APPENDIX "A"

DLD-059

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-2849**

KAREEM J. STANSBURY, Appellant

VS.

SUPERINTENDENT CAMP HILL SCI; ET AL.

(E.D. Pa. Civ. No. 2:18-cv-02022)

Present: KRAUSE, MATEY and PHIPPS, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

In two filings (Docs. 6 & 7), Kareem Stansbury has requested a certificate of appealability to appeal the District Court's decision denying habeas relief. Stansbury, however, has failed to demonstrate that jurists of reason would debate the District Court's decision. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Stansbury's claim concerning adjudicatory delay by the state courts was properly rejected as previously litigated and rejected by the District Court in federal habeas proceedings. See Sawyer v. Whitley, 505 U.S. 333, 338 (1992); see also Charles A. Wright, et al., 18a Federal Practice & Procedure § 4447 (3d ed.); cf. Stansbury v. Dist. Att'y of Phila., C.A. 20-3560, Doc. 9 (3d Cir. April 16, 2021) (order). Stansbury's apparent claim regarding an alleged denial of his Sixth Amendment right to self-representation is improperly raised for the first time in this Court. See Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80, 89 n.12 (3d Cir. 2013). The claim is inexcusably procedurally defaulted, in any event. Cf. Doc. 7 at 12. Stansbury's remaining claims all lack merit, for substantially the reasons given the Magistrate Judge's report. See 28 U.S.C. §2254(b)(2) (providing that a habeas petition may be denied on the merits,

notwithstanding the petitioner's failure to exhaust). Additionally, we observe that Stansbury's 'new evidence'—whether offered to excuse a procedural default or instead to advance a freestanding claim of actual innocence—fails to support an innocence theory by way of alibi. Compare Doc. 7 at 42-43 with Doc. 12-1 at 21, 24, 60; cf. Schlup v. Delo, 513 U.S. 298, 329 (1995); Commonwealth v. Johnson, 646 A.2d 1170, 1172 (Pa. 1994). Accordingly, Stansbury's requests for a certificate of appealability are denied.

By the Court,

s/ *Peter J. Phipps*
Circuit Judge

Dated: January 26, 2022
ARR/cc: KJS; MS; RE

A True Copy:

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

APPENDIX "B"

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

KAREEM J. STANSBURY	:	**CIVIL ACTION**
	:	
v.	:	
	:	**NO. 18-cv-02022-JS**
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, et al.	:	

Richard A. Lloret
U.S. Magistrate Judge

August 20, 2020

REPORT AND RECOMMENDATION

INTRODUCTION

On May 27, 2016, a jury convicted Plaintiff, Kareem J. Stansbury ("Plaintiff" or "Mr. Stansbury") in the courts of the Commonwealth of Pennsylvania of two counts of attempted murder, three counts of aggravated assault, one count of carrying firearms in public in Philadelphia, and one count of carrying a firearm without a license. *Com. v. Stansbury*, 190 A.3d 719, 3479 EDA 2016 (Pa. Super. 2018) ("*Stansbury II*"). Doc. No. 31-1 at 6.[1]

The trial court sentenced Mr. Stansbury to 35 to 70 years in prison, followed by seven years of probation. *Id.* His appeal was unsuccessful. *Id.* Mr. Stansbury filed a timely habeas petition under 28 U.S.C. § 2254. Doc. No. 1 ("Petition" or "Pet.").[2] This matter was referred to me for the disposition of all issues. Doc. No. 3. The defendants

[1] Because the Superior Court opinion is unpublished, I will refer to the copy reproduced as an exhibit to the Commonwealth's Response. *See* Doc. No. 31-1.

[2] Mr. Stansbury's Petition was accompanied by a Memorandum of Law ("Pet. Mem.") that was not identified as an exhibit or by a separate ECF docket number. *See* Doc. No. 1. The Petition appears at (ECF assigned) pages 1-16 of Doc. No. 1. The Memorandum of Law appears at pages 17-27. The ECF pagination will be used to refer to both Mr. Stansbury's Petition and his Memorandum of Law.

(collectively, the "Commonwealth") have filed a response. Doc. No. 31 ("Response" or "Resp.").

Mr. Stansbury alleges eight grounds for relief in his Petition, as follows:

1. The trial court erred by rejecting his request for recusal. Pet. at 7; Pet. Mem. at 19.
2. The trial court erred by rejecting his motion for suppression of photographic identifications made by witnesses. Pet. at 7; Pet. Mem. at 19-20.
3. The trial court erred by refusing his request for investigation and expert witness funds. Pet. at 9; Pet. Mem. at 21.
4. The trial court erred by rejecting his motion to dismiss for non-compliance with speedy-trial requirements. Pet. at 5; Pet. Mem. at 22.
5. The trial court erred by permitting the introduction into evidence of a victim's medical records without the treating doctor's testimony. Pet. at 5; Pet. Mem. at 23.
6. The trial court erred by refusing to permit some defense exhibits to go to the jury for examination during deliberation. Pet. at 9; Pet. Mem. at 24.
7. The trial court erred by supplying the jury with written jury instructions. Pet. at 10-11; Pet. Mem. at 25.
8. The trial court erred by rejecting his motion for a new trial based on newly discovered evidence. Pet. at 10-11; Pet. Mem. at 26.

I find that many of Mr. Stansbury's claims are unexhausted and procedurally barred. I also find that the state court's resolution of these issues was not an unreasonable application of federal law as determined by the Supreme Court. Therefore, I recommend that the Petition be denied.

FACTS AND PROCEDURAL HISTORY

On direct appeal, the Pennsylvania Superior Court adopted the trial court's statement of facts, which thoroughly summarized the evidence that led to Mr. Stansbury's conviction:

> On February 23, 2014, Ms. Rachel Ostrow was living at [a home on East Tioga Street, in Philadelphia. She lived] in a residence she shared with a woman named Patricia [Clarke], Ms. [Clarke's] two children and, at times, a

woman names Luz Ambert-Prieto. That same day, all of these individuals were at the residence[,] as was Abdul Scott, Appellant's step-brother.

At about 11:00 p.m., Ms. Ostrow was sitting on the porch of the residence with Abdul Scott smoking "K2," *i.e.* synthetic marijuana, when [Petitioner] drove up in a [four-door, dark colored] car with tinted windows. [Petitioner] stopped the car outside the residence, exited it, and began firing a handgun[,] which he rested on the roof of the car. Ms. Ostrow was struck in the back by bullet fragments as she [and] Abdul Scott fled into the residence. Pressure was applied to her wounds. As he tended to Ms. Ostrow, Abdul Scott began apologizing to her because he said his brother Kareem had shot her.

Ms. Ostrow was taken to a nearby hospital where her injuries were treated. The next day, she gave police a statement wherein she described the shooter as follows: "Tall, black male, dark skin. He had a beard and mustache and he was husky. He had on a black shirt?" At trial, Ms. Ostrow could not identify the shooter, which she was also unable to do at the scene. She also could not recall whether or not she saw the shooter holding the gun, flashes emanating from the gun, or if the shooter said anything during the incident. However, she told police when she was interviewed that she had witnessed those things and that the shooter said, "Yo" or "Abdul." In response to a question by the prosecutor about the contents of her statement, Ms. Ostrow averred that if she did tell the police about those matters, she had spoken the truth.

Ms. Ambert-Prieto was on the porch just prior to the shots being fired[,] smoking K2 with Ms. Ostrow. While Ms. Ambert-Prieto was on the porch, Abdul Scott ran onto the porch, sweating, out of breath[,] and [with rumpled clothes]. Ms. Ambert-Prieto jokingly asked if he was running from the police. Abdul Scott responded that he was running from his brother Kareem. He then explained that he and his brother had just had an argument. After he arrived he also smoked some of the K2.

Ms. Ambert-Prieto went inside to get boots belonging to Ms. Ostrow and when she did so, she heard two shots. She immediately went outside and saw Abdul Scott tending to Ms. Ostrow's gunshot wounds as she lay on the porch. Abdul Scott took Ms. Ostrow inside and, after putting her on the couch, continued to tend to her wounds. Ms. [Clarke] called 911. During the call, Abdul Scott and the other people present began screaming, all of which was recorded by the police dispatcher who answered the call. The screaming included identifying the shooter as Kareem Stansbury, Abdul Scott's brother.

Police arrived and took Abdul Scott and Ms. Ambert-Prieto to a police station where both of them were interviewed. Ms. Ambert-Prieto identified a photograph of [Petitioner] during the interview. She admitted giving the police a false address and explained that she did so because she did not want [] the police to know she resided [at the East Tioga Street home]. During Petitioner's] questioning of Ms. Ambert-Prieto, she [testified] that she saw [Petitioner] armed with a hand gun a few months prior to the incident.
At trial, Abdul Scott took the stand. He began his testimony by noting that, although he had a half-brother named Kareem Stansbury, he did not then see him in the [courtroom]. He then testified that on the day of the shooting, he and Kareem had argued inside his mother's house but that the argument did not involve violence. He denied that it spilled into the street and stated that after it broke up, he went to [the East Tioga Street house].

