UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2848

CARRINGTON JOSEPH,
Appellant

v.

SUPERINTENDENT ROCKVIEW SCI;
ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 5-18-cv-02202)

PETITION FOR REHEARING

BEFORE: CHAGARES, *Chief Judge*, and MCKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

Appendix "A"

The petition for rehearing filed by appellant Carrington Joseph in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court. It is now hereby **ORDERED** that the petition for rehearing is **DENIED**.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: August 5, 2022
CJG/cc: Joel Mandelman, Esq.
Ronald Eisenberg, Esq.
Andrew J. Gonzalez, Esq.
Carrington K. Joseph

DLD-122

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-2848**

CARRINGTON K. JOSEPH, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI; et al.

(E.D. Pa. Civ. No. 5-18-cv-02202)

Present: KRAUSE, MATEY and PHIPPS, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellee's response thereto

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied, see 28 U.S.C. § 2253(c), because Appellant has not demonstrated "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the [D]istrict [C]ourt was correct in

Appendix "B"

its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the reasons stated by the District Court, Appellant cannot overcome the procedural default of his ineffective-assistance-of-trial-counsel claim relating to recusal because that claim is not "substantial." See Martinez v. Ryan, 566 U.S. 1, 14 (2012); Strickland v. Washington, 466 U.S. 668, 694 (1984); Commonwealth v. Lott, 581 A.2d 612, 615–16 (Pa. Super. Ct. 1990).

By the Court,

s/ Paul B. Matey
Circuit Judge

Dated: May 3, 2022
SLC/cc: Arianna J. Freeman, Esq.
Andrew J. Gonzalez, Esq.
Joel Mandelman, Esq.

A True Copy:

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

CARRINGTON K. JOSEPH, Petitioner, v. SCI-ROCKVIEW SUPERINTENDENT MARK GARMAN, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2021 U.S. Dist. LEXIS 165622
CIVIL ACTION NO. 18-2202
August 31, 2021, Decided
August 31, 2021, Filed

Editorial Information: Subsequent History

Appeal filed, 10/01/2021

Editorial Information: Prior History

Joseph v. Garman, 2019 U.S. Dist. LEXIS 171114, 2019 WL 13038426 (E.D. Pa., Sept. 27, 2019)

Counsel {2021 U.S. Dist. LEXIS 1}CARRINGTON K. JOSEPH, Petitioner, Pro se, BELLEFONTE, PA.

For THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondent: AMARA M. RILEY, LANCASTER COUNTY DISTRICT ATTY OFFICE, LANCASTER, PA.

Judges: GERALD J. PAPPERT, J.

Opinion

Opinion by: GERALD J. PAPPERT

Opinion

MEMORANDUM

On May 24, 2018, **Carrington Joseph** filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF 1.) Over the next two months, Joseph filed several amendments to his petition. (ECF 5, 8, 10, 12.) Respondents answered the petition, (ECF 25), and Magistrate Judge Hart issued a Report and Recommendation recommending the petition's denial. (ECF 30.) Joseph objected to the R&R.1 (ECF 38.) After thoroughly reviewing the record, Judge Hart's R&R and Joseph's objections, the Court overrules the objections and adopts the R&R.

I

The relevant facts and procedural history are set forth in Judge Hart's R&R and need not be repeated here other than that Joseph was convicted of first-degree murder and sentenced to life without parole for the gruesome stabbing death of his wife. Joseph's petition asserts nine claims for relief: (1) insufficiency of the evidence to sustain a first-degree murder conviction; (2) ineffective assistance of counsel for{2021 U.S. Dist. LEXIS 2} failing to prevent him from waiving his right to a jury trial; (3) ineffective assistance of counsel for failing to move for a competency hearing; (4) prosecutorial misconduct for failing to disclose that a Commonwealth witness had a prior arrest and conviction; (5) ineffective assistance of counsel for failing to pursue an imperfect self-defense charge; (6) ineffective

Appendix "C"

assistance of counsel for instructing him not to testify; (7) prosecutorial misconduct for withholding evidence that the murder weapon contained the victim's fingerprints; (8) ineffective assistance of counsel for failing to move to dismiss under Pennsylvania's Speedy Trial Act; and (9) ineffective assistance of counsel for failing to move to recuse the trial judge and ineffective assistance of PCRA counsel for failing to raise the issue. (ECF 1, 5, 8, 10, 12.)

Judge Hart considered Joseph's claims and recommended that the Court deny his petition in full. The Court reviews *de novo* the portions of the R&R to which Joseph objects, *see* 28 U.S.C. § 636(b)(1); *Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011), and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

II

A

The Antiterrorism and Effective Death Penalty Act of 1996 limits federal courts' power to grant writs of habeas**{2021 U.S. Dist. LEXIS 3}** corpus. Under the Act, a federal court may not grant a writ "with respect to any claim that was adjudicated on the merits in State court proceedings [unless the state court's decision] was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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); *see also Berghuis v. Thompkins*, 560 U.S. 370, 380, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). A state court ruling is "contrary to" clearly established federal law if the court applies a rule that contradicts Supreme Court precedent or if the court confronts a set of facts that are materially indistinguishable from a Supreme Court decision but arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406-07, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court ruling "is considered an 'unreasonable application' if the state court unreasonably applies the correct legal rule to the particular facts, unreasonably extends a legal principle to a new context, or unreasonably refuses to extend the principle to a new context where it should apply." *McMullen v. Tennis*, 562 F.3d 231, 236 (3d Cir. 2009).

B

Before a federal court can grant a petition for a writ of habeas corpus, the petitioner must exhaust the remedies**{2021 U.S. Dist. LEXIS 4}** available in state court. *Lambert v. United States*, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). To satisfy the exhaustion requirement, the petitioner must "fairly present" his claims to the state court; if he does not, the claims become procedurally defaulted and he may not raise them in federal court. *Bronshtein v. Horn*, 404 F.3d 700, 725 (3d Cir. 2005).

A petitioner may be exempt from the exhaustion requirement under three circumstances: (1) he demonstrates cause for the default and actual prejudice as a result of the alleged violation of federal law; (2) he demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice; or (3) he invokes the narrow *Martinez* exception. *Id.* at 750; *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). To establish cause, the petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000). To show prejudice, the petitioner must prove "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.*

The fundamental miscarriage of justice exception "will apply only in extraordinary cases, *i.e.*, where a constitutional violation has probably resulted in the**{2021 U.S. Dist. LEXIS 5}** conviction of one who is

actually innocent." *Id.* Asserting actual innocence requires the petitioner to "show it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in his habeas petition." *Hubbard v. Pinchak*, 378 F.3d 333, 339 (3d Cir. 2004).

Finally, under the *Martinez* exception, ineffective assistance of trial counsel claims are not procedurally defaulted if: (1) the default was caused by ineffective assistance of post-conviction counsel, (2) that occurred in the first collateral proceeding in which the claim could be heard, and (3) the underlying claim of trial counsel's ineffectiveness has some merit, analogous to the substantiality requirement for a certificate of appealability. *Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014).

III

A

Joseph argues he is entitled to habeas relief because the evidence at trial was insufficient to support his conviction for first-degree murder. (Habeas Petition 3, ECF 1.) When analyzing a sufficiency of the evidence claim in a habeas case, "the critical inquiry . . . does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson v. Virginia*, 433 U.S. 307, 319 (1979). Instead, the Court must review "the evidence in the light most favorable to the prosecution**{2021 U.S. Dist. LEXIS 6}** and determine if *any rational* trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original).

