UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1862

TYRELL HART,
Appellant

v.

SUPERINTENDENT DALLAS SCI;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. No. 2:19-cv-00096)

SUR PETITION FOR REHEARING

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

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

By the Court,

s/ Stephanos Bibas
Circuit Judge

APPENDIX "A"

Dated: September 27, 2022
Sb/cc: Tyrell Hart
All Counsel of Record

July 14, 2022

CLD-194

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 22-1862

TYRELL HART,
Appellant

v.

SUPERINTENDENT DALLAS SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. Civ. No. 2:19-cv-00096)

Present: AMBRO, SHWARTZ and BIBAS, Circuit Judges

Submitted is Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. §2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because reasonable jurists would not debate whether the District Court properly denied Appellant's petition for a writ of habeas corpus. See 28 U.S.C. §2253(c); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the reasons stated by the Magistrate Judge in the Report and Recommendation and adopted by the District Court, jurists of reason would agree, without debate, that Appellant's claims are either non-cognizable on federal habeas review, see 28 U.S.C. §2254(i); Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998), procedurally defaulted, see Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir. 2012), or meritless, see Strickland v. Washington, 466 U.S. 558, 687 (1984); Morris v. Slappy, 461 U.S. 1, 11–12 (1983).

Exhibit "A"

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: July 20, 2022
Sb/cc: Tyrell Hart
Michael R. Scalera, Esq.

A True Copy:

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

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

TYRELL HART, *Petitioner,*	:	**CIVIL ACTION**
v.	:	
LAWRENCE MAHALLY, et al., *Respondents.*	:	**NO. 19-cv-096**

ORDER

AND NOW, this **14th** day of **April, 2022**, upon careful and independent consideration of the Petition for Writ of Habeas Corpus (ECF No. 2), review of the Report and Recommendation of United States Magistrate Judge Marilyn Heffley (ECF No. 32), and consideration of Petitioner's Objections (ECF No. 33), it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED WITH PREJUDICE**; and
3. There is no probable cause to issue a certificate of appealability.

The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

APPENDIX "D"

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

TYRELL HART, *Petitioner,*	:	**CIVIL ACTION**
v.	:	
LAWRENCE MAHALLY, et al., *Respondents.*	:	**NO. 19-cv-096**

MEMORANDUM

KENNEY, J. **April 14, 2022**

I. INTRODUCTION

Tyrell Hart petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Hart alleges multiple instances of ineffective assistance of counsel, that he was denied his constitutional right to his choice of counsel, and requests discovery and an evidentiary hearing. The Honorable Magistrate Judge Marilyn Heffley recommends that we deny the petition. We adopt Judge Heffley's reasoned Report and Recommendation. We also deny a certificate of appealability.

II. BACKGROUND

The Report and Recommendation summarizes the factual and procedural background of this case in detail. *See* ECF No. 32 at 1-4. Hart was convicted by jury of first-degree murder, third-degree murder of an unborn child, carrying a firearm without a license, and possessing instruments of crime. *Com. v. Hart*, No. 1231-EDA-2012, 2014 WL 10965823 at *1 (Pa. Super. Ct. Mar. 21, 2014). Hart received a sentence of life imprisonment without parole and a concurrent term of 20 to 40 years' imprisonment. *Id.*

On April 13, 2012, Hart filed a notice of appeal, arguing that his constitutional rights were violated when he was denied a continuance on the day of trial in order to replace his attorney. *Com. v. Hart*, 2014 WL 10965823 at *2. On January 8, 2014, Hart filed a motion to remand for an evidentiary hearing, arguing that detectives had coerced his confession. *Id.* at *4 n.5. On March 21, 2014, the Superior Court denied the appeal and the motion. *Id.* at *4. On July 3, 2014, Hart filed a timely petition for review pursuant to the Pennsylvania Post Conviction Relief Act. *Com. v. Hart*, No. 3779 EDA 2016, 2017 WL 5983867 at *2 (Pa. Super. Ct. Dec. 1, 2017). Counsel was appointed but then filed a "no merit" letter and moved to withdraw from the representation. *Id.* The PCRA court granted the motion and denied Hart's PCRA petition. *Id.* Hart appealed, and the Superior Court affirmed the dismissal. *Id.* at 10.

On January 2, 2019, Hart filed the petition for a writ of habeas corpus. ECF No. 2. Hart's petition raises the following claims: ineffective assistance of counsel for failing to properly argue an involuntary confession claim; violation of his right to counsel of his choice and ineffective assistance of counsel for failing to litigate this claim; ineffective assistance of counsel for failing to follow through on a request for a mistrial; ineffective assistance of counsel for failing to secure transcription of the voir dire, and ineffective assistance of counsel for failing to raise a speedy trial claim. *Id.* Hart also requests discovery and an evidentiary hearing. *Id.* at 111.

Magistrate Judge Marilyn Heffley issued a Report and Recommendation. ECF No. 32. In the Report and Recommendation, Judge Heffley found that all of Hart's claims were meritless. *Id.* Concluding that Hart failed to show that the state court decisions were contrary to or an unreasonable application of clearly established federal law, Judge Heffley recommended denial of the petition, denial of the request for discovery and a hearing, and denial of certificate of appealability. *Id.* at 27-28.

Hart timely objects to Magistrate Judge Heffley's Report and Recommendation. ECF No. 33. We make a *de novo* determination of the portions of the Report and Recommendation to which the objection is made. *Equal Emp't Opportunity Comm'n v. City of Long Branch*, 866 F.3d 93, 99 (3d Cir. 2017) (citing 28 U.S.C. § 636(b)(1)).

III. STANDARD OF REVIEW

The federal courts' power to grant habeas relief is limited. A court cannot grant habeas relief unless the state court 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). To prevail under the "contrary to" clause, a petitioner must show that the state court applied a rule differently from the governing law set forth by the United States Supreme Court or decided a case differently than the United States Supreme Court on a set of materially indistinguishable facts. *Bell v. Cone*, 535 U.S. 685, 694 (2002). To prevail under the "unreasonable determination" clause, a petitioner must show that the state court correctly identified a governing legal principle but unreasonably applied it to the facts of a particular case. *Id.* This is a "difficult to meet" and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citations omitted).

Additionally, a federal court cannot grant a petition for a writ of habeas corpus unless the petitioner has exhausted the remedies available in state court. *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). To exhaust their remedies, a petitioner must have fairly presented the same claim to the state court and pursued that claim

through one complete round of the state's established appellate review process. *See Bronshtein v. Horn*, 404 F.3d 700, 725 (3d Cir. 2005) (citation omitted). If a petitioner failed to exhaust their state remedies and would now be procedurally barred from presenting their claims in state court, those claims are procedurally defaulted for purposes of federal habeas relief. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). A petitioner may overcome procedural default by demonstrating either (1) good cause for the default and actual prejudice as a result of the violation of federal law or (2) failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. The Supreme Court has recognized a narrow exception for petitioners who cannot satisfy the requirements of exhaustion. In *Martinez*, the Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. 1, 9 (2012). To excuse a default under *Martinez*, the court must determine whether PCRA counsel was ineffective under the standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984), and determine that the underlying claim of ineffectiveness of trial counsel is "substantial" under the standard for granting a certificate of appealability. *Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockerell*, 537 U.S. 322 (2003)). However, the court may forego the *Martinez* analysis if the underlying claim has no merit. *See* 28 U.S.C. § 2254(b)(2) (writ may be denied "notwithstanding the failure of the applicant to exhaust" state court remedies); *see also Real v. Shannon*, 600 F.3d 302, 309 (3d Cir. 2010) (counsel not ineffective for failing to raise a meritless argument); *Parrish v. Fulcomer*, 150 F.3d 326, 328-29 (3d Cir. 1998) (same).

For habeas petitions that claim ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner must show 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." *Strickland v. Washington*, 466 U.S. at 686, 694. Courts "evaluate the conduct from counsel's perspective at the time," rather than with the benefit of hindsight, and "apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (citations omitted). A petitioner must show counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.*

IV. DISCUSSION

Hart makes the following objections to the Report and Recommendation: that his involuntary confession claim is neither procedurally defaulted nor meritless, that Judge Heffley's denial of his Sixth Amendment claim was objectively unreasonable, that his mistrial claim is not defaulted and Judge Heffley's findings and conclusions were unreasonable, that Judge Heffley's findings and conclusions regarding his voir dire claim were unreasonable, and that any default of his speedy trial claim should be excused and Judge Heffley's findings on this claim should be rejected. *See* ECF No. 33 at 2-11. We conduct *de novo* review of the portions of the Report and Recommendation to which Hart objects.

