims also lacked merit. (R&R at 27-29.)

Daniels argues counsel should have objected to the following statement from the prosecutor's opening, made after she explained that Murchison, Scott and a third co-defendant had pled guilty for their roles:

You may be wondering why these three are here. Well no matter how much evidence we have, we can't force people to plead guilty. Everyone has a right to a trial by a jury of his peers and that's what these three are getting. They are getting a trial by you. . . .

Now, I don't know what the Defense is going to say, but when there is a mountain of evidence, they will try to distract you away from it because if you look at it, you will very quickly convict every single one of these Defendants. As the Judge already told you, lawyer's questions are not evidence. Lawyer's antics are not evidence. Sideshow distractions and theories without support are not evidence.

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(Nov. 14, 2011 Trial Tr. at 23.) Daniels contends the prosecutor's statement improperly expressed an opinion about his guilt and disparaged his counsel. (Pet'r Mem. at 30-31.) But the prosecutor told the jury that any attorney's statements could not be considered evidence. And her opening statement was reasonably within the latitude afforded to counsel when presenting a case. The state and federal tests for prosecutorial misconduct claims are "substantively identical; both focus on the fundamental fairness of the trial based on potential prejudice from the alleged prosecutorial misconduct."

Walker v. Palahovich, No. 05-609, 2007 WL 666763, at *5-6 (E.D. Pa. Feb. 6, 2007). "[A] prosecutor is 'free to present his or her arguments with logical force and vigor' and some 'oratorical flair' woven into a fact-based description does not give rise to a finding of misconduct." *Sneed v. Beard*, 328 F. Supp. 3d 412, 439 (E.D. Pa. 2018) (quoting *Commonwealth v. Sneed*, 45 A.3d 1096, 1113 (Pa. 2012)). In the context of the prosecutor's opening, these statements were not sufficient to deprive Daniels of a fundamentally fair trial and his lawyers were not ineffective for not objecting to them.

Daniels feels his counsel should have objected to two statements in the prosecutor's closing argument. First, the prosecutor said:

In the kind of life that they live, they don't put anything in their name. It is easy enough when you go to Cricket or Boost, give a crack head \$20, say take out a cell phone in my name. Cricket or Boost just want money. You can take out ten cell phones. All of these guys had several cell phones on them . . .

(Nov. 29, 2011 Trial Tr. at 137.) These comments were made while discussing the arrest and confession of co-conspirator Antonio Wright. (*Id.* at 136-37.) Then, the prosecutor changed subjects to discuss Daniels, saying:

Now, let's talk about Daniels. The bottom line is this. We see Daniels, and when you look at the video, he is never on the phone, so there goes that cell

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phone stuff. In the phone, we couldn't verify which was his because they do it in different names and when we got it, we just couldn't prove it, so we back off, but we see the video and show the video and he is just lurking in the shadows there

(*Id.* at 140.) Daniels argues that the prosecutor's "comments imply prior criminal activity" and that he "was deceptive enough so that he could not be verified . . ." (Pet'r Mem. at 33.) In his petition, Daniels fails to state that the prosecutor made the initial comments about cell phones while discussing Wright. When the prosecutor switched to Daniels, he confirmed the prosecution had been unable to verify a phone number belonging to Daniels and had been unable to confirm that any co-conspirators had spoken on the phone with him. The prosecutor did not, as Daniels argues, claim that a particular phone number could be attributed to Daniels. (Pet'r Obj. at 30.) Daniels has not shown that the prosecutor's statements about cell phones so infected the trial with unfairness that he was denied due process and his counsel cannot be deemed ineffective for failing to object to them.

9

Daniels argues that Judge Heffley's findings regarding his claims of ineffective trial counsel are contrary to the principle of party presentation. Daniels contends that for each of his claims, "arguments were made in the R&R in response to Daniels's claims for relief that the Commonwealth failed to make" and that the arguments he made in support of his claims "were not squarely addressed." (Pet'r Obj. at 14.)

The "principle of party presentation" is that "parties frame the issues for decision and the courts generally serve as neutral arbiters of matters the parties present."

Greenlaw v. United States, 554 U.S. 237, 243 (2008). The Court has reviewed each of Daniels's ineffective assistance of counsel claims *de novo* and finds that the R&R's

consideration of his claims does not violate this principle. Even if it did, there is no basis for remanding Daniels's case for an evidentiary hearing on the claims. He has not met his burden to show trial counsel was ineffective.

D

Daniels also argues his appellate counsel was ineffective for failing to raise a claim on direct appeal of trial court error pertaining to comments the prosecutor made about Scott's stabbing during closing arguments. (Pet'r Mem. at 41-43.) Judge Heffley concluded that this claim was procedurally defaulted and also meritless. (R&R at 35-37.) Daniels claims that appellate counsel's ineffectiveness was enough to establish "cause and prejudice" for any default. (Pet'r Obj. at 18.) He also contends that his claim is not meritless. (*Id.*) This claim is procedurally defaulted and Daniels has not established cause and prejudice or a miscarriage of justice. As a result, Daniels's challenges to Judge Heffley's discussion of the merits of his claim cannot provide a basis for habeas relief. "It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel." *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017). It is unclear whether Daniels's argument is that: (1) the trial court's decision not to grant a mistrial was in error and appellate counsel's ineffectiveness is the "cause" that must excuse his default, or (2) appellate counsel was ineffective for failing to argue that the trial court's decision was in error and PCRA counsel's ineffectiveness is the "cause" that must excuse his default.⁷ Either way, the

⁷ If Daniels is arguing appellate counsel's ineffectiveness was the cause for his failure to bring the claim of appellate counsel ineffectiveness, his argument necessarily fails. While appellate counsel's errors might have caused him to fail to raise a claim of trial court error, appellate counsel

result is the same.