Judge Hart concluded that, "upon review of the evidence as presented by the prosecution in this case, there is no doubt that a rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt." (R&R 11, ECF 30.) Joseph objects, contending "[t]he evidence presented by the Commonwealth cannot rationally support an inference that Petitioner had the specific intent to kill." (Objs. to R&R 3, ECF 38.) He believes the evidence shows that he "did not intend to kill the decedent but protect himself from [her]." (*Id.*)

The Commonwealth presented more than enough evidence for a rational trier of fact to convict Joseph of first-degree murder.

> A person is guilty of first-degree murder where the Commonwealth proves that a human being was unlawfully killed; the person accused is responsible for the killing; and the accused acted with specific intent to kill. 18 Pa.C.S. § 2502(d); *Commonwealth v. May*, 584 Pa. 640, 887 A.2d 750, 753 (Pa. 2005). An intentional killing is a killing by means of poison, or by laying in wait, or by any other kind of willful, deliberate and premeditated killing.**{2021 U.S. Dist. LEXIS 7}** 18 Pa.C.S. § 2502(a). The Commonwealth may establish that a defendant intentionally killed another "solely by circumstantial evidence, and the fact finder may infer that the defendant intended to kill a victim based on the defendant's use of a deadly weapon on a vital part of the victim's body." *May*, 887 A.2d at 753.*Commonwealth v. Housman*, 226 A.3d 1249, 1271 (Pa. 2020). Evidence at trial showed Joseph stabbed the victim more than 80 times, mostly in the back, head, neck and torso. (Cmwlth. Appx. Vol. II 20-21, ECF 25-2.)2 In doing so, he broke several knives and repeatedly returned to the kitchen to retrieve additional knives so he could continue his attack. *See* (Cmwlth. Appx. Vol. I 93, 95-96, 100, ECF 25-1). When the victim managed to momentarily escape, Joseph followed her outside the house, threatened to stab her sister who tried to help her, pulled the victim's hair and stabbed her in the neck, then dragged her back inside the house. (Cmwlth. Appx. Vol. I 73-74, 86-89); *see also* (*id.* at 62). When police questioned him, Joseph calmly recounted his brutal attack. (Cmwlth. Appx. Vol. II 17); *see also* (Cmwlth. Appx. Vol. I 62). This evidence supports the first-degree murder conviction and, more specifically, the trial court's finding that Joseph had the specific intent to**{2021 U.S. Dist. LEXIS 8}** kill the victim. If Joseph meant only to defend himself-as he argues in his *pro se* objections-he could have stopped his brutal attack and

escaped at various times. He chose not to. Since a rational trier of fact could have concluded beyond a reasonable doubt that Joseph was guilty, the state court's determination that the evidence was sufficient to support Joseph's conviction was not contrary to or an unreasonable application of *Jackson*.

B

Next, Joseph asserts several ineffective assistant of counsel claims. The Supreme Court's two-part test in *Strickland v. Washington* governs ineffective assistance claims. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "To succeed on such a claim, the petitioner must demonstrate (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that the petitioner suffered prejudice as a result of the deficiency." *Blystone v. Horn*, 664 F.3d 397, 418 (3d Cir. 2011) (citing *Strickland*, 466 U.S. at 687)). With respect to *Strickland*'s first prong, there is a "strong presumption" that counsel's performance was not deficient. *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. With respect to prejudice, the "[d]efendant must show that there**{2021 U.S. Dist. LEXIS 9}** is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The Court must consider the totality of the evidence before the jury in determining whether a petitioner satisfied this standard. *See Berghuis*, 560 U.S. at 389.

1

First, Joseph contends he is entitled to relief because his trial counsel was ineffective for letting him waive his right to a jury trial. (Habeas Petition 8.) He claims his waiver was unknowing and involuntary because he was on heavy sedatives at the time. (*Id.*)

As Judge Hart explains in the R&R, the PCRA court reviewed Joseph's pre-waiver colloquy with the trial court in which he acknowledged using prescribed medications but denied that they would impede his ability to understand the proceedings. (Cmwlth. Appx. Vol. I 40.) Joseph then admitted to having "ample opportunity to consult with [his] attorneys about the decision" to waive his right to a jury trial. (*Id.* at 42.) The trial court accepted Joseph's waiver after the colloquy. (*Id.* at 42-43.)**{2021 U.S. Dist. LEXIS 10}** The R&R also recognizes the significant benefit Joseph received by waiving this right-the Commonwealth took the death penalty off the table. (R&R 13.) Joseph presents no evidence, and the Court perceives none, showing that the state court's finding on this ineffective assistance claim was an unreasonable application of clearly established federal law or was based upon an unreasonable determination of the facts.

2

Second, Joseph claims his trial counsel was ineffective for failing to move for a competency hearing before trial and objects to Judge Hart's contrary conclusion. (Habeas Petition 13; Objs. to R&R 5-6.) As discussed above in the context of his waiver claim, Joseph testified that he was taking medication that did not impede his ability to understand the court proceedings. His interview with the police after the murder, his education level and his general demeanor and responses throughout the pre-trial process would not have led counsel to reasonably believe Joseph was incompetent. *See* (Cmwlth. Appx. Vol. I 40; Cmwlth. Appx. Vol. II 17); *see also* (Cmwlth. Appx. Vol. I 62). Judge Hart considered this evidence and concluded that "[t]he Superior Court's finding that counsel was not**{2021 U.S. Dist. LEXIS 11}** ineffective because there was nothing to indicate that [Joseph] was incompetent is not

contrary to [ ] clearly established federal law or an unreasonable application of the facts." (R&R 14.) The Court's independent review of the record confirms that determination. Nothing in the record suggests counsel was ineffective for not requesting a competency hearing; Joseph consistently answered the trial court's questions and acted in ways suggesting competence.

3

Third, Joseph argues trial counsel was ineffective for not pursuing an imperfect self-defense theory. (Habeas Petition 22.) Judge Hart rejected this claim and Joseph objects, saying the evidence supports his position that he stabbed the victim "in the heat of passion in an attempt to protect himself after she had threatened to get a knife from the kitchen and stab him when the struggle ensued." (Objs. to R&R 10.)

Joseph's objection, like his claim, is meritless and absurd. In Pennsylvania, a defendant arguing self-defense must show that he

> "(a) . . . reasonably believed that he was in imminent danger of death or serious bodily injury and that it was necessary to use deadly force against the victim to prevent such harm; (b) that the defendant**{2021 U.S. Dist. LEXIS 12}** was free from fault in provoking the difficulty which culminated in the slaying; and (c) that the [defendant] did not violate any duty to retreat." *Commonwealth v. Samuel*, 527 Pa. 298, 590 A.2d 1245, 1247-48 (1991); *see* 18 Pa.C.S. § 505; *see also Commonwealth v. Harris*, 550 Pa. 92, 703 A.2d 441, 449 (1997). "The Commonwealth sustains its burden [of disproving self-defense] if it proves any of the following: that the slayer was not free from fault in provoking or continuing the difficulty which resulted in the slaying; that the slayer did not reasonably believe that [he] was in imminent danger of death or great bodily harm, and that it was necessary to kill in order to save [him]self therefrom; or that the slayer violated a duty to retreat or avoid the danger." *Commonwealth v. Burns*, 490 Pa. 352, 416 A.2d 506, 507 (1980).*Commonwealth v. Sepulveda*, 618 Pa. 262, 55 A.3d 1108, 1124 (Pa. 2012). The "imperfect belief self-defense" theory is different only in that the defendant can rely on an unreasonable belief that deadly force was necessary. *Id.* Even if Joseph is correct that at the outset of his attack he reasonably or unreasonably believed deadly force was necessary to protect himself, the reality of his attack eviscerates this defense. Joseph stabbed his wife more than 80 times and declined countless opportunities to stop or retreat. Even worse, when the victim managed to briefly escape, Joseph dragged her back inside their home and continued his attack.**{2021 U.S. Dist. LEXIS 13}** The state court correctly found that any argument that Joseph was eligible for this defense clearly lacked merit, so counsel could not have been ineffective for failing to raise it.

