No. 22-

IN THE

Supreme Court of the United States

JOHN HART,

Petitioner,

v.

COUNTY OF PHILADELPHIA AND ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ZAK T. GOLDSTEIN
Counsel of Record
GOLDSTEIN MEHTA LLC
1717 Arch Street, Suite 320
Philadelphia, PA 19103
(267) 225-2545
ztg@goldsteinmehta.com

Attorneys for Petitioner

314090

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

John Hart was convicted of harassment and stalking after the trial court prohibited him from presenting evidence of actual innocence in the form of a voice print analysis. The court did not evaluate the admissibility of the expert testimony conclusion but instead precluded the evidence based on a non-existent notice requirement. Hart's counsel failed to properly introduce the evidence, and his appellate counsel failed to raise the issue on appeal.

In the subsequent habeas litigation, the Magistrate Judge erroneously found that she should not evaluate the admissibility of the evidence under Pennsylvania's *Frye* standard because she was bound by the court's ruling. The Magistrate Judge should have reviewed the claim under the rubric of the ineffective assistance of counsel. The Third Circuit Court of Appeals declined to issue a certificate of appealability, finding in a cursory fashion that a 45-year old Pennsylvania Supreme Court case forever prohibits the admission of voice print analysis.

This case merits review because a ruling which amounts to a *per se* bar on a particular type of scientific evidence regardless of advances in the science behind the expert technique violates a criminal defendant's constitutional right to present a defense. Hart should have received an evidentiary hearing on his claim. Therefore, the question presented is:

Where a criminal defendant has compelling evidence of actual innocence in the form of exculpatory expert voiceprint analysis, does that defendant receive

the ineffective assistance of counsel when trial and appellate counsel fail to properly challenge the trial court's violation of the defendant's fundamental due process right to present a defense in excluding that evidence on the basis of a non-existent notice requirement without even holding a hearing on whether the latest scientific evidence would render the testimony admissible?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those named in the caption of the case.

STATEMENT OF RELATED PROCEEDINGS

- *Commonwealth of Pennsylvania v. John Hart*, CP-51-CR-4175-2012, Philadelphia Court of Common Pleas. The trial court's judgment of sentence was entered on May 26, 2016. The same trial court dismissed a Post-Conviction Relief Act Petition on September 3, 2018.

- *Commonwealth of Pennsylvania v. John Hart*, 3284 EDA 2016, Pennsylvania Superior Court. The Pennsylvania Superior Court affirmed the trial court's judgment of sentence on May 22, 2018.

- *Commonwealth of Pennsylvania v. John Hart*, 2209 EDA 2019, Pennsylvania Superior Court. The Superior Court affirmed the order dismissing the Post-Conviction Relief Act Petition on December 30, 2020.

- *John Hart v. County of Philadelphia and Attorney General of Pennsylvania*, Civ. No. 18-4402, Eastern District of Pennsylvania. The District Court adopted the Magistrate Judge's report and recommendation and denied the habeas petition on August 18, 2020.

- *John Hart v. County of Philadelphia, et al.*, No. 20-2886, United States Court of Appeals for the Third Circuit. The Third Circuit issued an order denying a motion for the issuance of a certificate of appealability on March 9, 2022. The Third Circuit denied a timely application for rehearing on April 8, 2022.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Cited Authorities

Page

Statutes and Other Authorities

Cited Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner John Hart respectfully petitions the Court for a writ of certiorari to review the Order of the Third Circuit affirming the denial of his federal habeas petition filed under 28 U.S.C. § 2254.

DECISIONS BELOW

The citation to the Third Circuit Order denying the certificate of appealability is *John Hart v. County of Philadelphia, et al.*, No. 20-2886, 2020 WL 866310 (3d Cir. March 9, 2022). It is included in the Appendix at 1a – 2a. The citation to the District Court Order adopting the report and recommendation of the United States Magistrate Judge and denying the habeas petition is *John Hart v. County of Philadelphia and Attorney General of Pennsylvania*, Civ. No. 18-4402, 2020 WL 4815820 (E.D.Pa. 2020). The order is included in the Appendix at 3a – 4a. The report and recommendation of the United States Magistrate Judge is included in the Appendix at 5a – 29a. Finally, the Third Circuit's Order denying rehearing is included in the appendix at 30a – 31a.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this matter pursuant to 28 U.S.C. § 2254. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Third Circuit denied the motion for the issuance of a certificate of appealability on March 9, 2022. Mr. Hart filed a timely petition for rehearing on March 23, 2022. The Third Circuit denied the petition for rehearing on April 8, 2022, giving Mr. Hart until July 7, 2022, to file this Petition for Writ of Certiorari. This Petition is timely-filed on or before July 7, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)
> >
> > > (i) there is an absence of available State corrective process; or
> > >
> > > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF CASE

On November 12, 2015, Petitioner John Hart was convicted of harassment and stalking following a jury trial before the Honorable Gwendolyn N. Bright in the Philadelphia Court of Common Pleas. Hart was convicted despite the fact that the jury found him not guilty of all of the offenses which would have involved the only methods by which Hart could have committed the offenses for which the jury convicted him. Specifically, the jury acquitted Hart of identity theft, disruption of service, possessing an instrument of crime, and unlawful use of a computer. Despite the jury's confusing verdict, Judge Bright sentenced Hart to 2.5 – 5 years' incarceration followed by two years' probation.

The Commonwealth based the prosecution on the theory that Hart used computer technology to access his ex-girlfriend Erika von Tiehl's personal information and online account passwords in order to conduct a month-long campaign of online harassment. The Commonwealth sought to prove that Hart was responsible for sending the complainant anonymous text messages, changing her telephone number without her consent or knowledge, cancelling her cable television account, and sending her hang-up calls from blocked phone numbers. The Commonwealth claimed that Hart engaged in this campaign of online harassment because he was angry that the complainant broke up with him.

The Commonwealth's case hinged on 1) Ms. von Tiehl's testimony that Hart seemed upset when she broke up with him and that she recognized his disguised voice on an audio recording, 2) prior bad acts testimony from another

ex-girlfriend of Hart, Laura Selvage, who alleged that he had done similar things to her despite the fact that a Baltimore judge had rejected her attempts to obtain a restraining order for failure to prove her allegations by even a preponderance of the evidence, and 3) questionable voice identifications made by Ms. von Tiehl and Hart's probation officer, Agent Michael Sanders, who identified Hart as the man disguising his voice to imitate a female in an audio recording of a telephone call to a Verizon customer service representative. That caller attempted to disconnect Ms. von Tiehl's telephone service. Ms. Selvage never identified Hart as the individual who spoke in a disguised voice.

The case depended almost entirely on the questionable voice identifications. No one saw Hart do these things, Hart did not make any incriminating statements, and there was no forensic evidence found on his electronic devices to link him to these acts. Neither Ms. von Tiehl nor his parole agent had ever heard Hart disguise his voice as that of a female.

Nonetheless, the jury found Hart guilty of harassment and stalking despite this lack of evidence, and that is primarily because Hart received the ineffective assistance of counsel as his trial attorneys failed to bring timely pre-trial motions to dismiss the case and suppress evidence. They also failed to lodge timely objections to inadmissible evidence which cloaked his parole agent's testimony in a "scientific" grounding without foundation. The Commonwealth had seized Hart's two computers and cell phone in order to look for forensic evidence, and the Federal Bureau of Investigation assisted in this forensic analysis. Despite seizing Hart's electronic devices and

thoroughly reviewing the content of those devices, the Commonwealth found nothing linking Hart to any of these crimes. At most, agents found evidence that Hart had searched for the complainant's name on the internet. This is certainly not illegal or even unusual when meeting someone from the internet, and Ms. von Tiehl and Hart had met on Facebook.

It should also be noted that the Commonwealth, at first, claimed that it did not have any reports as to what was found on Hart's electronic devices. It was only after Hart himself subpoenaed the FBI directly seeking any records relating to the search of his electronic devices that he was provided with the exculpatory reports.

Prior to trial, Hart sought to introduce the testimony of an expert witness who would have testified that he had conducted a voice print analysis of the recording and concluded that it was not Hart's voice on the recording. The trial court precluded that testimony based on a notice requirement that does not exist in either the Pennsylvania Rules of Criminal Procedure or Pennsylvania Rules of Evidence. Despite the fact that the improper preclusion of the critical voice print testimony left Hart with a limited defense, his appellate attorney failed to raise this issue on appeal.

Additionally, Hart presented the testimony of three witnesses who he had known for a long time. They listened to the same audio recording and could not tell whether the voice on the recording belonged to Hart or not. The jury found Hart guilty of two charges and acquitted him of the remainder.

Hart was found guilty following the jury trial on the charges of harassment and stalking in violation of 18 Pa.C.S. § 2709 § A4 and 18 Pa.C.S. § 2709.1 § A1. Hart filed a timely appeal to the Pennsylvania Superior Court, and that court denied Hart's appeal on May 22, 2018. He did not file a Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

Hart filed a timely Post-Conviction Relief Act Petition in the Philadelphia Court of Common Pleas on September 3, 2018. The state court dismissed the PCRA Petition on June 11, 2019 because Hart's probation had expired, thereby rendering the petition moot under Pennsylvania law. Prior to the expiration of the probation, Hart filed a petition in the Eastern District of Pennsylvania seeking habeas corpus relief under 28 U.S.C. § 2254. The district court referred that petition to a magistrate judge, and the magistrate judge issued a report and recommendation reaching the merits of the petition but recommending that it be denied.