Abdul Scott testified that when he arrived at the residence, Ms. Ostrow was on the porch and Ms. Ambert-Prieto was inside the residence. According to Abdul Scott, [Ms. Ambert-Prieto] remained in the house the entire time. While on the porch, Abdul Scott heard gunshots and saw that Ms. Ostrow had been shot. He rendered aid to her and took her inside the residence.

After Abdul Scott gave the foregoing testimony, he was confronted by the prosecutor with the contents of a

statement he gave Philadelphia Police Detective Joseph Newbert on February 24, 2014, approximately an [hour-and-a-half] following the shooting. In his statement, Abdul Scott admitted that he and [Petitioner] had a fist-fight at his residence [and] that it was broken up by his other brothers. He further told police that after the fight broke up, he told his brother Jabbar that he was going to [the East Tioga Street house].

He further told police that he was sitting on the porch at about 11:00 p.m., with Ms. Ostrow, when [Petitioner] drove down the street in a 1995 purple Chevy Cavalier registered to his mother. He told police:

When he came down the street, he stopped right in front of the house, got out and stood in the street and fired his gun two times at me. The first shot missed, and the second shot hit Rachel in the hip. Then Kareem jumped back in his car and drove off towards Ella from Tioga. Abdul told police that "Kareem" possessed a silver .22 caliber hand gun, that "Kareem" threatened to shoot him earlier in the evening, and that he cursed at him during the incident on Tioga Street when Ms. Ostrow was shot. Abdul Scott ended the interview by identifying a photograph of [Petitioner], who he called "Kareem."

After giving his statement, [Abdul] Scott acknowledged that the photograph he identified for police depicted [Petitioner]. He testified that [Petitioner] did not shoot at him on the night of the incident, and that he did not tell police that [Petitioner] had done so. He testified that he only told police that [Petitioner] was the brother with whom he was fighting earlier in the evening.

After disavowing much of his statement, Abdul Scott denied that the voice on the 911 tape, wherein the speaker named "Kareem" as the shooter and described him, was his. He ended his testimony by acknowledging that he was then in custody awaiting sentencing in an unrelated matter. On cross-examination, Abdul Scott denied anything that could be considered incriminating with respect to [Petitioner].

He also testified that he was intoxicated on the night of the incident and had smoked K2 while on the porch.

Philadelphia Police Officer Ricardo Rosa was on routine patrol at 11:16 p.m., when [he responded] to the scene of the shooting. Upon arrival, Abdul Scott exited [the East Tioga Street house], ran to the officer, and urged him to hurry because there was a shooting victim inside the residence. The officer then encountered Ms. Ostrow, placed her in his police vehicle, and drove her to a nearby hospital. When the officer first encountered Abdul Scott, he was very agitated and demonstrative. The officer testified that Abdul Scott told him that his brother, Kareem Stansbury, had driven up in a purple [two-door] Chevrolet and pointed a gun at him, which he then fired at him. Abdul Scott gave the officer a description of the shooter.

Patricia Clarke was inside the [East Tioga Street home] when Ms. Ostrow was shot. She directed Ms. Ostrow, Ms. Ambert-Prieto, and Abdul Scott to go outside after they said they were going to smoke K2 inside the residence. Approximately [15] minutes after they went outside, Ms. Ambert-Prieto ran into the residence screaming that Ms. Ostrow had been shot. After observing Abdul Scott treating Ms. Ostrow, Ms. Clarke called 911. As she was on the phone with a police dispatcher, Abdul Scott was yelling that his brother, Kareem, who Ms. Clarke identified as [Petitioner] [], shot Ms. Ostrow. Ms. Clarke testified that the male's voice on the 911 recording identifying [Petitioner] as the shooter was that of Abdul Scott.

Ms. Clarke was taken to the police station where she was interviewed. Ms. Clarke stated that she was completely sober and lucid. She did not appear to be intoxicated according to the officer who interviewed her. [Petitioner]presented evidence of alibi consisting of testimony and documents he argues proved that he was at a minimart located about [20] minutes from the scene of the shooting. He also introduced evidence that he did not fight with his half-brother Abdul Scott.

Stansbury II, at 2-6 (quoting trial court opinion *Com. v. Stansbury*, CP-51-CR-0006484-2014 and 0006485-2014[3] at 2-7 (Pa. Ct. Com. Pleas June 26, 2017) (internal citations and footnotes omitted in quoted material) ("*Stansbury I*")). Doc. No. 31-2.[4]

Mr. Stansbury elected to represent himself at trial and on appeal. *Com. v. Stansbury*, 219 A.3d 157, 158 (Pa. Super. 2019) ("*Stansbury III*") (appellate opinion in Mr. Stansbury's PCRA case). Mr. Stansbury raised eight issues on appeal, which track the eight issues raised in this habeas proceeding. *Stansbury II*, at 6-7. The Superior Court affirmed his conviction and sentence, adopting the trial court's opinion as its own. *Id.* at 8. Mr. Stansbury filed a *pro se* petition under Pennsylvania's Post–Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§ 9541–9546, making two claims, (1) that the evidence was insufficient to establish his identity as the shooter, and (2) that the trial court abused its discretion in denying his motion *in limine* to exclude a 911 telephone call right after the shooting during which Mr. Stansbury was identified as the shooter. *Stansbury III*, 219 A.3d at 158. The PCRA court appointed counsel, but counsel filed a letter with the court indicating the PCRA petition had no merit and asked to withdraw as counsel.[5] *Id.* at 159. The PCRA court granted the motion to withdraw and dismissed the PCRA petition. *Id.* Mr. Stansbury appealed to the Superior Court, raising three issues, summarized by the Superior Court as follows:

1. The trial court refused to hold an evidentiary hearing and denying Appellant's pre-trial motion *in limine* was unreasonable and allowed highly prejudicial and harmful evidence to be introduced against Appellant at his second trial, thus denying him a fair trial and resul[t]ing in a miscarriage of justice[.]

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[3] Mr. Stansbury was charged in '6484 with shooting at Abdul Scott and in '6485 with shooting Rachel Ostrow. *Stansbury* III, 219 A.3d at 158. The two shooting charges arose from the same incident.

[4] The trial court's opinion (*Stansbury* I) is unpublished and is attached as an exhibit to the Response. *See* Doc. 31-2.

[5] Counsel utilized the procedure adopted by the Pennsylvania Supreme Court in *Com. v. Turner*, 544 A.2d 927 (1988), and *Com. v. Finley*, 550 A.2d 213 (1988) (*en banc*).

2. The Commonwealth presented insufficient evidence at Appellant[']s trial to establish his identity as the shooter beyond a reasonable doubt thereby violating due process and resulting in a miscarriage of justice[.]

3. The PCRA court erred denying Appellant's PCRA petition without a[n] evidentiary hearing when the petition raised gen[uin]e issues of material facts[.]

Id. at 161 (brackets in the original). The Superior Court affirmed the PCRA court's rejection of the first two issues because both issues had been raised (and rejected) on direct appeal and therefore previously litigated. *Id.* The Superior Court held that the PCRA court had not abused its discretion in finding that the first two claims warranted dismissal without an evidentiary hearing, because they did not present any genuine issues of material fact, and therefore rejected Mr. Stansbury's third claim. *Id.* at 161-62.

None of the issues raised in Mr. Stansbury's PCRA litigation were raised in his habeas petition. The eight issues raised on his direct appeal track the issues he has raised in this habeas petition.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, a prerequisite to the issuance of a writ of habeas corpus on behalf of a person in state custody pursuant to a state court judgment is that the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). In order to satisfy this requirement, a petitioner must have "fairly presented" the merits of his federal claims during "one complete round of the established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

A federal claim is fairly presented to the state courts where the petitioner has raised "the same factual and legal basis for the claim to the state courts." *See Nara v.*

Frank, 488 F.3d 188, 198-99 (3d Cir. 2007). A petitioner who has raised an issue on direct appeal is not required to raise it again in a state post-conviction proceeding. *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) (citations omitted).