4

Joseph's fourth ineffective assistance of counsel claim relates to trial counsel's advice that Joseph not testify in his own defense. (Habeas Petition 25.) Joseph claims his counsel coerced him into not testifying and that, by testifying, Joseph could have revealed facts supporting his self-defense theory. (*Id.*) Judge Hart rejected this argument as well, highlighting the state court's review of the trial record showing that Joseph intended to testify but indicated that he did not have a sufficient opportunity to speak to counsel about that decision. (R&R 18-19; Cmwlth. Appx. Vol. II 30-31.) The trial court called a recess, giving Joseph the opportunity to discuss the decision with counsel. (Cmwlth. Appx. Vol. II 30-31.) Joseph ultimately decided not to testify and told the trial court he was "comfortable" with the decision. (*Id.* at 31.)

"Claims alleging ineffectiveness of counsel premised on allegations that trial counsel's actions interfered with an accused's right to testify require a defendant to prove**{2021 U.S. Dist. LEXIS 14}** either that counsel interfered with his right to testify, or that counsel gave specific advice so

unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf." *Commonwealth v. Miller*, 605 Pa. 1, 987 A.2d 638, 660 (Pa. 2009) (citations and quotation marks omitted). "The decision of whether or not to testify on one's own behalf is ultimately to be made by the defendant after full consultation with counsel. In order to sustain a claim that counsel was ineffective for failing to call the defendant to the stand, he must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf." *Commonwealth v. Uderra*, 550 Pa. 389, 706 A.2d 334, 340 (Pa. 1998). Joseph had ample opportunity to discuss this decision with counsel and he presents nothing suggesting counsel's advice not to testify was so unreasonable as to "vitiate a knowing and intelligent decision." *Id.* He argues only that the trial court was denied his version of events leading up to the attack. (Objs. to R&R 11.) But he ignores the many dangers of opening himself up to cross-examination and the fact that nothing in the record suggests his decision not to testify was anything but voluntary.

5

Fifth,**{2021 U.S. Dist. LEXIS 15}** Joseph contends his counsel was ineffective for not filing a speedy trial motion under Rule 600 of the Pennsylvania Rules of Criminal Procedure. (Habeas Petition 31.) Rule 600 allows for dismissal where the Commonwealth fails to bring a defendant to trial within 365 days after filing the criminal complaint, excluding certain delays attributable to the defendant or the court. Judge Hart agreed with the state court's conclusion that Joseph could not have prevailed on a Rule 600 motion because, after accounting for delays attributable to him and the trial court, the Commonwealth waited only 280 days before bringing him to trial. (R&R 20.) Joseph objects, relying on a constitutional speedy trial argument based on the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). (Objs. to R&R 12-13.)

Joseph is not entitled to relief no matter what theory he asserts as the grounds for his speedy trial claim. The record shows that, although approximately 17 months elapsed between the criminal complaint and his trial, Joseph was responsible for at least 124 days of delay and may have been responsible for an additional 202 days.3 At the very least, Joseph presents no evidence that the Commonwealth was "anything other than prepared to go to trial" before the Rule 600 deadline. (R&R 21.) Because he has no evidence**{2021 U.S. Dist. LEXIS 16}** that a Rule 600 motion would have had any chance of success, counsel cannot have been ineffective for failing to pursue the motion.

6

Finally, Joseph claims his trial counsel was ineffective for failing to move to recuse the trial judge. (Am. Habeas Petition 1-5, ECF 12.) He alleges a family member attacked him in open court on November 9, 2015, and that this attack "inflamed the passion of the trial judge." (Objs. to R&R 13.) Judge Hart found that Joseph failed to exhaust this claim by presenting it on direct appeal or in his PCRA petition. (R&R 21-22.) He further concluded that the claim is procedurally defaulted because the time to file a PCRA petition has lapsed. (*Id.*)

Joseph objects, arguing the Court should excuse his procedural default under *Martinez* because (1) the default was caused by ineffective assistance of post-conviction counsel, (2) that occurred in the first collateral proceeding in which the claim could be heard, and (3) the underlying claim of trial counsel's ineffectiveness has some merit, analogous to the substantiality requirement for a certificate of appealability. *Cox*, 757 F.3d at 119. He contends the Court should assume bias where the trial judge witnesses an assault against the petitioner**{2021 U.S. Dist. LEXIS 17}** in court. (Objs. to R&R 14.) Based on that assumption, Joseph argues trial counsel was ineffective for not raising this issue and moving for recusal. (*Id.* at 14-15.)

Joseph's claim fails for two reasons. First, the record contains no evidence substantiating Joseph's description of the alleged attack. *See* (Cmwlth. Appx. Vol. I 81) (referencing only a "disruption in courtroom"). The Court cannot discern bias on the part of the trial judge without any record evidence of the alleged attack. Second, even accepting Joseph's version of events nothing in the record suggests the trial judge was biased against him based on that attack. Without any support for his conclusion that the Court should assume bias, he cannot show that his underlying claim of ineffective assistance has some merit and therefore cannot overcome the procedural default under *Martinez*.

C

Joseph also raises two prosecutorial misconduct claims under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Brady*, the Supreme Court held "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The duty to**{2021 U.S. Dist. LEXIS 18}** disclose such evidence applies even if there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), and encompasses both impeaching and exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (citing *Bagley*, 473 U.S. at 682); *see also Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

To establish a *Brady* violation a petitioner must also show "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281. Thus, the "materiality" of the undisclosed evidence separates the mere nondisclosure of *Brady* material from a true Fourteenth Amendment due process violation under *Brady*. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 289-90 (citing *Kyles*, 514 U.S. at 434).

1

Joseph argues the Commonwealth committed prosecutorial misconduct by withholding evidence of witness Porschia Garcia's prior criminal record. (Habeas Petition 18); *see also* (Objs. to R&R 6-9). He claims he could have used this evidence to impeach**{2021 U.S. Dist. LEXIS 19}** Garcia. (*Id.*) Judge Hart rejected this claim, concluding the state court did not err in deciding that nondisclosure of this witness's criminal record "was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"-an essential element of any *Brady* claim. (R&R 14-16); *Strickler*, 527 U.S. at 281. Joseph objects to Judge Hart's treatment of this claim by rehashing his conclusory position that "[i]t cannot be seriously argued that a Commonwealth witness [sic] prior arrest was not materially favorable to Petitioner." (Objs. to R&R 7.)