We adopt the Report and Recommendation in its entirety and dismiss the Petition and the Objections.

A. Ineffective Assistance of Counsel Claim - Involuntary Confession

In his habeas petition, Hart argues that his counsel were constitutionally ineffective because they failed to properly or effectively argue his involuntary confession claim. This claim is comprised of two arguments: (1) his counsel were ineffective for failing to cite to legal authority in a motion for remand regarding newly discovered evidence of an involuntary

confession and (2) his counsel were ineffective for failing to call him as a witness at a suppression hearing. Judge Heffley determined that both arguments were meritless and procedurally defaulted. In his Objections, Hart repeats his arguments in substantially the same manner as in his petition.

We find that Hart's ineffective assistance of counsel claims related to his involuntary confession claims are defaulted and meritless. Hart argues that his counsel provided constitutionally deficient representation because counsel did not cite legal authority in Hart's motion for remand over the involuntary confession claim. However, the PCRA court and the Superior Court on appeal rejected this claim, finding that even with legal authority, the motion would have failed. *Com. v. Hart*, 2017 WL 5983867, at *7. Counsel cannot be faulted for failing to litigate, or failing to properly litigate, a meritless issue. *See Carnavale v. Superintendent Albion SCI*, 654 F. App'x 542, 548-49 (3d Cir. 2016) (counsel not ineffective where state court found the underlying after-discovered evidence claim to be meritless). To the extent that Hart challenges the state courts' determination that the motion for remand did not identify after-discovered evidence and would have failed regardless of citation to legal authority, that is a matter of state law not subject to federal habeas review. *Fielder v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004) (claims resting on state law are not cognizable for federal habeas review). Accordingly, we do not find that the state court's rejection of this ineffective assistance of counsel claim was contrary to or an unreasonable application of federal law.

Hart's claim that his counsel was ineffective for not calling him as a witness at the suppression hearing fares no better. In the Objections, Hart makes no additional argument other than restating the arguments in the Petition and fails to show that his counsel's decision was unreasonable. There are clear strategic reasons why counsel would decide not to call a criminal

defendant as a witness at a suppression hearing as the defendant could be cross-examined. This testimony could be helpful to a prosecutor in developing the underlying case and could be used for impeachment purposes at trial. *See United States v. Salvucci*, 448 U.S. 83, 88 n.8 (1980). Additionally, given the low standard that the prosecution must meet at a suppression hearing, it was not unreasonable for Hart's counsel to determine that the risks did not outweigh the benefits. Hart has not shown that his counsel's decision was objectively unreasonable or that the decision caused substantial prejudice to his case. This claim is without merit.

To the extent that Hart makes an independent argument, irrespective of effective assistance of counsel, that habeas relief should be granted because his confession was involuntary, Judge Heffley found that this claim was procedurally defaulted and meritless. ECF No. 32 at 10-11. In his Objections, Hart clarifies that his involuntary confession claim "has always been ineffective assistance of counsel in failing to effectively litigate the claim." ECF No. 33 at 4. This Court finds that Hart does not make an involuntary confession claim separate from his ineffective assistance of counsel claim in the Petition and does not object to Judge Heffley's finding of procedural default regarding such a claim.

B. The Sixth Amendment Right to Retained Counsel of Choice Claims

Hart argues that his Sixth Amendment right to counsel of his choice was violated when the trial court rejected his request for a continuance on the day of trial to allow Hart to change his attorney. Hart also argues that his counsel were constitutionally ineffective for failing to litigate his Sixth Amendment claim. Judge Heffley found that both claims were meritless. ECF No. 32 at 14. In his Objections, Hart argues that Judge Heffley's findings are objectively unreasonable. ECF No. 33 at 5.

In our *de novo* review of the Report and Recommendation and Hart's objections, we reach the same conclusion as Judge Heffley. The right to choice of counsel is not absolute, *United States v. Voigt*, 89 F.3d 1050, 1074 (3d Cir. 1996) (citation omitted), and a defendant's right to counsel of choice may be moderated by the needs of the trial court, *Randolph v. Sec'y Pa. Dep't of Corr.*, 5 F.4th 362, 374 (3d Cir. 2021). Courts apply a balancing test to determine if the trial court acted fairly and reasonably, weighing the efficient administration of criminal justice, the accused's rights, and the rights of other defendants awaiting trial. *See United States v. Miller*, 731 F. App'x 151, 155 (3d Cir. 2018) (citing *United States v. Hodge*, 870 F.3d 184, 201 (3d Cir. 2017)). Here, we find that the trial court's decision to deny the continuance was not inappropriate or arbitrary. *See Smith v. Delbaso*, No. 19-CV-3066, 2020 WL 5261016, at *11 (E.D. Pa. Mar. 4, 2020) (collecting cases denying habeas relief where trial court denied continuance on the eve of trial). Accordingly, the state courts' rejections of Hart's Sixth Amendment claim were not contrary to or an unreasonable application of federal law. Regarding Hart's related ineffective assistance of counsel claim, Hart's counsel cannot be deemed ineffective for failing to raise a meritless claim.

In the Objections, Hart argues that the trial court was required to engage in an inquiry before it could deny the continuance request. ECF No. 33 at 6 (citing *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982). It is clear from the record that the trial court conducted an extensive inquiry. After Hart's counsel requested a continuance on the day that trial was set to begin, the trial court discussed the issue with Hart's counsel and with the attorney that Hart wanted to represent him, Mr. Peruto. Although Peruto ultimately declined to represent Hart, the court had Peruto come to the courthouse and speak with Hart. The next day, another attorney, Mr. Johnson, came to court and discussed the possibility of representing Hart. Again, the court

discussed the issue with Johnson, noting that the start of trial would not be delayed, and gave Johnson multiple opportunities to talk with Hart. Johnson also decided not to represent Hart. Based on these facts, the appellate court denied Hart's claim that his rights were violated by the denial of the continuance. *Com. v. Hart*, 2014 WL 10965823, at *4. The trial court engaged in an extensive inquiry on the day that trial was scheduled and allowed Hart multiple opportunities to discuss his case with three different sets of counsel. Not finding good cause for an extension, the request was denied. Hart's Sixth Amendment and related ineffective assistance of counsel claims are meritless. The state court decisions rejecting these claims were not contrary to or an unreasonable application of federal law.

C. Ineffective Assistance of Counsel Claim - Mistrial

Hart argues that his trial, appeal, and PCRA counsel were constitutionally ineffective for failing to "follow through" on a request for a mistrial and failing to argue that the trial court abused its discretion when it denied a mistrial. Judge Heffley found that these claims were meritless and procedurally defaulted. ECF No. 32 at 19-22. In the Objections, Hart repeats his merit arguments regarding these claims, argues that the Report and Recommendation are unreasonable, and argues that any procedural default should be excused under *Martinez*. ECF No. 33 at 7-8. We find that Hart's claims are meritless.

Regarding Hart's claim that his trial counsel were ineffective for failing to "follow through" on the request for a mistrial, the Superior Court on PCRA appeal rejected this claim because it found that his counsel did object to the prosecutor's conduct and specifically requested a mistrial. *Com v. Hart*, 2017 WL 5983867, at *9-10. In the Petition and Objections, Hart both concedes that his trial counsel requested a mistrial and argues that his trial counsel was ineffective for failing to "follow through" with that request. Hart does not develop this argument

further and fails to explain what else his trial counsel should have or could have done in their request for a mistrial. The fact that counsel did not obtain the desired outcome does not establish that counsel was constitutionally ineffective. We find that the state courts' rejection of this claim was not contrary to or an unreasonable application of federal law, and we find this claim lacks merit. To the extent Hart argues that his trial counsel was ineffective for failing to object to the trial court's cautionary instruction, this claim is procedurally defaulted, and we also find it meritless, as juries are presumed to follow the trial court's curative instructions. *Shannon v. United States*, 512 U.S. 573, 584-85 (1994) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Accordingly, we also find that Hart's claims that his appellate counsel were ineffective for failing to raise these same claims is similarly meritless.

Finally, Hart's claim of ineffective assistance of PCRA counsel is non-cognizable, as it is a state law claim that does not implicate federal constitutional concerns. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings.... Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") (citations omitted); *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254).

