APPENDIX "A"

ALD-273 September 22, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 21-2075

FREDDIE CLEVELAND, Appellant

v.

SUPERINTENDENT SMITHFIELD SCI; ET AL.

(E.D. Pa. Civ. No. 2-16-cv-00640)

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

Submitted is Appellant's application for a certificate of appealability pursuant to 28 U.S.C. §2253(c) in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. §2253(c). To the extent that Appellant's motion under Federal Rule of Civil Procedure 60(b) sought to raise new claims or to attack the District Court's denial of claims in his 28 U.S.C. §2254 petition on the merits, jurists of reason would agree, without debate, that the Rule 60(b) motion constituted an unauthorized second or successive §2254 petition that the District Court lacked jurisdiction to consider. See 28 U.S.C. §§2253(c)(2), 2244(b)(3)(A); Gonzalez v. Crosby, 545 U.S. 524, 530–32 (2005); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000). To the extent that Appellant's motion raised "true" Rule 60(b) claims, see Gonzalez, 545 U.S. at 531, by challenging the District Court's failure to provide him an opportunity to amend his petition sua sponte, jurists of reason would agree, without debate, that Appellant was not entitled to relief under Rule 60(b) because he failed to show that there were "extraordinary circumstances where, without [Rule 60(b)] relief, an extreme and unexpected hardship would occur." Cox v. Horn, 757 F.3d 113, 115 (3d Cir. 2014) (citation omitted); see also Gonzalez, 545 U.S. at 535.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: October 14, 2021
PDB/cc: Freddie Cleveland
William R. Toal, III, Esq.

A True Copy:

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

PATRICIA S. DODSZUWEIT

CLERK

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
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RE: Freddie Cleveland v. The Attorney General, et al
Case Number: 21-2075
District Court Case Number: 2-16-cv-00640

ENTRY OF JUDGMENT

Today, **October 14, 2021** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

For the Court,

s/ Patricia S. Dodszuweit,
Clerk

s/ pdb Case Manager

cc:
Ms. Kate Barkman

APPENDIX "B"

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

FREDDIE CLEVELAND,	:	
Petitioner,	:	
	:	
v.	:	**Civ. No. 16-0640**
	:	
THE ATTORNEY GENERAL OF PENNSYLVANIA, et al.,	:	
Respondents.	:	

ORDER

Pro se state prisoner Freddie Cleveland filed a Petition for habeas relief on February 9, 2016. (Doc. No. 1); 28 U.S.C. § 2254. Later that year, Magistrate Judge Linda Caracappa recommended denying the Petition, and I agreed. (Doc. Nos. 13, 15.) Some five years later, Cleveland seeks to reopen his closed habeas proceedings under Rule 60(b)(6). (Doc. No. 20.) I will deny relief.

To prevail under Rule 60(b)(6), Cleveland must establish "extraordinary circumstances," which "rarely occur in the habeas context." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005). In addition, the Motion must be a true Rule 60(b) motion, not an unauthorized second or successive habeas petition. See id. at 533. A Rule 60(b) motion "that seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim *on the merits*" is an unauthorized, successive habeas petition; a Rule 60(b) motion in which the prisoner alleges "some defect in the integrity of the federal habeas proceedings" is permissible. Id. at 532 (emphasis in original).

In the instant Motion, Cleveland makes three arguments: (1) he did not have the mental state required to sustain his underlying his murder conviction; (2) PCRA counsel was ineffective for failing to rise trial counsel's ineffectiveness; and (3) Magistrate Judge Caracappa erred by failing to construe his claims liberally and allow him to amend his habeas petition to include the

allegation that PCRA counsel was ineffective. (Doc. No. 20.) The first two arguments are plainly substantive claims and must be dismissed for lack of jurisdiction. The third argument includes a procedural issue that I may address. See Gonzalez, 545 U.S. at 532.

As Cleveland correctly notes, *pro se* filings must be liberally construed. Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002). "Court personnel reviewing pro se pleadings are charged with the responsibility of deciphering why the submission was filed, what the litigant is seeking, and what claims she may be making." Higgins v. Atty. Gen. of the U.S., 655 F.3d 333, 340 (quoting Jonathan D. Rosenbloom, Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York, 30 Fordham Urb. L.J. 305, 308 (2002)). Yet, "unrepresented litigants are not relieved from the rules of procedure and the requirements of substantive law." Parkell v. Danberg, 833 F.3d 313, 324 n.6 (3d Cir. 2016).