Neither of these claims were raised at any time during state proceedings and both are procedurally defaulted, which Daniels concedes. To the extent Daniels is arguing that appellate counsel's ineffectiveness is the "cause" that excuses the default, his argument is foreclosed. Daniels had an opportunity to challenge appellate counsel's ineffectiveness during PCRA proceedings. This allegation of cause is itself procedurally defaulted and thus unavailable. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). To the extent Daniels is arguing his defaulted claim of appellate counsel ineffectiveness should be reviewed because PCRA counsel's ineffectiveness "caused" the default, his argument also fails. The Supreme Court has concluded allegations of PCRA counsel ineffectiveness cannot provide a basis to excuse the default of a claim of ineffective assistance of appellate counsel. *Davila*, 137 S. Ct. at 2065.

E

Daniels argues that he is entitled to a new trial because of newly discovered evidence, unavailable at the time of trial, about the conduct of Detectives Ronald Dove, Ohmarr Jenkins and James Pitts. (Pet'r Mem. at 38-41.) Judge Heffley found that such claims did not warrant habeas relief and the Court agrees.

1

Daniels says he received copies of newspaper articles about Detectives Pitts⁸ and would not have been raising a claim of his own ineffectiveness and cannot be said to have caused the default of such a claim.

⁸ In his objections, Daniels asserts that he "was interviewed by the Internal Affairs Unit" of the Philadelphia Police Department, apparently in conjunction with their investigation of misconduct by Detective Pitts "and was told he would need an attorney to obtain the evidence against Detective Pitts." (Pet'r Obj. at 17.) Two motions he filed seeking appointment of counsel so he could obtain evidence against Pitts were denied. (*Id.*; see also ECF Nos. 19 and 21.) Daniels asks the Court to set aside these denials, appoint counsel and allow him additional time to obtain

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Jenkins suggesting they were jointly involved in other murder cases where witnesses or suspects were coerced to make statements. (Pet'r Mem. at 38.) He argues all the evidence about Pitts and Jenkins was discovered after he was tried, convicted and sentenced and "no evidence" was "presented at trial to undermine" their credibility. *Id.* at 40. He seeks an investigation and an evidentiary hearing to allow for a determination of "how much of the information provided in" witness statements they obtained in this case was "a result of coercion and intimidation by Pitts and Jenkins." (*Id.* at 40.)

Daniels first raised an argument about the Pitts/Jenkins newspaper stories in his second PCRA petition. (See Second PCRA Trial Ct. Op. at 3-4.) The PCRA court held that this petition was untimely as it was filed on June 2, 2017, well after the PCRA's one-year statutory deadline had expired. (Second PCRA Trial Ct. Op. at 6. The PCRA court declined to excuse Daniels's untimeliness because the accusations against Pitts and Jenkins "came to light in September of 2016 . . . well prior to the date" of his second PCRA petition. (*Id.* at 6-7.) When he filed his second PCRA petition, the PCRA required petitions invoking an exception to the Act's one-year filing limitation based on new facts to be filed *within 60 days* of the date the new facts became available. 42 Pa. Cons. Stat. § 9545(b)(2). The statute was later amended to allow petitioners to file a petition within one year of the date the claim could have been presented, but the amendment applies only to claims arising no more than one year before October 24, 2018 — meaning only claims that arose one year or less before December 24, 2018 are

evidence. (*Id.*) Daniels's request is effectively an untimely motion for reconsideration of the decisions on his motions for appointment of counsel.

guilty beyond a reasonable doubt" in this case. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

F

Finally, the Court considers Daniels's motion to expand the record. (ECF No. 32.) Daniels seeks to obtain additional evidence about Detective Pitts to include with his habeas petition. Daniels argues that through other investigations "there is a substantial amount of evidence being disclosed that demonstrates that Detective Pitts has engaged in a long pattern of abuse and coercion to obtain statements from witnesses and suspects." (*Id.* at 1.) He contends that he "has not had a full and fair opportunity to develop the factual basis of his claim of newly-discovered evidence" and that some statements from the witnesses Pitts interviewed in this case "follow the pattern of misconduct by Detective Pitts." (*Id.*) Pitts interviewed Daniels and other witnesses in this case including Wright, Murchison and Scott. (*Id.*) In support of his motion, Daniels attaches documents including a Superior Court opinion from a different case, *Commonwealth v. Dwayne Thorpe*, CP-51-CR-0011433-2008, which affirmed the PCRA court's decision to vacate Thorpe's conviction and order a new trial based upon Pitts's pattern of behavior in that case.

Rules 6 and 7 of the Rules Governing Section 2254 Cases in the United States District Courts provide guidance for discovery issues in habeas proceedings. Rule 7 states that a federal habeas judge may "direct the parties to expand the record by submitting additional materials relating to the petition." See Rule 7(a), 28 U.S.C. foll. § 2254. "The burden rests upon the [movant] to demonstrate that the sought-after information is pertinent and that there is good cause for its production." *Williams v.*

Beard, 637 F.3d 195, 209 (3d Cir. 2011); *see also Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994) (petitioner establishes “good cause” by “point[ing] to specific evidence that might be discovered that would support a constitutional claim”).

Daniels has not met his burden. First, he has been on notice of Pitts’s alleged misconduct since at least September of 2016. (Second PCRA Trial Ct. Op. at 6.) The Superior Court already found that any claims regarding Pitts’s alleged misconduct are untimely. (See Second PCRA Super. Ct. Op., 2018 WL 3469857, at *6-7.) Further, even if any claims related to Pitts are not untimely, Daniels has not shown how Pitts’s use of coercive tactics in another case or cases would provide pertinent new evidence sufficient to support a constitutional claim in this case. He does not point to any witness testimony suggesting that Pitts used coercive tactics with Wright, Murchison, Scott or anyone else involved in this case. Instead, Daniels only speculates that Pitts engaged in a pattern of witness coercion after Thal’s and Gilmore’s murders. This is not the type of “specific evidence” that requires the Court to grant Daniels’s motion.