D. Ineffective Assistance of Counsel Claim – Voir Dire Transcript

In the Petition, Hart argues that his appellate and PCRA counsel were ineffective for failing to obtain or review the transcript of the voir dire proceedings, which were recorded but not transcribed. Judge Heffley found that this claim was meritless. ECF No. 32 at 22. On PCRA appeal, the Superior Court rejected this claim because it found that Hart failed to demonstrate

how he was prejudiced by his appellate counsel's decision not to review a transcript of the voir dire proceedings. *Com. v. Hart*, 2017 WL 5983867, at *10. Judge Heffley found that the Superior Court's decision was not contrary to or an unreasonable application of federal law and that Hart failed to show a reasonable likelihood of a different result if not for his appellate counsel's omission. In the Objections, Hart argues that his PCRA counsel provided ineffective assistance of counsel because they failed to obtain or review the transcript of the voir dire proceedings. ECF No. 33 at 9-10. Hart did not object to Judge Heffley's determination regarding his appellate counsel's representation. *Id.*

We deny Hart's objection. The claim is meritless and non-cognizable. Ineffective assistance of PCRA counsel is a state law claim that does not implicate federal constitutional concerns. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also* 28 U.S.C. § 2254(i).

E. Ineffective Assistance of Counsel Claim - Speedy Trial Claim

Hart argues that his trial, appellate, and PCRA counsel were ineffective because they did not raise a speedy trial claim. Judge Heffley found that Hart's claim that his counsel were ineffective for failing to raise constitutional speedy trial claims was procedurally defaulted. ECF No. 32 at 23-25; *see Com. v. Hart*, 2017 WL 5983867 at *3-4. Additionally, Judge Heffley found that the claim was meritless and the default would not be excused under *Martinez*. *Id.* at 25-26.

In the Objections, Hart argues that any procedural default should be excused under *Martinez*, and that the Report and Recommendation should be rejected because 540 days of judicial delay were not properly excusable. ECF No. 33 at 10-11. Hart also argues that his petition presents a substantial claim of fraud and necessitates an evidentiary hearing. *Id.* at 11.

We find that the underlying constitutional and state speedy trial claims are meritless. Because we find the claims meritless, no procedural default is excused under *Martinez*. On PCRA appeal, the Superior Court evaluated whether the delay for trial was justified, finding that 188 days were excludable due to either Hart not having an attorney or Hart's attorney's subsequent continuance requests and that 540 days were excusable due to the court's difficulty in scheduling a capital case for trial. *Com v. Hart*, 2017 WL 5983867 at *5-6. The court concluded that the claim was meritless, and so Hart's counsel could not be deemed ineffective for raising a meritless claim. *Id.* Considering the length of the delay, the reasons for the delay, Hart's failure to assert his right to a speedy trial until after he was convicted, and Hart's failure to show substantial prejudice due to the delay, we reach the same conclusion. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Regarding the 540 days of excusable time due to the court's difficulty in scheduling a capital case for trial, Hart argues that the 540 days cannot be excused because the government eventually decided not to pursue the death penalty. This argument is meritless. In effect, Hart argues that after the trial was scheduled with the potential for a death penalty, the government could not then decide to drop the death penalty, because that would create a speedy trial violation. We disagree. Regardless of whether the government later decided not to seek the death penalty, the scheduling of the trial was reasonable and did not violate Hart's constitutional rights.

Hart also claims that respondents attempted to commit fraud on the state court when they incorrectly represented to the state court that Hart was on bail during the pre-trial proceedings. As Hart references in the Petition, a determination of fraud requires "clear, unequivocal and convincing evidence" of intentional fraud that in fact deceives the court. *See Herring v. U.S.*, 424

F.3d 384, 386-87 (3d Cir. 2005); *see also* ECF No. 2 at 79. This is a demanding standard, and Hart fails to satisfy it. This claim is meritless and denied.

F. Request for Discovery and Evidentiary Hearing

Judge Heffley recommends that we deny Hart's request for discovery and an evidentiary hearing. Hart objects. Because his claims are plainly meritless, we deny this request.

V. CONCLUSION

The Court declines to issue a certificate of appealability. "A certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Hart has not shown that "reasonable jurists" would find this Court's assessment of the constitutional claims "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). No certificate of appealability will issue.

Because we find that none of Hart's rights were violated and his claims lack merit, we DENY his petition and his objections in their entirety, and we ADOPT Judge Heffley's reasoned Report and Recommendation. An appropriate order follows.

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

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

TYRELL HART,	:	CIVIL ACTION
Petitioner,	:	
v.	:	NO. 19-96
LAWRENCE MAHALLY, et al.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

MARILYN HEFFLEY, U.S.M.J. **December 29, 2021**

This is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Tyrell Hart ("Hart" or "Petitioner"), a prisoner incarcerated at the State Correctional Institution in Dallas, Pennsylvania. For the following reasons, I recommend that the petition be denied.

I. FACTUAL AND PROCEDURAL HISTORY

On April 2, 2012, after a jury trial in the Philadelphia County Court of Common Pleas, Hart was convicted of first-degree murder, third-degree murder of an unborn child, carrying a firearm without a license, and possessing instruments of crime. Commonwealth v. Hart, No. 1231 EDA 2012, 2014 WL 10965823, at *1 (Pa. Super. Ct. Mar. 21, 2014) [hereinafter "Super. Ct. Op."]. Hart was sentenced to life imprisonment without parole for the first-degree murder conviction and a concurrent term of 20 to 40 years' imprisonment for the murder of an unborn child conviction. Id.

The Pennsylvania Superior Court summarized the facts underlying Hart's conviction as follows:

> The victim, Selene Raynor ("Selene") was pregnant with [Hart's] baby. On October 13, 2009, Danette Raynor ("Danette"), Selene's mother, overheard a telephone conversation between [Hart] and Selene. Danette testified that in

APPENDIX "F"

> response to Selene telling [Hart] she was going to keep the baby, [Hart] got angry. The next day, Selene received a phone call from [Hart], after which she borrowed her mother's vehicle and picked up [Hart] at Twenty-Ninth and Montgomery Avenue in Philadelphia. They drove around for a while before Selene turned onto North Newkirk Street and parked the vehicle.
>
> While in the parked vehicle, [Hart] shot Selene in the head, killing her and the unborn child. Selene's body was found the next day inside her mother's vehicle at 1920 North Newkirk Street.
>
> On October 15, 2009, [Hart] was questioned by police. [Hart] made two statements on October 16, 2009. In the first statement, he claimed the gun accidentally fired when he heard a loud noise that caused him to jump while he was playing with it. In the second statement, given to police approximately eight and one half hours later, [Hart] admitted that he intentionally shot Selene because he was angry, scared, and frustrated over her being pregnant. He claimed that he aimed for Selene's shoulder. [Hart] also admitted to police that the whole time he was in the car with Selene—about twenty minutes—he was thinking about shooting her. Both statements were admitted into evidence at trial.
>
> Based on [Hart's] statements, the police were able to locate the gun at the home of Shayonna Price ("Price"), the cousin of [Hart's] best friend. A ballistics expert testified that the gun [Hart] used to shoot Selene required five pounds of pressure to be applied on the trigger in order for the gun to shoot. Therefore, according to the expert, the trigger had to be pulled to fire.
>
> The medical evidence was that Selene had been shot in the head and that she had died from that wound and that her unborn baby had died as the result of Selene's death.

Commonwealth v. Hart, No. 3779 EDA 2016, 2017 WL 5983867, at *1-2 (Pa. Super. Ct. Dec. 1, 2017) (quoting Opinion at 2-3, Commonwealth v. Hart, No. CP-51-CR-0000461-2010 (Pa. Ct. Com. Pl. Phila. Cnty. June 28, 2017) [hereinafter "PCRA Ct. Op."]) [hereinafter "PCRA Super. Ct. Op."].

On April 13, 2012, Hart filed a timely notice of appeal with the Pennsylvania Superior Court. Super. Ct. Op. at *2. On appeal, Hart argued that his constitutional right to a fair trial was violated when he was not represented by the attorney of his choice and when he was denied a continuance in order to be represented by the attorney of his choosing. Id. On January 8, 2014, Hart also filed a motion to remand for an evidentiary hearing, arguing that the detectives

actually coerced his confession and attaching a newspaper article stating that the homicide detectives involved in Hart's case had coerced confessions from other criminal defendants. Id. at *4 n.5. On March 21, 2014, the Superior Court denied his claim, denied his motion to remand for an evidentiary hearing, and affirmed the judgment of sentence. Id. at *4. Hart did not seek further review with the Pennsylvania Supreme Court. PCRA Super. Ct. Op. at *2.