If a petitioner fairly presents a claim to the state courts, but it was denied on a state-law ground that is "independent of the federal question and adequate to support the judgment," the claim is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A claim is also procedurally defaulted if the petitioner failed to present it in state court and would now be barred from doing so under state procedural rules. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). Where a claim is procedurally defaulted, it cannot provide a basis for federal habeas relief unless the petitioner shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Where the federal court reviews a claim that has been adjudicated on the merits by the state court, the federal court may grant a petition for habeas relief only if: (1) the state court's adjudication of the claim, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(1)-(2); *see Parker v. Matthews*, 567 U.S. 37, 42-45 (2012) (reiterating that the standard under 2254(d)(1) is highly deferential to state court decisions, and overturning a Sixth Circuit decision

granting habeas relief because the state court's decision denying relief was not objectively unreasonable).[6]

DISCUSSION

A. Previous habeas litigation in federal court.

As a preliminary matter I must address the impact, if any, of Mr. Stansbury's previous habeas litigation in this court. The current petition, filed May 11, 2018, is Mr. Stansbury's second petition under 28 U.S.C. § 2254. On March 12, 2018, Mr. Stansbury filed a separate petition under docket number 18-cv-1066. *See Stansbury v. District Attorney of Philadelphia*, No. 18-1066, 2020 WL 1821020 (E.D. Pa. April 10, 2020) ("*Stansbury IV*") (the federal district court opinion resolving a previously filed habeas petition arising from the same state judgment). The respondent in both cases, the District Attorney of Philadelphia, has not objected to the filing of successive petitions.[7] Mr. Stansbury did not move for consolidation of the two cases. After a Report and Recommendation by the Magistrate Judge, the District Judge resolved the only issue raised in the first petition (No. 18-cv-1066), a speedy trial claim, on two grounds: first, that Petitioner had not proven he exhausted his available state court remedies, and second, that the claim failed on the merits. *Id.* at *3, *5. The two petitions (in No. 18-cv-1066 and in this case, No. 18-cv-02022) challenge the same state court judgment of conviction. The speedy trial issue raised in the first petition (No. 18-cv-1066) has been raised as Mr. Stansbury's fourth issue in this habeas proceeding.

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[6] As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000) (citing *Williams*, 529 U.S. at 411).

[7] Indeed, the respondent recommended in the first petition (No. 18-cv-1066) that the two petitions be consolidated. *See* No. 18-cv-1066, ECF 28, at 8.

Title 28, United States Code, Section 2244(b)(1) requires that a district court dismiss a claim in a "second or successive" habeas petition that has been presented in a "previous application" under 28 U.S.C. § 2254. The speedy trial issue is a claim in both petitions. Because Mr. Stansbury has filed two petitions seeking relief from the same state court judgment, section 2244's claim preclusion requirements apply, at least on first glance. *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (to come within the preclusive effect of section 2244(b), applications must arise from the same state court judgment).

The statute, at 28 U.S.C. § 2244(b)(2), also calls for dismissal of claims not presented in a "prior application" under 28 U.S.C. § 2254, unless the applicant shows the existence of one of several narrow exceptions,[8] none of which apply here. Thus, two preliminary questions arise: whether Mr. Stansbury's speedy trial issue (issue number 4 in this petition) should be dismissed under 28 U.S.C. § 2244(b)(1); and whether the rest of Mr. Stansbury's claims, other than the speedy trial claim, should be dismissed under 28 U.S.C. § 2244(b)(2).

Magwood explains that section 2244's claim preclusion rules do not apply if (1) the claim would have been unripe if presented in the first application, *id.* (citing *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007); *Stewart v. Martinez–Villareal*, 523 U.S. 637, 643 (1998)), and (2) if the first application was dismissed for lack of exhaustion. *Id.*

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[8] The two statutory exceptions are:

> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A), (B).

(citing *Slack v. McDaniel*, 529 U.S. 473, 478, 487 (2000)). The Pennsylvania Superior Court's decision on Mr. Stansbury's appeal of his conviction was dated April 17, 2018, a few weeks after Mr. Stansbury filed his previous petition in No. 18-cv-1066. Doc. No. 31-1, at 8. Because the filing date of Mr. Stansbury's prior habeas petition in No. 18-cv-1066 preceded the Superior Court's decision resolving his state court appeal, the claims presented in the current petition (No. 18-cv-2022) were unripe as of the time of filing of the first petition. "The statutory bar on 'second or successive' applications does not apply to a . . . claim brought in an application *filed when the claim is first ripe.*" *Panetti*, 551 U.S. at 947 (emphasis supplied). Under *Panetti*'s language, it seems that none of Mr. Stansbury's claims were "second or successive" claims barred under 28 U.S.C. § 2244(b), since his petition in No. 18-cv-2022 was filed when the claims were "first ripe," and his petition in No. 18-cv-1066 was filed when the claims were unripe. *Id.*

In addition, because Mr. Stansbury's current habeas petition was filed before the conclusion of the time for appeal in his previous petition, it is likely not a "second or successive" petition under the rule of *United States v. Santarelli*, 929 F.3d 95 (3d Cir. 2019). In *Santarelli* the court of appeals held that a "Motion to File Subsequent Petition," filed during the pendency of an appeal of a district court decision on plaintiff's habeas petition, was not a "second or successive" habeas petition under 28 U.S.C. §§ 2244 and 2255(h), because it was filed before the final adjudication of plaintiff's initial petition. *Id.* at 106.

Nevertheless, the language of 28 U.S.C. § 2244(b) is not the only basis for preclusion of a claim that has been previously litigated in a section 2254 action. The Supreme Court enforced claim and issue preclusion doctrines in the context of successive habeas petitions before the adoption of section 2244(b). Under pre-existing

doctrine a court may not reach the merits of either claims raising identical grounds to a claim already heard and decided, or new claims that could have been raised but were not raised in a previously filed application, unless the petitioner shows cause and prejudice, or a miscarriage of justice. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) (describing the circumstances under which claim preclusion will be applied); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (barring consideration of issues that could have been raised, but were not, in a prior habeas application, absent a showing of cause and prejudice or miscarriage of justice). This pre-existing body of doctrine did not expire with the adoption of the AEDPA. As the Court of Appeals put it, the "AEDPA dealt with habeas petitions under § 2254 and § 2255 by building on *McCleskey* rather than supplanting it." *Zayas v. I.N.S.*, 311 F.3d 247, 257 (3d Cir. 2002). While their holdings must be harmonized with section 2244, *McCleskey* and *Sawyer* still provide grounds for issue and claim preclusion where section 2244(b) does not apply. *Id.*

Mr. Stansbury has not shown, nor even attempted to show, cause and prejudice or a miscarriage of justice that would excuse the bar on consideration of an issue already decided in No. 18-cv-1066. *McCleskey*, 499 U.S. at 493. Accordingly, I recommend that the Petitioner's fourth issue, a speedy trial claim, be dismissed because it was previously raised and decided in *Stansbury IV*. Alternatively, I recommend that the ruling in *Stansbury IV* be adopted in this case, the effect of which is to dismiss Mr. Stansbury's fourth ground of relief.

As for the balance of Mr. Stansbury's issues, because they were unripe and unexhausted when he filed his first petition in No. 18-cv-1066, I recommend that they not be dismissed for failure to raise them in No. 18-cv-1066. The fact that the Superior Court's opinion deciding Mr. Stansbury's appeal had not issued at the time his previous

petition was filed means that he could not, in compliance with applicable legal standards, have included these claims in his first habeas petition, because he had not exhausted one full round of state litigation. *O'Sullivan*, 526 U.S. at 845. Since only claims that Stansbury "could have raised in his first" petition may be barred under *McCleskey*, 499 U.S. at 489, the predicate for applying claim preclusion to claims not raised in his first petition is missing.

B. Many of Mr. Stansbury's claims are unexhausted and procedurally barred, and none of them warrant habeas relief.

Mr. Stansbury was required to exhaust his claims in state court before bringing this habeas action in federal court. 28 U.S.C. § 2254(b)(1); *see McCandless*, 172 F.3d at 261. Many of his claims were not fairly presented to the Pennsylvania courts as Constitutional issues and were therefore unexhausted, and they are now procedurally barred. *McCandless*, 172 F.3d at 261. The Commonwealth also argues that the Superior Court rejected some of Mr. Stansbury's claims because they were not presented in accordance with state procedural requirements. I will deal with the questions of exhaustion, procedural bar, and the merits of the claim, as appropriate, for each of Mr. Stansbury's eight issues, in turn.

1. *Petitioner's claim that the failure of the trial judge to recuse himself was a Due Process violation was not fairly presented to the Pennsylvania courts as a constitutional issue and is therefore unexhausted and procedurally barred. The claim is also meritless.*

On appeal to the Superior Court, Mr. Stansbury argued this claim solely under Pennsylvania law.[9] *See* Stansbury Appellate Brief (Stan. App. Br.) at 19-22. While he

[9] An action under 28 U.S.C. § 2254 is not a device for correcting errors of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law.") (internal quotations and citations omitted). To the extent that Mr. Stansbury claims that he is entitled to relief based on Pennsylvania law his claim is non-cognizable.

stated in a heading that the failure to recuse violated the Due Process Clause of the United States Constitution, he did not cite to a single case explaining the dimensions of the constitutional right he sought to enforce, nor did he mention a constitutional standard in the text of his brief. *Id.* This means that the issue – as a federal constitutional issue – is barred because Mr. Stansbury failed to exhaust the issue by fairly presenting it to the state court.