In his original petition, Cleveland made four arguments, only one of which is relevant here: that the trial court abused its discretion in admitting graphic photographs of the victim's body. Judge Caracappa rejected that claim, concluding that his argument pertained only to state evidentiary law and thus was not cognizable on federal habeas review. (R&R, Doc. No. 13, at 11) (citing Pulley v. Harris, 465 U.S. 37, 41) (1984)). Cleveland now argues that Judge Caracappa should have liberally construed his original petition to include the allegation that PCRA counsel ineffectively failed to argue that trial counsel ineffectively failed to object to the introduction of this evidence under the due process clause. Such a construction would have gone well beyond "liberal." Judge Caracappa was not obligated to rewrite Cleveland's petition. See In re BG Petroleum, LLC, 619 B.R. 320, 322 (Bankr. W.D. Pa. 2020) (citing Merryfield v. Jordan, 584 F.3d 923, 924 n.1 (10th Cir. 2009)) ("[T]he Court is not required to assume the role

of advocate on behalf of a pro se party."); see also Hodson v. Alpine Manor, Inc., 512 F. Supp. 2d 373, 384 (W.D. Pa. 2007) ("Where one party is proceeding pro se, the court reads the pro se party's papers liberally and interprets them to raise the strongest arguments *suggested therein*.") (emphasis added). In any event, because the AEDPA provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief" in a § 2254 habeas proceeding, the ineffectiveness claim Cleveland now urges would not have been cognizable. 28 U.S.C. § 2254(i).

In sum, I am without jurisdiction to consider two of Cleveland's arguments, and the third is without merit.

AND NOW, this 7th day of May, 2021, it is hereby **ORDERED** that Petitioner Freddie Cleveland's Motion Pursuant to FRCP 60(b)(6) (Doc. No. 20) is **DENIED**.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

FREDDIE CLEVELAND,	:	
Petitioner,	:	
	:	
v.	:	**Civ. No. 16-0640**
	:	
THE ATTORNEY GENERAL OF	:	
PENNSYLVANIA, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this 26th day of October, 2016, upon careful and independent consideration of Freddie Cleveland's Petition for Writ of Habeas Corpus (Doc. No. 1), and after review of the Report and Recommendation of Chief Magistrate Judge Caracappa (Doc. No. 13) to which no objections have been filed (Doc. No. 14), it is hereby **ORDERED** that the Report and Recommendation (Doc. No. 13) is **APPROVED** and **ADOPTED**. The Petition for Writ of Habeas Corpus (Doc. No. 1) is **DENIED** and **DISMISSED with prejudice**. A Certificate of Appealability shall **NOT ISSUE** because Petitioner has not made a substantial showing of the denial of a constitutional right. The **CLERK OF COURT** shall **CLOSE** this case.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

FREDDIE CLEVELAND, Petitioner,	:	CIVIL ACTION
v.	:	
THE ATTORNEY GENERAL OF PENNSYLVANIA, et al., Respondents.	:	No. 16-0640

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE

Now pending before this court is a petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated in the State Correctional Institution Smithfield in Huntingdon, Pennsylvania. For the reasons that follow, it is recommended that the petition be DENIED.

I. PROCEDURAL HISTORY

On March 26, 2010, following a jury trial, petitioner was convicted in the Court of Common Pleas of Delaware County of first degree murder, criminal trespass, and possession of an instrument of crime. (CP-23-CR-0000001-2009). On May 3, 2010, petitioner was sentenced to a term of life imprisonment for first degree murder and an aggregate consecutive term of two (2) to four (4) years' imprisonment for criminal trespass and possession of an instrument of crime. Id. Petitioner filed a timely direct appeal, and on May 13, 2011, the Pennsylvania Superior Court affirmed petitioner's judgment of sentence. See Commonwealth v. Cleveland, 30 A.3d 545 (Pa. 2011). Subsequently, the Pennsylvania Superior Court denied petitioner's petition for reargument, and on July 31, 2012, the Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal. See Commonwealth v. Cleveland, 49 A.3d

442 (Pa. 2012).