On July 3, 2014, Hart filed a timely pro se petition for collateral review under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541-9546. PCRA Super. Ct. Op. at *2. Counsel was appointed, but he subsequently filed a "no merit" letter and moved to withdraw pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. Ct. 1988). PCRA Super. Ct. Op. at *2. On November 18, 2016, the PCRA court granted counsel's petition to withdraw and dismissed Hart's PCRA petition. Id. Hart appealed the dismissal, raising the following issues for review: (1) trial counsel was ineffective in failing to raise a meritorious speedy trial motion pursuant to Pennsylvania Rule of Criminal Procedure 600; (2) appellate counsel was ineffective in failing to successfully argue for a remand based on after-discovered evidence related to an involuntary confession claim; (3) appellate counsel was ineffective in failing to properly argue his claim that he was denied his counsel of choice; (4) trial counsel was ineffective in failing to "follow-through" on a requested mistrial due to prejudicial prosecutorial misconduct; (5) appellate counsel was ineffective in failing to ensure the jury selection process was transcribed; and (6) the PCRA court erred in failing to conduct an evidentiary hearing. PCRA Super. Ct. Op. at *3. On December 1, 2017, the Superior Court affirmed the dismissal of Hart's PCRA petition. Id. at *10. Hart did not seek further review with the Pennsylvania Supreme Court.

Hart filed the present petition for a writ of habeas corpus on January 2, 2019.[1] In his petition, Hart raises the following claims: (1) ineffective assistance of counsel for failing to properly argue an involuntary confession claim; (2) violation of his right to retain counsel of his choice and ineffective assistance of counsel for failing to adequately litigate this claim; (3) ineffective assistance of counsel for failing to properly argue for a mistrial based on prosecutorial misconduct; (4) ineffective assistance of counsel for failing to ensure that the voir dire was transcribed; and (5) ineffective assistance of counsel for failing to raise a speedy trial claim. Hart also requests an evidentiary hearing.

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).

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[1] Pursuant to the prison mailbox rule, a pro se prisoner's habeas application is deemed filed on the date he or she delivers it to prison officials for mailing to the district court, not on the date the application was filed with the court. See Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). As Hart signed his habeas petition on January 2, 2019, Pet. (Doc. No. 2) at 171, I will use that date as the date his petition was filed. Moreover, when referring to Hart's habeas petition, I will use the pagination provided by the Court's Electronic Filing System.

The United States Supreme Court has made clear that a writ may issue under the "contrary to" clause of § 2254(d)(1) only if the "state court applies a rule different from the governing law 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, 27 (2002).

State court factual determinations are also given considerable deference under the AEDPA. Palmer v. Hendricks, 592 F.3d 386, 391-92 (3d Cir. 2010). 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 a 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 exhaustion requirement mandates that the claim "have been 'fairly presented' to the state courts." Bronshtein v. Horn, 404 F.3d 700, 725 (3d Cir. 2005) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)). Fair presentation requires that a petitioner have pursued his or her claim "through one 'complete round of the State's established appellate review process.'" Woodford v. Ngo, 548 U.S. 81, 92 (2006) (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)). The

procedural default barrier, in the context of habeas corpus, also 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 the petitioner would be required to present his [or her] claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is a procedural default for purposes of federal habeas . . . ." Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

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.

C. Ineffective Assistance of 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." 466 U.S. at 686-88, 693-94.

To satisfy the reasonable performance prong of the analysis, a petitioner must show "'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 687). In evaluating counsel's performance, the reviewing court "must

apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance" and that there are "'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'" Id. at 104, 106 (quoting Strickland, 466 U.S. at 689). The reviewing court must "'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from counsel's perspective at the time.'" Id. at 107 (quoting Strickland, 466 U.S. at 689). "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Id. at 111.

To satisfy the prejudice prong of the analysis, a petitioner must demonstrate that counsel's errors were "'so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable.'" Id. at 104 (quoting Strickland, 466 U.S. at 687). Thus, a petitioner must show "'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. (quoting Strickland, 466 U.S. at 694). This determination must be made in light of "the totality of the evidence before the judge or jury." Strickland, 466 U.S. at 695.

III. DISCUSSION

A. Hart's Claim that His Counsel Was Ineffective for Failing to Properly Argue an Involuntary Confession Claim is Meritless

In his first claim for relief, Hart argues that the state courts unreasonably rejected his claim that his counsel was ineffective for failing to properly litigate an involuntary confession claim based on evidence of the police detectives' history of unconstitutional practices in obtaining false confessions. Pet. at 34-51. This claim is meritless.

On direct appeal, Hart filed a motion to remand for an evidentiary hearing, claiming that a newspaper published an article stating that the homicide detectives involved in his case had coerced confessions from other criminal defendants. Super. Ct. Op. at *4 n.5. In the motion, Hart attached an affidavit stating that the detectives actually coerced his confession. Id. The Superior Court determined that Hart's after-discovered evidence claim was waived due to Hart's failure to cite any relevant authority. Id. The Superior Court, therefore, denied the motion without prejudice to his right to pursue the claim in a collateral petition. Id.

On PCRA appeal, Hart argued that his direct appeal counsel was ineffective for failing to cite appropriate legal authority regarding his after-discovered evidence claim, which Hart claimed would have resulted in a remand for an evidentiary hearing regarding his alleged involuntary confession. PCRA Super. Ct. Op. at *3. The Superior Court rejected this claim, relying on the Pennsylvania Supreme Court's holding in Commonwealth v. Castro, 93 A.3d 818 (Pa. 2014) in finding that "the newspaper article [Hart] attached to his [PCRA] petition is not 'evidence.'" PCRA Super. Ct. Op. at *7; Castro, 93 A.3d at 825 & n.11 ("[A]llegations in the media, whether true or false, are no more evidence than allegations in any other out-of-court situation" and "do not constitute evidence."). The Superior Court, agreeing with the PCRA court's rejection of this claim, further held that:

> "[Hart] references . . . a newspaper article accusing Detective James Pitts and Detective Omar Jenkins of coercing statements from witnesses in other cases. [Hart] [did not allege in the trial court] that the statement he gave to detectives was coerced. Indeed, had [Hart's] statement been coerced, that fact would have been known to him and could have been raised during the trial."
>
> Therefore, at most, [Hart] could have utilized the newspaper article to attack the credibility of witnesses who testified that [Hart's] confession was voluntary. Accordingly, even if the item identified by [Hart] comprised relevant evidence, it would not meet the four-prong admissibility test provided in Castro as an appellant seeking a new trial must demonstrate that he will not use the alleged after-discovered evidence "solely to impeach a witness's credibility." Castro, 93 A.[3]d 821 n.7. Accordingly, [Hart] is not entitled to relief on his allegation of

> ineffective assistance of appellate counsel in connection with his after-discovered evidence claim.

PCRA Super. Ct. Op. at *7 (quoting PCRA Ct. Op. at 9).

The state courts' rejection of Hart's ineffective assistance of appellate counsel claim was not contrary to or an unreasonable application of clearly established federal law. As an initial matter, the state courts' determination that the newspaper article cited by Hart did not qualify as "after-discovered evidence" necessitating a remand for an evidentiary hearing is a matter of state law not subject to federal habeas review. Estelle v. McGuire, 502 U.S. 62, 68 (1991); Fielder v. Varner, 379 F.3d 113, 122 (3d Cir. 2004) (habeas claims based on newly-discovered evidence are not grounds for federal habeas relief absent an independent constitutional violation); Slocum v. Delbaso, No. 16-5961, 2019 WL 2144460, at *11 (E.D. Pa. Feb. 4, 2019) (rejection of after-discovered evidence claim not reviewable by a federal habeas court as it alleges an error of state law), report and recommendation adopted sub nom. Slocum v. Phila. Dist. Att'y Off., No. 16-5961, 2019 WL 2137728 (E.D. Pa. May 16, 2019).

Here, even assuming for the sake of argument that Hart's counsel was unreasonable in failing to support his motion to remand with relevant authority, Hart's claim fails to meet the Strickland standard because he cannot show that having done so would have been reasonably likely to alter the result of his appeal. The PCRA Superior Court rejected Hart's claim that the newspaper article amounted to after-discovered evidence that would support a remand. PCRA Super. Ct. Op. at *7. Accordingly, Hart's appellate counsel cannot be deemed ineffective for failing to have pursued or more properly litigated a non-meritorious issue on appeal. See Carnevale v. Superintendent Albion SCI, 654 F. App'x 542, 548-49 (3d Cir. 2016). Consequently, Hart's claim that his appellate counsel was ineffective for failing to support his motion to remand with proper authority does not entitle him to habeas relief. Id. (rejecting

ineffective assistance of counsel claim where state courts had held underlying after-discovered evidence claim to be without merit).