IV

The Court overrules Daniels’s objections, adopts the R&R and denies and dismisses Daniels’s petition. The Court also denies Daniels’s motion to expand the record. An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIAEDWARD N. DANIELS,
Petitioner,

v.

CIVIL ACTION
NO. 18-00687MARK GARMAN, et al.,
*Respondents.***ORDER**

AND NOW, this 5th day of May, 2020, upon consideration of Edward N. Daniels's Petition for a Writ of Habeas Corpus (ECF No. 1), Respondents' Response (ECF No. 13), Petitioner's Reply (ECF No. 22.), the Report and Recommendation of United States Magistrate Judge Marilyn Heffley (ECF No. 23), and Petitioner's Objections (ECF No. 30) and Motion to Expand the Record (ECF No. 32), it is

ORDERED that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for a Writ of Habeas Corpus is **DENIED** and **DISMISSED** with prejudice;
3. The Motion to Expand the Record is **DENIED**;
4. No certificate of appealability shall issue; and
5. This case shall be **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

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

Edward N. Daniels, Petitioner

v.

Civil Action No. 18-CV-687

Mark Garman, et al., Respondents.

OBJECTIONS TO THE REPORT AND RECOMMENDATION

Now Comes the Petitioner, Edward N. Daniels, pursuant to 28 U.S.C. § 636 and Fed.R.Civ.P. 72(a), submitting the following objections to the Magistrate Judge's non-dispositive order and the Report and Recommendation ('R&R'). Petitioner states the following in support thereof:

I. STANDARD OF REVIEW

Where objections to the Magistrate Judge's R&R are filed, the Court must conduct a *de novo* review of the contested portions of the report. See *Sample v. Diecks*, 885 F.2d 1099, 1106 n. 3 (3d Cir. 1989) (citing 28 U.S.C. § 636(b)(1)(C)). However, this only applies when a party's objections are both timely and specific. See *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1994). In conducting *de novo* review, this Court may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the Magistrate Judge. See 28 U.S.C. § 636(b)(1). Uncontested portions of the R&R may be reviewed at a standard determined by the District Court. See *Thomas v. Arn*, 474 U.S. 140, 154, 106 S.Ct. 466 (1985); also see *Goney*, at 7. At the very least, the Court should review the uncontested portions of the R&R for clear error or manifest injustice. See *Cruz v. Chater*, 990 F.Supp. 375, 376-77 (M.D. Pa. 1998). The recommendation of the Magistrate Judge carries no presumptive weight and the responsibility to make a final determination remains with the District Judge. See *Matthews v. Weber*, 423 U.S. 261, 270-71, 96 S.Ct. 549 (1976).

The Magistrate Judge may hear non-dispositive motions. See 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a). A District Judge may modify or set aside the Magistrate Judge's non-dispositive order if the ruling was "clearly erroneous and contrary to law." Fed.R.Civ.P.

72(a); also see *Haines v. Liggett Group Inc.*, 975 F.2d 81, 91 (3d Cir. 1992). A ruling is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Dome Petroleum Ltd. v. Employers Mut. Liab. Ins. Co.*, 131 F.R.D. 63, 65 (D.N.J. 1990) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525 (1948)). A Magistrate Judge's Order is contrary to law "when the magistrate judge has misinterpreted or misapplied the applicable law." *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 548 (D.N.J. 1990) (citing *Pharm. Sales & Consulting Corp. v. J.W.S. Delavau Co.*, 106 F.Supp.2d 761, 764 (D.N.J. 2000)).

II. OBJECTIONS TO THE REPORT AND RECOMMENDATION

A. DANIELS'S RIGHT TO CONFRONTATION WAS VIOLATED WHEN A COMMONWEALTH WITNESS REFUSED TO TESTIFY ON CROSS-EXAMINATION AND THE TRIAL COURT DENIED A MISTRIAL

Daniels's asserts that his right to confrontation was violated when Donnell Murchison testified on direct-examination, then refused to be cross-examined. N.T. 11/18/11, pp. 3-127; see Memorandum of Law, pp. 3-10. During direct-examination, Murchison's statements implicating Daniels in the crime were read, he adopted the statements, and claimed he feared for his safety and that of his family. Id. Trial counsel requested a mistrial, which was denied. Daniels asserts that striking Murchison's testimony and giving a curative instruction was insufficient to remedy the violation. The Magistrate Judge recommended that Daniels be denied relief on the grounds that the trial court's actions are entirely consistent with established federal law, and the trial court is not required to grant a mistrial in such cases. The state courts' rejection of Daniels' claim challenging the trial court's decision to not grant a mistrial did not result in a decision contrary to or involve an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and it cannot be a ground for habeas relief. R&R, pp. 11-14.

Daniels objects to the Magistrate Judge's recommendation with respect to this claim.

Objection # 1

On direct appeal, Daniels relied squarely on the Supreme Court's decisions in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620

(1968) and *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056 (1986). In Daniels's Memorandum of Law before this Court, he relied on *Bruton v. United States* and *Lee v. Illinois* again, and also cited *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074 (1965) and *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987). As required by the AEDPA, this Court is precluded from granting habeas corpus relief unless the adjudication of the claims "Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). Under the AEDPA, Supreme Court precedent is the only controlling authority. See *Renico v. Lett*, 559 U.S. ___, 130 S.Ct. 1855, 1876 (2010) (Stevens, J., dissenting); also see *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir. 2002).

However, the R&R did not address any of the Supreme Court precedents upon which Daniels's claim was based. Furthermore, Daniels has already demonstrated that the cases relied on by the Superior Court, and in turn the R&R, were not applicable to his claim for relief. See Memorandum of Law, pp. 8-9. The R&R essentially ignored the arguments presented by Daniels and simply repeated the arguments of the State Courts and the Commonwealth, which is contrary to the "principle of party presentation[.]" *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559 (2008).

Daniels request that this Court reject the R&R in whole with respect to this claim and review it *de novo*.