On January 22, 2013, petitioner filed a timely, counseled petition for collateral review under the Pennsylvania Post-Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, et seq. On June 25, 2013, an evidentiary hearing was held, and on December 19, 2013, the PCRA court denied petitioner's petition. See Answer, Exhibit R (December 19, 2013 Order Denying PCRA Relief). On November 10, 2014, the Pennsylvania Superior Court affirmed the judgment, and on June 10, 2015, the Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal. See Commonwealth v. Cleveland, No. 210 EDA 2014, 2014 WL 10788851 (Pa. Super. Ct. Nov. 10, 2014); Commonwealth v. Cleveland, 117 A.3d 295 (Pa. 2015).

On February 8, 2016, petitioner filed the instant, timely pro se petition for Writ of Habeas Corpus.[1] Petitioner raises the following four (4) grounds[2] for relief:

1. Petitioner's Fifth Amendment right to counsel was violated when law enforcement officers failed to honor petitioner's request for an attorney and unlawfully denied petitioner access to an attorney;

2. The trial court abused its discretion by refusing to suppress evidence of petitioner's statement to the police;

3. The trial court abused its discretion by admitting as evidence at trial certain graphic photographs of the victim's body; and

4. Trial counsel was ineffective for pursuing a strategy asserting that petitioner did not commit the murder.

See Habeas Pet., Brief for Appellant at 10, 14. Respondents argue petitioner's claims should be dismissed as either meritless or non-cognizable. See Memo. in Resp. to Habeas Pet. at 15, 33,

[1] Although the habeas petition was not docketed by this court until February 9, 2016 (Doc. 1), the "mailbox rule" applies. Under the "mailbox rule," a pro se prisoner's habeas petition is considered filed on the date the prisoner delivers the complaint to prison authorities for filing. See Houston v. Lack, 487 U.S. 266, 276 (1988). Here, petitioner executed his petition on February 8, 2016, so we will presume it was placed in the prison mailing system on that date.

[2] When listing grounds two through four, petitioner states "see appellate brief" and provides no supporting facts. See Habeas Pet. at 7-10. As such, this court has outlined petitioner's claims to the best of its ability.

35. Following a review of petitioner's claims and the record, and for the reasons that follow, we recommend the instant petition for habeas corpus relief be denied.

II. STANDARDS OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for Writ of Habeas Corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption a petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless adjudication of the claim -
>
> (i) 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
>
> (ii) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision may be contrary to Supreme Court precedent in two ways: (i) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (ii) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court's]." Williams v. Taylor, 529 U.S. 362, 405 (2000). However, this "contrary to" clause does not encompass the "run-of-the-mill" state court decisions "applying the correct legal rule from [Supreme Court] cases to the facts of the prisoner's case." Id. at 406.

To reach such "run-of-the-mill" cases, the Court in Williams turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). Id. at 407-08. The Court found a state court decision can involve an unreasonable application of Supreme Court precedent in one of two ways: (i) "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (ii) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407. However, the Supreme Court specified that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. "The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 573 (2007).

III. DISCUSSION

Preliminarily, we note Rule 9.3 of the Local Rules of Civil Procedure provides:

> All petitions for writ of habeas corpus . . . shall be filed on forms provided by the Court and shall contain the information called for by such forms . . . Any attempt to circumvent this requirement by purporting to incorporate by reference other documents which do not comply with this Rule may result in dismissal of the petition.

See Local R. Civ. P. 9.3(a). Here, we find petitioner has violated Rule 9.3, because he failed to include his grounds for relief on the habeas corpus form. See Habeas Pet. at 5. Rather than setting forth his grounds for relief on the form, petitioner attempted to incorporate by reference an appellate brief submitted during petitioner's state court proceedings. As such, petitioner has

failed to comply with Local Rule 9.3, and his petition may be dismissed on that basis. See, e.g., Cook v. Coleman, 2012 WL 2421484, at *2 (E.D. Pa. June 6, 2012) report and recommendation adopted, 2012 WL 2435587 (E.D. Pa. June 25, 2012). Even excusing this violation, however, for the reasons discussed below, we recommend petitioner's habeas petition be denied.

a. Claim One: Whether Petitioner's Fifth Amendment Right to Counsel was Violated when Law Enforcement Officers Failed to Honor Petitioner's Request for an Attorney and Unlawfully Denied Petitioner Access to an Attorney