A habeas petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To satisfy this requirement, a petitioner must have "fairly presented" the merits of his federal claims during "one complete round of the established appellate review process." *O'Sullivan*, 526 U.S. at 845. A federal claim is fairly presented to the state courts where the petitioner has raised "the same factual and legal basis for the claim to the state courts." *See Nara*, 488 F.3d at 198–99. A claim that was not fairly presented to the state court may not be reviewed in a habeas proceeding in federal court unless the failure to exhaust is somehow excused. The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Waymart*, 579 F.3d 330, 367 (3d Cir. 2009) (quoting *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)).

In *Duncan v. Henry*, 513 U.S. 364, 364-66 (1995) (*per curiam*), the Supreme Court explained that when a federal constitutional issue is not explicitly presented to a state court, it is "fairly presented" only when both the legal standard, argued under state law, and the facts forming the context of the state and federal issues, are the same for both the federal and state law claims. "[M]ere similarity of claims is insufficient to exhaust." *Id.* at 366. For instance, raising a claim that evidence was admitted in violation of state evidentiary standards does not fairly present a claim that the evidence

was admitted in violation of the U.S. Constitution. *See McCandless*, 172 F.3d at 262 (state double hearsay claim did not "fairly present" a constitutional issue).

The Third Circuit explained how a petitioner might fairly present a federal claim to a state court:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Evans v. Court of Common Pleas, Del. County, Pa., 959 F.2d 1227, 1232 (3d Cir. 1992) (quoting *Daye v. Attorney General of New York*, 696 F.2d 186 (2d Cir. 1982) (en banc)). In state court, Mr. Stansbury did not rely on federal cases. He did not rely on state cases employing federal constitutional analysis. His claim was not so particular as to call to mind a specific constitutional right. The fact pattern was not within the mainstream of constitutional litigation. Mr. Stansbury failed to satisfy any of the communicative possibilities suggested by *Evans*.

In *Nara*, as well as in *Evans*, the Court of Appeals dealt with the application of federal and state legal standards that were identical. *See Nara*, 488 F.3d at 198-99 (defendant "articulated the test applied by both federal and state courts"); *Evans*, 959 F.2d at 1232 ("the test for reviewing sufficiency of the evidence is essentially identical" under state law and the Constitution). *Evans* and kindred cases are based on the reality that a state court applying a state standard that is identical to a federal constitutional standard *has in fact* applied the federal standard, albeit under another name, to the same facts. In that event, the federalism concerns that underlie the exhaustion doctrine

have been satisfied, and there is no point in sticking by a requirement that the petitioner explicitly argue the federal standard in the state case.

Here, the federal due process standard is not the same as the standard for recusal under state law. *Compare Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) ("whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable[]"), *with Com. v. Darush*, 459 A.2d 727, 731 (Pa. 1983) ("In general, a 'trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case *or whenever he believes his impartiality can be reasonably questioned.' Commonwealth v. Goodman,* 311 A.2d 652, 654 (Pa. 1973) (quoting from A.B.A. Standards Relating to the Function of the Trial Judge § 1.7)." (emphasis in the original)). Though Mr. Stansbury mentioned "due process" in a heading in his state court brief, he argued the recusal issue solely on state law grounds, citing state law precedent. *See* Stan. App. Br. at 19-22. The Pennsylvania trial court "understandably confined its analysis to the application of state law[,]" and concluded that recusal was not required under state law. *Duncan*, 513 U.S. at 366; *see* Doc. No. 31-2 at 21. Mr. Stansbury did not fairly present the due process claim to the state courts. His federal due process claim is unexhausted and is now procedurally barred, since the time for raising the claim in a PCRA petition has long passed. *See O'Sullivan*, 526 U.S. at 845 (issue must be "fairly presented" to the state courts or it is unexhausted); *McCandless*, 172 F.3d at 261 (unexhausted claims are also procedurally barred if the time for raising them in state court has passed); *Coleman*, 501 U.S. at 729 (effect of a procedural bar).

If I ignore Mr. Stansbury's failure to exhaust the claim before the state courts and assume that his due process claim was fairly presented, the state court's resolution of his

recusal claim was not an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). Having assumed for the purpose of argument that the federal due process claim was fairly presented, because it was similar enough to the state recusal issue, I would in fairness also apply the rebuttable presumption that the state court adjudicated the federal claim on the merits. *See Johnson v. Williams*, 568 U.S. 289, 298–302 (2013). Mr. Stansbury has done nothing to rebut the presumption required under *Johnson*, meaning the state court's decision rejecting the recusal claim is subject to the deferential standard of review under 28 U.S.C. § 2254(d)(1), which asks if the state unreasonably applied a federal constitutional standard as determined by the Supreme Court.

The federal due process standard is described in *Rippo*: "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." 137 S.Ct. at 907. The circumstances alleged by Mr. Stansbury do not come close to making the risk of bias "too high to be constitutionally tolerable." *Id.* He contends that he moved for recusal, and the trial judge agreed to recuse, only to reverse himself and proceed with the trial. Doc. No. 1 at 19. Mr. Stansbury does not explain the grounds he advanced for recusal. The trial court's opinion supplies more information: Mr. Stansbury alleged the trial judge was biased because he granted a short trial continuance based on a motion by the Commonwealth. Doc. No. 31-2 at 21.

Granting a short trial continuance is not evidence of a "risk of bias . . . too high to be constitutionally tolerable." *Rippo*, 137 S.Ct. at 907. Adverse rulings are almost never evidence of bias at all, much less of a risk of bias so substantial as to trigger a constitutional obligation to recuse. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) (discussing recusal under a federal statute governing judicial conduct). On their own,

adverse rulings do not demonstrate an extra-judicial source of bias, and "only in the rarest circumstances" can they demonstrate the favoritism or antagonism that must exist in the absence of an extra-judicial source of bias. *Id.* "Almost invariably, they are proper grounds for appeal, not for recusal." *Id.*

An adverse ruling is qualitatively different than the kind of relationship between a judge and litigant that typically calls for recusal. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881–82 (2009) (a judge was required to recuse himself where one of the litigants had been instrumental in getting him elected); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903 (2016) (judge who had been the District Attorney that authorized the death penalty in defendant's case should have recused himself from hearing the appeal). In the case cited by Mr. Stansbury,[10] the Supreme Court ruled that an administrative agency that both investigated and adjudicated a case need not recuse itself, as a matter of due process. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (cited at Doc. No. 1, at 19). The Court explained that cases that call for recusal, as a constitutional matter, typically involve a judge with a pecuniary interest in the outcome, or cases in which the judge has been the target of personal abuse or criticism from a party. *Id.*

Granting a short continuance was not evidence of bias, certainly not of the type that calls for recusal under the Constitution. The Pennsylvania court's resolution of this

[10] In addition to the case described in the text, Mr. Stansbury also cites to *Puckett v. United States*, 556 U.S. 129 (2009), and quotes it as saying that an "unconstitutional failure to recuse is a structural error." Doc. No. 1 at 19. The case has nothing to do with judicial recusal and does not contain the quote attributed to it by Mr. Stansbury. Mr. Stansbury also cites to *In re Kensington Int, Ltd.* 353 F.3d 24 (3d cir 03) [sic]. *Id.* That citation is actually to a case by the name of *United States v. Gibson*, 353 F.3d 21 (D.C. Cir. 2003). Again, this case has nothing to do with judicial recusal. Mr. Stansbury likely meant to cite to *In re Kensington Intern. Ltd.*, 353 F.3d 211 (3d Cir. 2003), in which the Court of Appeals remanded a mandamus to the district court for further discovery and hearings on a recusal request. That case does note that an appearance of impropriety may be grounds for recusal, which was Mr. Stansbury's point.

issue was not an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).[11]

2. *Petitioner's claim that the trial court erred by rejecting his motion for suppression of photographic identifications made by witnesses is procedurally barred because he failed to comply with state procedural standards, and the state court's resolution of the issue is not an unreasonable application of federal law determined by the Supreme Court.*

The Commonwealth points out in its brief that several of Mr. Stansbury's claims are procedurally barred because he waived them in Pennsylvania state court by not raising them properly. Doc. No. 31, at 10 n.3. His claim that the trial court erred by rejecting his motion for suppression of photographic identifications is one such claim.

Mr. Stansbury raised this issue in paragraph 3 of his "Statement of Matters Complained of on Appeal Pursuant to 1925(B)."[12] The trial court held that Mr. Stansbury had waived the issue by failing to articulate why the admission of the photographic evidence was an error. Trial Op. at 28. In the alternative, the trial judge explained why the admission of the photographic identification evidence was not error. *Id.* The Superior Court adopted the trial court's opinion as its own. *See* Doc. No. 31-1, at 8.

A failure to comply with the requirements of Pa. R. App. Pro. 1925(b) constitutes an independent and adequate state ground of decision that bars a federal habeas claim. *Buck v. Colleran*, 115 F. App'x 526, 527–28 (3d Cir. 2004) (not precedential) (citing

[11] If the due process issue were fairly presented (it was not) and the *Johnson* presumption did not apply (it does), then the state court has not considered on the merits a claim that was fairly presented. The result would be that a *de novo* standard of review would be appropriate. *Breakiron v. Horn*, 642 F.3d 126, 131 (3d Cir. 2011). Under *de novo* review, I would come to the same conclusion, for the same reasons, as I have under 28 U.S.C. § 2254(d)(1) deference.