Hart also appears to argue that his confession to the police was involuntary and that his counsel was ineffective for failing to call him as a witness at the suppression hearing. Pet. at 41. This claim is procedurally defaulted because Hart never presented a claim regarding the improper admission of his statements to the police to the state courts. Because Hart is now well beyond his one-year limitation period for filing an additional PCRA petition to assert his claim, 42 Pa. Cons. Stat. Ann. § 9545(b)(1), a Pennsylvania court would find any attempt to raise this claim now through a new PCRA petition to be time-barred. Therefore, Hart's claim regarding the admission of his statements is procedurally defaulted and does not qualify for habeas relief. Coleman, 501 U.S. at 729; McCandless, 172 F.3d at 260.

To the extent Hart asserts that he may raise this claim despite his procedural default under the rule established in Martinez v. Ryan, 566 U.S. 1, 9-13 (2012), because his PCRA counsel was ineffective in failing to pursue this claim, see Pet. at 41, 49, Martinez does not excuse his procedural default. In Martinez, the United States Supreme Court noted that when a state requires a petitioner to raise an ineffective assistance claim on post-conviction review, rather than on direct appeal, a post-conviction relief hearing is the first opportunity the petitioner has to have his or her ineffective assistance claim heard.[2] 566 U.S. at 9-13. The Court, therefore, concluded that a habeas petitioner may establish cause and prejudice to allow a court to hear a defaulted ineffective assistance claim by showing that his or her post-conviction relief

[2] In Pennsylvania, ineffective assistance claims cannot be brought on direct appeal. Torres-Rivera v. Bickell, No. 13-3292, 2014 WL 5843616, at *16 (E.D. Pa. Nov. 10, 2014) (citing Commonwealth v. Grant, 813 A.2d 727, 738 (Pa. 2002)).

counsel was ineffective in failing to properly raise that claim in the post-conviction relief proceeding. Id. at 13-14. To pursue such a claim, a petitioner must show that his or her underlying ineffective assistance of counsel claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit" as defined by reference to the standard applicable to determining whether to grant certificates of appealability. Id. at 14 (citing Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)); see also Valentin-Morales v. Mooney, No. 13-3271, 2015 WL 617316, at *4 (E.D. Pa. Feb. 11, 2015) (Miller-El standard applies to Martinez merit analysis). A claim meets that standard if "jurists of reason could disagree with the [state] court's resolution of [the] constitutional claims or [if] jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327. Here, Hart cannot meet Martinez's requirements because his claim that his trial counsel was ineffective in failing to suppress his statement to the police is meritless.

The Fifth Amendment contains an individual privilege against self-incrimination, and Miranda v. Arizona, 384 U.S. 436 (1966), provides a mechanism to safeguard that privilege. Pursuant to Miranda, statements made by a defendant during a custodial interrogation must be suppressed unless the defendant was provided certain warnings and voluntarily, knowingly, and intelligently waived his or her right to have an attorney present during the interrogation. Id. at 475. Coercive police activity is a necessary predicate to the finding that a confession is not "voluntary." Colorado v. Connelly, 479 U.S. 157, 167 (1986); United States v. Jacobs, 431 F.3d 99, 108 (3d Cir. 2005). A statement is coerced, or involuntary, if the suspect's will was overborne in such a way as to render his or her confession the product of coercion. United States v. Latz, 162 F. App'x 113, 118 (3d Cir. 2005); see also Arizona v. Fulminate, 499 U.S. 279, 288 (1991). Courts must consider the totality of the circumstances in determining if a statement was

freely and voluntarily given, which includes "not only the crucial element of police coercion," but may also include "the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." Withrow v. Williams, 507 U.S. 680, 693 (1993) (citations omitted).

Here, prior to trial, Hart's counsel sought to suppress Hart's statements to the police on the basis that Hart was not properly given his Miranda warnings, that the statements were not knowing, intelligent, or voluntary, and that he was not afforded an attorney after asking for one. Transcript of Record at 30-95, Commonwealth v. Hart, No. CP-51-CR-0000461-2010 (Pa. Ct. Com. Pl. Phila. Cnty. Mar. 27, 2012) [hereinafter "Mar. 27 Tr."]. The trial court held a hearing on the motion, during which Detective Jenkins and Detective Henry Glenn testified regarding two signed statements that Hart gave to the police. Id. During the hearing, Detectives Jenkins and Glenn testified that Hart was advised of his Miranda rights prior to giving his statements to the police. Id. They each testified that Hart signed and initialed forms confirming that he understood those rights and that he declined an opportunity to consult with an attorney. Id. In denying the motion to suppress, the trial court found that the testimony of Detectives Jenkins and Glenn was credible, that Hart was properly given his Miranda warnings, and that there was no evidence that his will was overborne or that his statements were involuntary or the product of coercion. Id. at 94-95. The trial court's determination of these factual issues, including its credibility determinations, is presumed to be correct, and Hart has failed to satisfy his burden of rebutting that presumption of correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Colon v. Ferguson, No. 5:19-cv-03475-EGS, 2020 WL 5261014, at *5 (E.D. Pa. June 17, 2020) ("Courts on habeas review have 'no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.'" (quoting

Marshall v. Lonberger, 459 U.S. 422, 434 (1983))), report and recommendation adopted, No. 19-3475, 2020 WL 5260389 (E.D. Pa. Sept. 3, 2020).

In his petition, Hart claims that he was not provided his Miranda warnings, he was kept at the police station from approximately 7:30 p.m. to 2:00 a.m., and that he was subjected to "physical abuse and mental torture." Pet. at 40-41. Hart also references his affidavit that he submitted in support of his PCRA petition, in which he claims the detectives shouted and screamed at him, punched him, took his sweatshirt so that he was cold, and would not let him sleep. Affidavit at 2-4, Commonwealth v. Hart, No. CP-51-CR-0000416-2010 (Pa. Ct. Com. Pl. Phila. Cnty. Dec. 17, 2013). Although the Commonwealth bears the burden at trial of proving that a confession was voluntary, this burden shifts on collateral review; a habeas petitioner must prove by a preponderance of the evidence that his or her confession was involuntary. Miller v. Fenton, 796 F.2d 598, 604 (3d Cir. 1986). Where the state court's "account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not revise it," even when "convinced that, had it been sitting as the trier of fact, it would have weighted the evidence differently." United States v. Swint, 15 F.3d 286, 288 (3d Cir. 1994). Here, the trial court's determination of the voluntariness of his statements to the police was not unreasonable or "clearly erroneous," see 28 U.S.C. § 2254(d)(2); Swint, 15 F.3d at 288. Nor has Hart otherwise demonstrated that his statements violated Miranda.

Moreover, Hart's claim that his counsel was ineffective in failing to call him as a witness to testify in support of these allegations at the motion to suppress hearing does not warrant habeas relief. Pet. at 41. As noted by the Supreme Court, a defendant's suppression hearing testimony can be used for impeachment purposes if he or she testifies to the contrary at trial. See United States v. Salvucci, 448 U.S. 83, 88 n.8 (1980). Also, a prosecutor may elicit information

during cross-examination of a defendant during a suppression hearing that might be helpful to the prosecutor in developing its case or in deciding its trial strategy. Id. at 96. Here, Hart's conclusory criticism regarding his trial counsel's performance does not demonstrate that the decision not to call him to testify was anything other than a tactical and strategic decision. Moreover, at a suppression hearing, the prosecution must prove by only a preponderance of the evidence that the defendant confessed voluntarily. Commonwealth v. Nester, 709 A.2d 879, 882 (Pa. 1998). Given this relatively low standard, Hart has failed to show that his self-serving allegations would have led to the suppression of his statements.

Accordingly, Hart cannot demonstrate that his trial counsel's decision not to call him to testify at the suppression hearing fell below an objective standard of reasonableness, or that there was resulting prejudice. Because the claim that Hart's trial counsel was constitutionally ineffective in failing to call Hart to testify at the suppression hearing lacks merit, Martinez does not excuse his procedural default and, as a result, Hart is not entitled to habeas relief.