Objection # 2

Daniels asserts that the R&R failed to consider the factual basis of the claim. "A claim is more than a mere theory on which a court could grant relief; a claim must have a factual basis, and an adjudication of that claim requires an evaluation of that factual basis." *Wilson v. Workman*, 577 F.3d 1284, 1290 (10th Cir. 2009) (*en banc*).

To experienced lawyers it is commonplace that the outcome of a lawsuit -- and hence the vindication of legal rights -- depends more on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents.

Wingo v. Wedding, 418 U.S. 461, 474, 94 S.Ct. 2852 (1974).

The R&R fails to consider essential facts relevant to this claim. First, Murchison's entire confessions, which implicated Daniels, were

read to the jury. Murchison adopted the statements, said they were true, and then refused to testify further. This was the most direct evidence implicating Daniels in the crime and it was highly prejudicial not to be able to cross-examine him.

Secondly, Murchison repeatedly testified that his family had been threatened. N.T. 11/18/11, p. 7. His family had received threats and were supposed to be hiding out. Id. at 9. Murchison said he had told his attorneys he could not testify because of the threats and the District Attorney had offered some assistance to Murchison's daughter and her mother. Id. at 14-15. The jury was also informed that Murchison was held in custody in another county to prevent contact with other defendants. Id. at 28-29. Thus, the jury logically would have connected Murchison's refusal to testify to the allegations that he had been threatened. Again, such testimony would have been highly prejudicial.

Finally, the R&R failed to consider whether the curative instruction was sufficient to dispel the prejudicial impact of Murchison's statement in regard to Daniels. Murchison testified on a Friday. The jury was instructed on the following Monday to disregard his testimony. The brief, simple instruction to not to consider Murchison's testimony, his statements, or his demeanor was insufficient to dispel the impact; especially, after having so much time to consider his testimony. N.T. 11/21/11, pp. 24-26.

When these facts are considered, striking Murchison's testimony and issuing a curative instruction was not a remedy for the violation of Daniels's right to confrontation. "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090 (1974).

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 3

The Magistrate Judge relies upon *Koehler v. Wetzel*, No. 3:12-CV-00291, 2015 U.S. Dist. LEXIS 63118 (M.D.Pa. May 14, 2015) in support of the recommendation to dismiss this claim. The facts of this case are not similar to what occurred at Daniels's trial. Furthermore, the legal claim raised in *Koehler v. Wetzel* is not the same.

Mr. Koehler argue[d] that the trial court improperly limited the scope of the cross-examination of a witness, Kerrien Ramsey, after she asserted her Fifth Amendment privilege against self-incrimination. He also makes a related ineffective assistance of counsel claim for failure to litigate this issue.

Id. at 2015 U.S. Dist. LEXIS 252.

The witness in question asserted the Fifth Amendment privilege against self-incrimination with respect to whether she was under the influence of drugs at particular times. The trial court limited cross-examination of that specific subject. The witness was not a codefendant, did not witness the shootings Koehler was on trial for, and was still subjected to cross-examination. On the other hand, Murchison was the actual shooter and a codefendant of Daniels, he did not assert any privilege against self-incrimination, and Daniels had no opportunity for cross-examination.

Furthermore, in Koehler, the witness's testimony was not stricken and the jury was not instructed to disregard any testimony, which occurred at Daniels's trial. There are no legal or factual similarities between the claim raised in Koehler and the claim Daniels raised.

Under the circumstances, Daniels request that the recommendation of the Magistrate Judge be rejected in whole and that this Court review this claim *de novo*.

B. THE TRIAL COURT ERRED IN ADMITTING THE LAY OPINION TESTIMONY OF A PROBATION OFFICER TO IDENTIFY DANIELS, IN VIOLATION OF THE DUE PROCESS CLAUSE

Daniels asserts that the trial court erred in admitting the lay opinion testimony of Akaga Campbell, a federal probation officer, to identify the perpetrator alleged to be Daniels from surveillance video. See Memorandum of Law, pp. 10-15. The Magistrate Judge concluded that this claim was not cognizable because it was based on state law, was procedurally defaulted, and was meritless. See R&R, pp. 14-18.

Objection # 1

Following the arguments presented by the Commonwealth, the R&R considered this claim to be based on state law and that the federal due process component of the claim was not raised in the state courts; thus, it was procedurally defaulted. See Response to Petition, pp. 16-

17. In Daniels's Reply, he addressed the Commonwealth's allegation that the claim did not have a federal component. Daniels explained that the Massachusetts case relied upon on direct appeal was explicitly based on the Supreme Court decision in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967). Daniels also alleged that claims relating to the reliability of identification evidence are inherently due process claims under *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977). The Magistrate Judge completely ignored Daniels's argument. See *Reply to the Response*, p. 9.

Under the circumstances, Daniels request that the recommendation of the Magistrate Judge be rejected in whole and that this Court consider whether the claim is cognizable in federal habeas corpus proceedings *de novo*.

Objection # 2

The Commonwealth made a boilerplate allegation that the claim, as presented in these proceedings, was procedurally defaulted. See *Response to Petition*, pp. 16-17. Daniels submitted a reply addressing all of the ways this claim could be considered procedurally defaulted. See *Reply to the Response*, pp. 9-13. Again, the R&R completely ignored Daniels's arguments.

The state law ground on which the claim was denied, i.e., Pa.R.Evid.P. 701, is not "independent" of the federal question involved to bar federal review. A state law ground for denying a claim for relief can be subject to federal review "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." *Johnson v. Pinchak*, 392 F.3d 551, 557 (3d Cir. 2004) (citation & internal quotations omitted). The R&R does not conclude that the state law ground was independent of the federal question involved.

Daniels also argued that, if the claim was considered to be procedurally defaulted, there was "cause and prejudice" to excuse the default. See *Reply to Response*, pp. 10-13. If a claim is procedurally defaulted, "federal habeas review ... is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the violation of federal law[.]" *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546 (1991).