Joseph makes no showing that the Commonwealth's failure to disclose Garcia's criminal record impacted his trial. Garcia served as one of three eyewitnesses who testified at trial. As Judge Hart recognized, the state court found that Garcia's testimony was consistent with the other witnesses' and the physical evidence from the scene. (R&R 15-16.) The record supports that finding and, as explained above, substantial evidence supported Joseph's conviction. He presents nothing to suggest that evidence of one witness's criminal record would have impacted his trial.4

2

Finally, Joseph argues the Commonwealth committed prosecutorial{2021 U.S. Dist. LEXIS 20} misconduct by failing to disclose evidence that the victim's fingerprints were found on the knives he used during his attack. (Habeas Petition 29.) Judge Hart recommended the Court deny relief on this claim because the state court did not err in finding that evidence of the victim's fingerprints on the kitchen knives Joseph used in the attack was not exculpatory and therefore its disclosure was not contrary to *Brady*. (R&R 19-20.)

This final claim for relief deserves little attention. The trial evidence showed Joseph stabbed his wife more than 80 times-mostly in the head, neck, torso and back-and suffered no stab wounds himself. So he cannot seriously argue that the Commonwealth withholding evidence of his wife's fingerprints on her own kitchen knives somehow casts doubt on the verdict or the fairness of his trial.

IV

For the reasons above, the Court adopts the R&R, overrules Joseph's objections and denies and dismisses Joseph's Petition. An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert

GERALD J. PAPPERT, J.

ORDER

AND NOW, this 31st day of August 2021, upon consideration of Joseph's Petition for a Writ of *Habeas Corpus* (ECF 1), the Amended Petitions (ECF 5, 8, 10, 12), Respondents'{2021 U.S. Dist. LEXIS 21} Response in Opposition (ECF 25), the Report and Recommendation of United States Magistrate Judge Jacob Hart (ECF 30), and Joseph's Objections (ECF 38), it is hereby **ORDERED** that:

1. Joseph's objections are **OVERRULED** and Magistrate Judge Hart's Report and Recommendation (ECF 30) is **APPROVED** and **ADOPTED**;

2. Joseph's Petition for a Writ of *Habeas Corpus* (ECF 1) and his Amended Petitions (ECF 5, 8, 10, 12) are **DENIED** and **DISMISSED**;

3. No certificate of appealability shall issue;1

4. This case shall be **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Gerald J. Pappert

GERALD J. PAPPERT, J.

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

CARRINGTON K. JOSEPH, Petitioner, v. SCI-ROCKVIEW SUPERINTENDENT MARK GARMAN, et al., Respondents.	:	CIVIL ACTION NO. 18-2202

REPORT AND RECOMMENDATION

JACOB P. HART, U.S.M.J. September 27, 2019

I. FACTS AND PROCEDURAL HISTORY

On November 12, 2015, following a non-jury trial before the Honorable Dennis E. Reinaker of the Lancaster County Court of Common Pleas, Petitioner, Carrington K. Joseph ("Petitioner" or "Joseph"), was convicted of first-degree murder. Petitioner waived his right to a jury trial in exchange for the Commonwealth agreeing not to pursue the death penalty.

The trial court summarized the facts revealed at trial as follows:

> At trial, the Commonwealth established the following, gruesome facts. On May 2, 2014, [Petitioner] stabbed the victim. His wife, more than eighty (80) times. N.T.T at 235-252; Commonwealth's Exhibits 13, 18-21. The majority of the wounds were to the victim's abdomen, neck and head. Id. During the attack, [Petitioner] broke two knives and made multiple trips to the kitchen to retrieve additional knives. N.T.T. at 142-149, 161-166; Commonwealth's Exhibits 3, 5-10, 13. At one point, the victim attempted to stagger out of the apartment's front door, and as the victim's family attempted to assist her, [Petitioner] pointed the knife at them and told them to move back before they too got stabbed. N.T.T. at 53-57, 104-108, 111-117; Commonwealth's Exhibit 13. Defendant then dragged the victim back into the apartment and closed the door to continue his attack. N.T.T. at 116-117. During the majority of this extended attack, the victim was laying helplessly on the ground. N.T.T. at 254-255, 260-261, Commonwealth's Exhibit 13. The Defendant's infant children were seated in their car seats in the room in which the attack took place. Notes of Pretrial Hearing at 25-26. Defendant was described as calm throughout this whole incident, and after being taken into custody, calmly recounted these

Appendix "D"

> facts, in great detail, with little remorse shown. N.T.T. at 206; Commonwealth's Exhibit 13.

Respondent's Exhibit N (January 8, 2016 Pa. R. App. Pr. 1925(a) Memorandum Opinion at 2-3.

On December 15, 2015, Joseph was sentenced to life without parole. Petitioner filed a direct appeal and his judgment of sentence was affirmed by the Pennsylvania Superior Court on July 14, 2016. Commonwealth v. Joseph, 154 A.3d 856 (Pa. Super 2016) (unpublished memorandum).

On September 12, 2016, Petitioner filed a petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. C.S. §9541 *et seq*. After appointed counsel filed a "no-merit letter," pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), the PCRA court issued a Notice of Intent to Dismiss the petition on March 21, 2017. Petitioner filed a pro se response, and the Lancaster County Court of Common Pleas dismissed the PCRA petition on May 11, 2017. On that same date, Joseph filed an appeal of the dismissal. On January 18, 2018, the Pennsylvania Superior Court affirmed the judgment of the PCRA court.

Joseph filed a pro se Petition for Writ of Habeas Corpus in this Court on May 24, 2018. He raised the following claims: (1) insufficiency of the evidence to sustain a conviction of first degree murder; (2) Ineffective assistance of counsel for failing to prevent Petitioner from waiving his right to a jury trial, where waiver was entered while he was on heavy sedatives; (3) ineffective assistance of counsel for failing to move for a competency hearing; (4) prosecutorial misconduct, under Brady, for failing to disclose that a Commonwealth witness had a prior arrest which could have been used for impeachment; (5) ineffective assistance of counsel for failing to pursue an imperfect self-defense charge; (6) ineffective assistance of counsel for instructing Joseph not to testify on his own behalf, where he alleges that his testimony could have resulted in the court giving an imperfect self-defense charge; (7) prosecutorial misconduct in violation of

Brady for withholding the murder weapon which contained the decedent's fingerprints and would have negated the Commonwealth's theory of events; and (8) ineffective assistance of counsel for failing to move to dismiss pursuant to the Speedy Trial Act. Doc. No. 1. Joseph subsequently filed multiple amendments or addendums to his petition, in which he did not file a new or replacement petition, but rather, he added argument and/or case law to expand upon his claims. (Doc. Nos. 5, 8, 12). His Fourth Amendment filed on July 26, 2018, included an additional ninth claim in which he alleges that his trial counsel was ineffective for failing to file a motion to recuse the trial judge and that his PCRA counsel was also ineffective for failing to raise the issue. (Doc. No. 14).

Joseph filed a second pro se PCRA petition in the Lancaster County Court of Common Pleas on July 12, 2018 requesting that a DNA test be conducted on the murder weapon. He argued that testing would show the decedent's fingerprints on the kitchen knife, which would prove that the Commonwealth's theory of the events leading to the murder are incorrect. Petitioner's request was denied on August 6, 2018. Joseph filed a Notice of Appeal, which was docketed by the Pennsylvania Superior Court on August 20, 2018. 1388 MDA 2018.