B. Hart's Claim that He Was Denied His Constitutional Right to Counsel of His Choice and that His Appellate Counsel Was Ineffective in Failing to Pursue this Claim is Meritless

In his second claim for relief, Hart argues that he was denied his right to counsel of his choice and that his appellate counsel was ineffective in failing to properly challenge the trial court's decision not to grant him a continuance to retain new counsel. Pet. at 51-57. These related claims lack merit.

At Hart's preliminary hearing on January 12, 2010, Hart was represented by privately-retained counsel, Charles Peruto, Sr., Esquire ("Peruto"). Super. Ct. Op. at *1. Hart had not retained Peruto for trial, however, and Peruto did not enter his appearance. Id. The trial court subsequently appointed David Scott Rudenstein, Esquire ("Rudenstein"). Id. The trial court ultimately scheduled trial for March 27, 2012, but on that date Rudenstein requested a

continuance, claiming that Hart wanted additional time to retain Peruto. Id. The trial court contacted Peruto, who said he would not represent Hart at trial, and the trial court denied the continuance request. Id. Nevertheless, the trial court also asked Peruto to come to the courthouse to meet with Hart to explain that he would not be representing him, which Peruto did that same day. Id. The case then proceeded through the completion of jury selection as well as a suppression hearing, with Rudenstein representing Hart. Id. The following day, the parties appeared for trial, with Shaka Johnson, Esquire ("Johnson") present at the request of Hart's family. Id. Johnson explained that he was contacted at 11:00 p.m. the previous evening by a family member who sought to retain him for Hart's trial. Id. Johnson did not accept any payment, because he wanted to speak with the court before taking the case, had not met Hart or the family member previously, and was not prepared for trial. Id. The Commonwealth objected to any additional continuances, and the trial court noted that it would not delay the start of the trial. Id. However, the trial court did order a one-hour recess for Johnson to meet Hart and discuss the Commonwealth's plea offer. Id. Hart ultimately declined the plea offer, and trial commenced with Rudenstein representing Hart. Id.

On direct appeal, Hart argued that he was denied his constitutional right to counsel of his choice when the trial court denied a continuance. Id. at *2. The Superior Court rejected this claim, holding:

> On this record, the court properly denied [Hart's] eleventh-hour request for a continuance. Hart failed to make the request more than forty-eight hours before the time set for the trial. Moreover, Attorney Peruto's comments to the court revealed his unwillingness to represent [Hart] at trial. Although Attorney Johnson considered representing [Hart], counsel needed additional time to meet with his client and prepare for trial. Thus, [Hart's] request for a continuance to proceed with new counsel on the first day of trial served to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice. Consequently, the court did not abuse its discretion in denying the request for a continuance.

Id. at *4 (internal quotation marks and citations omitted).

The Superior Court's rejection of Hart's claim on direct appeal that he was improperly denied a continuance, depriving him of his right to retain counsel of his choice, was not contrary to or an unreasonable interpretation of federal law. The Sixth Amendment right to assistance of counsel includes a basic right to counsel of choice. See Powell v. Alabama, 287 U.S. 45, 53 (1932); Randolph v. Sec'y Pa. Dep't of Corr., 5 F.4th 362, 374 (3d Cir. 2021). "The right to counsel of choice, however, is not absolute." United States v. Voigt, 89 F.3d 1050, 1074 (3d Cir. 1996) (citing Wheat v. United States, 486 U.S. 153 (1988)). The Supreme Court has also recognized that a trial court must have "wide latitude in balancing the right to counsel of choice against the needs of fairness." United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006). "The Court also has recognized that trial judges must have certain discretion over . . . the exigencies of court administration. So on occasion a defendant's right to counsel of choice may be moderated by a trial court's schedule, or the court's need to 'assembl[e] the witnesses, lawyers, and jurors at the same place at the same time." Randolph, 5 F.4th at 374 (quoting Morris v. Slappy, 461 U.S. 1, 11 (1983)). Nevertheless, "the Sixth Amendment entails a 'presumption in favor of counsel of choice,'" id. (quoting Wheat, 486 U.S. at 160), and a trial court's "'unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel,'" id. (quoting Morris, 461 U.S. at 11-12). An erroneous deprivation of the Sixth Amendment right to counsel of one's choice is a structural error not subject to harmless error analysis. Gonzalez-Lopez, 548 U.S. at 150.

Moreover, granting or denying a continuance request is within the trial judge's discretion. See United States v. Hodge, 870 F.3d 184, 202 (3d Cir. 2017); see also Commonwealth v. Hicks, 98 A.2d 478, 479 (Pa. Super. Ct. 1953). "Where the judge's discretionary power to deny a

continuance comes into conflict with the defendant's choice of counsel, we apply 'a balancing test to determine if the trial judge acted fairly and reasonably.'" United States v. Miller, 731 F. App'x 151, 155 (3d Cir. 2018) (quoting Hodge, 970 F.3d at 201). "Factors to be considered include 'the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare a defense; and the rights of other defendants awaiting trial who may be prejudiced by a continuance.'" Id. (quoting United States v. Kikumura, 947 F.2d 72, 78 (3d Cir. 1991)). The Supreme Court has stated that a trial court abuses its discretion in denying a continuance only when it is "so arbitrary as to violate due process." Ungar v. Sarafite, 376 U.S. 575, 589 (1964). "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." Morris, 461 U.S. at 11-12. "Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to assistance of counsel." Id. (quoting Ungar, 376 U.S. at 589).

The state courts' rejection of Hart's claim on direct appeal did not conflict with the Supreme Court's Sixth Amendment jurisprudence. In its analysis, the Superior Court outlined in detail the facts involving the trial court's denial of Hart's motion for continuance to retain counsel. Super. Ct. Op. at *1, *3-4. As to Peruto, the trial court communicated with him by phone on the record, wherein Peruto informed the court that he was not willing to represent Hart for trial, was not fully retained, and had not entered his appearance. Mar. 27 Tr. at 11-12. Nevertheless, the trial court requested that Peruto come to the courthouse in order to speak with Hart to explain that he did not represent him. Id. at 13-14. Peruto complied, and when meeting

with Hart, he also discussed the plea agreement the Commonwealth had offered. Id. at 21-24. The trial court commenced the proceedings with jury selection and a suppression hearing, where Hart was represented by Rudenstein. Id. at 24-98.

With respect to Johnson, the Superior Court explained in detail he was present at the request of Hart's family. Superior Ct. Op. at *1, *3-4; Transcript of Record at 5, 8-12, Commonwealth v. Hart, No. CP-51-CR-0000416-2010 (Pa. Ct. Com. Pl. Phila. Cnty. Mar. 28, 2012) [hereinafter "Mar. 28 Tr."]. Johnson explained that he was contacted at 11:00 p.m. the previous evening by a family member who sought to retain him for Hart's trial. Id. at 8-12. Johnson did not accept any payment, because he wanted to speak with the court before taking the case, had not met Hart or the family member previously, and was not prepared for trial. Id. at 8-14. The Commonwealth objected to any additional continuances, noting that the jury had been picked, pre-trial motions had been litigated, and all the witnesses and officers were at the courthouse or en route. Id. at 7, 10-12. The trial court noted that it would not delay the start of the trial, but did order a one-hour recess for Johnson to meet Hart and discuss the Commonwealth's plea offer. Id. at 16-17. Hart ultimately declined the plea offer, and trial commenced with Rudenstein representing Hart. Id.

In light of these unique circumstances, the trial court's decision to deny the continuance request made after jury selection, "a critical stage of the criminal proceeding," Randolph, 5 F.4th at 377, was already completed, in order for Hart to possibly retain an attorney who had first been contacted by his family at 11:00 p.m. the evening before was appropriate under the circumstances. See, e.g., Smith v. Delbaso, No. 19-CV-3066, 2020 WL 5261016, at *11 (E.D. Pa. Mar. 4, 2020), (collecting cases denying habeas relief when trial court denied continuance request in order for defendant's last minute request to retain new counsel), report and

recommendation adopted, No. CV 19-3066, 2020 WL 5258437 (E.D. Pa. Sept. 3, 2020); cf. Randolph, 5 F.4th at 378 (holding that state courts violated defendant's Sixth Amendment right to choice of counsel when it denied request for three-hour continuance to begin jury selection).