Hart filed timely objections to the report and recommendations. The district court adopted the report in its entirety and denied the petition on August 18, 2020. The district court declined to issue a certificate of appealability. Hart filed a timely appeal to the United States Court of Appeals for the Third Circuit. Hart moved for the issuance of a certificate of appealability. The Third Circuit denied the motion for the issuance of a certificate of appealability on March 9, 2022. Hart filed a timely petition for rehearing on March 23, 2022. The Third Circuit denied the petition for rehearing on April 8, 2022, and this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. Introduction

The Court should grant a writ of certiorari on the issue of whether Hart received the ineffective assistance of counsel due to trial counsel and appellate counsel's failure to properly present Hart's expert testimony regarding voice print analysis. Few would dispute that "due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). It is likewise generally undisputed that "[c]riminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). In this case, Hart was completely deprived of the ability to present critical exculpatory evidence to the jury. Hart retained the services of a respected expert in voice print analysis. That expert concluded that the voice on the recording, which was the key piece of evidence against Hart, was the voice of someone else. Due to erroneous rulings from the trial court and ineffective attorneys who failed to properly challenge those rulings, the jury never heard that evidence.

Each court to address the issue thus far justified the improper preclusion of this evidence of actual innocence without so much as an evidentiary hearing by relying on a different rationale, and each court erred in its conclusion.

First, the trial court erred in precluding the evidence based on a state court rule of criminal procedure that does not exist. Specifically, the trial court ruled the evidence inadmissible because Hart did not provide notice

of his intent to call an expert in advance. Pennsylvania, however, has no rule requiring the defense to provide the Commonwealth with notice of anything unless the Commonwealth has filed a discovery motion prior to trial. In this case, the Commonwealth had not done so.

Second, the state post-conviction court did not have jurisdiction to address the issue because Hart's sentence concluded before the court could address his petition, leaving the court without jurisdiction under Pennsylvania law.

Third, the United States Magistrate Judge erred in concluding that she could not even address the issue because she was prohibited from entertaining alternative arguments regarding the effectiveness of trial and appellate counsel. The Magistrate Judge also erroneously found that she was bound by the trial court's findings by decisions of this Court which do not apply in the context of an ineffective assistance of counsel claim. The Magistrate Judge's flawed analysis, which was adopted by the district court, if applied broadly, would have the effect of forever prohibiting any claim of ineffective assistance of appellate counsel.

Finally, the United States Court of Appeals for the Third Circuit denied Hart's motion for a certificate of appealability, reasoning that the 45-year old Pennsylvania Supreme Court case of *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977), prohibited the use of voice print analysis. A decision that a certain type of scientific evidence is permanently barred from use at trial forever regardless of the advances in modern science does not comply with the requirements of basic due process.

As this Court has ruled many times, the United States Constitution gives a criminal defendant the fundamental right to present a defense and to challenge the prosecution's evidence. *See Holmes v. South Carolina*, 547 U.S. 319, 321 (2006) (finding federal constitutional rights violated by evidence rule under which defendant may not introduce proof of third-party guilt if prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict); *Rock v. Arkansas*, 483 U.S. 44 (1987) (finding state's rule barring hypnotically refreshed testimony unconstitutional when used to bar defendant from testifying on her own behalf); *Crane v. Kentucky*, 476 U.S. 683, 687 – 88 (1986) (finding trial court could not exclude evidence and argument to jury that confession may have been involuntary even where trial court had made a pre-trial ruling that the confession was voluntary as part of denying motion to suppress); *Washington v. Texas*, 388 U.S. 14 (1967) (finding state court rule that alleged accomplice could not testify on behalf of defendant to be unconstitutional).

Hart had compelling evidence of actual innocence, and the trial court and lower courts violated his due process rights by precluding that evidence. No court has even held a hearing on whether the evidence should be admissible under the *Frye* standard which governs the admissibility of expert testimony in Pennsylvania. Hart received the ineffective assistance of counsel from his state court attorneys, and this Court should grant the writ of certiorari to clarify that a criminal defendant has a fundamental due process right to present a defense, that state court rules and case law which categorially prohibit certain types of evidence despite advances in science violate that right, and that the right includes

the opportunity to be heard on whether compelling, exculpatory expert testimony should be admissible.

II. The Trial Court's Error and the Ineffective Performance of Trial and Appellate Counsel

First, the problems with Hart's representation stem from the trial court's decision to completely prohibit Hart from presenting a defense based on a rule of criminal procedure that does not exist. Trial counsel and appellate counsel were both ineffective in their handling of Mr. Hart's proposed voice print expert. Either trial counsel was ineffective in failing to secure the admission of testimony from a voice analysis expert in advance, or appellate counsel was ineffective in failing to appeal the trial court's order precluding such testimony.[1]

In early October, three weeks prior to trial, defense counsel Conor Wilson, Esquire, contacted multiple experts in voice analysis to inquire as to whether a voice imprint could be taken of Hart's voice and compared to the voice

---

1. Hart's claims involve the ineffective assistance of counsel, which must be analyzed based upon the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, a petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*, but it is less than a preponderance of the evidence. *Id.* at 693, 694.

on the key recording in which someone called Verizon in an attempt to disconnect the complainant's account. Counsel received a response from Roger Boyell, a forensic analyst who has been qualified as an expert and given testimony on the analysis and processing of audio recordings for courts in Delaware, Maryland, and New Jersey.

Boyell informed counsel that he could take a recording of Hart's voice prior to trial by way of telephone and compare Hart's voice to the voice on the recording using computer technology. Boyell conducted the voice comparison and determined that it was not Hart's voice on the recording. Boyell prepared a written report on October 25, 2015, and he emailed that report to defense counsel on the same day.

The Commonwealth never filed a motion for pre-trial discovery. Nonetheless, on October 26, 2015, prior to the start of jury selection, defense counsel voluntarily provided the Commonwealth with notice of intent to call Boyell as an expert in voice analysis. Defense counsel also provided the assigned prosecutor with a copy of Boyell's report and curriculum vitae.

On October 27, 2015, just before trial, the Commonwealth made an oral motion *in limine* seeking to preclude Boyell's testimony, claiming that it had not received sufficient notice of the proposed testimony in advance of trial. The trial court granted the Commonwealth's oral motion in a hearing held on October 28, 2015. (N.T. 10/28/15.) This ruling suddenly deprived Hart of his entire defense to the charges just as trial was set to begin.

The trial court based its ruling entirely on the notice issue and did not conduct a *Frye* hearing. *Id.* Unlike the federal courts, Pennsylvania still uses the *Frye* standard rather than the *Daubert* standard. *See Commonwealth v. Walker*, 92 A.3d 766, 789 - 90 (Pa. 2014).[2] To the extent that the trial court's ruling was correct, and the Commonwealth conceded it was not in the lower courts, Attorney Wilson was ineffective in failing to retain an expert and provide the report well in advance of trial. That ruling, however, was not correct, as the Commonwealth had not filed the discovery motion necessary to trigger any defense obligation to provide expert reports in advance.

Hart's appellate attorney, Alston B. Meade, Jr., Esquire, was also ineffective in failing to appeal the trial court's ruling because neither the Rules of Criminal Procedure nor the Rules of Evidence require the defense to provide advance notice of potential expert witnesses or reports unless the Commonwealth files a formal discovery motion. Pa.R.Crim.P. 573. Rule 573(C) governs when the defense must provide discovery to the Commonwealth. Neither the rule nor the comments to the

2. Pennsylvania generally allows expert testimony under Pa.R.Crim.P. 702: If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. This Pennsylvania Supreme Court further determined that "[u]nder *Frye*, novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003) (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

rule require the defense to provide notice of an expert to the Commonwealth unless the Commonwealth has filed a discovery motion. The rule also does not authorize the trial court to bar such testimony for lack of notice. Here, the trial court had no authority to bar the witness from testifying based on a lack of notice because the plain language of Rule 573 requires the Commonwealth to file a discovery motion. The Commonwealth filed no such motion and was therefore not entitled to advance notice. Trial counsel had provided the notice to the Commonwealth as a courtesy, and he was not required to do so.

Instead of barring the testimony, the trial court should have held a *Frye* hearing to determine the admissibility of the expert testimony. *See Walker*, 92 A.3d at 789 – 90. If the Commonwealth or the trial court needed a continuance to evaluate the proposed expert testimony, then the trial court may well have been justified in granting one. It had no authority to simply preclude the testimony due to lack of notice. Given that the voice print analysis was the basis of Hart's entire defense and that it would have scientifically proven that he did not commit the crimes charged, either trial or appellate counsel was necessarily ineffective in failing to make sure that this crucial evidence was presented to the jury.

III. The Magistrate Judge Also Failed to Consider the Actual Admissibility of the Evidence in the Report and Recommendation

Following the conclusion of his direct appeals, Hart filed a Post-Conviction Relief Act Petition alleging that he received the ineffective assistance of counsel from either trial or appellate counsel for failing to properly

challenge the trial court's decision to preclude the voice print analysis. Hart also filed a federal habeas petition pursuant to 28 U.S.C. § 2254 in which he raised the same claims. The state courts denied the PCRA petition when Hart's probation expired because Pennsylvania's Post-Conviction Relief Act requires a petitioner to be serving a sentence at the time that the state court rules on the petition. As Hart filed the federal habeas petition prior to the expiration of his probation, the Magistrate Judge reviewed the claims *de novo* due to Hart's inability to obtain collateral review on the merits in the state courts.