Petitioner argues, in claim one, his Fifth Amendment right to counsel was violated, because petitioner implicitly requested the assistance of counsel following his initial waiver of his Fifth Amendment right, and the police officers knew petitioner's family had contacted and secured counsel for petitioner, yet the police never mentioned this fact to petitioner. See Habeas Pet., Appellate Brief at 4-5. Petitioner states the officers did not advise petitioner he was entitled to counsel while he was in the hospital. See id. Moreover, petitioner states his attorney was improperly prevented from assisting petitioner while petitioner was in the hospital being interrogated. See id. at 5. As a result, petitioner argues the incriminating statement petitioner made to police in the hospital should have been suppressed, because petitioner's statement was taken in violation of petitioner's Fifth Amendment right to counsel, and petitioner is entitled to a new trial or an evidentiary hearing. See id. at 6-7. Respondents argue the Superior Court adjudicated petitioner's claim and denied it on the merits, and the state court's decision was not contrary to or an unreasonable application of clearly established federal law. See Memo. in Resp. to Habeas Pet. at 32-33. For the reasons that follow, we recommend this claim be denied.

The Fifth Amendment to the United States Constitution contains an individual privilege against self-incrimination, and Miranda v. Arizona, 384 U.S. 436 (1966), provides a

mechanism to safeguard that privilege. See id. at 467 ("In order . . . to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."). Before an interrogation, an accused must be fully informed of both the state's "intention to use his statements to secure a conviction," and of his rights to remain silent and to have counsel present. Id. at 469; Moran v. Burbine, 475 U.S. 412, 420 (1986). An accused may waive his rights verbally or in writing, so long as he makes "a deliberate choice to relinquish the protection those rights afford." United States v. Whiteford, 676 F.3d 348, 362 (3d Cir. 2012) (quoting Berghuis v. Thompkins, 560 U.S. 370, 385 (2010)). When the issue of waiver arises on a motion to suppress statements, the government bears the burden of proving by a preponderance of the evidence that: (i) the defendant was properly advised of his Miranda rights; (ii) the defendant voluntarily, knowingly, and intelligently waived his rights; and (iii) the ensuing statement was made voluntarily. Colorado v. Connelly, 479 U.S. 157, 169 (1986). "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." Moran, 475 U.S. at 422-23. As such, the Supreme Court has held the failure of police to inform an accused of his attorney's telephone call, even if unethical, does not invalidate an otherwise valid Miranda waiver. See id. at 422 ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.").

Here, the Superior Court reviewed petitioner's claim and denied it on the merits, stating, in relevant part:

[Petitioner] argues that the Fifth Amendment required suppression of his post-arrest, pre-arraignment statement to Captain Rhoades, because the police prevented [petitioner's] attorney from speaking with him before he met Captain Rhoades.

. . . .

The police did not violate [petitioner's] Fifth Amendment rights by preventing his attorney from speaking with him before his interrogation, since he knowingly, voluntarily and intelligently waived his Miranda rights and was unaware that an attorney was attempting to contact him. Moran, supra, is squarely on point. There, the suspect confessed to murdering a young woman after receiving Miranda warnings and executing a series of written waivers. At no point during the course of the interrogation, which occurred prior to arraignment, did he request an attorney. While he was in police custody, his sister attempted to retain a lawyer to represent him. The attorney telephoned the police station and received assurances that the suspect would not be questioned further until the next day. In fact, the interrogation session that yielded the inculpatory statements began later that evening. The United States Supreme Court held that the police did not violate the suspect's Fifth Amendment rights. Where a suspect waives his Miranda rights prior to arraignment, the court observed, failure by the police to inform the suspect that an attorney tried to contact him does not invalidate an otherwise proper waiver. The court reasoned that '[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.' Id., 475 U.S. at 422.

. . . .

As in Moran, [petitioner] did not know that an attorney was attempting to contact him, since Upper Darby police refused to allow the attorney to visit [petitioner] and disregarded the attorney's letters demanding that [petitioner] not provide any statement. Under Moran, this behavior, while arguably unethical, does not violate the Fifth Amendment. The fact that [petitioner's] family hired counsel did not trigger [petitioner's] Fifth Amendment rights, since this right is personal and cannot be invoked by another party. Commonwealth v. Hall, 549 Pa. 269, 285, 701 A.2d 190, 198 (1997).