[12] A copy of the document is contained in the state court record for CP-51-CR-0006485 2014, forwarded to the District Court by the Court of Common Pleas as part of this litigation.

Murray v. Carrier, 477 U.S. 478 (1986)). Thus, Mr. Stansbury's claim is procedurally barred. *See Coleman*, 501 U.S. at 729 (effect of procedural bar).

Even if the issue is not barred as a result of Mr. Stansbury's failure to comply with a state court procedural rule, the issue's resolution by the trial court, adopted by the Superior Court on appeal, was not an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).[13] The trial court explained that the pre-trial photographic identification was only suppressible if "the identification procedure was so infected by suggestiveness as to give rise to a substantial likelihood of irreparable misidentification." Doc. No. 32-2, at 10 (quoting from *Commonwealth v. Sample*, 468 A.2d 799, 801 (Pa. Super. 1983) (internal quotation marks and citations omitted)).[14] The court held that showing the witnesses a single photograph did not create a substantial likelihood of misidentification, because the witnesses knew Mr. Stansbury quite well. *Id.* at 10-11. One of the witnesses, Abdul Scott, was Kareem Stansbury's half-brother; the other, Ms. Ambert-Prietto, knew him from the neighborhood. *Id.* at 10.

An identification based on a single photograph is not necessarily unduly suggestive, as a constitutional matter. *Manson v. Brathwaite*, 432 U.S. 98, 114–17

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[13] I apply the deferential standard under section 2254(d)(1), and not a *de novo* standard of review, for the same reasons explained in my discussion of Mr. Stansbury's first issue, above. If I were to apply a *de novo* standard of review, the result would be the same. In addition, I would find the error harmless, based on the standard explained *infra*, at 41. *See Hassine v. Zimmerman*, 160 F.3d 941, 955 (3d Cir. 1998) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435, 436 (1995)).

[14] The federal and state standard appear to be substantially the same. *Compare Sample*, 468 A.2d at 801, *with Perry v. New Hampshire*, 565 U.S. 228, 232-33 (2012) ("If there is 'a very substantial likelihood of irreparable misidentification,' *Simmons v. United States*, 390 U.S. 377, 384 (1968) [ ], the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.") (internal parallel citations omitted). Application of the state standard is therefore the substantial equivalent of applying the federal constitutional standard.

(1977). Other factors may lessen the risk of undue suggestiveness. *Id.* Where a witness knows the suspect before the incident and is merely confirming an identification already made, when presented with a photograph, there is no constitutional infirmity to the photographic identification. *See Burgos-Cintron v. Nyekan*, 510 F. App'x 157, 161 (3d Cir. 2013) (not precedential) (photographic identification was not unduly suggestive because the victim was acquainted with the defendant); *United States v. Simmons*, 633 F. App'x 316, 320–21 (6th Cir. 2015) (not precedential) (other circumstances "negate the 'corrupting effect of the suggestive identification,' particularly where the witness knows the defendant" (quoting *Manson*, 432 U.S. at 114)); *Walston v. City of New York*, 289 F. Supp. 3d 398, 408–09 (E.D.N.Y. 2018) ("When [the victim] identified [the defendant] in the photograph she was merely confirming for police that he was the perpetrator[.]").

The Superior Court's resolution of this issue was not an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

3. *Petitioner's claim that the trial court erred by refusing his request for investigation and expert witness funds is procedurally barred because he failed to raise it as a federal Constitutional issue before the Pennsylvania courts. The claim is also meritless.*

Mr. Stansbury claims that the trial court violated his due process right to hire expert witnesses to support his defense. Doc. No. 1 at 21. In his appellate briefing before the Superior Court, Mr. Stansbury raised his third issue exclusively as a matter of state – not federal – law. *See* Stan. App. Br. at 27-31. Therefore, the issue was not fairly presented as a federal constitutional claim in the Pennsylvania courts, has not been exhausted, and is now procedurally barred because the time has long passed for presenting the issue to the state courts under state procedural rules. *O'Sullivan*, 526

U.S. at 845 (issue must be "fairly presented" to the state courts); *Coleman*, 501 U.S. at 729 (effect of procedural bar); *McCandless*, 172 F.3d at 261 (unexhausted claims are also procedurally barred if the time for raising them in state court has passed).

Mr. Stansbury's habeas petition alleges that he was improperly denied funds for a host of experts: "The requested expert were [sic] relevant for identification, drug use, forsenis [sic] evidence (e.g, bullet trajectory, blood-splatter, injury causation, weapons[.]" Doc. No. 1 at 21. But Mr. Stansbury properly raised and argued only one factual issue before the trial and appellate courts in Pennsylvania: his need for a toxicologist to testify about the effect of K-2 on a person's memory and perception.[15] Stan. App. Br. at 11, 30, 31; *see* Doc. No. 31-2 at 16, 18 (*Stansbury I*). This request was directed in part at developing impeachment evidence for Rachel Ostrow, the victim who was actually hit by a bullet at the time of the incident which led to Mr. Stansbury's arrest and conviction. Stan. App. Br. at 30. As the trial court pointed out, Ms. Ostrow did not testify that Kareem Stansbury shot her, so the existence of K-2 in her system (or not) was irrelevant. *Id.* The Superior Court adopted the trial judge's findings and conclusions as its own. Doc. No. 31-1 at 8 (*Stansbury II*).

The other reason for Mr. Stansbury's request for a toxicology expert was to describe to the jury the effects of K-2 on perception and memory of witnesses who admittedly smoked K-2 at some point before the incident. The trial court held that it did not abuse its discretion in denying the request on this ground, because (1) there was no evidence that the witnesses exhibited signs of intoxication, (2) there was no evidence that they had smoked more than a minimal amount of K-2 that evening, (3) there was

[15] Mr. Stansbury asked for funds for multiple witnesses before his first trial, but before his retrial asked only for a toxicologist to testify about the effect of K-2 in a person's bloodstream. *See* Stan. App. Br. at 11.

no evidence about the time that had elapsed between smoking K-2 and the shooting, and (4) there was no basis for an expert opinion about the effect of the K-2 on witness perception, and any such testimony would have been at most speculative. Doc. No. 31-2 at 18. The Superior Court adopted the trial judge's findings and conclusions as its own. Doc. No. 31-1 at 8.

Mr. Stansbury does not develop his claim that due process entitled him to the assistance of a toxicologist at trial. While there is no Supreme Court case law directly addressing this issue, *see* discussion *supra* at p. 27, the Supreme Court has identified a due process right to the assistance of a competent psychiatrist when "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial[.]" *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *see McWilliams v. Dunn*, 137 S. Ct. 1790, 1798 (2017) (due process requires that an indigent defendant must receive the assistance of a competent psychiatrist when his sanity at the time of the offense is seriously in question and his mental condition is relevant to the punishment he might suffer).

The case relied upon by Mr. Stansbury, *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985),[16] held that due process *did not* require the appointment of various forensics investigators and experts, under the circumstances: "Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision." *Id.* In the same way, Mr. Stansbury offers no more than undeveloped assertions that the requested assistance would have been helpful. Mr. Stansbury does not offer a coherent

[16] Cited by Mr. Stansbury in his Memorandum. Doc. No. 1 at 20.

explanation, for instance, about what a ballistics expert would have offered at trial. Doc. No. 1 at 21-22. The case involved one victim, Abdul Scott, who well knew it was his half-brother that shot at him and Rachel Ostrow, and another (Ostrow) who was hit by a bullet, bled from the wound at the scene, was taken to the hospital as a result, and had a bullet fragment pulled out of her by a doctor. How a ballistics expert would have helped Mr. Stansbury at trial is not at all evident on the facts of this case and is thus quite beyond me.

Nor does Mr. Stansbury point to any Supreme Court cases that have established, in concrete terms, a due process right to the kind of forensics experts he now seeks. Finally, adapting the test described in *Ake* and *McWilliams*, Mr. Stansbury has not demonstrated that the toxicology issues he preserved in the state court are significant to his defense, or relevant to his punishment. *Ake*, 470 U.S. at 83; *McWilliams*, 137 S. Ct. at 1798.

If I were to disregard the procedural bar arising from Mr. Stansbury's failure to properly exhaust the due process issue before the Pennsylvania courts, I would find that the state court's resolution of the issue was not an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). In both *Ake* and *McWilliams*, there was ample evidence before the trial judge that the defendant had a mental disorder at the time of the offense, and his sanity or insanity was obviously significant to his defense and relevant to his punishment. Here, the trial judge explained the speculative nature of the evidence Mr. Stansbury sought and its absolute lack of relevance, in Rachel Ostrow's case. The trial judge's resolution of the issue was not an unreasonable application of federal law as determined by the Supreme Court, especially because there is no Supreme Court precedent directly on point.