Under the circumstances, Daniels request that the recommendation

of the Magistrate Judge be rejected in whole and that this Court consider whether the claim is cognizable in federal habeas corpus proceedings *de novo*.

Objection # 3

Despite concluding that the claim was not cognizable in federal habeas corpus proceedings because it was based on state law, and that the federal claim was procedurally defaulted, the Magistrate Judge purported to address the merits of the claim. The Magistrate Judge stated: "Even if this Court were able to consider Daniels' due process claim on the merits, the argument would be unavailing." R&R, p. 17. However, a review of the R&R, and the argument Daniels presented, makes it quite clear that the federal due process claim was not considered. See R&R, pp. 17-18. The R&R recommends that the claim be dismissed based solely on Pa.R.Evid. 701. The claim Daniels presented is based upon *Stovall v. Denno*, *supra*, *Manson v. Brathwaite*, *supra*, and *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968). See *Reply to the Response*, pp. 9-10.

Therefore, Daniels request that this Court reject the R&R in whole with respect to this claim and review it *de novo*.

C. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND IT WAS PREJUDICIAL, DEPRIVING DANIELS OF A FAIR TRIAL

Daniels asserted that his trial attorneys, Steven Gross and Mythri Jayaraman, were ineffective based on several objectively unreasonable acts and omissions. See Memorandum of Law, pp. 15-38. The Magistrate Judge concluded that this claim was meritless. See R&R, pp. 18-29. Daniels raises the following objections.

Objection # 1

As a matter of convenience, and without any analysis of the legal basis and factual arguments, the R&R concludes that the eight claims of ineffective assistance of counsel were raised during PCRA proceedings by court-appointed counsel. In Daniels's PCRA Petition, his attorneys raised 67 claims of ineffective assistance of counsel. They provided no legal basis for the claims or factual support. The Commonwealth made the same allegation. See Response to Petition, pp. 17-18. Neither the Commonwealth, nor the Magistrate Judge, identify which of the 67 claims raised were "distilled or amalgamated" to make

up the claims raised by Daniels herein. See Response to Petition, supra.

Both the Superior Court and PCRA Court acknowledged that PCRA Counsel raised boilerplate claims with no factual or legal basis. See Memorandum of Law, pp. 35-36. Daniels asserted that this refusal to address the fact that PCRA counsel was ineffective is in effect to deny him any possible remedy for his claims of ineffective assistance of counsel. For every right, there must be a remedy. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Furthermore, this is not a case such as that addressed in *Harrington v. Richter*, in which the Court held that "§2254(d) does not require a state court to give reasons before its decision can be deemed to have been "adjudicated on the merits.'" 562 U.S. ___, 131 S.Ct. 770, 785 (2011). Here, this Court is concluding that the state courts adjudicated claims on the merits, when PCRA counsel never presented the merits of the claims in the first place.

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 2

Daniels asserted that trial counsel was ineffective for failing to request a cautionary instruction to dispel any inference that Daniels was responsible for stabbing Langdon Scott. See Memorandum of Law, pp. 15-17. The jury heard testimony on November 16, 2011, that Scott was stabbed about 11 times in his chest, face, and arm, after moving to a different block in the county prison. N.T. 11/16/11, 88-90. After an objection, a sidebar was called, in which the prosecutor explained he was attempting to demonstrate that the stabbing was connected to Daniels. The trial court precluded the testimony. Id. at 90-105. When the trial resumed, the prosecutor asked Scott about a fight between him and Daniels on July 6, 2011. Id. at 105-108. He then established through Scott that he, and the other defendants had received discovery from the District Attorney's Office, including statements, which would have included his own statements. Id. at 108-109. With this testimony, the jury was led to infer that when Scott was stabbed on September 6, 2011, it was connected to Daniels.

The R&R concludes that a cautionary instruction given after closing arguments was sufficient to dispel any prejudice from this

testimony. See R&R, p. 20. This is not true for two reasons. First, the instruction was given thirteen days after the jury heard this evidence. N.T. 11/29/11, p. 181. Secondly, this instruction was given after closing arguments, during which the prosecutor again raised the inference that Scott was stabbed because of Daniels, or another codefendant, despite the evidence being precluded. Under the circumstances, and Pennsylvania law, at the stage a mistrial should have been granted. See Commonwealth v. Padilla, 923 A.2d 1189, 1193-94 (Pa. Super. 2007).

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 3

Daniels asserted that trial counsel was ineffective for failing to object to Murchison's testimony implying that he received threats that could not be tied to any of the defendants. See Memorandum of Law, pp. 17-19. The Magistrate Judge assumed the jury followed the trial court's instructions and did not consider Murchison's testimony. See R&R, p. 21. To believe that the jury could have simply ignored such testimony is a convenient, and illogical, legal fiction. Asking the jury to ignore Murchison's repeated testimony that he did not want to testify because his family had been threatened is asking them to perform an impossible "psychological feat." Delli Paoli v. United States, 352 U.S. 231, 247, 77 S.Ct. 294 (1957). The combination of this testimony along with identifying Daniels as a perpetrator would not have been dismissed by the brief, simple jury instruction. Such "[s]pecific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." Richardson v. Marsh, 481 U.S. 200, 208, 88 S.Ct. 1620 (1968). The Magistrate Judge's presumption that the jury instruction was sufficient to remove the prejudicial impact of Murchison's testimony is to ignore the "practical and human limitations of the jury system[.]" Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620 (1968).

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 4

Daniels asserted that trial counsel was ineffective for failing

to request a mistrial after a chart was introduced showing unverified phone calls attributed to Daniels. See Memorandum of Law, at 19-22. The Magistrate Judge concluded that this claim was meritless. See R&R, pp. 21-23.