The Magistrate Judge, however, also erroneously declined to consider the actual admissibility of the evidence or whether Hart was improperly deprived of his constitutional right to present a defense. First, the Magistrate Judge concluded that she could not address Hart's alternative arguments that either trial counsel or appellate counsel had been ineffective. Instead, she ruled that she could only review the performance of appellate counsel. Although she found that she could review appellate counsel's performance, she did not actually do so. Instead, she concluded that she was bound by the trial court's ruling on the non-existent notice requirement. She opined that *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) and *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), stand for the proposition that a habeas court may never second-guess a state court's evidentiary ruling.

The Magistrate Judge was partially correct; this Court's rulings do not allow a petitioner to simply allege that a state court's decision was wrong. Thus, in *Bradshaw*, the Court recognized that the state Supreme Court in question had already evaluated an evidentiary claim and

reached a conclusion which was not so unreasonable as to rise to the level of a due process violation. Likewise, in *Estelle*, the Court found that the Court of Appeals erred in making its own rulings on the admissibility of evidence in a state court trial rather than respecting the state court's ruling.

Those cases, however, have nothing to do with an ineffective assistance of counsel claim. Here, the claim is not solely that the state court made a decision that was wrong. The state court obviously did, and the Commonwealth has conceded as much. Instead, the claim is that the state court made a decision that was wrong and had appellate counsel provided the effective assistance of counsel, Pennsylvania's courts would have remanded the case for an evidentiary hearing on the admissibility of the evidence. If the Magistrate Judge's ruling was correct, then it would never be possible to bring a claim of ineffective assistance of appellate counsel because the habeas court would also be bound by the decision of the trial court. Of course, this is not the case. *See Smith v. Robbins*, 528 U.S. 259 (2000) (explaining standard of review for ineffective assistance of appellate counsel claims); *Anders v. California*, 386 U.S. 738 (1967).

The trial court precluded evidence based on the application of a rule that does not exist, and the Magistrate Judge was not bound by that decision in the context of an ineffective assistance of counsel claim. The district court, however, adopted the Magistrate Judge's report and recommendation, so neither court actually reviewed whether the expert testimony would have been

admissible.[3] Finally, it is also important to note that his case was decided under a *de novo* standard of review as Pennsylvania provided Hart with no procedure for challenging the performance of his counsel in the state court system.

IV. The Third Circuit Should Have Ordered an Evidentiary Hearing Because Due Process Requires the Opportunity to be Heard Before Evidence is Excluded

Finally, the Third Circuit Court of Appeals is the only Court that considered the admissibility of the underlying evidence in any fashion. The Court however, relied almost entirely on a 45-year old Pennsylvania Supreme Court case in concluding that voice print analysis is never admissible in Pennsylvania. This conclusion violates Hart's right to present a defense.

Under well-established precedents of this Court, it is clear that a criminal defendant has the right to present a defense. As this Court has held, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). In *Chambers*, the Court found that a state rule of evidence that prohibited a defendant from

3. The report also repeatedly suggests that the evidence against Hart was extremely strong or overwhelming. As the Third Circuit's order to produce the transcripts makes clear, however, neither the magistrate judge nor the district court actually had or had reviewed the transcripts from the trial at the time that the report was written or adopted. It is unclear how a habeas court could evaluate the strength of the evidence in a case without even having the transcripts.

impeaching his own witness to show that the witness confessed to the crime charged was unconstitutional. Likewise, in *Holmes v. South Carolina*, 547 U.S. 319, 321 (2006), the Court found that a criminal defendant's federal constitutional rights were violated by a rule of evidence under which a defendant could not introduce proof of third-party guilt where the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.

The Court recognized that state and federal lawmakers have broad latitude under the Constitution to establish rules of evidence for the conduct of criminal trials, but there are limits provided by the Due Process Clause of the Fourteenth Amendment and the Compulsory and Confrontation Clauses of the Sixth Amendment in that the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Id.* at 324. Thus, in *Crane v. Kentucky*, the Court ruled that the trial court could not exclude evidence and argument to the jury that the defendant's confession may have been involuntary even where the trial judge had made a pre-trial ruling that the confession was voluntary in the course of denying a motion to suppress the confession. 476 U.S. 683, 687 – 88 (1986). In *Crane*, the Court broke "no new ground in observing that an essential component of procedural fairness is an opportunity to be heard." *Id.* at 690. The exclusion of credible evidence of innocence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690 – 91.

Finally, this Court has also found that a state rule that an alleged accomplice may not testify on the behalf of a

defendant unless the accomplice has been acquitted to be unconstitutional. *Washington v. Texas*, 388 U.S. 14 (1967); *but see United States v. Scheffer*, 523 U.S. 303 (1998) (upholding *per se* preclusion of polygraph evidence but only after extensively reviewing reliability of such evidence). This Court's precedents overwhelmingly establish that states may not create rules of evidence which prohibit the introduction of relevant, reliable evidence of actual innocence.

Here, the Third Circuit's acceptance of *Commonwealth v. Topa* as a permanent bar on the admissibility of voice print analysis no matter how much the science advances violates this Court's repeated findings that criminal defendants have a right to be heard and to present a defense. The Third Circuit simply ignored the fact that the trial court simply did not conduct the necessary *Frye* hearing and analysis to determine whether expert voice print analysis should have been admissible. The only Pennsylvania case in which voice print analysis was rejected as expert testimony is *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977). *Topa* was decided 45 years ago in 1977, and the Pennsylvania Supreme Court has shown a willingness to reconsider blanket prohibitions on expert testimony in response to additional research and subsequent changes in scientific consensus. *See Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014) (reversing blanket ban on expert witness testimony on the subject of identification).

Ultimately, the panel cited two cases for the proposition that Hart was not prejudiced by counsel's failure, presumably because he would not have been permitted to call a voiceprint expert no matter what

counsel had done. *See* Appendix A (citing *Commonwealth v. Topa*, 369 A.2d 1277, 1282 (Pa. 1977) and *United States v. Angleton*, 269 F. Supp. 2d 892, 905 (S.D. Tex. 2003)). Neither case, however, establishes that Hart would have been categorically unable to introduce such testimony. Instead, the trial court should have conducted a *Frye* hearing in order to determine its admissibility.

First, *Angleton* is from a jurisdiction which does not apply Pennsylvania law, and it is now twenty years old. It is also a federal case, and the federal courts apply the *Daubert* standard instead of the *Frye* standard relied on by the Pennsylvania courts. Second, *Topa* is now nearly 50 years old and as such has virtually no bearing on the current reliability of voiceprint technology. *Topa* is the only case in which a Pennsylvania appellate court has rejected voice print analysis as expert testimony, but the Pennsylvania Supreme Court has shown a willingness to reconsider blanket prohibitions on expert testimony in response to additional research and subsequent changes in the scientific consensus. *See Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014) (reversing blanket ban on expert witness testimony on the subject of identification).

Until *Walker*, Pennsylvania appellate courts had long prohibited the use of expert testimony to challenge the reliability of eyewitness identifications. *See id.* at 771 (citing *Commonwealth v. Simmons*, 662 A.2d 621 (Pa. 1995) and *Commonwealth v. Bormack*, 827 A.2d 503 (Pa. Super. 2003)). The *Walker* Court, however, reconsidered the blanket ban on expert testimony in this field. The Court recognized that additional research in the intervening years undermined the validity of the complete ban on this type of testimony. *Walker*, 92 A.3d at 789. Based on recent studies, the Court concluded:

> Factors at issue in this appeal—concerning weapons focus; the reduced reliability of identification in cross-racial identification cases; decreased accuracy in eyewitness identifications in high-stress/traumatic situations; the risk of mistaken identification when police investigators do not warn a witness, prior to viewing a photo array or line up, that the perpetrator may or may not be in the display; and the lack of correlation between witness statements of confidence and witness accuracy—all are topics which the average juror may know little about. Thus, in light of misconceptions ordinary individuals may possess regarding eyewitness testimony, and its presumption of reliability, we conclude that, as a general proposition, the particular area of expert testimony at issue in this appeal may be beyond the ken of the average juror, and thus, as a threshold matter, possibly subject to expert testimony.

Id.

Although studies had begun to show the problems with eyewitness identifications, the *Walker* Court did not simply allow for the introduction of this type of testimony. Instead, the Court simply reiterated the principles behind the *Frye* test. The Court noted that "novel scientific evidence is admissible 'if the methodology that underlies the evidence has general acceptance in the relevant scientific community.'" *Id.* at 789 – 90 (citing *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003)). Most importantly, "what constitutes novel scientific evidence is

usually decided on a case-by-case basis as there is some flexibility in the construction, as 'science deemed novel at the outset may lose its novelty and become generally accepted in the scientific community at a later date, or the strength of the proponent's proffer may affect the *Frye* determination.'" *Id.* at 790 (citing *Commonwealth v. Dengler*, 890 A.2d 372, 382 (Pa. 2005)).