. . . .

[Petitioner] knowingly, voluntarily and intelligently waived his Miranda rights before giving his statement. [Petitioner] was composed, alert, thoughtful and not in visible pain despite undergoing major surgery 18 hours earlier and receiving pain medication two hours before Captain Rhoades arrived. He understood everything Captain Rhoades was saying; he was oriented as to time, place and circumstances; he spoke in a manner that demonstrated his lucidity; he readily agreed to participate in an interview, and Captain Rhoades and Detective Missimer did not threaten him with repercussions if he refused to give a statement

. . .

Thus, even though the police prevented [petitioner's] attorney from speaking with him and disregarded the attorney's demands not to interview him, [petitioner's]

> statement to Captain Rhoades was not subject to suppression under the Fifth Amendment.
>
> [Petitioner] also contends that he invoked his right to counsel during the interrogation by asking whether he could see an attorney when he left the hospital. While Pennsylvania courts have not addressed this scenario, other courts have found similar requests too equivocal to constitute invocation of the right to counsel under the Fifth Amendment.
>
> Courts apply an objective standard in determining whether the defendant has invoked the right to counsel. Davis v. United States, 512 U.S. 452, 458-59, 114 S.Ct, 2350, 129 L.Ed.2d 362 (1994) (citing Connecticut v. Barrett, 479 U.S. 523, 529, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987)). The defendant must 'articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' Id. at 459. It is not enough that the defendant might be invoking the right to counsel; he must do so unambiguously. Id. When he makes an ambiguous statement, police officers need not cease an interrogation, id. at 459-60, 114 S.Ct. 2350 (citation omitted), or ask clarifying questions. Id. at 461-62. Thus, the defendant's statement in Davis, 'maybe I should talk to a lawyer,' was too ambiguous to constitute a request for counsel under the Fifth amendment. Id. at 462.
>
> . . . .
>
> [Petitioner] did not unambiguously state that he wanted to speak to an attorney before talking with Captain Rhoades. Nor did he demand that an attorney be present during the interview. He merely asked whether he could speak with an attorney after the interview—specifically, after he got out of the hospital. This did not constitute an unequivocal invocation of his right to counsel during the interview, so it did not require Captain Rhoades to stop the interview or ask [petitioner] to clarify his request. The court properly denied [petitioner's] motion to suppress.

Commonwealth v. Cleveland, 2010 WL 4357311 (Pa. Com. Pl. July 7, 2010), aff'd, 30 A.3d 545 (Pa. Super. May 23, 2011).

Factual determinations of the state court are due a highly deferential presumption of correctness and are presumed to be correct absent clear and convincing evidence to the contrary. See Weeks v. Snyder, 219 F.3d 245, 257 (3d Cir. 2000); 28 U.S.C. § 2254(e)(1).

i. Whether Petitioner's Fifth Amendment Right to Counsel was Violated when Law Enforcement Officers Failed to Honor Petitioner's Request for an Attorney

As discussed supra, the Superior Court determined police did not violate petitioner's Fifth Amendment rights by preventing petitioner's attorney from speaking with petitioner before petitioner's interrogation, because petitioner knowingly, voluntarily and intelligently waived his Miranda rights. See Cleveland, 2010 WL 4357311. For the reasons that follow, we find petitioner cannot show by clear and convincing evidence that said determination was incorrect. The state court credited Captain Rhoades testimony that petitioner correctly answered questions regarding: (i) the day of the week; (ii) who Captain Rhodes was; and (iii) why Captain Rhodes was speaking with petitioner. See id.; Answer, Exhibit N (Court of Common Pleas Opinion). Petitioner received Miranda warnings and was told he was under arrest for murder; moreover, the state court credited Captain Rhodes testimony that petitioner: (i) answered each question on the Miranda form and signified he understood his rights and agreed to an interview; (ii) seemed coherent, did not look confused and signed his name in the appropriate box; (iii) correctly noted he was twenty-two (22) years of age rather than twenty-one (21), which Captain Rhodes noted was significant, because it was petitioner's birthday, and the day before, petitioner had been twenty-one (21). See id. As such, petitioner has not shown by clear and convincing evidence that the state court incorrectly determined petitioner knowingly, voluntarily, and intelligently waived his Miranda rights. Moreover, despite petitioner's allegations, and in light of the Supreme Court's holding in Moran, the police's failure to inform petitioner that his attorney had contacted police and asked that petitioner not be questioned does not invalidate petitioner's waiver. See Moran, 475 U.S. at 422-23.