If I were to resolve the preserved issue about a toxicology expert under a *de novo* standard of review, I would find that there has been no due process violation, for the same reasons relied upon by the trial judge. In addition, I would find the error harmless, based on the standard explained *infra*, at 41. *See Hassine*, 160 F.3d at 955 (quoting *O'Neal*, 513 U.S. at 435-36).

Finally, if I were to address the balance of Mr. Stansbury's claims for a phalanx of additional forensic experts, entirely abandoning the procedural reasons why they should not be considered, I would find that that there has been no due process claim elaborated, for the reasons explained in *Caldwell*. 472 U.S. at 323, n.1. Mr. Stansbury has supplied nothing but assertions about why these experts would have been significant for his defense. His bald assertions are unconvincing and do not form a basis for habeas relief.

4. *Petitioner's claim that the trial court erred by rejecting his motion to dismiss for non-compliance with state and federal speedy-trial requirements has been decided against the Petitioner in another federal habeas proceeding and is therefore barred.*

I have explained why, as a preliminary matter, Mr. Stansbury's fourth claim – a speedy trial issue – is not cognizable in this action because it was previously decided in another federal habeas proceeding. *Supra*, at 10-14. Even if principles of claim preclusion or issue preclusion do not prevent me from deciding the issue, I am convinced that Mr. Stansbury's speedy trial claim was properly rejected in the district court's opinion in No. 18-cv-1066, and for the same reasons should be rejected here, as nothing material has changed.

5. *Petitioner's claim that the trial court erred by permitting the introduction into evidence of a victim's medical records without the treating doctor's testimony is procedurally barred because the Petitioner did not raise this*

as a constitutional claim in the Pennsylvania courts. The claim is also meritless.

Mr. Stansbury claims that the admission of medical records of Rachel Ostrow's treatment and diagnosis was a Confrontation Clause violation. Doc. No. 1 at 23. The trial court decided there was no error under Pennsylvania hearsay law, because that is how Mr. Stansbury presented the issue in state court: as an error under state evidence law, not as a federal constitutional issue. Stan. App. Br. at 37-40; *see* Doc. No. 31-2 at 29-30 (Tr. Ct. Op.). While Mr. Stansbury included a heading mentioning the Sixth and Fourteenth Amendments (*id.* at 37), that is not enough. *See Sims v. Warren*, No. 12-7321, 2015 WL 9308257, at *4 (D.N.J. Dec. 22, 2015) (mentioning federal constitutional rights only in a heading is merely "repackaging" state claims as federal claims and is insufficient to exhaust a federal claim before state courts) (citing to *Johnson v. Rosemeyer*, 117 F.3d 104, 110 (3d Cir. 1997) ("errors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.").

Mr. Stansbury did not make any arguments under the relevant Confrontation Clause cases. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The Pennsylvania trial court "understandably confined its analysis to the application of state law[,]" *Duncan*, 513 U.S. at 366, and concluded that the records were properly admitted under the Pennsylvania exception for medical records. *See* Doc. No. 31-2 at 30. The trial court also concluded that even if the medical records were admitted in error, the admission was harmless. *Id.* The Superior Court adopted the trial court's conclusions. Doc. No. 31-1 at 8.

The consequence of Mr. Stansbury's failure to make the Confrontation Clause argument in state court is that his claim was not fairly presented, was therefore not exhausted, and is now procedurally barred as the time for properly raising the issue in state court has passed. *O'Sullivan*, 526 U.S. at 845 (issue must be "fairly presented" to the state courts); *McCandless*, 172 F.3d at 261 (unexhausted claims are also procedurally barred if the time for raising them in state court has passed); *Coleman*, 501 U.S. at 729 (effect of procedural bar).

If I ignore the procedural bar and review the issue *de novo*, after bypassing the required analysis under *Johnson*,[17] I find that Mr. Stansbury's argument is meritless. The Supreme Court has made clear that admission of an out-of-court statement can violate the Confrontation Clause only if the statement is "testimonial:" that is, its "primary purpose" was to "gather evidence" for a prosecution. *Ohio v. Clark*, 576 U.S. 237, 247 (2015). Thus, a small child's statements about his injuries to a teacher were not testimonial, and did not implicate the Confrontation Clause, because they were not made for the primary purpose of gathering evidence for a prosecution. *Id.*

The Court has made a point of clarifying, in *dicta*, that medical documents created as an ordinary part of the diagnosis and treatment of a patient's condition are not barred by the Confrontation Clause. *See Michigan v. Bryant*, 562 U.S. 344, 362 (2011) (citing to *Giles v. California*, 554 U.S. 353, 376 (2008), which noted that "[s]tatements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by

[17] *See supra*, at 19. Mr. Stansbury has done nothing to rebut the presumption under *Johnson* that the state courts resolved the constitutional issues on the merits. *See Johnson*, 568 U.S. at 298–302. If the state court decided the issue on the merits, I owe the state court decision the deference required under 28 U.S.C. § 2254(d)(1), and would conclude that the state court's resolution of the issue was not an unreasonable application of federal law as determined by the Supreme Court. *Id.*

hearsay rules"); *cf. Melendez-Diaz*, 557 U.S. at 324 ("Business and public records are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.").

The medical records introduced at Mr. Stansbury's trial concerning the diagnosis and treatment of Rachel Ostrow's gunshot wounds were not created for the primary purpose of gathering evidence for a prosecution. They were made as part of the routine diagnosis and treatment of a patient's injuries. The documents were not testimonial and did not implicate the Confrontation Clause. Mr. Stansbury's claim is meritless. In addition, if I were reviewing the issue *de novo*, I would find the error harmless, based on the standard explained *infra*, at 41. *See Hassine*, 160 F.3d at 955 (quoting *O'Neal*, 513 U.S. at 435-36).

6. *Petitioner's claim that the trial court erred by refusing to permit defense exhibits to go to the jury for examination during deliberation is procedurally barred because the Petitioner did not raise this as a constitutional claim in the Pennsylvania courts. The claim is also meritless.*

Mr. Stansbury claims that the trial court's refusal to permit several defense exhibits to go out with the jury during their deliberations was a due process violation. Mr. Stansbury did not argue this constitutional violation before the state court, but rather argued that refusal to send out the exhibits with the jury was an error of state law. *See* Stan. App. Br. at 43-44. He did not fairly present the issue to the state courts, and his constitutional claim is therefore unexhausted and procedurally barred. *See O'Sullivan*, 526 U.S. at 845 (issue must be "fairly presented" to the state courts or it is unexhausted); *McCandless*, 172 F.3d at 261 (unexhausted claims are also procedurally barred if the time for raising them in state court has passed); *Coleman*, 501 U.S. at 729

(effect of a procedural bar). His claim could and should be denied for this reason alone. Nevertheless, there are more reasons to deny his claim.

In his habeas petition and memorandum Mr. Stansbury does not identify any Supreme Court case determining that a routine decision not to send out exhibits to a jury amounts to a due process violation. Doc. No. 1 at 24. He cites to one federal case that stands for the proposition that it is within the trial court's discretion to send out exhibits to the jury. *Id.* (citing *Vuong v. Lukens Steel Co.*, 881 F. Supp. 962 (E.D. Pa. 1994)). *Vuong* was decided by a district court under federal procedural rules and is not binding on state courts. Nor is its holding helpful to Mr. Stansbury's position. He cites to two other federal cases that have nothing to do with due process. *Id.* (citing to *United States v. Hans*, 738 F.2d 88, 93 (3d Cir. 1984) (allowing a jury to examine an unadmitted exhibit, over objection, was prejudicial); *United States v. Gordon*, 685 F. Supp. 106, 107 (E.D. Pa. 1988) (there was no prejudice in allowing a plea agreement to go out with the jury, where there was no objection)). None of these cases purport to establish a due process standard. None of these cases establish that Mr. Stansbury has a constitutional claim cognizable in this habeas proceeding. That is Mr. Stansbury's burden, and he has failed to meet it.

My own review of the case law, unaided by the parties, supports dismissal of Mr. Stansbury's claim. As a general matter, a state's criminal procedural rule "is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (internal citations omitted)). The Supreme Court, on relatively rare occasions, has held that the Due Process Clause is implicated

when a state's evidentiary rules exclude relevant, probative evidence with no substantial justification. *See Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (upholding the exclusion of defense evidence of voluntary intoxication and explaining that *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Crane v. Kentucky*, 476 U.S. 683 (1986), did not stand for a broad due process right to the admission of all relevant evidence); *see also Holmes v. South Carolina*, 547 U.S. 319, 328-30 (2006) (state rule that barred evidence that someone else did the crime, based on the strength of the government's evidence, violated due process).