Before trial, counsel was prepared to file a motion in limine to preclude any testimony that a particular phone number could be attributed to Daniels. The prosecutor informed trial counsel that there were no such records. N.T. 11/8/11, p. 3. However, a poster-board size chart was displayed to the jury showing a number attributed to Daniels. The R&R concludes that since the prosecutor told trial counsel that Detective Dove would testify that he was unable to verify the number, Daniels is not entitled to relief. But, that was not exactly what Detective Dove testified to. When asked if he ever got verification that the number belonged to Daniels, he testified: "No. We did receive a number that was suggested that it was his number. We were unable to verify that that was his number." Id. at 70-71. Thus, Detective Dove suggested to the jury that there was some evidence to "suggest" that the number belonged to Daniels. This is not what trial counsel and the prosecutor agreed to.

Such a "suggestion" to the jury that the number may have been attributed to Daniels was prejudicial and was grounds for a mistrial under Commonwealth v. Padilla, *supra*. As noted in the R&R: "The calls were intended to demonstrate that the high volume of calls leading up to and during the day of the robbery and murders and their subsequent drop-off afterwards was an indication that these individuals had in fact conspired to commit the crime in question, especially when combined with evidence of them talking on their phones shown in the video-surveillance footage of the crime scene." R&R, pp. 21-22. In this light, having Daniels's name on the poster-board along with a phone number that could not be verifiably attributed to him should never have been admitted. Trial counsel should have requested a mistrial based on the prosecutor's misrepresentations. See Memorandum of Law, p. 21.

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 5

Daniels asserted that trial counsel was ineffective for failing

to object to Campbell being identified as a probation officer. See Memorandum of Law, pp. 22-24. The Magistrate Judge concluded that this claim was meritless because Daniels could not establish prejudice. See R&R, pp. 23-24.

It is important to note that the reasonable probability "standard is not a stringent one." *Thomas v. Varner*, 428 F.3d 491, 502 (3d Cir. 2005). On the record, the prosecutor even admitted that identifying Campbell as a probation officer would be prejudicial to Daniels. N.T. 11/17/11, pp. 3-4. It was the trial judge ordering Campbell to be identified as a probation officer, to which trial counsel never objected. It has been recognized that "the admission of evidence of the accused's prior criminal activity is so highly prejudicial in its effect upon the jury as to be equalled only by an actual confession in its impact." *Commonwealth v. Hawkins*, 626 A.2d 550, 554 (Pa. 1993). There is a reasonable probability that the outcome of the proceedings would have been different without evidence of prior bad acts. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068 (1984).

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 6

Daniels asserted that trial counsel was ineffective for failing to insure that the trial court gave a cautionary instruction regarding hypothetical questions posed to the medical examiner by the prosecutor. See Memorandum of Law, pp. 24-26. The Magistrate Judge concluded that trial counsel may have had a reasonable strategic basis for not reminding the trial court to give the instruction. See R&R, pp. 24-26.

The prosecutor asked the medical examiner if it was possible that Thal may have been in a headlock before she was shot, based on Murchison's testimony, which was stricken. Trial counsel objected and requested a mistrial. The Magistrate Judge claims that it was trial counsel's strategy not to request a mistrial, because they did not want to highlight it. See R&R, *supra*. Under the circumstances of this case, this speculative theory makes no sense. If trial counsel did not want to highlight such testimony, they would not have objected in the first place. If they did still choose to object to the hypothetical questions, they would have advised the judge during the sidebar that

they felt a cautionary instruction would only have highlighted the testimony. Finally, the prosecutor's hypothetical questions were highlighting testimony that the jury was already being asked to perform the essentially impossible task of forgetting. To assume that trial counsel did not want the trial court to highlight the questions that highlighted testimony that was supposed to be stricken from the record is illogical. Such speculation could easily have been eliminated by holding an evidentiary hearing.

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 7

Daniels asserted that trial counsel was ineffective for failing to object to the in-court identification of Daniels by Langdon Scott. See Memorandum of Law, pp. 26-30. The Magistrate Judge concluded that the claim lacked substance. See R&R, 26-27. It was stated that: "While trial counsel did not move to have Scott's identification of Daniels suppressed, he did cross-examine Scott, asking pointed questions revealing Scott's prior unfamiliarity with Daniels and the apparent contradiction between the identification he made on the witness stand and his testimony at the preliminary hearing." R&R, *supra*.

Cross-examination is not a substitute for suppressing inadmissible evidence. "[A] defendant arguably ... has 'everything to gain and nothing to lose' in filing a motion to suppress[.]" *Tomlin v. Meyers*, 30 F.3d 1235, 1238 (9th Cir. 1994) (citation & internal quotations omitted). "Positive identification testimony is the most dangerous evidence known to the law.... Tainted identification evidence cannot be allowed to go to a jury because they are likely to accept it uncritically." *United States v. Greene*, 704 F.3d 298, 306 (4th Cir. 2013) (citations & internal quotations omitted). "Studies also suggest that jurors tend to overestimate the likely accuracy of eyewitness evidence[.]" *Young v. Conway*, 698 F.3d 69, 88 (2d Cir. 2012) (citations & internal quotations omitted). Only by ignoring the decades of research on eyewitness identification evidence, can it be concluded that cross-examination can make-up for trial counsel's failure to move to suppress identification evidence. See *Dennis v. Sec., Penn. Dept. of Corr.*, 834 F.3d 263, 313 (3d Cir. 2016) (McKee, C.J., concurring).

Daniels request that this Court reject the R&R in whole with respect to this claim and review it de novo.

Objection # 8

Daniels asserted that trial counsel was ineffective for failing to object to several instances of prosecutorial misconduct during opening statements and closing arguments. See Memorandum of Law, pp. 30-34. The Magistrate Judge concluded that these claims were meritless. See R&R, pp. 27-29.