On August 16, 2018, Petitioner filed a Motion for Stay and Abeyance of his federal habeas petition. (Doc. No. 13). He also filed a motion for discovery in this action, in which he requested that this Court enter an order that Respondent shall furnish Petitioner with DNA results in its possession and further mandate that testing be conducted on other evidence including the kitchen knife. (Doc. No. 15). This Court denied both his request for a stay and his motion for discovery.

Respondent asserts that all of Petitioner's claims are unexhausted, procedurally defaulted and/or lack merit and request that the federal habeas petition be denied. Upon review, this Court agrees.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Issuance of a Writ of Habeas Corpus

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly limited the federal courts' power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

1. 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. 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).

The United States Supreme Court has made clear that a writ may issue under the "contrary to" clause of Section 2254(d)(1) only if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court "unreasonably applies it to the facts of the particular case." Id. This requires a petitioner to demonstrate that the state court's analysis was "objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

Further, state court factual determinations are given considerable deference under the AEDPA. Lambert v. Blackwell, 387 F.3d 210, 239 (3d Cir. 2004). A petitioner must establish that the state court's adjudication of the claim "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)(2).

B. Exhaustion and Procedural Default

"[A] federal habeas court may not grant a petition for writ of habeas corpus unless the petitioner has first exhausted the remedies available in the state courts." Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The procedural default barrier, in the context of habeas corpus, precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . ." Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

1. Exceptions to Procedural Default

To survive procedural default in the federal courts, a petitioner must either "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

a. Cause and Prejudice Exception

A showing of cause demands that a petitioner establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available to counsel; or (2) a showing that "some interference by officials" made compliance with the state procedural rule impracticable. Murray v. Carrier, 477 U.S. 478, 488 (1986). Once cause is proven, a petitioner must also show that prejudice resulted from trial errors that "worked to [petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494.

There is also a narrow exception in which attorney error in collateral proceedings may sometimes establish cause for the default of a claim of ineffective assistance of trial counsel. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) (finding that in some cases ineffective assistance of PCRA cases can serve as cause and prejudice to excuse procedural default of ineffective assistance of trial counsel claims that could not have been previously presented). As a general rule because there is no constitutional right to an attorney in a state post-conviction proceeding, a habeas petitioner cannot claim constitutionally ineffective assistance of PCRA counsel. Coleman v. Thompson, supra, at 752. However, in Martinez, the United States Supreme Court held that "where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Id. at 1320. Martinez has been used to establish cause and prejudice for failure to bring ineffective assistance of counsel claims at initial review collateral proceedings where they could not have previously been raised. Id. In order to overcome procedural default under Martinez, a petitioner must

demonstrate that his collateral review counsel was ineffective pursuant to the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) and "must also demonstrate that the underlying ineffective- assistance-of-trial-counsel claim is a substantial one, which is to say that the petitioner must demonstrate that the claim has some merit." Id. at 1318.

b. Fundamental Miscarriage of Justice Exception

To establish the fundamental miscarriage of justice exception, the petitioner must demonstrate his or her "actual innocence." Schlup v. Delo, 513 U.S. 298, 324 (1995); Calderon v. Thompson, 523 U.S. 558, 559 (1998). A demonstration of actual innocence requires the petitioner to present new, reliable evidence of his or her innocence that was not presented at trial. Schlup, 513 U.S. at 324. The new evidence must be considered along with the entire record, including that which was excluded or unavailable at trial. Id. at 327-28. Once such evidence is presented, the petitioner's defaulted claims can only be reviewed if "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of the new factual evidence. Id. at 327.

C. Ineffective Assistance of Legal Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 686–88, 693–94.

First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. at 688. The court "must judge the reasonableness of

counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Because of the difficulties in making a fair assessment, eliminating the "distorting effect" of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). It is well-established that counsel cannot be ineffective for failing to raise a meritless claim. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d 706, 730 (E.D. Pa. 2001).

To satisfy the second prong of the Strickland analysis, a defendant must establish that the deficient performance prejudiced the defense. This showing requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. Strickland, 466 U.S. at 687. More specifically, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. DISCUSSION

A. Sufficiency of the Evidence

In his first claim Petitioner alleges that the evidence presented at trial was insufficient to sustain his conviction of first-degree murder. He argues that the evidence "was insufficient to establish that Petitioner acted with specific intent to kill the victim where evidence produced at trial demonstrated that Petitioner and decedent engaged in a very heated argument which

escalated and decedent scrambled to retrieve a kitchen knife, resulting in a struggle and Petitioner defending himself from decedent." Pet. at 6.

A habeas claim alleging insufficiency of the evidence is grounded in the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment guarantees that no person shall be criminally convicted except upon sufficient proof, which is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Jackson v. Virginia, 443 U.S. 309, 316 (1979). Traditionally, the standard of review for challenges to sufficiency of the evidence is highly deferential. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction. . . . does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.'" Jackson, 443 U.S. at 318-19 (quoting Woodby v. INS, 385 U.S. 276, 282 (1966)). Rather, as set forth by the United States Supreme Court, "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original); see also Sullivan v. Cuyler, 723 F.2d 1077, 1081 (3d Cir. 1983) (adopting the Jackson standard).

Joseph raised this claim to the Pennsylvania Superior Court on direct appeal. The Superior Court noted that although Joseph told the police that he blacked out after inflicting the first stab wound "this assertion was contradicted by other portions of his statement wherein he clearly recounted much of the incident and displayed a calm demeanor while doing so." Superior Court- Direct Appeal Op. (7/14/2016) at 7 (Doc. No. 25-3 at 96). The court rejected his claim as follows:

> Indeed, the evidence presented at trial established that the victim was stabbed repeatedly in her face, neck and torso area. A knife left lodged in her back had to

be removed by emergency personnel as it was hindering CPR. N.T., 11/10/15 at 196. Dr. Wayne K. Ross, a forensic pathologist who performed the autopsy, testified regarding [decedent's] injuries and determined the cause of death was multiple stab wounds and the manner of death was a homicide. N.T., 11/10/15, at 251. He further remarked that while she may have died as a result of a single stab wound to her neck, her wounds were sustained from a defensive, rather than an offensive posture. N.T., 11/10/15, at 252, 256. Moreover, while he could not speak definitively as to the amount of time that transpired during the brutal attack, Dr. Ross indicated that in light of the evidence of movement around the scene and the fact that the victim sustained 82 stab wounds inflicted by multiple bent and broken knives, he believed '[t]hat would take some time.' Id. at 260-61.

The victim's sister Keina Cowan testified that as [Petitioner] and her sister argued, she ran to a neighbor's home to call police, because [Petitioner] had confiscated their cell phones. As she fled, she could hear the victim apologize to [Petitioner] and plead with him to stop. N.T., 11/9/15, at 49-50. When she returned to the home, she found the door had been locked and proceeded to kick it in. She discovered her sister alone in the living room bleeding on the couch. Id. at 50-51. Ms. Cowan fled again to get help, and when she returned with the victim's friend and neighbor Porschia Garcia, the two were unable to gain entry to the home, because someone was holding the door shut. Id. at 52. Thereafter, the victim fell out of the house, and Ms. Cowan and Ms. Garcia attempted to pull her away. [Petitioner] appeared in the doorway and ordered the women to retreat, held a knife to Ms. Cowan's forehead and threatened to stab them if they refused to leave. Next, he pulled the victim's hair and stabbed her in the neck while the women looked on. Id. at 54-56.