The Pennsylvania Supreme Court clearly recognized that the science may change. What initially may be a novel technique or one which is even rejected by the courts may become generally admissible as studies are conducted and science advances. *See id.* at 791 – 92 ("The absolute prohibition of such expert testimony simply proves too extreme an approach in determining whether relevant testimony should be admitted in this area.") In order to evaluate whether the science has changed, a *Frye* hearing is necessary. *Id.* This is particularly true as other courts have begun to recognize that expert testimony may in fact be admissible in the field of voice identification. *See United States v. Ahmed*, No. 12–CR–661, 2015 WL 1442981 (E.D.N.Y. 2015) (agreeing to hold *Daubert* hearing on voice identification expert testimony); Geoffrey Stewart Morrison & William C. Thompson, *Assessing the admissibility of a new generation of forensic voice comparison testimony*, 18 Columbia Science and Technology Law Review (2017), preprint version available at https://escholarship.org/uc/item/5239p0tz. Further, the computer-based analysis performed by Hart's voice expert is the type discussed in the article.

Walker is not the only recent case in which the Pennsylvania Supreme Court has reconsidered the admissibility of previously prohibited categories of

expert testimony. For many years, Pennsylvania prohibited expert witnesses from testifying about the typical responses of sexual assault victims. *See generally Commonwealth v. Jones*, 240 A.3d 881 (Pa. 2020). In response, the Pennsylvania legislature enacted a statute which allows that type of testimony in some cases. *Id.* at 888 (explaining 42 Pa.C.S. § 5920). The *Jones* Court rejected the testimony of the witness in that particular case because he had not been properly qualified as an expert witness, but the court ultimately found that the new statute was constitutional and that in some cases, it may be proper to admit expert testimony in sexual assault cases where expert testimony had previously been prohibited. *Id.* at 896 – 97.

Accordingly, the Third Circuit panel's reliance on *Topa* is misplaced because the panel's order suggests that *Topa* prohibits voice print analysis forever no matter how reliable the technology has become, thereby violating a criminal defendant's right to present a defense. The Pennsylvania Supreme Court has shown an increased willingness to reconsider previous bans on entire categories of potential expert testimony. That court has also generally held that courts should hold a hearing pursuant to *Frye* in order to determine whether the methodology behind proposed scientific testimony is generally accepted and the testimony therefore admissible. The mere fact that the technology was deemed unreliable nearly fifty years ago does not mean that the same result would be reached today. This case is important enough for the Court to review because Hart was deprived of his entire trial defense at the last minute based on a rule of criminal procedure that does not exist. He should have been given the opportunity to be heard on why voice print analysis is

now admissible, and the lower courts' refusal to give him that opportunity and instead rely on incorrect rules of criminal procedure and interpretations of federal habeas law violate the fundamental right to present a defense.

Because the Third Circuit assumed, without the benefit of an evidentiary hearing, that the evidence would not have been admissible, all of the lower courts have failed to conduct an actual prejudice analysis. If the expert testimony was admissible, then Hart suffered overwhelming unfair prejudice from the trial court's erroneous preclusion of his expert witness. This is particularly true in light of the fact that trial counsel failed to object when the Commonwealth improperly presented at trial almost exactly the type of expert testimony Hart was not permitted to use.

Hart's parole agent, Michael Sander, testified at trial that he had special training in recognizing speech patterns based on his undergraduate degree in Communications from Pennsylvania State University. Specifically, Agent Sander testified that he could recognize Mr. Hart's voice based on unique voice patterns. He claimed that Mr. Hart regularly used phrases such as "and things like that." (N.T. 11/05/15, 15). Agent Sander testified that these patterns were relevant to him in recognizing the voice on the recording because he "graduated from Penn State in communications, so [he] studied a lot of speech patterns" and "[t]he speech pattern is the same."

Although Agent Sander, like any other witness familiar with Hart's voice, could properly provide a lay opinion, that is not what Agent Sander did. Instead, Agent Sander went far beyond the limits on lay opinion testimony.

The Pennsylvania Rules of Evidence, like the federal rules, certainly allow lay opinion testimony on this issue. The problem, however, is that Agent Sander provided expert opinion testimony when he claimed that he could recognize the voice as belonging to Hart not because of any extensive experience in speaking with Hart, but because had received special training in communications and in identifying speech patterns. He specifically testified that he recognized the voice not because he had repeatedly met with Mr. Hart, but because "the speech pattern is the same."

In Pennsylvania, expert testimony "reflects the application of expertise" and does not "stray[ ] into matters of common knowledge." *Commonwealth v. Manivannan*, 186 A.3d 472, 485 (Pa. Super. 2018) (citing *Nobles v. Staples, Inc.*, 150 A.3d 110, 114 (Pa. Super. 2016)). It "requires knowledge, information or skill beyond what is possessed by the ordinary juror." *Id.* (citing *Ovitsky v. Capital City Econ. Dev. Corp.*, 846 A.2d 124, 126 (Pa. Super. 2004)) (quoting *Commonwealth v. Carter*, 589 A.2d 1133, 1134 (1991)). That expert testimony must be "distinctly related to a science, skill or occupation which is beyond the knowledge or experience of an average lay person" and does not "involve[ ] a matter of common knowledge." *Id.* (citing *Commonwealth v. Minerd*, 753 A.2d 225, 230 (Pa. 2000)).

Agent Sander provided expert testimony despite the fact that the trial court never qualified him as an expert, and the Commonwealth made an objection when Hart attempted to present actual expert testimony on voice prints. In this very same case, both at trial and throughout in these appellate proceedings, the Commonwealth has

argued that expert speech comparison and "voice prints" are inadmissible expert testimony, yet it requested that the district court disregard the fact that it introduced the exact type of testimony which it believes should not be admissible. This Court should not allow such an incompatible result. The Commonwealth's witness did not even have any pretense of real expertise, and there was certainly no hearing to evaluate whether Agent Sander had sufficient expertise in speech patterns. The trial court also made no findings as to whether that expertise was reliable enough for him to testify as an expert. Trial counsel should have objected, but he did not, so the testimony was admitted without objection.

Had trial counsel objected, the objection almost certainly would have been sustained. Pennsylvania appellate courts have reversed numerous convictions due to improper opinion testimony from law enforcement and other pseudo-expert witnesses. *See e.g.*, *Commonwealth v. Gause*, 164 A.3d 532 (Pa. Super. 2017) (reversing conviction where non-expert police officer testified that eye tremors suggest recent marijuana usage); *Commonwealth v. Allison*, 703 A.2d 16 (Pa. 1997) (lay witness could not testify regarding "split and opened" condition of complainant's hymen in absence of qualified expert testimony to explain significance of these personal observations); *see also Commonwealth v. Yanoff*, 690 A.2d 260 (Pa. Super. 1997) (murder defendant attempted to elicit objectionable opinion by asking police officer whether victim had appeared to be under influence of drugs; officer had not been qualified to render such opinion); *Commonwealth v. Hopkins*, 231 A.3d 855 (Pa. Super. 2020) (affirming grant of new trial for failure to object where expert improperly claimed ability to determine date of DNA deposit).

Further, the improper opinion testimony was particularly egregious because it provided the only real basis for Agent Sander's opinion. Contrary to the conclusion in the magistrate's report, Hart never argued that Agent Sander's lay opinion would have been totally inadmissible; he argued that Agent Sander only met with him on a limited number of occasions and therefore would not have made for a credible witness based on lay opinion alone. (N.T. 1/15/15, 18-19). Agent Sander fixed this potential credibility issue for the jury by relying on his claimed special scientific ability to recognize speech patterns. He supervised over 100 other parolees and had met with Hart at most a handful of times. *Id.* Thus, his entire conclusion was really premised on his overconfidence in his abilities to engage in expert speech recognition due to his college degree.

Finally, Hart suffered prejudice from having that opinion testimony improperly cloaked in expertise from a law enforcement officer. Federal courts have reached the same conclusion in similar circumstances. *United States v. Jackson*, 849 F.3d 540 (3d Cir. 2017) (finding error where case agent permitted to explain certain wiretap conversations were incriminating); *United States v. Diaz*, 951 F.3d 148 (3d Cir. 2020) (reaching similar conclusion as in *Jackson*); *United States v. Fulton*, 837 F.3d 281 (3d Cir. 2016) (finding agent should not have been permitted to opine as to who made critical phone call). The prejudice was compounded by the fact that the witness's profession informed the jury that Hart was on parole at the time of the alleged offense. At a minimum, if Agent Sander was permitted to testify essentially as an expert due to his undergraduate degree in communications, then Boyell's testimony should have been admissible as lay opinion

testimony, as well. *See United States v. Hall*, 28 F.4th 445 (3d Cir. 2022) (finding probation officer could give opinion that he recognized defendant's voice on recording).

Hart suffered prejudice from these errors; the Commonwealth was given *carte blanche* to present any identification testimony it wished without any challenge to the reliability of that testimony, and Hart was precluded from even having an opportunity to be heard on the reliability and admissibility of his exculpatory expert testimony. This was not a case in which the Commonwealth presented overwhelming evidence, and as previously explained, the magistrate judge and district court did not even have the transcripts before denying the habeas petition. The complainant testified that she and Hart had a bad break up and that she thought it was his voice on the recording despite the fact that the voice was disguised. Hart's parole agent, who barely knew him, testified that he had a special ability to recognize speech patterns beyond that of an ordinary lay witness. Finally, a second woman, whose unproven allegations had already been rejected by a judge in Baltimore, testified that annoying things had happened to her. The Baltimore woman, however, failed to make any voice identification.