Nor was the state courts' rejection of his corresponding ineffective assistance of counsel claim contrary to or an unreasonable interpretation of federal law. On PCRA appeal, Hart argued that his "appellate counsel was ineffective for failing to cite legal precedent that would have persuaded th[e Superior] Court on direct appeal that the trial court abused its discretion in denying [Hart's] request for a continuance so that he could be represented by the attorney of his choice during the jury trial proceedings." PCRA Super. Ct. Op. at *7. Specifically, Hart claimed that his appellate counsel should have cited to Commonwealth v. Prysock, 972 A.2d 539 (Pa. Super. Ct. 2009), which held that the trial court abused its discretion in denying appellant's request for a continuance in order to secure new counsel. PCRA Super. Ct. Op. at *7; Prysock, 972 A.2d at 545. The Superior Court rejected the claim, finding that Prysock was distinguishable and "appellate counsel would not have succeeded on appeal with the citation and discussion thereof." Id. at *8-9. The state courts' determination that citation to Prysock would not have altered the outcome of Hart's claim on appeal is a determination of state law that is not subject to federal habeas review. Estelle, 502 U.S. at 67-68. Accordingly, Hart's appellate counsel cannot have been ineffective in failing to raise a state-law argument that the state courts have found to be meritless. See Derrickson v. Meyers, 177 F. App'x 247, 250 (3d Cir. 2006).

C. Hart's Claim that His Counsel Was Ineffective for Failing to "Follow Through" on a Request for a Mistrial Lacks Merit

In his third claim for relief, Hart argues that his trial and appellate counsel were ineffective for failing to "follow through" on a request for a mistrial due to prosecutorial misconduct. Pet. at 58-64. This claim lacks merit.

During closing argument, the prosecutor said: "[Hart] acted as [the victim's] judge, her jury, and her executioner and a self-proclaimed abortionist of that baby, because when he shot her in the head, the baby died, too." Transcript of Record at 52, Commonwealth v. Hart, No. CP-51-CR-0000416-2010 (Pa. Ct. Com. Pl. Phila. Cnty. Mar. 30, 2012) [hereinafter "Mar. 30 Tr."]. Trial counsel immediately objected to the prosecutor's statement, but the trial court overruled the objection. Id. at 53. Moreover, contrary to Hart's contention, his trial counsel specifically requested a mistrial due to the prosecutor's statement. Id. at 82. The trial court denied the request for a mistrial, but indicated it planned to give a curative instruction to the jury. Id. at 82-84. Thereafter, the trial court instructed the jury:

> [D]uring her closing argument, the District Attorney mentioned the word "abortion." This case is not about abortion. That was inappropriate. This case is about the murder of an unborn child, not abortion. So you will please disregard that.

Id. at 88.

On PCRA appeal, Hart argued that his trial counsel was ineffective for failing to request a mistrial in response to the prosecutorial misconduct that occurred during the prosecutor's closing argument to the jury. PCRA Super. Ct. Op. at *9. Based on the record, the Superior Court concluded that there was no merit to Hart's claim that trial counsel failed to request a mistrial, and, therefore, counsel could not be deemed ineffective. Id. at *10. The Superior Court further held that, "[t]o the extent [Hart] contends trial counsel was ineffective in failing to object to the cautionary instruction, we note that, aside from asserting the trial court's curative instruction did not remove the alleged 'taint' from the prosecutor's statement, [Hart] has not developed the argument further." Id. at *10 n.5. The Superior Court's rejection of this claim that trial counsel was ineffective is not contrary to or an unreasonable application of federal law as trial counsel

did specifically object to the prosecutor's comments and request a mistrial. Mar. 30 Tr. at 52, 82.

Moreover, to the extent Hart argues that his trial counsel was ineffective for failing to object to the cautionary instruction, that claim is both procedurally defaulted and substantively meritless. The claim is procedurally defaulted because, as the Superior Court noted, he did not develop that argument on appeal, see PCRA Super. Ct. Op. at *10 n. 5; Leake v. Dillman, 594 F. App'x 756, 758-59 (3d Cir. 2014) (holding that the Superior Court's reliance on petitioner's failure to develop arguments meaningfully on appeal and cite appropriate authorities is an independent and adequate state law ground). Nor does Hart sufficiently allege any cause and prejudice or a miscarriage of justice to excuse the default. Coleman, 501 U.S. at 750. Likewise, to the extent Hart relies on Martinez to overcome the procedural default, Martinez would not excuse Hart's default of this claim because Hart cannot show that his counsel's performance was deficient in failing to object to the cautionary instruction or that he suffered any prejudice as a result of trial counsel's failure to object. Both federal and Pennsylvania law presume that the jury follows the trial court's instructions. See Gov't of Virgin Islands v. Mills, 821 F.3d 448, 463 (3d Cir. 2016); Commonwealth v. Laird, 988 A.2d 618, 629 (Pa. 2010). Accordingly, Hart has not shown his counsel was ineffective where the jury is presumed to follow the trial court's curative instruction to disregard the prosecutor's comment. See Daniels v. Garman, No. CV 18-00687, 2020 WL 2126832, at *10 (E.D. Pa. May 5, 2020), certificate of appealability denied sub nom. Daniels v. Superintendent Rockview SCI, No. 20-2251, 2021 WL 2624181 (3d Cir. June 24, 2021), cert. denied sub nom. Daniels v. Salamon, No. 21-6089, 2021 WL 5435099 (U.S. Nov. 22, 2021). Because Hart's claim of ineffective assistance of counsel for failing to request a mistrial or object to the trial court's cautionary instruction are without merit, appellate counsel

likewise was not ineffective for failing to raise these claims on direct appeal.[3] Real v. Shannon, 600 F.3d 302, 310 (3d Cir. 2010). Thus, Hart is not entitled to habeas relief on this claim.

D. Hart's Claim that His Counsel Was Ineffective for Failing to Have the Jury Voir Dire Proceedings Transcribed is Meritless

In his next claim for relief, Hart argues that his counsel was ineffective for failing to have the jury voir dire proceedings transcribed, which prevented counsel from reviewing those transcripts for a potential claim pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), or for juror bias. Pet. at 64-80. This claim lacks merit.

On PCRA appeal, Hart argued that his appellate counsel was ineffective in ensuring that the transcript related to jury selection was transcribed and reviewed by him prior to the filing of a direct appeal on Hart's behalf. PCRA Super. Ct. Op. at *10. The Superior Court rejected this claim, agreeing with the PCRA court's determination that Hart "failed to demonstrate how he was prejudiced by direct appeal counsel's omission." Id. This determination is not contrary to or an unreasonable application of Strickland. Hart's assertion that he and his counsel were deprived of the opportunity to review the voir dire record to support a completely vague assertion that he was deprived of a fair jury falls far short of showing a reasonable likelihood of a different result on appeal or PCRA review. See, e.g., Richter, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."); Johnson v. Link, No. 17-2624, 2019 WL 11274845, at *17 (E.D. Pa. Dec. 23, 2019) ("Counsel's failure to ensure that the voir dire record was complete did not deprive Petitioner of his Sixth Amendment right to counsel. He has not established prejudice in that he has not indicated what the records would have shown to

[3] Indeed, the Supreme Court recognizes that appellate counsel need not raise every possible issue on appeal: "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

> was attributed to the Commonwealth's request not to schedule the trial during the weeks of Christmas and New Year's Day, was excusable.] When all excludable and excusable time is considered, [Hart] was brought to trial 165 days after his arrest. Thus, the case was tried within the time allotted by Rule 600.

PCRA Super. Ct. Op. at *6 (quoting PCRA Ct. Op. at 8) (second alteration in original). The Superior Court agreed with the PCRA court's analysis and held that Hart's counsel could not be deemed ineffective in failing to raise a meritless claim, specifically rejecting Hart's argument that his defense counsel's requests for continuances did not constitute "excludable time" for Rule 600 purposes. Id.