During opening statements, the prosecutor implied to the jury that it made no sense for the defendants to go to trial, when there was a "mountain of evidence" against them. N.T. 11/14/11, p. 53. These comments undermined Daniels right to a fair trial and all of the constitutional rights intended to assure Daniels a fair trial. These comments were beyond the "considerable latitude" afforded to prosecutors; the comments were not about "reasonable inferences" to be drawn from the evidence, but a claim that there was so much evidence it made no sense for Daniels to go to trial; and, these comments were not "oratorical flair" arguing a particular version of the evidence to the jury, but an argument that any version of the case presented by the defense was a "sideshow distraction." R&R, p. 28.

Furthermore, the Magistrate Judge states that the prosecutor "indeed cautioned the jury that an attorney's statements could not be considered evidence." Id. It is clear from the prosecutor's arguments that it was only defense counsels's "antics," "sideshow distractions," and "theories" that were not considered evidence. On the other hand, the prosecutor had such a "mountain of evidence" that it made no sense for Daniels to go to trial.

With respect to closing arguments, despite agreeing that there was no evidence to verify that a particular phone number belonged to Daniels, the prosecutor still claimed that the number could be attributed to him during closing arguments. N.T. 11/29/11, p. 137. The prosecutor claimed that with "the kind of life that they live, they don't put anything in their name." Id. People like Daniels would give a crack head \$20 to put a phone in their name. The prosecutor essentially argued that they could not prove the number belonged to Daniels, but don't hold it against the Commonwealth, because people like him have ways to conceal such things. In other words, Daniels

should be found guilty because he is a criminal that knows how to avoid detection, even though the evidence was not presented by the Commonwealth to prove the number belonged to him.

Daniels request that this Court reject the R&R in whole with respect to this claim and review it *de novo*.

Objection # 9

Daniels asserts that the Magistrate Judge's R&R, with respect to each of his claims on ineffective assistance of counsel is contrary to the "principle of party presentation." *Greenlaw v. United States*, *supra*. For each claim, arguments were made in the R&R in response to Daniels's claims for relief that the Commonwealth failed to make. At the same time, the arguments presented by Daniels in support of his claims were not squarely addressed.

Furthermore, as previously noted, the Magistrate Judge concluded that each of these claims of ineffective assistance of counsel was addressed on the merits by the State courts. See R&R, 19. However, the R&R does not address the applicability of § 2254(d) with respect to any of these claims.

Daniels request that each of his claims of ineffective assistance of counsel be reviewed *de novo* and the case remanded for an evidentiary hearing on the claims.

D. DANIELS IS ENTITLED TO A NEW TRIAL ON THE BASIS OF NEWLY-DISCOVERED EVIDENCE THAT WAS UNAVAILABLE AT THE TIME OF TRIAL, UNDER THE FOURTEENTH AMENDMENT.

Daniels asserted that he was entitled to a new trial on the basis of newly-discovered evidence, which consisted of evidence of misconduct by Detectives Dove, Jenkins, and Pitts. See Memorandum of Law, pp. 38-41. The Magistrate Judge concluded that this claim was non-cognizable and meritless. See R&R, pp. 30-34. Daniels raises the following objections.

Objection # 1

Daniels initially raised a claim of newly-discovered evidence with respect to Detectives Pitts and Jenkins based on newspaper articles indicating that they had coerced statements from witnesses in several murder cases. While the appeal was pending, Daniels obtained transcripts and court opinions extensively detailing a pattern of Detective Pitts abusing witnesses and suspects in order to coerce

statements. Much of this evidence is currently before the Superior Court on appeal from the dismissal of Daniels's third PCRA Petition.

In recommending that this aspect of Daniels's claim be dismissed, the Magistrate Judge meticulously went through the procedural history of Daniels's second PCRA Petition and conveniently ignored the fact that this aspect of the claim is still before the State courts. See R&R, pp. 6-7. It should also be noted that the Superior Court held that the additional evidence of Pitts's misconduct had to be considered in a third PCRA Petition. If the Superior Court holds that this claim is timely, this claim would not be procedurally defaulted before this Court. See Commonwealth v. Daniels, No. 35 EDA 2019 (Pa. Super. Ct.).

Daniels request that this Court reject the R&R in whole with respect to this claim, stay the proceedings until the conclusion of the State court proceedings, and subsequently review this claim de novo.

Objection # 2

With respect to the aspect of this claim addressing Detectives Pitts and Jenkins, the Magistrate Judge stated: "The PCRA and Superior courts' determinations that Daniels' newly-discovered evidence claim was untimely as to Pitts and Jenkins was not contrary to, nor an unreasonable application of United States Supreme Court precedent, and Daniels is not entitled to habeas relief on this claim." R&R, p. 31. Section 2254(d) only applies to claims "adjudicated on the merits." It is clearly erroneous to apply § 2254(d) to the Superior Court's holding that this claim was untimely. The Superior Court's decision would result in this claim being procedurally defaulted in this Court. Daniels acknowledged that the claim was not adjudicated on the merits. See Memorandum of Law, p. 41. The Commonwealth argued that this claim was procedurally defaulted. See Response to Petition, pp. 19-21. Daniels addressed whether the claim is procedurally defaulted in his Reply. See Reply to the Response, pp. 15-18. The R&R is not addressing the arguments as presented by the parties. See Greenlaw v. United States, *supra*.

Daniels request that this Court reject the R&R in whole with respect to this aspect of the newly-discovered evidence claim and review it de novo.

Objection # 3

The newly-discovered evidence claim with respect to Detective Dove was held to be timely by the State courts, but denied Daniels relief on the merits. The Magistrate Judge concluded that the evidence that Dove helped someone avoid arrest after committing a murder was only impeaching. Evidence that Dove had interfered in the investigation of a murder, when it is his job to investigate murders, is not merely impeaching. It is material. See *Boyd v. Puckett*, 905 F.3d 895, 896 n. 1 (5th Cir. 1990). "Impeachment is directed to the credibility of the witness for the purposes of discrediting him. It ordinarily furnishes no factual evidence. Contradiction on the other hand, is directed to the accuracy of testimony and supplies additional factual evidence to be considered along with such evidence." *Commonwealth v. Myrick*, 360 A.2d 598, 602 (Pa. 1976) (citations omitted). Daniels has presented factual evidence for the jury to consider along with Dove's testimony. It undermines the integrity of the investigation and does not merely discredit Dove.