The jury rejected much of the Commonwealth's case by acquitting Hart of a number of the charges. Thus, the allegations were very much in dispute, and given the fact that the Commonwealth was allowed to introduce its own improper quasi-expert testimony, it was that much more critically important for Hart to be allowed to call an actual expert to testify. The lower courts, however, relied on rules that simply do not exist in order to completely deprive Hart of his defense. This Court should grant the writ of

certiorari so that it can protect a criminal defendant's opportunity to be heard on the admissibility of evidence before that evidence can be categorically excluded. At a minimum, Hart should receive an evidentiary hearing on whether his expert testimony would have been admissible so that the lower courts can conduct a proper analysis under both of the prongs of *Strickland*.

CONCLUSION

For the foregoing reasons, Petitioner John Hart respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ZAK T. GOLDSTEIN
Counsel of Record
GOLDSTEIN MEHTA LLC
1717 Arch Street, Suite 320
Philadelphia, PA 19103
(267) 225-2545
ztg@goldsteinmehta.com

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MARCH 9, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 9, 2022, Decided

C.A. No. 20-2886

JOHN HART,

Appellant,

VS.

COUNTY OF PHILADELPHIA; ET AL.

(E.D. Pa. Civ. No. 2-18-cv-04402)

Present: AMBRO, SHWARTZ and BIBAS, *Circuit Judges.*

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

in the above-captioned case.

Respectfully,

Clerk

Appendix A

ORDER

The foregoing application for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to deny Appellant's habeas petition. *See Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). Jurists of reason would not debate its conclusion that Appellant was not denied the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In relation to Hart's claim regarding the proposed testimony of a voiceprint expert, we conclude that he has not shown that he was prejudiced by his counsel's performance. *See Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277, 1282 (Pa. 1977) (explaining that spectrography and voiceprint identification were not admissible because they were not generally accepted in the scientific community); *United States v. Angleton*, 269 F. Supp. 2d 892, 905 (S.D. Tex. 2003) (noting that there is "great dispute among researchers and the few practitioners in the field over the accuracy and reliability of voice spectrographic analysis").

By the Court,

/s/ Patty Shwartz
Circuit Judge

Dated: March 9, 2022

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED AUGUST 18, 2020

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 18-4402

JOHN HART,

Petitioner,

v.

COUNTY OF PHILADELPHIA AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondent.

August 18, 2020, Decided;
August 18, 2020, Filed

ORDER

AND NOW, this 18th day of August, 2020, upon consideration of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells on May 19, 2020 (ECF No. 31), as well as Defendant's Objections thereto (ECF No. 34), **IT IS ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

2. The Clerk of Court shall **CLOSE** this matter statistically.

BY THE COURT:

/s/ Wendy Beetlestone, J.
WENDY BEETLESTONE, J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED MAY 19, 2020

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

May 19, 2020, Decided; May 19, 2020, Filed

CIVIL ACTION NO. 18-4402

JOHN HART

v.

COUNTY OF PHILADELPHIA, *et al.*

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE

Presently before the court is a Petition for a Writ of Habeas Corpus filed by John Hart ("Petitioner"), *pro se*, pursuant to 28 U.S.C. § 2254.[1] At the time the habeas petition was filed, Petitioner was serving a

1. On the same day the habeas petition was filed, an attorney, Zak T. Goldstein, Esq., entered his appearance for Petitioner (Document No. 3) and filed a motion to stay proceedings (Document No. 4). However, Mr. Goldstein did not sign the habeas petition, *see* Pet. at 16, or the Memorandum of Law. *See* Pet.'s Mem. of Law at 53. Therefore, the court treats the habeas petition and memorandum of law as being filed *pro se*.

term of probation.[2] He seeks habeas relief based upon several claims of ineffective assistance of counsel. The Honorable Wendy Beetlestone referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Petitioner not be afforded habeas relief.

I. PROCEDURAL HISTORY[3]

On November 16, 2011, Petitioner was arrested on charges of identity theft, unlawful use of a computer, disruption of service, possessing an instrument of crime, stalking and harassment. Response ("Resp.") at 1. Petitioner's victim was Erika Von Tiehl, a news anchor for the CBS television station in Philadelphia.[4] Petitioner briefly dated Ms. Von Tiehl, from September to October 6, 2011, when Ms. Von Tiehl broke up with Petitioner. Resp. at 2. After the breakup, Petitioner made Ms. Von Tiehl's life both miserable and frightening. *Id.* at 2-3. He impersonated Ms. Von Tiehl in an attempt to change her

2. Petitioner's term of probation expired on November 16, 2018. Response at 7.

3. The information set forth in this procedural history was derived from Petitioner's *pro se* Habeas Corpus Petition, his *pro se* Memorandum of Law, the exhibits attached thereto, the Commonwealth's Response, the Reply filed by Petitioner's attorney, and the state court record.

4. Petitioner's actions with respect to Ms. Von Tiehl resemble acts he previously committed against a third woman in Delaware County and which the undersigned considered in Civil Action No. 12-7272.

Facebook password; he tried to change her cellphone number; he canceled her cable and internet service. *Id.* Petitioner sent Ms. Von Tiehl vulgar, threatening and abusive text messages from an email address that was unfamiliar to Ms. Von Tiehl; many of the messages contained personal information about Ms. Von Tiehl that Petitioner had learned from her. *Id.* As part of Petitioner's harassment campaign, he called Verizon, Ms. Von Tiehl's cellphone provider, on October 26, 2011, and pretended to be her, in order to change her cellphone number. *Id.* at 3. Later, a police detective obtained and played a recording of that call from Verizon; despite Petitioner's effort to disguise his voice, both Ms. Von Tiehl and Petitioner's probation officer at the time, Michael Sander, recognized his voice. *Id.*

At trial, the above evidence regarding Ms. Von Tiehl was presented, as well as evidence of Petitioner's campaign of stalking and harassment of another woman, Laura Selvage, a Maryland resident, who also testified at Petitioner's trial.[5] Resp. at 4-5. Petitioner's similar acts against Ms. Selvage, occurred from March to May 2011, before he even met Ms. Von Tiehl. *Id.*

Petitioner's trial commenced in late October 2015. Pet.'s Mem. of Law ("Pet. Mem.") at ¶ 94. After a jury trial, on November 12, 2015, Petitioner was convicted of stalking and harassing Ms. Von Tiehl. Resp. at 6; Pet. Mem. at ¶ 3. He was sentenced to a term of incarceration

5. Petitioner did not face trial for his conduct against Ms. Selvage. Her testimony was presented as evidence of Petitioner's similar pattern of conduct.

of two and one-half to five years, followed by two years of probation. *Id.* On direct appeal, the Pennsylvania Superior Court affirmed his judgment of sentence, on May 22, 2018. *Id.* Petitioner did not seek allowance of appeal. Pet. Mem. at ¶ 6.

Next, on September 3, 2018, Petitioner filed a counseled petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. Resp. at 6. His probation expired on November 16, 2018; consequently, the state court dismissed his PCRA petition, for lack of jurisdiction, on July 30, 2019. Resp. at 6. Petitioner's appeal of that decision is pending in the Pennsylvania Superior Court. *Id.*

On October 12, 2018, Petitioner filed the instant habeas petition, claiming that: (1) trial counsel was ineffective for failing object to "quasi-expert" testimony provided by Petitioner's parole officer; (2) trial and direct appellate counsel[6] were ineffective for failing to obtain a voiceprint expert sufficiently in advance of trial or appeal the trial court's decision to exclude the expert's testimony; (3) direct appellate counsel was ineffective for failing to appeal the denial of Petitioner's motion to dismiss all charges on federal and state speedy trial grounds; (4) trial counsel was ineffective for failing to object to the admission of Laura Selvage's text messages, based on the evidentiary rule of completeness; (5) trial counsel was ineffective for failing to challenge the computer and

6. Petitioner was represented by an attorney on direct appeal that was different from his trial attorney. Pet. at 14.

phone search warrants the police had obtained, on the ground that they were overbroad; (6) direct appellate counsel was ineffective for failing to move to bar Laura Selvage's testimony under the doctrine of issue preclusion; and (7) trial and direct appellate counsel were ineffective for failing to challenge lay testimony concerning the physical location of an IP address. Pet. Mem. at ¶¶ 20-253. The Commonwealth responds that all of Petitioner's claims lack merit. Resp. at 7, 9-30. This court agrees that Petitioner's claims lack merit, under *de novo* review.

II. DISCUSSION

A. Ineffective Assistance of Counsel Standard

All of Petitioner's claims involve ineffective assistance of counsel, which must be analyzed based upon the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In short, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotation omitted).

Second, the petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*, but it is less than a preponderance of the evidence. *Id.* at 693, 694.

If the petitioner fails to satisfy either prong of the *Strickland* test, there is no need to evaluate the other part, because his claim will fail. *Id.* at 697. Further, counsel will not be found ineffective for failing to present an unmeritorious claim or objection. *Johnson v. Tennis*, 549 F.3d 296, 301 (3d Cir. 2008).