But we are many miles from an exclusion of defense evidence that might trigger due process scrutiny. Here, there was no exclusion of defense evidence, only a trial judge's discretionary decision not to send several defense exhibits out with the jury. The exhibits had been introduced into evidence during the trial and the information in the exhibits was before the jury. The trial judge explained why he refused to send the exhibits back with the jury:

> Had the Court agreed to Appellant's request, the Court would have been compelled to give the jury the Commonwealth's exhibits for the sake of fairness. In a trial that took only days to try and involved less than ten witnesses, the Court's refusal to provide the jury with Appellant's exhibits certainly was not an abuse of discretion. The jury was able to reach a verdict shortly after the Court denied its request thereby demonstrating that Appellant was not prejudiced by the ruling.

Doc. No. 31-2 at 32-33. Granting Mr. Stansbury the benefit of the liberal construction afforded to *pro se* pleadings, it is still the case that conclusory and unsupported assertions of fact or law are not enough to make a habeas claim stick. *Palmer v. Hendricks*, 592 F.3d 386, 395 (3d Cir. 2010); *see McFarland v. Scott*, 512 U.S. 849, 856 (1994) (heightened pleading standards in habeas litigation); *Simms v. Carroll*, 432 F.

Supp. 2d 443, 444 (D. Del. 2006) (inadequately stated habeas claim warranted dismissal). Not only do Mr. Stansbury's petition and memorandum fail to state a cognizable due process claim, my own review of the case law reveals that his failure is simply a function of the reality that there is no cognizable due process claim available, under the circumstances. I recommend that his claim be dismissed for failure to state a claim upon which relief can be granted.

Were I to ignore the procedural bar and pleading inadequacy that attend this claim, and assume for the purposes of argument that there was an applicable due process standard, I would find that the trial judge, in resolving this claim, did not unreasonably apply federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). This is especially so since there appears to be no Supreme Court case law supporting Mr. Stansbury's claim. Nor is there any reason to believe that the Supreme Court would find that a routine decision to withhold exhibits from a jury "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445 (internal quotations and citations omitted). Were I to go further, and apply a *de novo* standard of review,[18] I would come to the conclusion that there was no due process violation. In addition, if I were reviewing the issue *de novo*, I would find the error harmless, based on the standard explained *infra*, at 41. *See Hassine*, 160 F.3d at 955 (quoting *O'Neal*, 513 U.S. at 435-36).

7. The Petitioner's claim that the trial court erred by supplying the jury with written jury instructions is procedurally barred because the Petitioner did not raise this as a constitutional claim in the Pennsylvania courts. The claim is also meritless.

[18] I would be disregarding, in the process, the *Johnson* presumption that the state courts decided the constitutional claim on the merits. *See supra*, at 19.

Once again, Mr. Stansbury has argued a claim exclusively under state law while in state court and has only elaborated a federal claim in his habeas petition. This time the claim is that the trial court violated the Constitution by sending written instructions back with the jury. The claim is procedurally barred and substantively meritless.

Mr. Stansbury argued exclusively state law when making his claim in state court. Stan. App. Br. at 46-47. Mr. Stansbury mentioned the Constitution in the heading of his argument, but that is not enough to fairly present a federal issue to a state court. *See Sims*, 2015 WL 9308257, at *4 (mentioning federal constitutional rights only in a heading is merely "repackaging" state claims as federal claims and is insufficient to exhaust a federal claim before state courts); *Rosemeyer*, 117 F.3d at 110 ("[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause."). The Pennsylvania trial court "understandably confined its analysis to the application of state law[,]" and concluded that giving the jury written instructions did not violate state law. *Duncan*, 513 U.S. at 366; *see* Doc. No. 31-2 at 21. A habeas court cannot correct errors of state law. *Estelle*, 502 U.S. at 67-68. That said, the trial judge was obviously right about state law. The holding in the case upon which Mr. Stansbury relied to argue that the submission of written instructions violated Pennsylvania law was superseded in 2009 by a court rule that permitted written instructions to be submitted to the jury. *Compare Commonwealth v. Karaffa*, 709 A.2d 887 (1998) (it was reversible error to submit written jury instructions to the jury), *with* Pa. R. Crim. Pro. 646(B) (permitting submission of written instructions to the jury). Mr. Stansbury's trial occurred in 2016, many years after the adoption of Rule 646(B).

Mr. Stansbury's constitutional claim is procedurally barred, because it was not fairly presented to the state court. *See O'Sullivan*, 526 U.S. at 845 (issue must be "fairly presented" to the state courts or it is unexhausted); *McCandless*, 172 F.3d at 261 (unexhausted claims are also procedurally barred if the time for raising them in state court has passed); *Coleman*, 501 U.S. at 729 (effect of a procedural bar).

If I disregard the procedural bar and apply the *Johnson* presumption[19] that the state court decided Mr. Stansbury's federal issue on the merits, the trial court's resolution of the issue (adopted by the Superior Court on appeal, *see* Doc. No. 31-1 at 8) was not an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). Certain jury instructions, if wrongly drafted, may offend due process. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (a deficient reasonable-doubt instruction violates due process); *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979) (a defendant is entitled as a matter of due process to have the state prove every element of the offense beyond a reasonable doubt) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). But Mr. Stansbury points to no Supreme Court cases holding that there is a constitutional right to have jury instructions read orally or supplied in writing. Doc. No. 1 at 26.

My own research indicates that the manner of delivery is left to the discretion of the trial judge. Correct written instructions may cure misstated oral instructions, and vice versa. *See Martinez v. Ryan*, 926 F.3d 1215, 1231 (9th Cir. 2019) (correct written instructions cured misstated oral instructions); *United States v. Pray*, 869 F. Supp. 2d 44, 50–51 (D.D.C. 2012) (instructions delivered orally need not be included in written

[19] *See supra*, at 19.

instructions supplied to the jury); *Amin v. Davis*, No. 11-3312, 2013 WL 4590202, at *13 (D.N.J. Aug. 28, 2013) (oral instructions satisfy due process).

Finally, if I apply a *de novo* standard of review, I conclude there was no due process violation. Giving written jury instructions to the jury does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445 (internal quotations and citations omitted). Quite the contrary, the practice seems sensible, just, and fair, given that an exceedingly large percentage of the population is now literate, in contrast to the vagaries of literacy when the tradition of laboriously reading instructions to juries originated in the mists of time. If I were reviewing the matter *de novo*, I would find the error harmless, based on the standard explained *infra*, at 41. *See Hassine*, 160 F.3d at 955 (quoting *O'Neal*, 513 U.S. at 435-36).

As for Mr. Stansbury's argument that the trial judge supplied instructions to the jury off the record, and had *ex parte* contact with the jury (Doc. No. 1 at 25), none of this was brought up in the state court proceedings, none of it has been properly preserved, and none of it is corroborated by evidence of record. *See* Stan. App. Br. at 45-47; Doc. No. 31-2 at 32. The argument is therefore procedurally barred and meritless.

8. *The Petitioner's claim that the trial court erred by rejecting his motion for a new trial based on newly discovered evidence is procedurally barred because he did not raise this as a constitutional claim in the Pennsylvania courts. The claim is also meritless.*

Mr. Stansbury's last claim has two components: (1) that the trial judge should have held a post-verdict evidentiary hearing, based on evidence submitted after the trial, and (2) should have given him a new trial. Pet. Mem. at 26-27. Mr. Stansbury argued this issue as a matter of state law, not as a violation of due process, during his appeal.

Stan. App. Mem. at 49-51. In his habeas petition and memorandum, Mr. Stansbury includes the phrase "due process" but does not cite to any cases that explain the federal due process standard, nor does he explain how due process was implicated by the trial court's refusal to grant a new trial. Pet. Mem. at 25-26. For the most part, Mr. Stansbury recites Pennsylvania law. *Id.* The federal cases he cites do not discuss due process, but rather the standard for new trial under Fed. R. Crim. Pro. 33, which does not control Pennsylvania courts. *See* Pet. Mem. at 26 (citing *United States v. Quiles*, 618 F.3d 383, 390 (3d Cir. 2010)); *id.* at 27 (citing *United States v. Siddiqi*, 959 F.2d 1167, 1173 (2d Cir. 1992)). Mr. Stansbury has failed to exhaust the constitutional question because he failed to "fairly present" the issue to the state court. *See O'Sullivan*, 526 U.S. at 845 (issue must be "fairly presented" to the state courts or it is unexhausted). The issue is also procedurally barred, because the time for raising it in state court is long past. *McCandless*, 172 F.3d at 261 (unexhausted claims are also procedurally barred if the time for raising them in state court has passed); *Coleman*, 501 U.S. at 729 (effect of a procedural bar).

Reading his habeas petition and memorandum charitably, Mr. Stansbury does nothing more than restate his arguments to the state court and conclude that due process was violated. Pet. Mem. at 26-27. He does not identify the appropriate due process standard or discuss why the facts of the case meet that standard. That alone suffices to doom his claim, as he has the obligation of spelling out his claim in sufficient detail so that I can review it meaningfully. Conclusory and unsupported assertions of fact or law are not enough to make out a habeas claim. *See Palmer*, 592 F.3d at 395.