As an initial matter, Hart's habeas claim is procedurally defaulted because Hart did not argue on PCRA appeal that his counsel was ineffective for failing to raise a constitutional speedy trial claim, and instead limited his argument to failure to seek dismissal of the charges based on a violation of Pennsylvania Rule of Criminal Procedure 600. See PCRA Super. Ct. Op. at *3, *4; Pet. at 82-83. Thus, the claim is not exhausted for purposes of habeas corpus. Gibson v. Scheidelmantel, 805 F.2d 135, 138 (3d Cir. 1986) (citing Picard, 404 U.S. at 277) (for exhaustion, petitioner must have presented same factual predicate and legal theory to the state courts); Santini v. Wenerowicz, No. 13-6183, 2014 WL 6822515, at *8 n.5 (E.D. Pa. Dec. 4, 2014) ("It is well settled [that] a Rule 600 claim does not exhaust a federal speedy trial claim).[4]

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[4] To the extent Hart challenges the Superior Court's determination that his trial did not violate Rule 600, that determination is a matter of state law not subject to federal habeas review. Estelle, 502 U.S. at 68. Moreover, to the extent Hart argues that the state courts' calculation of days related to his Rule 600 claim was an unreasonable determination of the facts pursuant to § 2254(d)(2), his argument likewise does not entitle him to habeas relief. "Section 2254(d)(2) permits an examination of reasonableness of factual determinations underlying a *federal* claim, not a claimed violation of state law." Kim v. Garman, No. 18-CV-3380-PBT, 2020 WL 4228695, at *8 (E.D. Pa. Jan. 31, 2020) (emphasis in original) (citing Wilson v. Corcoran, 562 U.S. 1, 5-6 (2010)), report and recommendation adopted, No. CV 18-3380, 2020 WL 4226499 (E.D. Pa. July 23, 2020). Accordingly, although he raises a federal ineffectiveness claim here, he cannot challenge the Superior Court's underlying conclusion that there was no Rule 600

(Footnote continued on next page)

support a Batson claim."), report and recommendation adopted, No. 17-2624, 2020 WL 7041806 (E.D. Pa. Dec. 1, 2020); cf. Nunez v. Lamas, No. 12-7196, 2014 WL 1492768, at *6 (E.D. Pa. Apr. 15, 2014). Moreover, to the extent Hart argues that a juror who was pregnant should not have been allowed onto the jury, Pet. at 72-74, that claim is likewise meritless. The trial transcript already reflected that one of the jurors was pregnant, see Mar. 28 Tr. at 17, and Hart provides no additional explanation as to how the transcript of the voir dire could have permitted him to further develop a claim that this juror could not be fair and impartial. See, e.g., Hall v. Rozam, No. 11-0921, 2012 WL 3560826 (M.D. Pa. Aug. 16, 2012) ("Petitioner has not demonstrated that there was a reasonable probability that if his trial attorney had a transcript of the preliminary hearing, the result of the trial would have been different."). Consequently, this claim must fail.

E. Hart's Claim that His Counsel Was Ineffective for Failing to Successfully Argue a Speedy Trial Claim Is Procedurally Defaulted and Substantively Meritless

Next, Hart argues that his trial, appellate, and PCRA counsel were all ineffective for not raising a speedy trial claim pursuant to the Sixth Amendment. Pet. at 81-111. This claim is procedurally defaulted and substantively meritless.

As Hart acknowledges, on PCRA appeal Hart argued that his counsel was ineffective for failing to raise a meritorious speedy trial claim pursuant to Pennsylvania Rule of Criminal Procedure 600, which requires a criminal defendant to be brought to trial within one year, not counting excludable time. Pet. at 82; PCRA Super. Ct. Op. at *3, *4. The PCRA court rejected this claim, noting:

> In the instant case, 188 days of the delay were excludable: 35 days due to [Hart] not having an attorney, and 153 days due to defense requests for continuances. In addition, 540 excusable days were due to the difficulty, by the court, in scheduling a capital case for trial. [For instance, on September 20, 2010, the trial court listed the case for trial on March 26, 2012, ruling all but twelve days, which

Because Hart has no way to present the claim to the state courts at this point, see 42 Pa. Con. Stat. Ann. §§ 9544(b), 9545(b), the claim is procedurally defaulted. Furthermore, because Hart's claim is also meritless, he cannot rely on Martinez to excuse the default.

The Constitution's guarantee to a speedy trial is not "quantified into a specified number of days or months." Barker v. Wingo, 407 U.S. 514, 523 (1972). To determine whether there has been a deprivation of the right to a speedy trial, the court must use "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." Id. at 530. Four factors are considered: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. Id. Here, on balance, Hart fails to show any merit to a claim that he was deprived of his Sixth Amendment right to a speedy trial. As to the first factor, a delay of 29 months is sufficient to trigger the initial presumption that Hart was prejudiced. See, e.g., Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year."). However, this delay is shorter than that of other cases in which no Sixth Amendment violation has been found. See, e.g., Vermont v. Brillon, 556 U.S. 81, 84 (2009) (reversing state court's judgment that defendant's speedy-trial right was violated when defendant was tried "[n]early three years" after his arrest on charges); Douglas v. Cathel, 456 F.3d 403, 413-14 (3d Cir. 2006) (rejecting speedy-trial claim where "[t]he trial commenced . . . some three years after [the defendant] was indicted and approximately two years after [counsel] w[as] appointed to represent him"). As to the second factor, the Superior Court found that 540 days were attributable to the trial court's difficulty

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violation by alleging an unreasonable determination of the facts under § 2254(d)(2). Kim, 2020 WL 4228695, at *8.

scheduling a capital case for trial.[5] PCRA Super. Ct. Op. at *6. Pursuant to Barker, busy court dockets are a "neutral" reason for delay that "should be considered," albeit "less heavily." 407 U.S. at 531. An additional 153 days of delay was the result of the defense requests for continuances. PCRA Super. Ct. Op. at *6. With respect to the third factor, Hart did not assert his right to a speedy trial until after he was convicted, and even requested another continuance on the first day of trial, which the trial court denied. See Super. Ct. Op. at *1. Finally, Hart has not sufficiently stated how he was prejudiced by any delay. See, e.g., Heleva v. Brooks, No. 1:07-CV-1398, 2018 WL 338629, at *7 (M.D. Pa. Jan. 9, 2018) (finding that petitioner failed to establish prejudice when he did not claim that the "conditions of his confinement made his pretrial incarceration prejudicial, . . . made no allegations that would establish any prejudice, and . . . offer[ed] no theory as to how the delay impaired his defense[, such as] point[ing] to any witnesses or evidence that became unavailable during the delay"). Hart's PCRA counsel was not ineffective in failing to raise an unmeritorious claim. Real, 600 F.3d at 310. Accordingly, Hart has not met his burden under Strickland and, thus, has not established that he lacked effective PCRA counsel. Without ineffective PCRA counsel, the procedural default of this claim cannot be excused under Martinez. 566 U.S. at 9-13.

F. Hart is not Entitled to Discovery or an Evidentiary Hearing

In his last claim for relief, Hart seeks an evidentiary hearing and discovery. Pet. at 111-12. Habeas petitioners have no absolute right to make discovery demands upon respondents. Indeed, "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to

[5] The Commonwealth eventually elected not to pursue the death penalty. See Mar. 27 Tr. at 16-17.

discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Rather, decisions on discovery requests rest in the sound discretion of the court. See Levi v. Holt, 192 F. App'x 158, 162 (3d Cir. 2006). "Under Rule 6(a) of the Rules Governing Section 2254 cases, a judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of such discovery." Steward v. Grace, 362 F. Supp. 2d 608, 622 (E.D. Pa. 2005) (citation and internal quotation marks omitted). In determining whether to permit discovery, the Third Circuit has noted that "[t]he burden rests upon the petitioner to demonstrate that the sought-after information is pertinent and that there is good cause for its production." Williams v. Beard, 637 F.3d 195, 209 (3d Cir. 2011). "Under the 'good cause' standard, a district court should grant leave to conduct discovery only 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are more fully developed, be able to demonstrate that he [or she] is entitled to relief.'" Pinson v. Oddo, No. 16-1256, 2017 WL 4046815, at *2 (M.D. Pa. Sept. 13, 2017) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)); see also Martin v. Glunt, No. 15-3394, 2018 WL 1620983, at *9 (E.D. Pa. Apr. 4, 2018) (citing Williams, 637 F.3d at 209). Hart's stated claims do not entitle him to habeas relief. Accordingly, his request for discovery and an evidentiary hearing should be denied. See Goldblum v. Klem, 510 F.3d 204, 221 (3d Cir. 2007) (citing Schriro v. Landrigan, 550 U.S. 465, 473 (1993)).[6]

[6] I further recommend that Hart's request for the appointment of counsel be denied. See Pet. at 111. Given that Hart's claims are plainly meritless, appointment of counsel would not benefit either Hart or this Court. See Reese v. Fulcomer, 946 F.2d 247, 263-64 (3d Cir. 1991), cert. denied, 503 U.S. 998 (1991).

IV. CONCLUSION

For all of the foregoing reasons, I recommend that Hart's habeas petition be denied and dismissed. Therefore, I make the following:

RECOMMENDATION

AND NOW, this 29th day of December, 2021, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus be DENIED and DISMISSED. 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.

/s/ Marilyn Heffley
MARILYN HEFFLEY
UNITED STATES MAGISTRATE JUDGE