ii. Petitioner's Statement Regarding Whether Petitioner would be Permitted to Speak with an Attorney after Petitioner got out of the Hospital

The Superior Court determined petitioner's statement as to whether petitioner would be permitted to speak with an attorney after petitioner got out of the hospital did not rise

to the level of an unambiguous request for counsel, and, therefore, Captain Rhodes was not required to stop the interview or ask petitioner to clarify his request. See Cleveland, 2010 WL 4357311. For the reasons that follow, we find the court's determination in this regard was not contrary to or an unreasonable application of Supreme Court precedent. The Supreme Court has held that in order for an accused to invoke his right to counsel, the accused must make an unambiguous request for counsel. See Davis, 512 U.S. at 458-59 (finding accused's statement that "[m]aybe I should talk to a lawyer" was not a request for counsel and agents were not required to stop questioning accused).

Here, petitioner asked whether he would be allowed to see a lawyer when he got out of the hospital. See Cleveland, 2010 WL 4357311. As the Superior Court noted, asking whether one would be able to speak to an attorney at a later date is not an unequivocal invocation of the right to counsel and did not require Captain Rhoades to stop the interview or ask petitioner to clarify his request.[3] See Davis, 512 U.S. at 458-59. Because petitioner has not shown by clear and convincing evidence that the Superior Court's findings were incorrect, and there is nothing in the record to suggest the Superior Court's determinations were unreasonable or contrary to clearly established federal law, we find petitioner's request was not an unequivocal request for counsel, and we recommend this claim be denied.

b. Claim Two: Whether the Trial Court Abused its Discretion by Refusing to Suppress Evidence of Petitioner's Statement to Police

Petitioner argues, in claim two, the trial court abused its discretion by refusing to suppress evidence of petitioner's statement to police. As discussed in claim one, the Superior Court held petitioner's request did not constitute an unequivocal invocation of petitioner's right

[3] Moreover, the state court credited Captain Rhodes' testimony that after petitioner asked whether he would be able to see an attorney when he got out of the hospital, Captain Rhodes replied "you could see a lawyer whenever you want." Answer, Exhibit N (Court of Common Pleas Opinion) (citing N.T. 3/25/10, pp. 128-29).

to counsel, and petitioner has not shown by clear and convincing evidence that the Superior Court's findings were incorrect or that the determination was unreasonable or contrary to clearly established federal law. See Cleveland, 2010 WL 4357311. As such, the trial court did not err in refusing to suppress petitioner's statement to police, and we recommend petitioner's claim two be denied.

c. Claim Three: Whether the Trial Court Abused its Discretion by Admitting as Evidence at Trial Certain Graphic Photographs of the Victim's Body

Petitioner argues in claim three, in his appellate brief, that he is entitled to a new trial, or in the alternative, an evidentiary hearing, because unnecessary, inflammatory, gruesome, and prejudicial photographs of the homicide victim, along with unnecessary pictures of petitioner's shoes, were introduced into evidence. See Habeas Pet., Appellate Brief at 13, 25-27. Petitioner argues the minimal probative value was greatly outweighed by the undue prejudice that resulted from the jury seeing such images. See id. In response, respondents state petitioner's claim is not cognizable in federal habeas corpus litigation, because it involves an issue solely pertaining to state law. See Memo. in Resp. to Habeas Pet. at 33. For the reasons that follow, we find claim three is not cognizable, and we recommend the instant claim be dismissed.