Detective Brian Freysz, the prosecuting officer, testified that when he arrived at the scene he noticed [Petitioner] was covered in blood and that he 'seemed calm.' N.T., 11/10/15, at 204-05. At approximately 11:30 that morning he conducted an interview with [Petitioner] at which time [Petitioner] clearly understood the questions posed and detailed what had transpired earlier. Although [Petitioner] also indicated that he had 'blacked out,' Officer Freysz explained [Petitioner] revealed to him 'exact details' of the murder, and Officer Freysz believed [Petitioner] had told him 'the truth of exactly what transpired.' Id. at 215, 222-27.

The record is devoid of any expert or lay testimony to establish [Petitioner's] actions were a brief, spontaneous attack which occurred without deliberate thought and action. [Petitioner] stabbed his wife scores of times, during which he had the wherewithal to stop his brutal attack, retrieve additional knives, threaten to stab other women, lock and close the door, and drag his victim back inside the home to continue his savagery. He was able to recount calmly and methodically his actions to police shortly thereafter.

Any attempt on [Petitioner]'s part to claim he acted in self-defense is also negated by the record evidence and belied by the statement he coherently provided to police

> after the murder. Ms. Cowan heard her sister plead with [Petitioner] to stop and saw her immobilized due to her injuries. If [Petitioner] at any time felt threatened, as his wife lay bleeding in the doorstep he could have fled the premises when the women came to her aid; instead he threatened Ms. Cowan and Ms. Garcia and stabbed the victim in the neck in their presence.
>
> Clearly, [Petitioner]'s overall conduct was not the result of a heated exchange between the victim and him, nor were his actions the product of self-defense. As such, we conclude the Commonwealth presented sufficient evidence to establish [Petitioner]'s intent to commit first-degree murder.

Id. at 7-9 (Doc. No. 25-3 at 96-98).

The state court's findings are not contrary to the clearly established federal law in this area, which requires that "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. Clearly, upon review of the evidence as presented by the prosecution in this case, there is no doubt that a rational trier of fact could have found the essential elements of the crime, including the specific intent to kill, beyond a reasonable doubt. As the state court found, the nature of this brutal attack, including the fact that Petitioner, who was described by the court as "an obviously healthy, muscular adult male," stabbed the victim 82 times mostly in the head, neck and torso, the fact that after breaking or bending knives he obtained additional knives and continued the attack, that he threatened to stab the other women coming to the victim's aid and then stabbed the victim in the neck in front of them, and that he then calmly admitted to the police what he had done, is all more than sufficient to demonstrate a specific intent to kill. See Direct Appeal Op. at 6 (Doc. No. 25-3 at 95). The state court's finding is consistent with the clearly established federal law and was not based upon an unreasonable determination of the facts. The claim must be denied.

B. Ineffective Assistance of Trial Counsel for Allowing him to Waive Right to Jury Trial

In his second claim, Petitioner argues that he was denied his Sixth Amendment right to the effective assistance of trial counsel when his counsel failed to prevent him from waiving his right to a trial by a jury of his peers. He alleges that his waiver was entered unknowingly and unintelligently because he was on several heavy sedative psychotropic medications at the time of the waiver.

This claim was also rejected by the PCRA court and by the Pennsylvania Superior Court on appeal. As the PCRA court noted, the record reveals that the trial court informed Petitioner of the essential concepts of a trial by jury and conducted an on-the-record colloquy before accepting his waiver. The PCRA court noted as follows:

> [T]he Court specifically asked the [Petitioner] whether he had been treated for mental illness, to which the [Petitioner] responded in the negative. (N.T., 10/1/15, p. 5). The Court then asked the [Petitioner] if he took any prescribed medication, to which the [Petitioner] responded in the affirmative. (N.T., 10/1/15, p.5). The Court then followed up that question, asking if the medication would interfere with the [Petitioner]'s ability to understand the proceedings that took place that morning. (N.T., 10/1/15, p.5). To this question, the [Petitioner] responded in the negative. (N.T, 10/1/15, p.5). The Court then informed the [Petitioner] of the mandatory sentence that the [Petitioner] would face for a First-Degree Murder conviction. (N.T., 10/1/15, p. 9). Lastly, the [Petitioner] admitted to the Court that he had ample opportunity to consult with trial counsel about his decision to waive the jury trial. (N.T., 10/1/15, p. 11). Because the record illustrates that the [Petitioner]'s waiver was knowing and intelligent, the [Petitioner]'s ineffective claim is without merit.

PCRA Court Op. 3/21/17 (Doc. No. 1-1 at 10-11).

According to Petitioner's own admissions on record he was not being treated for mental illness, the medication he was taking did not interfere with his ability to understand the proceedings, and he had ample opportunity to discuss the waiver with his attorney. Id. Furthermore, he was then asked by the court if based upon his consultation with his attorneys and the rights reviewed with him by the court. he still wished to waive his right to a jury trial. He was also informed that once

the court accepted his waiver, he could not change his mind and following this Petitioner still testified that he was waiving his right to a jury trial.

As the Superior Court found, since the Commonwealth agreed not to pursue the death penalty in exchange for Petitioner's jury trial waiver, counsel had a reasonable basis to recommend the waiver. See PCRA Superior Court Opinion, 1/18/18 at 6. There is no indication in the record that Petitioner was unable to waive his rights and there was certainly incentive to enter into the waiver given the Commonwealth's agreement not to pursue the death penalty. Therefore, the state court's finding that Petitioner's counsel had a reasonable basis to make such a recommendation and was therefore not ineffective is not an unreasonable application of the clearly established federal law or based upon an unreasonable determination of the facts. The claim must be denied as it clearly lacks merit.

C. ~~Ineffective Assistance of~~ Counsel for Failing to Move for Competency Hearing

In his third claim, Joseph asserts that he was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel failed to move for the court to conduct a competency hearing. He argues that the court should have conducted a competency hearing to determine if he understood the nature of the charges and whether he could assist counsel in defending his case because he was "on heavy sedative psychotropic medications".

The PCRA court noted that since a defendant is presumed to be competent to stand trial, the burden is on a defendant to prove that he is incompetent. The court found that without evidence of him actually being incompetent a claim of counsel ineffectiveness for failing to pursue a hearing would fail. In finding that there was no evidence supporting Petitioner's claim and that his counsel was therefore not ineffective in seeking a competency hearing, the court found the following:

> A review of the record demonstrates that there is no evidence supporting the [Petitioner]'s claim. The [Petitioner]'s interview with the police demonstrates that he was recognizant to the circumstances surrounding the crime, as he was responsive to questions posed and understood the Miranda rights there (sic) were read to him. (N.T., 11/10/15, p. 214-215). Further, the [Petitioner] graduated from high school and attended community college. (N.T., p. 21). The [Petitioner] further testified that he had never been treated for mental illness and, although he stated he was taking psychotropic medication, the [Petitioner] affirmed that the medicine did not interfere with his ability to understand court proceedings (N.T., 10/1/15, p.5). The [Petitioner] presents no evidence to support his claim, and the record clearly contradicts the [Petitioner]'s contention that he did not understand the nature of the proceedings. As such, this claim is without merit.