B. Claim One — Counsel's Failure to Object to "Quasi-Expert" Testimony

Petitioner first claims that trial counsel rendered ineffective assistance of counsel, because he failed to object when Petitioner's parole officer, Michael Sander, provided expert testimony about Petitioner's speech patterns. Pet. Mem. at ¶ 20. In particular, Petitioner maintains that Mr. Sander should only have been allowed to provide a lay opinion that the voice he had heard on the October 26, 2011 Verizon recording was that of Petitioner.[7] *Id.* at ¶ 25. Petitioner concedes that Mr.

7. Mr. Sander heard a voice recording made by Verizon; the

Sander could have been allowed to identify Petitioner's voice, based on his experience hearing Petitioner speak many times. *Id.* at ¶ 30. However, Petitioner asserts that it was improper for Mr. Sander to have mentioned his undergraduate education while testifying, because his education improperly bolstered the credibility of his opinion that the taped voice in question was that of Petitioner. *Id.* at ¶ 31. Petitioner asserts that, in part, he suffered prejudice because the Commonwealth's case was "highly circumstantial and speculative." *Id.* at ¶ 38.

The Commonwealth counters that Mr. Sander's testimony was admitted properly as his lay opinion and Petitioner cannot demonstrate that he was prejudiced. In his Reply, Petitioner's attorney seeks to undermine Petitioner's concession that Mr. Sander was qualified to offer his lay voice opinion by suggesting that Mr. Sander was not actually familiar with Petitioner's voice, because he rarely spoke to Petitioner. *See* Reply at 3. The court accepts Petitioner's concession, not his attorney's belated effort to retreat from it.

This court finds that, since Petitioner concedes that Mr. Sander could have provided his lay opinion that it was Petitioner's voice on the recording and there is no assertion that the trial court qualified Mr. Sander as an expert or instructed the jury that Mr. Sander was being allowed to testify as an expert, there is no merit to Petitioner's assertion that Mr. Sander testified as an expert or "quasi-

---

caller was trying to change Ms. Von Tiehl's cell phone number. Mr. Sander, like Ms. Von Tiehl, recognized the voice as being that of Petitioner. Resp. at 3.

expert." Moreover, contrary to Petitioner's assertion, the evidence of his guilt — summarized in Section I — was quite strong. The strength of the Commonwealth's case refutes the possibility that Petitioner was prejudiced by Mr. Sander's properly admitted and corroborated testimony that the voice he heard on the Verizon recording was that of Petitioner. *See Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999) (Alito, J.).

C. Claim Two — Counsel's Errors Concerning his Voiceprint Identification Expert

Petitioner asserts that trial counsel rendered ineffective assistance, in that he failed to secure trial testimony from the voiceprint identification expert ("the expert") he had retained. Pet. Mem. at ¶ 47. Petitioner further claims that direct appellate counsel rendered ineffective assistance when he failed to appeal the trial court's decision to preclude the expert's testimony. *Id.* at ¶ 48. For purposes of challenging trial counsel's performance, Petitioner concedes that the trial court correctly excluded the testimony, inasmuch as trial counsel failed to retain the expert and provide the expert's report sufficiently in advance of trial. *Id.* at ¶ 60. However, to challenge appellate counsel's performance, Petitioner argues that the trial court misapplied Pennsylvania law when excluding the expert's testimony. *Id.* at ¶¶ 64-76. The Commonwealth takes the position that neither attorney was ineffective, because the expert's testimony was not admissible under Pennsylvania evidentiary law. Resp. at 11-14. This court finds, for reasons set forth below, that Petitioner cannot prevail on these two claims.

Notably, Petitioner's two assertions of ineffective assistance are internally inconsistent. On the one hand, he argues that trial counsel was ineffective for failing to comply with Pennsylvania evidentiary law, which the trial court applied correctly. On the other hand, Petitioner argues that appellate counsel rendered ineffective assistance, because he failed to argue that the trial court misapplied Pennsylvania evidentiary law. This court discourages Petitioner's legal gamesmanship and only addresses the claim to which Petitioner devotes the majority of his argument: that the trial court was wrong to exclude the expert, because trial counsel had no duty to provide the report in advance of trial, hence, appellate counsel was ineffective for failing to appeal the trial court's decision. In the Reply, Petitioner's attorney focuses on the appellate counsel claim, arguing that trial counsel had no duty to provide advance notice to the Commonwealth. *See* Reply at 3-4.

Petitioner cannot prevail on this claim, because it is well-established that a federal court cannot reexamine state law questions when exercising its habeas jurisdiction. *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (*per curiam*); *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). As a result, this court is compelled to assume that the trial court correctly excluded testimony from Petitioner's expert, based upon the tardy production of the expert's report. *Bradshaw*, 546 U.S. at 76.[8] Appellate

8. The operation of *Bradshaw* would lead to a perverse result for Petitioner's claim that trial counsel rendered ineffective assistance. Because the court is compelled to find that the trial court properly

counsel cannot be ineffective for omitting a meritless claim, *Johnson*, 549 F.3d at 301, hence, he did not render ineffective assistance.

D. Claim Three — Counsel's Failure to Raise Speedy Trial Claims

Next, Petitioner contends that direct appellate counsel was ineffective for failing to raise Pennsylvania law and Sixth Amendment speedy trial claims. Pet. Mem. at ¶¶ 92-153. The Commonwealth counters that much, if not most, of the pre-trial delay was attributable to Petitioner himself, hence, both speedy trial claims lack merit. Resp. at 15-23. In Reply, Petitioner's attorney ignores the components of state law or Sixth Amendment speedy trial claims and primarily apportions much of the pretrial delay to the Commonwealth's failure to turn over all discovery in a timely fashion. Reply at 4-5. As to the state law speedy trial claim, this court is compelled to accept the state court's conclusion that the claim lacks merit. *Bradshaw*, 546 U.S. at 76. This means that direct appellate counsel was not ineffective for omitting this meritless claim. *Johnson*, 549 F.3d at 301. Furthermore, upon *de novo* review, Petitioner's Sixth Amendment speedy trial claim also lacks merit; hence, direct appellate counsel was not ineffective for omitting it. *Id.*

---

applied Pennsylvania law, the court would also be compelled to find that trial counsel failed to comply with that law by tardily disclosing the expert's existence. This would certainly suggest that trial counsel's performance was deficient. No doubt, Petitioner hoped for such a result, were the court to take the bait he had laid.

Appendix C

Petitioner asserts that 1152 days elapsed between the time the criminal information was filed against him and his trial began. Pet. Mem. at ¶ 139. He acknowledges that the U.S. Supreme Court's four-part test announced in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) governs his claim, and maintains that all four factors weigh in his favor, hence, his Sixth Amendment speedy trial claim was meritorious. Pet. Mem. at ¶¶ 141-48. He further argues that, since the federal constitutional speedy trial claim was meritorious, direct appellate counsel had no reason to omit it; the prejudice to Petitioner is manifest. *Id.* at ¶¶ 150-52. Unsurprisingly, the Commonwealth disagrees. Resp. at 21-23. After reviewing the *Barker* factors *de novo*, this court finds that Petitioner's Sixth Amendment right to a speedy trial was not violated, hence, direct appellate counsel was not ineffective for omitting the claim. *Johnson*, 549 F.3d at 301.

Petitioner's Sixth Amendment speedy trial claim requires consideration of four factors: (1) length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530. No single factor is either necessary or sufficient to determine that the defendant's speedy trial right has been violated. *Id.* at 533. These interrelated factors must be balanced to properly decide a Sixth Amendment question. *Id.* The required remedy for violation of this right is dismissal of the charges brought against the defendant. *Id.* at 522.

For Sixth Amendment speedy trial purposes, the length of the delay is typically measured from the filing of charges to the commencement of trial. *United States*

v. Battis, 589 F.3d 673, 678 (3d Cir. 2009). Petitioner asserts that this measure of time in his case was 1152 days, Pet. Mem. at ¶ 139, a fact the Commonwealth does not dispute. Resp. at 22. From November 2011, when Petitioner was initially charged, to October 2015, when his trial commenced, is approximately 47 months (not 38.4 months, as Petitioner calculated); this delay is sufficient to trigger consideration of the three remaining *Barker* factors.[9] *See Battis*, 589 F.3d at 678. Accordingly, the time factor weighs in Petitioner's favor.