It has long been held that claims raising only issues of state constitutional or statutory law are not cognizable on habeas review. See Pulley v. Harris, 465 U.S. 37, 41 (1984) (holding state law claims are not cognizable in federal habeas corpus). Here, petitioner argues the trial court improperly admitted pictures of the victim and pictures of petitioner's shoes in violation of the state rules of evidence. See Keller v. Larkins, 251 F.3d 408, 416, n. 2 (3d Cir. 2001) ("A federal habeas court . . . cannot decide whether the evidence in question was properly allowed under the state law of evidence. A federal habeas court is limited to deciding whether

the admission of the evidence rose to the level of a due process violation."). Although petitioner does not raise a formal claim in his habeas petition in this regard, in his appellate brief, petitioner points to Rule 403 of the Pennsylvania Rules of Evidence along with numerous Pennsylvania state cases in support of his claim. See Habeas Pet., Appellate Brief at 13, 25-27. Petitioner does not point to any federal law nor does petitioner argue the admission of the evidence rose to the level of a due process violation. See, e.g., Keller, 251 F.3d at 416, n. 2. As such, we find claim three is not cognizable on federal habeas review, and we recommend this claim be dismissed.

d. Claim Four: Whether Trial Counsel was Ineffective for Pursuing a Strategy Asserting that Petitioner did not Commit the Murder

Petitioner argues he was deprived of effective assistance of counsel, because trial counsel did not conduct a proper investigation, did not investigate whether petitioner had any emotional issues prior to the homicide, and merely stated petitioner did not commit the homicide. See Habeas Pet., Appellate Brief at 20-21. Petitioner argues he should have been examined by a mental expert, who could have assisted petitioner with recalling the incident, and trial counsel should have explored the option of voluntary manslaughter rather than relying on petitioner's allegation that petitioner could not remember what had happened. See id. at 23-24. Petitioner further states the testimonies of Detective Rhodes and the victim's sister should have been stricken as hearsay and "questioned in vigorous fashion upon cross-examination." Id. Petitioner argues that as a result of trial counsel's ineffectiveness, petitioner is entitled to a new trial and an evidentiary hearing. See id. at 20, 21. Respondents argue the Superior Court denied petitioner's claim on the merits and its decision was not an unreasonable application of clearly established federal law or an unreasonable determination of the facts. See Memo. in Resp. to Habeas Pet. at 35-49. For the reasons that follow, we recommend the instant claim be denied.

The applicable federal precedent for ineffective assistance of counsel claims is the well-settled two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). First, petitioner must prove "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In analyzing counsel's performance, the court must be "highly deferential." Id. at 689. The Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). A convicted defendant asserting ineffective assistance must therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. The reviewing court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. It follows that counsel cannot be ineffective for declining to raise a meritless issue. See United States v. Fulford, 825 F.2d 3, 9 (3d Cir. 1987); Premo v. Moore, 131 S. Ct. 733, 741 (2011).

Second, petitioner must demonstrate counsel's performance "prejudiced the defense." Strickland, 466 U.S. at 687. To establish prejudice, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. A reviewing court need not determine whether counsel's performance was deficient before considering whether the petitioner suffered any prejudice as a result of the alleged deficiency. If it is easier to dispose of an ineffectiveness claim for lack of sufficient prejudice, that course should be followed. Id. at 697.

Here, the Superior Court reviewed petitioner's ineffective assistance of counsel claim and denied it on the merits. The Superior Court noted:

> [Petitioner] filed a timely, counseled PCRA petition, in which he contended that, given the overwhelming evidence that he killed the victim, trial counsel was ineffective for failing to pursue a defense relating to [petitioner's] mental health issues, establishing that the crime rose to no more than voluntary manslaughter.
>
> . . . .
>
> A person is guilty of 'heat of passion' voluntary manslaughter if at the time of the killing he or she reacted under a sudden and intense passion resulting from serious provocation by the victim. 'Heat of passion' includes emotions such as anger, rage, sudden resentment or terror which renders the mind incapable of reason. An objective standard is applied to determine whether the provocation was sufficient to support the defense of 'heat of passion' voluntary manslaughter. The ultimate test for adequate provocation is whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection.
>
> . . . .
>
> Here, [petitioner] consistently informed trial counsel that he could not recall stabbing the victim. Thus, as in Mason, there is no indication that 'words were exchanged which would give rise to a heat of passion defense.' Also, as in Mason, there is no testimony (from either the victim's sister or the man who was on the phone with the victim at the time of the murder) as to provoking statements made by the victim. Instead, [petitioner] references his self-serving testimony [from his PCRA evidentiary hearing] that the victim was 'saying different nasty things' to him, and this fact caused him to stab her. N.T., 6/25/13, at 79. Finally, at the evidentiary hearing, trial counsel testified that 'my hands were kind of tied as it goes to [a voluntary manslaughter] defense because [petitioner] indicated that he did not recall the events.' Id. at 45.
>
> Because petitioner maintained that he did not recall the stabbing, the PCRA court's conclusion that trial counsel's decision to forgo a 'heat of passion' defense was reasonable is supported by the record. See also Miller, 987 A.2d at 649-50 (rejecting the PCRA petitioner's claim that trial counsel was ineffective for failing to call an expert to testify as to his 'personality makeup' and pursue a 'heat of passion' defense; '[o]nce [the defendant] refused to testify about the events surrounding the killing, he made it virtually impossible to convince the [fact finder] that the killing was committed in the 'heat of passion''). We thus affirm the PCRA court's order denying petitioner post-conviction relief.