Daniels request that this Court reject the R&R in whole with respect to this aspect of the newly-discovered evidence claim and review the claim *de novo*.

Objection # 4

The Magistrate Judge also erroneously concluded that Detective Dove's testimony "did little if anything to prove Daniels' alleged involvement in the crime, actually demonstrating instead that Daniels could not be connected to any of the phone records introduced as evidence.... Dove specifically testified that the phone number that was marked on the Commonwealth's exhibit as belonging to Daniels and shown to be connected to calls made by and to Epps could not be verified as Daniels' number." R&R, p. 33. This is not completely true. As previously explained, Detective Dove still managed to suggest to the jury that the number was Daniels, there just was not enough evidence to prove it. See Section II.C (Objection # 4), *supra*. The prosecutor went even further during closing arguments by telling the jury that people that live like Daniels (i.e., a criminal) use a "crack head" to get a phone for him. See Section II.C (Objection # 8), *supra*.

Daniels request that this Court reject the R&R in whole with

respect to this aspect of the newly-discovered evidence claim and review the claim *de novo*.

Objection # 5

The Magistrate Judge implies that Daniels has raised a substantive claim of actual innocence. See R&R, p. 34. He has not. Daniels made no argument of actual innocence under *Herrera v. Collins*, 506 U.S. 390, 401 (1993) or *Hause v. Bell*, 547 U.S. 518, 537 (2006).

Daniels request that this aspect of the R&R be rejected in whole and the newly-discovered evidence claim be reviewed *de novo*.

Objection # 6

The Philadelphia District Attorney's Office, the Internal Affairs Unit of the Philadelphia Police Department, and the Pennsylvania Innocence Project have all been involved in investigating misconduct by Detective Pitts. Daniels was interviewed by the Internal Affairs Unit and was told he would need an attorney to obtain the evidence against Detective Pitts. Daniels filed two motions for appointment of counsel seeking assistance to obtain the evidence against Pitts. Both motions were denied.

Daniels asserts that the denial of the motions for appointment of counsel were "clearly erroneous and contrary to law." Fed.R.Civ.P. 72(a). Daniels request that this Court set aside the ruling of the Magistrate Judge, appoint counsel, and allow counsel time to obtain the evidence Daniels has been seeking.

E. INEFFECTIVE ASSISTANCE OF COUNSEL: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM OF TRIAL COURT ERROR BY DENYING A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

Daniels argued that appellate counsel was ineffective for failing to raise the claim that the trial court erred in failing to grant a mistrial after the prosecutor explicitly argued that Scott was stabbed because of his cooperation with the Commonwealth. See Memorandum of Law, pp. 41-43. The Magistrate Judge concluded that this claim is procedurally defaulted and meritless. See R&R, pp. 35-37. Daniels raises the following objections.

Objection # 1

The Magistrate Judge concluded that this claim was procedurally defaulted without any analysis of whether there was "cause and

prejudice" for the default. See R&R, p. 36. Daniels asserted that appellate counsel's ineffectiveness was sufficient to establish "cause and prejudice" for the default. Daniels request that this Court reject the conclusion of the R&R with respect to procedural default of this claim and review it *de novo*.

Objection # 2

The Magistrate Judge further concludes that this claim is meritless. As was noted, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of [appellate] counsel be overcome." R&R, p. 36 (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Under Pennsylvania law, the trial court was required to grant a mistrial once the motion in limine was granted precluding evidence that Scott had been stabbed because of Daniels or any other codefendant. See Memorandum of Law, pp. 42-43 (citing *Commonwealth v. Padilla*, *supra*).

As previously noted, the trial court precluded testimony that Scott had been stabbed because of his cooperation with the Commonwealth. See Section II.C (Objection # 2); also see Memorandum of Law, pp. 15-17. It should also be noted that the Magistrate Judge's argument that the cautionary instruction at issue here, given in response to comments during closing arguments, was directed at Scott's testimony during direct-examination is clearly wrong when viewed in light of the comments made and when the instruction was given. See R&R, p. 20; cf. R&R, p. 36.

Daniels request that this Court reject the R&R in whole with respect to this claim and review it *de novo*.

III. REQUEST FOR RELIEF

For all of the foregoing reasons of law and fact, Daniels request that this Court:

- (a) STAY the proceedings until the outcome of the Superior Court decision in *Commonwealth v. Daniels*, 35 EDA 2019 (Pa. Super. Ct.);
- (b) APPOINT counsel to assist Daniels in obtaining the evidence of misconduct regarding Detective Pitts;
- (c) review the portions of the R&R objected to *DE NOVO*; and
- (d) any other relief that law and justice.

CERTIFICATE OF SERVICE

I, Edward N. Daniels, hereby certify under penalty of perjury that I am this day serving a true and correct copy of the foregoing OBJECTIONS TO THE REPORT AND RECOMMENDATION upon the following person by U.S.P.S. first-class mail, in a sealed, postage-paid envelope:

A.D.A. D. Wack
Philadelphia District Attorney's Office
Three South Penn Square
Corner of Juniper & South Penn Square
Philadelphia, Penn. 19107-3499

Service was executed on the 19th day of October, 2019.

Respectfully Submitted,

Edward Daniels
Edward N. Daniels
D.O.C. # KH0067
S.C.I. Rockview
Box A
Bellefonte, Penn. 16823-0820

VERIFICATION STATEMENT

I, Edward N. Daniels, hereby verify under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Date: October 19, 2019.

Respectfully Submitted,

Edward Daniels

Edward N. Daniels
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S.C.I. Rockview
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