The next factor to consider is the reason for the delay. *Barker*, 407 U.S. at 530. From November 2011, when Petitioner was initially charged, to April 2012, no proceedings were held, because of court unavailability or the failure to bring Petitioner to court; after two hearing in April, the case was delayed for another month, because of court unavailability. Resp. at 15. This time, approximately six months, is charged against the Commonwealth. *Barker*, 407 U.S. at 529, 531. After a defense continuance, a scheduling conference was held on June 30, 2012 and the trial was scheduled to commence on January 22, 2013. Resp. at 15. Absent explanation, this almost six-month delay is chargeable to the Commonwealth, which has the duty to bring Petitioner to trial. *Barker*, 407 U.S. at 529, 531. Petitioner requested a global plea offer in January 2013 and he rejected the offer on February 22, 2013. Resp. at 15. This delay, approximately one month, is attributable to Petitioner. His trial was then re-scheduled

9. If the length of pretrial delay is relatively brief, there is no need to consider the other factors. *Battis*, 589 F.3d at 678 (citing *Barker*, 407 U.S. at 530-31).

to September 16, 2013. Resp. at 15. However, Petitioner's counsel sought to withdraw; the court held a hearing on April 23, 2013 to determine the status of Petitioner's representation. Pet. Mem. at ¶ 108. Petitioner concedes that these two months are chargeable to him. *Id.* Next, Petitioner concedes that the three months between April 23, 2013 and July 24, 2013, and July 25, 2013 to September 5, 2013, approximately one and one-half months, should be charged to him. *Id.* at ¶¶ 109-11, 113-14. Petitioner further concedes that the time from September 5, 2013 to November 8, 2013, approximately two months, should be attributed to him. *Id.* at ¶¶ 118-19. On November 8, 2013, the trial court held a status conference and scheduled trial for August 25, 2014. *Id.* at ¶ 120. This delay, approximately nine and one-half months, is attributable to the Commonwealth, since the prosecution and the trial court, not the defendant, have the duty to see that the defendant is brought to trial. *Barker*, 407 U.S. at 529, 531. On April 17, 2014, Petitioner's attorney requested a continuance of the trial, which was granted to January 12, 2015. Pet. Mem. at ¶ 122. Petitioner agrees that this four and one-half months, is fairly chargeable to him. *Id.*

Petitioner's trial commenced on January 12, 2015, with Petitioner representing himself. Pet. Mem. at ¶ 123. Once trial commenced, Petitioner was granted another continuance, so he could retain an attorney. *Id.* at ¶ 124. October 26, 2015 was the new trial date; Petitioner concedes that he caused this delay of approximately nine and one-half months. *Id.*

Petitioner's concessions apportion approximately 23.5 months of delay to him; the court calculates that 21.5

months were attributable to the Commonwealth.[10] Since Petitioner caused more delay than the Commonwealth, this factor does not weigh in his favor.

The next factor is Petitioner's invocation of his right to a speedy trial. *Barker*, 407 U.S. at 530. Petitioner asserts that he filed "numerous motions" in state court to dismiss this case, based upon violations of Pennsylvania's speedy trial rule and the Sixth Amendment speedy trial guarantee. While his alleged invocation of his right is somewhat helpful to him, it is also true that Petitioner sought several continuances of the case, indicating he was not ready for trial. Being repeatedly unprepared for trial undermines the significance of Petitioner's invocation of his right, *Hakeem v. Beyer*, 990 F.2d 750, 765-66 (3d Cir. 1993), and strongly militates against this court finding a federal constitutional speedy trial violation. *See Barker*, 407 U.S. at 536.

The final factor to balance is prejudice to the defendant. *Barker*, 407 U.S. at 530. Petitioner asserts that this factor weighs strongly in his favor, because he was held pretrial on these charges the entire 47 months, triggering a presumption of prejudice. Pet. Mem. at ¶ 147. The Commonwealth seek to rebut this assertion, noting that Petitioner was being held on a detainer, for violation of probation proceedings in Delaware County. Resp. at 22. In response, Petitioner's attorney argues that the sole reason the Delaware County detainer was lodged was the

10. The court rounded the time, therefore, the combined delay is only 45 months, not the total elapsed time of approximately 47 months. This discrepancy does not affect the result in this case.

existence of the charges in this case. Reply at 5.

In an extraordinary case, the prosecution's negligence in locating a defendant, informing him of pending charges and bringing him to trial could permit the court to presume that the defendant suffered prejudice and absolve him of the need to demonstrate any specific prejudice, such as impediment of the defense due to lost evidence or diminished memory.[11] *United States v. Velazquez*, 749 F.3d 161, 175 (3d Cir. 2014) (citing *Doggett v. United States*, 505 U.S. 647, 658, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). The pretrial delays in *Doggett* and *Velazquez*, all attributable to the prosecution's negligent efforts to locate the defendants, were much longer than in this case. *See Doggett*, 505 U.S. at 658 (six years of negligent delay out of a total delay of eight and one-half years); *Velazquez*, 749 F.3d at 174 (six and one-half years of negligent delay). By contrast, the pretrial delay in this case was less than four years and more than half of that delay was caused by Petitioner, not the Commonwealth; the Commonwealth was not negligent by failing to find Petitioner. Therefore, it is inappropriate to presume prejudice and Petitioner must demonstrate specific prejudice. Petitioner has failed to demonstrate that he lost any favorable evidence during the hiatus or any other specific prejudice that the U.S. Supreme Court has recognized. Accordingly, this factor does not weigh in Petitioner's favor.

---

11. The two additional types of specific prejudice recognized by the U.S. Supreme Court are: oppressive pre-trial incarceration and the defendant's increased anxiety about unresolved charges. *Doggett v. United States*, 505 U.S. 647, 654, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

Consideration of all four *Barker* factors in concert leads to the conclusion that Petitioner's Sixth Amendment right to a speedy trial was not violated. Although the pretrial delay in this case was lengthy, causing the first factor to weigh in Petitioner's favor, he caused most of the delay, he was not ready for trial on several occasions, and he cannot demonstrate any actual prejudice resulting from the delay. Hence, Petitioner's claim is weaker than Barker's was, and Barker's claim was unsuccessful. *See Barker*, 407 U.S. at 533-36. Faithful application of the four *Barker* factors demonstrates that Petitioner was not denied his Sixth Amendment right to a speedy trial. Hence, direct appellate counsel was not ineffective for omitting the unmeritorious claim. *Johnson*, 549 F.3d at 301.

E. Claim Four — Counsel's Failure to Raise a Rule of Completeness Claim

Petitioner states that trial counsel was ineffective, because he did not object to Laura Selvage's testimony about the content of text messages between her and Petitioner on the ground that they were incomplete and inadmissible under Pa. R. Ev. 106; Ms. Selvage had failed to preserve her text messages to Petitioner, she had only saved Petitioner's text messages to her. Pet. Mem. at ¶¶ 157-73. The Commonwealth takes the position that, even though a Rule 106 objection was not raised in the trial court, since the trial court admitted the text messages on other grounds, a rule of completeness argument would have failed. Resp. at 24-25. Thus, trial counsel did not render ineffective assistance by omitting the claim. *Id.* at

25. In the Reply, Petitioner's attorney attempts to change the claim to ineffective assistance of appellate counsel for omitting the evidentiary claim; he ignores trial counsel's omission of the claim. Reply at 5-6. This court declines to amend Petitioner's claim and finds that Petitioner did not suffer prejudice at trial, hence, the ineffective assistance of trial counsel claim lacks merit.

Even if the evidentiary rule of completeness had prevented Ms. Selvage from reading Petitioner's text messages to her into the record, abundant evidence of Petitioner's guilt existed. As summarized in Section I, Ms. Von Tiehl testified about Petitioner's campaign of harassment, the vulgar, threatening messages Petitioner sent to her were read into the record, Ms. Von Tiehl and Petitioner's probation officer identified Petitioner's voice as the one trying to change Ms. Von Tiehl's cell phone number, and Ms. Selvage testified about Petitioner's other actions in relation to her, which were very similar to what he did several months later to Ms. Von Tiehl. Since the Commonwealth's case, without the text messages in question, was very strong, there is not a reasonable probability that the outcome of the trial would have been different if Ms. Selvage had not read Petitioner's text messages to her into the record. *See Buehl*, 166 F.3d at 172. No prejudice resulted from trial counsel's allegedly deficient omission, hence, Petitioner's ineffective assistance claim fails.

F. Claim Five — Counsel's Failure to Challenge the Search Warrants

Petitioner alleges that the two search warrants secured to obtain evidence against him only specified Ms. Von Tiehl as his victim, without mention of Ms. Selvage. Pet. Mem. at ¶¶ 183-206. Yet, when Petitioner's devices were searched, evidence about Ms. Selvage was removed and used as trial evidence against him. *Id.* For this reason, Petitioner argues that the warrants were overbroad and counsel ineffective for failing to challenge the warrants on that ground. *Id.* at ¶¶ 182, 203. The Commonwealth counters that the warrants were not overly broad, because they authorized searches of Petitioner's devices for any evidence of identity theft, stalking and harassment of Ms. Von Tiehl. Resp. at 25-27. It takes the position that, because the person committing the offenses against Ms. Von Tiehl sought to remain digitally anonymous, evidence that Ms. Selvage endured the same conduct as Ms. Von Tiehl was relevant to the crimes against Ms. Von Tiehl. *Id.* at 27. In the Reply, Petitioner's attorney repeats Petitioner's assertions about the warrants. Reply at 8-9. This court declines to accept the Commonwealth's implicit assertion that it was unnecessary for the police to have probable cause to believe that Petitioner may have committed any crimes against Ms. Selvage, before the police could obtain a warrant to search for such evidence. Instead, this court finds that the Commonwealth's case, without any evidence from Petitioner's devices about Ms. Selvage, was strong enough that Petitioner suffered no prejudice.

If the trial court had suppressed all evidence about Ms. Selvage obtained from Petitioner's devices, there was still abundant evidence to establish Petitioner's guilt. First, Ms. Von Tiehl offered powerful testimony about how Petitioner threatened and harassed her. Second, Ms. Von Tiehl and Petitioner's probation officer identified Petitioner as the person who called Verizon to try to change Ms. Von Tiehl's cell phone number. Third, Ms. Selvage provided testimony describing how Petitioner harassed her; since her experience was similar to that of Ms. Von Tiehl, Ms. Selvage's live testimony strengthened the Commonwealth's case. The evidence, unaffected by the possibly overbroad warrants, is so compelling that there is not a reasonable probability that, had trial counsel successfully excluded all evidence about Ms. Selvage the police uncovered from Petitioner's devices, the result of the trial would have been different. *See Buehl*, 166 F.3d at 172. Hence, Petitioner did not suffer prejudice and his claim must fail.