Aside from being inadequately pled, Mr. Stansbury's claim that due process compelled a post-trial evidentiary hearing on his motion for a new trial is meritless.

Many courts that have considered the issue have concluded there is no due process right to an evidentiary hearing on a post-verdict motion for a new trial. *See Jones v. Duncan*, 162 F. Supp. 2d 204, 217–19 (S.D.N.Y. 2001) (collecting cases)[20]; *Sparman v. Edwards*, 26 F. Supp. 2d 450, 467–68 (E.D.N.Y. 1997) (same). *But see Coogan v. McCaughtry*, 958 F.2d 793, 801 (7th Cir. 1992) (holding that "in some situations newly discovered evidence is so compelling that it would be a violation of the 'fundamental fairness embodied in the Due Process Clause' not to afford a defendant a new trial at which the evidence could be considered" (internal quotations and citation omitted)); *cf. Dickerson v. Walsh*, 750 F.2d 150, 152–53 (1st Cir. 1984) (claim that post-trial process violated equal protection could be remedied on habeas).

The Supreme Court has held that due process is not violated by a state's post-trial procedural rules unless the state's procedure "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Herrera v. Collins*, 506 U.S. 390, 407-08 (1993) (quoting *Medina v. California*, 505 U.S. 437, 445-46 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977))). In *Herrera*, the Court upheld Texas' requirement that a post-trial motion based on newly discovered evidence be brought within 60 days of judgment. *Id.* at 410. The effect in Mr. Herrera's case was to deny the petitioner an evidentiary hearing on his claim of actual innocence, based on newly discovered evidence brought forward 11 years after trial. *Id.* at 444 (Blackmun, J. dissenting). The Court held that evidence discovered for the first

[20] *Duncan* relies upon cases holding there is no due process right to an evidentiary hearing in a state collateral proceeding, akin to federal habeas. That is not the same procedural posture as a post-verdict motion for a new trial prior to the taking of a direct appeal; the interest in finality is stronger, post-judgment and appeal. The distinction is not explored in *Duncan* or *Sparman*. I need not address the issue, because I find that even if Mr. Stansbury's claim is theoretically cognizable, it is procedurally barred and meritless.

time after trial, even if it exculpates the defendant, does not of itself constitute an independent ground for habeas relief. *Herrera*, 506 U.S. at 404. A significant showing of innocence can operate to forgive the procedural default of a separate claim of Constitutional error, but it is not a freestanding claim entitling a petitioner to relief. *Id.*

Here, the gist of Mr. Stansbury's claim is that the evidence of the time and place of a Sunoco transaction on his bank card tended to bolster his alibi and prove he did not commit the crime, contrary to the jury's conclusion. Pet. Mem. at 26-27; *see infra*, at 39-40 (trial court's summary of facts). This is a freestanding claim of innocence, which is not itself a ground for relief in habeas. *Herrera*, 506 U.S. at 404. Nor does Mr. Stansbury point to any case law holding that he was entitled to a post-verdict evidentiary hearing by the trial judge as a matter of due process. Instead, Mr. Stansbury cites to *Com. v. Heaster*, 171 A.3d 268 (Pa. Super. 2017), as authority for his argument that an evidentiary hearing was appropriate. Pet. Mem. at 26-27. Obviously *Heaster* does not describe a federal constitutional standard. To the extent that Mr. Stansbury is seeking to correct an error of Pennsylvania law, a federal court sitting in habeas is not the place to do it. *See Estelle*, 502 U.S. at 67-68 ("federal habeas corpus relief does not lie for errors of state law.").

But if *Heaster* happened to be a Constitutional standard, Mr. Stansbury would be no better off. *Heaster* held that an evidentiary hearing was *not appropriate*, under Pennsylvania law, where the defendant had not made a detailed showing in his pleading of the newly discovered evidence that he claimed exculpated him. *Id.* at 274-75. This is *exactly* why the trial judge in this case denied Mr. Stansbury's claim. Doc. No. 31-2 at 38-39:

> [Mr. Stansbury's] evidence consists of a letter involving a transaction at a convenience store that Appellant alleges would show that, at or about the time of the crime herein, he was elsewhere. In order to be entitled to a new trial predicated on after-discovered evidence, a defendant must establish that the evidence: 1) was discovered after the trial and could not have been obtained earlier through the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely to impeach a witness's credibility; and, finally, 4) will likely result in a different verdict if a new trial is granted. *Commonwealth v. Chamberlain*, 30 A.3d 381, 414 (Pa. 2011). If any one of these elements fails, the claim fails without further analysis. *Id.*; *Commonwealth v. Nocero*, 582 A.2d 376, 382 (Pa. Super. 1990). "Unless there has been a clear abuse of discretion, the refusal by the court to grant a new trial on the basis of after-discovered evidence will not be disturbed." *Commonwealth v. Benson*, 463 A.2d 1123, 1125 (Pa. Super.1983).
>
> Appellant merely states that he received notification that the previously unavailable material was now available. He did not present the Court with any information or advise the Court about what information the material contained. Thus, he failed to meet his burden of proving that the information would likely result in a different verdict. In addition, the material is cumulative of evidence Appellant presented at trial and would not result in a different outcome. It would not have established that Appellant made the purchase he alleges at the time the crime was committed. Anyone could have had Appellant's bank card and made the transaction.

In short, Mr. Stansbury has procedurally forfeited his due process claim by not fairly presenting it to the state courts. His vague and conclusory allegations of a due process violation do not satisfy his pleading burden in a habeas case. His reliance on state cases in this habeas proceeding is unavailing, because this court does not correct errors of state law. Mr. Stansbury's claim, if understood as a freestanding claim of innocence based on evidence acquired after trial, is non-cognizable. If understood as a claim that the Due Process Clause required an evidentiary hearing on his post-verdict motion for a new trial, the claim is arguably non-cognizable[21] and certainly

[21] *See Jones*, 162 F. Supp. 2d at 217–19; *Sparman*, 26 F. Supp. 2d at 467–68.

unsupportable. The dissent's position in *Herrera* was that due process required that petitioner's claim of innocence should have been explored by the state court via an evidentiary hearing. 506 U.S. at 444 (Blackmun, J. dissenting). The majority disagreed.

If I were to ignore the procedural bar arising from Mr. Stansbury's failure to fairly present the issue to the state courts, I would find that the trial court's resolution of the issue did not unreasonably apply federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). The trial judge's resolution of the issue, adopted by the appellate court, was reasonable under any fair meaning of that word. Mr. Stansbury points to no Supreme Court case identifying a constitutional standard that was violated in this case.

If I were to toss aside all restraint and resolve the case *de novo*, I would find no constitutional violation in the rejection of Mr. Stansbury's new trial motion, for the same reasons cited by the trial judge. I would also find that the supposed error was harmless. I have no "grave doubt" about whether the supposed error had a "substantial and injurious effect or influence in determining the jury's verdict." *Hassine*, 160 F.3d at 955 (quoting *O'Neal*, 513 U.S. at 435-36). The matter is not so "evenly balanced" that I find myself in "virtual equipoise as to the harmlessness of the error." *Id.* Far from a state of equipoise, I am quite convinced of the harmlessness of the supposed error.

Mr. Stansbury would have me believe that, with his Sunoco document before them, a jury would have accepted his alibi, even in the face of a contemporaneous eye-witness identification of Mr. Stansbury as the shooter by *Mr. Stansbury's half-brother*, one of the intended victims, an identification made in the presence of lay witnesses at the scene of the shooting, caught on tape on a 911 call, and then repeated by Mr. Stansbury's half-brother again during a formal police interview. All without supplying me with a copy of the Sunoco document on which Mr. Stansbury relies, and after not

supplying the trial judge with the Sunoco document either. Together, this is unconvincing, to put it charitably. A jury would not have bought it.

The trial court's action in denying Mr. Stansbury a new trial does not offend a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera*, 506 U.S. at 407-08 (internal quotations and citations omitted). It was not a constitutional violation, and if it was, it was harmless.

RECOMMENDATION

Based upon the discussion above, I respectfully recommend that all of the claims in Mr. Stansbury's petition be dismissed with prejudice. I have denied, by separate Order, Mr. Stansbury's request for an evidentiary hearing, as such a hearing is unnecessary. I recommend that no certificate of appealability issue because "the applicant has [not] made a substantial showing of the denial of a constitutional right," under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262–63 (3d Cir. 2000), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012).

The parties may object to this report and recommendation under 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1 within fourteen (14) days after being served with this report and recommendation. An objecting party shall file and serve written objections that specifically identify the portions of the report or recommendations to which objection is made and shall provide an explanation of the basis for the objections. A party wishing to respond to objections shall file a response within fourteen (14) days of the date the objections are served. Failure to file timely