PCRA Court Op. 3/21/17 (Doc. No. 1-1 at 11-12).

As the Superior Court noted when it upheld the PCA court's finding that counsel was not ineffective, Petitioner presented no information which would have led counsel to believe he was incompetent at any point during the representation. Although Petitioner informed the court during the colloquy that he was taking prescription medication, ~~he also testified that he was never treated for mental illness and that he understood the proceedings.~~ Therefore, counsel's actions in failing to move for a competency hearing were not unreasonable. The Superior Court's finding that counsel was not ineffective because there was nothing to indicate that Petitioner was incompetent is not contrary to the clearly established federal law or an unreasonable application of the facts. This claim must also be denied.

D. Prosecutorial Misconduct

Next, Petitioner claims that the Commonwealth committed prosecutorial misconduct by withholding and failing to bring to the Court's attention the fact that a Commonwealth witness had a prior arrest record which he claims could have been used for impeachment purposes. He alleges that the prosecution failed to disclose this information in violation of Brady v. Maryland,

373 U.S. 83 (1963). He also alleges that his counsel was ineffective by failing to conduct an investigation to discover the record.

Brady requires that the prosecution turn over any exculpatory evidence to the defense. Brady, 373 U.S. at 87. There are three elements needed to show a Brady violation: "(1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense." United States v. Perdomo, 929 F.2d 967, 970 (3rd Cir.1991) (citing Moore v. Illinois, 408 U.S. 786 (1972)). In order to be considered "favorable to the accused, the evidence must be either exculpatory or impeaching. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Evidence is "material" under Brady when there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Simmons v. Beard, 590 F.3d 223, 234 (3d Cir.2009) (quoting U.S. v. Bagley, 473 U.S. 667, 682 (1985).

The PCRA court noted that Petitioner failed to present any evidence to support the claim and also failed "to establish how, assuming arguendo, the revelation of a witness's criminal record would've changed the outcome of the proceedings." Petitioner's Ex. A (Doc. No. 1-1 at 12). The Pennsylvania Superior Court noted that "for a defendant to be entitled to a new trial based on the prosecution's failure to disclose information regarding a witness's credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence." Superior Ct. Op. at 9, quoting Commonwealth v. Simpson, 66 A.2d 253, 266 (Pa. 2013). The court continued as follows:

> Instantly, in addition to Garcia, the Commonwealth produced two additional eyewitnesses, the victim's sister and another next door neighbor. Both testified to circumstances that were consistent with Garcia's account. See N.T., 11/9/2015, at 34-57, 87-99. In addition, the Commonwealth produced a host of physical evidence in support of its position that the victim was stabbed over 80 times, while [Petitioner] did not suffer one stab wound. Accordingly, even if admissible

> evidence about Garcia's prior arrests or convictions existed, and was discovered by counsel or disclosed by the Commonwealth, the outcome of the trial would not have been different. Accordingly, there was no *Brady* violation and counsel was not ineffective for failing to discover this information.

Superior Court Opinion at 9-10 (Doc. No. 1-1 at 29-30).

The state court's finding in this matter was consistent with the applicable clearly established federal law. Given the remaining evidence presented at trial, even if Petitioner could have demonstrated that the government withheld evidence of a conviction that could have been used for impeachment purposes against Garcia, there would not be a reasonable probability that the outcome would have been different if the evidence was not suppressed. Therefore, the court's finding that there was no Brady violation which would warrant a new trial is not contrary to or an unreasonable application of the clearly established law or based upon an unreasonable determination of the facts, as the evidence is not "material".

Furthermore, the court's finding that the ineffective assistance of counsel claim for failing to conduct an investigation which would have revealed the arrest record of witness Porschia Garcia lacks merit was also not contrary to or an unreasonable application of the clearly established federal law. Even if counsel had uncovered a conviction that could have been used for impeachment purposes, given the other evidence in the case, it is unlikely that the result would have been different. Accordingly, this claim must also be denied as Joseph is unable to prove prejudice as required under the second prong of Strickland to prove a claim of ineffective assistance of counsel. Therefore, this claim must also be denied.

E. Ineffective Assistance of Counsel for Failing to Pursue Imperfect Self-Defense Claim

Petitioner asserts that his trial counsel was ineffective for failing to pursue the defense of imperfect self-defense in his case. He argues that the he stabbed the decedent in the heat of

passion in an attempt to protect himself after she had threatened to get a knife from the kitchen and stab him and a struggle ensued. Petition -Doc. No. 1 at 49.

The Pennsylvania Superior Court properly rejected this claim, finding that his argument lacked arguable merit. First the court set forth the requirements for an imperfect self-defense claim, as follows:

> A defense of 'imperfect self-defense' exists where the defendant actually, but unreasonably, believed that deadly force was necessary. However, all other principles of self-defense must still be met in order to establish this defense. The requirements of self-defense are statutory: 'The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.' 18 Pa.C.S.[]§ 505(a). If the defender did not reasonably believe deadly force was necessary[,] he provoked the incident, or he could retreat with safety, then his use of deadly force in self-defense was not justifiable. A successful claim of imperfect self-defense reduces murder to voluntary manslaughter.

Superior Court Opinion at 10 (Doc. No. 1-1 at 30)., quoting Commonwealth v. Truong, 36 A.3d 599 (Pa. Super. 2012). The evidence at trial established that Petitioner stabbed the decedent more than 80 times and he did not incur even one stab wound. As the Superior Court noted, "[t]his fact alone is sufficient to establish that [Petitioner]'s belief deadly force was necessary was unreasonable." Id. Furthermore, as the Court noted, the fact that he used multiple knives over a period of time and dragged the victim back into the house when she tried to escape, established that he could have retreated safely even if she was the aggressor. Id.

As the state court found, an argument that Petitioner was eligible for such a defense clearly lacks merit and pursuant to Strickland, counsel cannot be ineffective for failing to raise a meritless argument, such as this. This claim must be denied as the Superior Court's finding is

~~not~~ contrary to or an unreasonable application of the clearly established federal law and is ~~not~~ based upon an unreasonable determination of facts in this matter.

F. Ineffective Assistance of Counsel for Advising Petitioner Not to Testify

Next, Petitioner argues that he was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel prevented him from testifying on his own behalf. Joseph argues that testifying would have brought to the court's attention the facts leading up to the altercation between him and the decedent and would have demonstrated imperfect self-defense.

As the Superior Court found, Petitioner's claim that he was coerced into his decision not to testify is completely belied by the record in this matter. The Superior Court explained as follows:

> At trial, the trial court informed [Petitioner] that counsel had indicated that it was [Petitioner]'s wish that he testify on his own behalf. N.T. 11/10/2015, at 276. When the trial court then went on to colloquy [Petitioner] about this decision, [Petitioner] was asked if he believed he had 'sufficient opportunity to confer with counsel with regard' to his testifying. Id. [Petitioner] responded, 'Not really.' Id. at 277. The trial court called a recess, and after about 15 minutes, [Petitioner] and counsel returned to the courtroom. At that point, the defense rested, and the trial court continued the colloquy of [Petitioner] about his new decision not to testify. Specifically, [Petitioner] stated that he was 'comfortable' with the changed decision. Id. at 278. Based on the foregoing, the record shows that [Petitioner] had every opportunity to exercise his right to testify, and we cannot agree with [Petitioner] [that] trial counsel interfered with this right.