G. Claim Six — Counsel's Failure to Invoke Collateral Estoppel to Bar Ms. Selvage's Testimony

Petitioner contends that direct appellate counsel rendered ineffective assistance, because he did not argue that Ms. Selvage's testimony concerning Petitioner's prior bad acts was barred by the principle of collateral estoppel. Pet. Mem. at ¶ 223. Petitioner asserts that, in a proceeding held in Baltimore before his trial in this matter, a Maryland judge ruled that Petitioner did not harass Ms. Selvage; hence, the Commonwealth was barred from re-litigating this issue at his trial. *Id.* at

¶¶ 224-25, 229-38. The Commonwealth counters that collateral estoppel does not apply because (1) it was not a party to the Baltimore proceeding, (2) Petitioner's harassment of Ms. Selvage was not "an ultimate issue" in his trial concerning Ms. Von Tiehl, and (3) the issue of his harassment of Ms. Selvage was not actually decided in the Baltimore proceeding. Resp. at 28. Therefore, appellate counsel did not render ineffective assistance by omitting a collateral estoppel claim. *Id.* Petitioner's attorney replied that the Commonwealth need not be a party in the prior proceeding to invoke collateral estoppel. Reply at 6-7. This court disagrees and finds that collateral estoppel does not apply, hence, direct appellate counsel was not ineffective for omitting the claim.

Fifty years ago, the Supreme Court decided that collateral estoppel is a component of the Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel is a principle holding that, when an issue of ultimate fact has been previously decided in litigation between two parties, those identical parties may not later re-litigate that fact in a subsequent proceeding between the two of them. *Id.* at 443. The case Petitioner's attorney relies upon herein, *Commonwealth v. Holder*, 569 Pa. 474, 805 A.2d 499 (Pa. 2002), acknowledges *Ashe* as the origin of the collateral estoppel rule and collateral estoppel as a component of the Double Jeopardy Clause. *Holder*, 805 A.2d at 502. Moreover, *Holder* cites *Ashe* for the requirement that, for collateral estoppel to apply in subsequent litigation, both parties must have been parties in the prior litigation where the ruling at issue arose. 805 A.2d at 502. Clearly, under

Pennsylvania and federal law, this requirement exists for collateral estoppel to apply.

Petitioner asserts that, in the Baltimore proceeding, the ultimate fact that he did not harass Ms. Selvage was decided. Pet. Mem. at ¶¶ 235-37. Whether that is true or not, the Commonwealth was not a party to the Baltimore proceeding, hence, collateral estoppel is inapplicable. *Ashe*, 397 U.S. at 443. Since collateral estoppel did not apply herein, direct appellate counsel was not ineffective for omitting a meritless claim that it did. *Johnson*, 549 F.3d at 301.

H. Claim Seven — Counsels' Failures to Object to Certain Evidence Concerning an IP Address Located in Philadelphia

Finally, Petitioner asserts that trial and direct appellate counsel rendered ineffective assistance for failure to challenge Detective Katherine Gordon's testimony that one of the IP addresses that contacted Ms. Selvage was located in Philadelphia. Pet. Mem. at ¶¶ 235-37, 244-53. Petitioner argues that Detective Gordon was not an expert and only an expert may provide testimony about where an IP address is located. *Id.* at ¶ 250. The Commonwealth counters that Petitioner suffered no prejudice from the challenged testimony, hence the ineffective assistance claims must fail. Resp. at 29-30. Counsel counters that Detective Gordon's testimony was inadmissible, and prejudiced Petitioner. Reply at 8-9. This court concludes that inasmuch as neither counsel's performance was deficient the question of prejudice need not be decided..

First, this court acknowledges that the IP testimony in question was inadmissible. In *Commonwealth v. Manivannan*, 2018 PA Super 112, 186 A.3d 472 (Pa. Super. Ct. 2018), the Pennsylvania Superior Court held that only an expert witness may testify that a particular IP address corresponds to a geographic location; a non-expert witness cannot provide such information, because it is not within common knowledge. *Id.* at 488. Detective Gordon was not qualified as an expert and the Commonwealth provides no evidence that she could have been qualified as an expert. *Manivannan* was decided, on May 4, 2018, eighteen days before Petitioner's direct appeal was decided by the Superior Court. Hence, if direct appellate counsel had raised the claim, it would have been found to be meritorious. That is not end of the matter, however.

Manivannan, decided more than two years after Petitioner's trial was conducted, was a case of first impression in Pennsylvania. 186 A.3d at 483. An attorney cannot ordinarily be expected to predict new legal developments, *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989), hence, this court declines to find that trial counsel's performance was objectively unreasonable under the first prong of *Strickland*. Consequently, Petitioner's ineffective assistance claim fails as to trial counsel. *Strickland*, 466 U.S. at 697.

This court also declines to hold that direct appellate counsel's performance was objectively unreasonable in that he failed to anticipate the argument that would prevail in *Manivannan*. By the time *Manivannan* was decided, briefing was completed in Petitioner's appeal and counsel

likely had no opportunity to add the claim. Furthermore, Petitioner does not allege that direct appellate counsel was aware that *Manivannan* was pending at the time of Petitioner's appeal and consciously declined to raise the claim. Under *Forte*, these omissions are important.

In *Forte*, the defendant was a white man who faced trial for raping a black woman, in the U.S. Virgin Islands. 865 F.2d at 61. Prior to trial, Forte's local trial counsel consulted with an attorney from Philadelphia; the Philadelphia attorney informed local counsel that *Batson v. Kentucky*[12] was pending in the U.S. Supreme Court and that she should object if the prosecutor used peremptory challenges to exclude prospective white jurors. *Id.* Forte himself also requested that trial counsel raise a *Batson* objection if the prosecutor used peremptory challenges to exclude prospective white jurors. *Id.* at 61. Trial counsel agreed but failed to do so during jury selection; trial counsel stated that she was too embarrassed to object, because she had previously used peremptory challenges to exclude prospective white jurors from black defendant's juries. *Id.* at 61-62. In the unique circumstances of the case, the Third Circuit decided that trial counsel's failure

12. In *Batson*, the Supreme Court held that a black defendant could attempt to prove an equal protection violation, based solely upon proof that, in his case, the prosecutor used peremptory challenges to exclude black venirepersons from his jury. *Batson*, 476 U.S. 79, 96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). This reversed *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), which made it practically impossible to prove such a claim, because it required proof of the prosecutor's historic pattern of peremptory strikes. *Batson*, 476 U.S. at 92-93.

to object constituted objectively unreasonable conduct. *Id.* at 62-63. The court emphasized that trial counsel was aware the *Batson* was pending at the time of trial and she had no valid reason to forgo objection.[13] *Id.* at 63. The Third Circuit also emphasized that its holding was "very narrow" and its "opinion should not be broadly read." *Id.*

In this case, direct appellate counsel's circumstances and conduct were not similar to those in *Forte*. There is no evidence that appellate counsel knew that *Manivannan* was pending, had agreed to raise a *Manivannan* argument on appeal and, due to an insubstantial reason, had intentionally omitted the claim. Absent such special circumstances, this court will not deviate from the ordinary rule that an attorney is not required to predict new legal principles in order to render objectively reasonable assistance. *Forte*, 865 F.2d at 62. Hence, this court declines to find that direct appellate counsel's performance was objectively unreasonable, which means that the ineffective assistance claim must fail. *Strickland*, 466 U.S. at 697.

III. CONCLUSION

All of Petitioner's claims lack merit under *de novo* review. Reasonable jurists would not debate this court's

---

13. Although the Third Circuit did not explicitly state the point, it is clear that trial counsel's embarrassment was not objectively reasonable; this is so because the court emphasized that objecting to the prosecutor's use of peremptory challenges to exclude whites "would not have been a reprehensible or unprofessional act." *Forte*, 865 F.2d at 63.

substantive disposition of Petitioner's claims; therefore, a certificate of appealability should not issue for any claim. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 19th day of May 2020, for the reasons contained in the preceding Report, it is hereby **RECOMMENDED** that Petitioner's claims be **DENIED**, without an evidentiary hearing. Petitioner has neither demonstrated that any reasonable jurist could find this court's rulings debatable, nor shown denial of any federal constitutional right; hence, there is no probable cause to issue a certificate of appealability for any of his claims.

Petitioner may file objections to this Report and Recommendation within fourteen (14) days of being served with a copy of it. *See* Local R. Civ. P. 72.1(IV). Failure to file timely objections may constitute a waiver of any appellate rights.

It be so **ORDERED**.

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS
United States Magistrate Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 8, 2022

UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2886
(E.D. Pa. Civ. No. 2-18-cv-04402)

JOHN HART,

Appellant,

v.

COUNTY OF PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA; DISTRICT ATTORNEY PHILADELPHIA.

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, McKEE, AMBRO, 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/Patty Shwartz
Circuit Judge

Dated: April 8, 2022