Cleveland, 2014 WL 10788851, at *2-5.

Factual determinations of the state court are due a highly deferential presumption of correctness and are presumed to be correct absent clear and convincing evidence to the

contrary. See Weeks, 219 F.3d at 257; 28 U.S.C. § 2254(e)(1). Moreover, the Pennsylvania standard for judging ineffective assistance of counsel claims is not contrary to the ineffectiveness standard enunciated in Strickland. See Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000).

Here, we find the Superior Court's determination that trial counsel was not ineffective for failing to pursue or investigate a voluntary manslaughter defense in light of the fact that petitioner consistently maintained he could not remember what had happened on the date of the crime was not contrary to clearly established federal law or an unreasonable determination of the facts. Under Pennsylvania law, a heat of passion, voluntary manslaughter defense is appropriate where the evidence demonstrates the defendant acted under a sudden and intense passion, without time for the defendant to "cool off," resulting from serious provocation from the victim. See Graves v. Mahally, 2016 WL 3579049, at *8 (W.D. Pa. May 20, 2016) (citing Commonwealth v. Browdie, 671 A.2d 668, 671 (Pa. 1996)). Moreover, it requires a defendant to admit culpability. Here, petitioner did not admit culpability; rather, petitioner consistently maintained he could not remember what happened. Accordingly, it was reasonable for trial counsel to pursue an innocence defense by attempting to discredit the Commonwealth's theory. See Cleveland, 2014 WL 10788851.

Moreover, even assuming counsel could have pursued a voluntary manslaughter defense, the evidence petitioner proffers does not enable petitioner to make out all of the required elements of voluntary manslaughter. As the Superior Court noted, petitioner claimed during the PCRA evidentiary hearing that the victim provoked petitioner by "saying different nasty things" to petitioner, and this fact caused petitioner to stab the victim. Cleveland, 2014 WL 10788851, at *5 (citing N.T., 6/25/13, at 79). Pennsylvania courts have noted, however, that simple words do not constitute adequate provocation to kill. See Commonwealth v. Frederick, 498 A.2d 1322,

1325 (Pa. 1985) (finding evidence that defendant and victim had difficult relationship and had argued on day of killing was insufficient to warrant voluntary manslaughter instruction); Commonwealth v. Copeland, 554 A.2d 54, 58 (Pa. Super. 1988) (finding mere words combined with "slight assault" did not constitute adequate provocation for voluntary manslaughter). Because petitioner could not have successfully made out a voluntary manslaughter defense, petitioner was not prejudiced by counsel's decision not to develop or further investigate evidence related to that defense. As such, and in light of the above, we recommend claim four be denied.

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 27th day of September, 2016, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED. Further, there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ LINDA K. CARACAPPA
LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE

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

FREDDIE CLEVELAND, Petitioner,	:	CIVIL ACTION
v.	:	
THE ATTORNEY GENERAL OF PENNSYLVANIA, et al., Respondents.	:	No. 16-0640

ORDER

PAUL S. DIAMOND, J.

AND NOW, this _____ day of _____, 2016, upon careful and independent consideration of the petition for Writ of Habeas Corpus, and after review of the Report and Recommendation of United States Chief Magistrate Judge Linda K. Caracappa, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for Writ of Habeas Corpus is DENIED with prejudice.
3. There is no probable cause to issue a certificate of appealability.
4. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

_____
PAUL S. DIAMOND, J.