Superior Court Opinion at 12-13 (Doc. No. 1-1 at 32-33).

The court further noted that Joseph did not suggest that counsel offered unreasonable advice that would "vitiate a knowing and intelligent decision." Id. at 32. The court stated that while Petitioner argued that he should have testified because he did not have any prior convictions to be used for impeachment, he neglected to consider "the myriad of reasons as to why his testimony would not have been helpful to his cause." Id. As the Superior Court noted, if Joseph

had testified, the Commonwealth could have cross-examined him about the gruesome attack. The Superior Court therefore concluded that Petitioner had failed to present evidence to support his claim that counsel's advice was so unreasonable that his decision was not knowing and intelligent. Given the record demonstrating that he had ample time to discuss the issue with counsel and then clearly indicated that he did not wish to testify and the lack of any evidence to demonstrate that he was coerced or that his decision was not fully informed and voluntary, Joseph has failed to demonstrate that his counsel did not act reasonably. Therefore, the Superior Court's finding is ~~not~~ contrary to or an unreasonable application of the clearly established federal law and does not involve an unreasonable determination of the facts. This claim must also be denied.

G. **Prosecutorial Misconduct by Failing to Disclose Decedent's Fingerprints on Knives**

In his seventh claim, Joseph argues that the Commonwealth committed prosecutorial misconduct by withholding "substantial material evidence, namely the murder weapon, which contained the Decedent[']s fingerprints." Pet. at 12C- Doc. No. 1 at 18. He argues that ~~the evidence~~ would have tarnished the Commonwealth's theory of events.

Once again, Petitioner alleges that evidence was withheld in violation of Brady. However, as the Superior Court found, "[t]o establish a Brady violation, [Petitioner] must demonstrate that the evidence at issue was favorable to him, because it was either exculpatory or could have been used for impeachment; the prosecution either willfully or inadvertently suppressed the evidence; and prejudice ensued." Superior Court at 13-14, citing In re R.D., 44 A.2d 657, 675 (Pa. Super. 2012). The state court's finding in this case that evidence of the victim's fingerprints on her own kitchen knives is not exculpatory, is certainly not contrary to Brady, the clearly established

federal law and is not based upon an unreasonable application of the facts. Since the evidence cannot be considered exculpatory, the government cannot be guilty of misconduct for failing to produce the evidence. As the Superior Court noted, Petitioner stabbed the victim over 80 times and was not stabbed himself even once. Therefore, "the existence of the victim's fingerprints on her own kitchen knives is certainly not material to his guilt or innocence." Id. at 14 – Doc. No. 1-1 at 34. This claim must be denied as it lacks merit.

H. Ineffective Assistance of Counsel for Failing to File a Motion to Dismiss Pursuant to the Speedy Trial Act

Joseph argues that he was deprived of effective assistance of counsel because his trial counsel failed to file a motion to dismiss his case pursuant to Pennsylvania's Speedy Trial Act. The state court found that Petitioner failed to demonstrate that he would have prevailed on a Rule 600 motion and therefore his counsel's actions in failing to file the motion were not unreasonable.

The state court denied his claim of ineffective assistance of counsel upon finding that his claim under Pennsylvania's Speedy Trial Act lacked merit. The Superior Court noted that dismissal is required under Pennsylvania Rule of Criminal Procedure 600 "only when the Commonwealth fails to bring a defendant to trial within 365 days, with the deadline adjusted to take into account all excludable time and excusable delay." Superior Court Op- Doc. No. 1-1 at 36.

As the PCRA court found, Joseph failed to calculate excludable time attributable to the defendant. PCRA Op.- Doc. No. 1-1 at 17. The Court found that after excluding the time for two continuances sought by Joseph, only 280 days remained attributable to the Commonwealth and there was therefore no violation. Id. at 17-18. The Court found no misconduct on the part of

the Commonwealth to deprive Petitioner of his Speedy Trial Act rights and therefore found that there was no ineffective assistance of counsel in failing to file the motion. Id. at 18.

The Superior Court found that after examining the continuances, the record does not support a conclusion that the Commonwealth was anything other than prepared to go to trial. In addition to the initial continuances requested by the defense, as the Commonwealth asserts, the time given to allow the defense to obtain records and experts for the penalty phase of the trial should also be excluded from the calculation. Accordingly, the state court's determination that there was no ineffective assistance of counsel given that there was no arguable merit to his position that he would have prevailed on a motion filed pursuant to Rule 600 was not contrary to or an unreasonable application of the clearly established federal law and was not based upon an unreasonable determination of the facts. Once again, this claim must be denied.

I. Ineffective Assistance of Counsel for Failing to Move for Recusal

In his final claim, added by way of a later filing, Petitioner alleges that his trial counsel failed to provide effective assistance of counsel as guaranteed by the Sixth Amendment by failing to file a motion to have the trial judge recuse himself. Joseph alleges that he was assaulted by Keyon Bertrand Cowan in open court on November 9, 2015. Joseph claims that "[t]he anger and assault upon Petitioner by Cowan exhibited to the trial judge the hostility brandished by Cowan, a family member, towards Petitioner which ultimately inflamed the passion of the trial judge." ~~Doc. No. 12 at 3-4.~~ He argues that because of the inflammatory impact the attack had on the trial judge, his counsel should have immediately filed a motion for recusal.

As Respondent argues, this claim was not raised to the state courts on direct appeal or in his PCRA petition and was therefore not exhausted. The claim is also procedurally defaulted

since his time for filing a PCRA petition has lapsed and because the state court would also likely find the claim has been waived. Joseph does not even allege that he can otherwise demonstrate actual cause and prejudice or that failure to review the claim would result in a fundamental miscarriage of justice in order to excuse the default. He seeks to excuse the procedural default pursuant to Martinez v. Ryan by alleging that his PCRA counsel was ineffective for failing to raise the claim. See Martinez v. Ryan, 132 S. Ct. 1309 (2012) (finding that in some cases ineffective assistance of PCRA cases can serve as cause and prejudice to excuse procedural default of ineffective assistance of trial counsel claims that could not have been previously presented).

As Respondent argues, the record contains no evidence regarding the incident at all, only a notation of a "disruption in courtroom." Because Petitioner failed to raise the claim in the state courts, the record was not developed at trial or during a PCRA hearing. Furthermore, even based upon the attack as Joseph describes it, there is no evidence to support Petitioner's claim that the trial judge was biased. Accordingly, as the state court found, the underlying claim of ineffective assistance of counsel for failing to move for the judge to recuse himself lacks merit. He is unable to demonstrate that the underlying ineffective assistance of trial counsel claim is a "substantial one", since the claim lacks merit. Id. at 1318. Therefore, Joseph cannot overcome procedural default under Martinez, because he cannot demonstrate that his collateral review counsel was ineffective pursuant to the standard set forth in Strickland.

Petitioner's trial counsel cannot be ineffective pursuant to Strickland for failing to raise this unsupported and meritless claim. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d 706, 730 (E.D. Pa. 2001). Therefore, the default will not be excused pursuant to Martinez. The claim, which also lacks merit, remains procedurally defaulted and must be denied.

IV. CONCLUSION

For all of the foregoing reasons, Joseph's habeas petition should be denied in its entirety. Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 27th day of September, 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. The Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT

/s/ Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE