In the

Supreme Court of the United States

Tyree Lawson,

v.

M. Overmyer, Superintendent of SCI Forest
the District Attorney of Montgomery County
and the Attorney General of Pennsylvania,

APPENDIX IN SUPPORT OF PETITION FOR CERTIORARI RELIEF

Tyree Lawson
State No. JW2704
SCI Phoenix
P.O. Box 244
Collegeville, PA 19426

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2306

TYREE LAWSON,
Appellant

v.

SUPERINTENDENT FOREST SCI;
DISTRICT ATTORNEY MONTGOMERY COUNTY;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. No. 2:14-cv-00135)

SUR PETITION FOR REHEARING

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

Dated: November 15, 2022
Sb/cc: Tyree Lawson
Robert M. Falin, Esq.

CLD-251

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 22-2306

TYREE LAWSON,
Appellant

v.

SUPERINTENDENT FOREST SCI;
DISTRICT ATTORNEY MONTGOMERY COUNTY;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. 2:14-cv-00135)

Present: AMBRO, SHWARTZ, and BIBAS, Circuit Judges

Submitted are

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

(2) Appellant's supplemental request for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. Jurists of reason would not debate the District Court's denial of Appellant's motion under Rules 59(e) of the Federal Rules of Civil Procedure. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Blystone v. Horn, 664 F.3d 397, 411 (3d Cir. 2011). Specifically, Appellant was not entitled have the District Court consider his claim of new evidence because it constituted an unauthorized second or successive habeas petition over which the District Court lacked jurisdiction. See 28 U.S.C. § 2244(b); Gonzalez v. Crosby, 545 U.S. 524, 531 (2005).

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: September 30, 2022
Sb/cc: Tyree Lawson
Robert M. Falin, Esq.
Ronald Eiseberg, Esq.

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

TYREE LAWSON	:	**CIVIL ACTION**
	:	
v.	:	
	:	
M. OVERMYER, Superintendent of SCI Forest, et al., THE DISTRICT ATTORNEY OF THE COUNTY OF MONTGOMERY and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	**NO. 14-135**

ORDER

NOW, this 29th day of June, 2022, upon consideration of the petitioner's F.R.C.P. Rule 60(b)(1) Motion for Relief (Doc. No. 79), the response, and the Petitioner's Opposition to the Respondents' Response, it is **ORDERED** that the motion is **DENIED.**[1]

IT IS FURTHER ORDERED that a certificate of appealability will not issue because there has been no substantial showing of the denial of a constitutional right.

/s/ TIMOTHY J. SAVAGE J.

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[1] The petition is actually a motion for reconsideration. However, it does not satisfy the requirements meriting reconsideration.

A party may move for reconsideration "to correct manifest errors of law or fact or to present newly discovered evidence." *Schumann v. Astrazeneca Pharm., L.P.*, 769 F.3d 837, 848 (3d Cir. 2014) (citation omitted). Under Federal Rule of Civil Procedure 59(e), a judgment may be altered or amended only where: (1) there has been an intervening change in controlling law; (2) new evidence has become available; or (3) there is a need to correct a clear error of law or fact, or to prevent manifest injustice. *Id.* at 848–49 (citation omitted); *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011) (citation omitted); *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). The decision to alter or amend a judgment is discretionary. *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

Petitioner has not shown a clear error of law or any other reason for granting his request for reconsideration.

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

TYREE LAWSON	:	**CIVIL ACTION**
	:	
v.	:	
	:	
M. OVERMYER, Superintendent of SCI Forest, et al., THE DISTRICT ATTORNEY OF THE COUNTY OF MONTGOMERY and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	**NO. 14-135**

MEMORANDUM OPINION

Savage, J. **February 9, 2022**

Petitioner Tyree Lawson, a state prisoner serving a life sentence for murder, has filed a motion under Federal Rule of Civil Procedure 59(e) to amend the January 5, 2021 Order denying his motion to amend his *habeas* petition. The instant motion does not set forth, nor can we discern any, grounds meriting relief under Rule 59(e). It is unclear exactly what judgment he seeks to amend or alter. Liberally construed, we shall treat the motion as one for reconsideration of the January 5, 2021 Order.

Respondents contend that his motion is untimely. A Rule 59(e) motion must be filed within 28 days of the Court's decision. Fed. R. Civ. P. 59(e). The time cannot be extended. Fed. R. Civ. P. 6(b)(2). *See Banister v. Davis*, 140 S.Ct. 1698, 1703 (2020).

The current motion was filed on January 28, 2021. The decision he seeks to amend was made on January 5, 2021, 23 days before he filed his motion under Rule 59(e). Given the closeness of time, we shall assume the prison mailbox rule applies, rendering his filing timely. Nevertheless, we shall deny the motion.

It appears Lawson is attempting to supplement the record that he had submitted to the Third Circuit after we transferred his "Supplemental Claims for Relief Under Rule

60(b)(6)" for consideration as an application for authorization to file a second or successive *habeas* petition. The Third Circuit denied authorization on April 30, 2018. Lawson did not file his motion to supplement his Rule 60(b) motion in this court until December 17, 2020. At that time, there was nothing to supplement or amend because the Third Circuit had denied his Rule 60(b) motion as an impermissible second or successive petition. Thus, we denied his motion to amend.

In short, there is nothing to alter or amend. Nothing has changed. Therefore, we shall deny Lawson's motion under Rule 59(e).

JHG

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

TYREE LAWSON, Petitioner v. SUPERINTENDENT of SCI FOREST M. OVERMYER ET AL.; THE DISTRICT ATTORNEY OF THE COUNTY OF MONTGOMERY; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents	)	Civil Action No. 14-cv-00135

ORDER

NOW, this 27th day of August, 2015, upon consideration of the following documents:

(1) Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, which petition was filed by petitioner Tyree Lawson pro se on January 2, 2014[1] ("Petition"), together with various supporting documents (jointly, Document 1);

(2) Memorandum of Law in Support of Petition for Writ of Habeas Corpus, which memorandum was filed by petitioner pro se on March 17, 2014 ("Petitioner's Memorandum"), together with Exhibits A through Z to Petitioner's Memorandum (jointly, Document 3-1);[2]

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[1] Although the within Petition was filed with the Clerk of Court on January 9, 2014, petitioner certified, under penalty of perjury, that he placed the Petition in the prison mailing system on January 2, 2014. Thus, it is treated as having been filed January 2, 2014 pursuant to the prison mailbox rule. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998); Rule 3(d) of the Rules Governing Section 2254 Habeas Cases in the United States District Courts.

[2] On March 17, 2014 petitioner filed a Motion for Acceptance of Accompanying Memorandum by In Forma Pauperis[]& Mailbox Rule. (Document 3)

(Footnote 2 continued):

(3) Respondent/Commonwealth's Response in Opposition to Petition for Writ of Habeus Corpus, which response was filed October 3, 2014 (Document 15) ("Commonwealth's Response"), together with Exhibits A through C to the Commonwealth's Response (jointly, Document 15-1);

(4) [Petitioner's] Objection to Filed State Court Record and Request for Copies of Each Document Filed for Authentication and/or Certified List Detailing All Documents Individually, which objection was filed November 17, 2014 (Document 19);

(5) Petitioner's Offer of Proof Demonstrating the Last State Court's Trial Record, which offer of proof was filed December 12, 2014, together with a copy of a letter dated February 19, 2014 from the Montgomery County Clerk of Courts and Filings Information concerning petitioner's state court proceedings (jointly, Document 20);

(6) Addendum to Petitioner's Objection to the State Court's Filed Record and Request for Copies of Each Document and/or Certified List Detailing All Documents Individually for Authentication Purpose, which addendum was filed by petitioner pro se December 29, 2014 ("Petitioner's Addendum to Objection to Record"), together with Exhibits A through G to Petitioner's Addendum to Objection to Record (jointly, Document 24);

(7) Petitioner's Response to Respondents' Answer, which response was filed January 9, 2015 ("Petitioner's Response"), together with Exhibits A through GG to Petitioner's Response (jointly, Document 26);

(Continuation of footnote 2):

("Motion for Acceptance") with Petitioner's Memorandum and Exhibits A through Z to Petitioner's Memorandum attached to the Motion for Acceptance. Chief United States Magistrate Judge Carol Sandra Moore Wells granted the Motion for Acceptance by Order dated and filed February 26, 2015 (Document 28). Petitioner's Memorandum and the exhibits thereto were considered by Magistrate Judge Wells and have been considered by me.

(8) Report and Recommendation of Chief United States Magistrate Judge Carol Sandra Moore Wells dated and filed February 26, 2015 (Document 27); and

(9) Petitioner's Objection to the Report and Recommendation, which objection was filed March 16, 2015 ("Petitioner's Objection"), together with the Appendix to Petitioner's Objection (jointly, Document 31);

and upon consideration of the Pennsylvania state court record which was filed electronically in this court on September 17, 2014 (Documents 11 through 11-222);[3] it appearing that petitioner's objections to Chief Magistrate Judge Wells' Report and Recommendation are a restatement of the issues raised in his underlying petition for habeas corpus relief and are without merit; it further appearing, after de novo review of this matter, that Chief Magistrate Judge Wells' Report and Recommendation correctly determined the legal and factual issues presented in the petition for habeas corpus relief,

IT IS ORDERED that petitioner's objections to Chief Magistrate Judge Wells' Report and Recommendation are overruled.

IT IS FURTHER ORDERED that Chief Magistrate Judge Wells' Report and Recommendation is approved and adopted.[4]

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[3] The state court record was filed electronically pursuant to my Order dated September 12, 2014 and filed September 15, 2014 (Document 7).

[4] When objections are filed to a magistrate judge's report and recommendation, I am required to make a de novo determination of those portions of the report, findings, or recommendations made by the magistrate judge to which there are objections. 28 U.S.C. § 636(b)(1); Rule 72.1(IV)(b) of the Rules of Civil Procedure for the United States District Court for the

(Footnote 4 continued):

IT IS FURTHER ORDERED that the within Petition is dismissed without an evidentiary hearing.

(Continuation of footnote 2

Eastern District of Pennsylvania. Furthermore, district judges have wide latitude regarding how they treat the recommendations of the magistrate judge. See United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980).

Indeed, by providing for a de novo determination, rather than a de novo hearing, Congress intended to permit district court judges, in the exercise of their sound discretion, the option of placing whatever reliance they chooses to place on the magistrate judge's proposed findings and conclusions. I may accept, reject or modify, in whole or in part, any of the findings or recommendations made by the magistrate judge. See Raddatz, supra.

Here, Petitioner's Objection purports to refute the Report and Recommendation in its entirety. Petitioner also raises objections regarding both the Pennsylvania state court's procedural record and the appointment of stand-by trial counsel by the state court.

To the extent that Petitioner's Objection contests the conclusions presented in the Report and Recommendation, I find that petitioner merely restates his underlying constitutional claims. Magistrate Judge Wells correctly determined petitioner's first and second claims to be barred by Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed. 2d 1067 (1976), and petitioner's third, fourth, and fifth claims to be procedurally defaulted. (See Report and Recommendation at pages 3-5 concerning first and second claims, pages 5-9 concerning third, fourth, and fifth claims.) To the extent that petitioner objects to those determinations, his objections are overruled.

Petitioner's additional objection concerning the state court record is without merit. Despite petitioner's assertion to the contrary, the state court record was not filed secretly. Rather, pursuant to my September 12, 2014 Order, the state court record was filed electronically on this court's docket. Moreover, petitioner attached numerous state court documents to his various filings in this action. Accordingly, petitioner's objection that he has been denied "equal protection, due process and an effective legal review" (Petitioner's Objection at page 2) is overruled.

Petitioner's assertion that he was denied pro se status through the State Court's "forced" appointment of counsel (Petitioner's Objection at page 4) is also without merit. Petitioner's own exhibits demonstrate that he not only assented to appointment of stand-by trial counsel from the state court, but actually requested assistance from such counsel. (Appendix to Petitioner's Objection at Pages 35, 40, 42, and 56.).

Upon review of the Report and Recommendation, together with de novo review of this matter, I conclude that the Report and Recommendation correctly determines the legal and factual issues raised by the petitioner. Accordingly, I approve and adopt Magistrate Judge Wells' Report and Recommendation and overrule Petitioner's Objection to the Report and Recommendation

IT IS FURTHER ORDERED that a Certificate of Appealability is denied.[5]

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case closed for statistical purposes.

BY THE COURT:

James Knoll Gardner
United States District Judge

[5] Because petitioner has not shown the denial of a federal constitutional right and has not met statutory requirements to have his case heard, and that no reasonable jurist could find this ruling debatable, a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542, 555 (2000).

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

TYREE LAWSON	:	CIVIL ACTION
	:	
v.	:	
	:	
M. OVERMYER, *et al.*	:	NO. 14-135

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
CHIEF UNITED STATES MAGISTRATE JUDGE February 26, 2015

Presently before the court is a Petition for a Writ of Habeas Corpus filed by Tyree Lawson ("Petitioner") pursuant to 28 U.S.C. § 2254. Petitioner, who is currently serving a nineteen to sixty year term of incarceration at the State Correctional Institution-Forest, seeks habeas relief based on alleged violations of his Fourth Amendment rights, right to a speedy trial, double jeopardy guarantee, and right to be free from cruel and unusual punishment. The Honorable James Knoll Gardner referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Petitioner not be afforded habeas relief.

I. FACTUAL AND PROCEDURAL HISTORY[1]

The facts and circumstances leading to Petitioner's conviction and sentence follow:

> [Petitioner's] convictions arose out of his role in a vicious home invasion robbery, which he committed with his co-conspirators, Andrew Bing and Michael Porter. At trial it was established that on June 12, 2006, at approximately 5:30 a.m., Nancy Hevener was going about her usual morning routine at her home located in Glenside, Montgomery County. While reentering her home from the outside, she was shoved from behind by an assailant wearing a stocking over his face. (Jury Trial, V. 2, 3/8/11 p. 174-175). Another assailant, also with a stocking over his face,

[1]This factual and procedural history was gleaned from Petitioner's Habeas Corpus Petition, inclusive of all exhibits thereto, the Commonwealth's Response, inclusive of all exhibits thereto, and Petitioner's Response to the Commonwealth's Response, inclusive of all exhibits thereto, and the state court record.

> rushed past Mrs. Hevener into her home. Id. at 175. Mrs. Hevener screamed for her husband. Id. at 176. When Joseph Hevener heard his wife scream, he jumped up and saw two men in his kitchen running towards him. (Jury Trial, V. 1, 3/7/11 p. 31-32). A fight between the men ensued. During the fight, one of the assailants hit Mr. Hevener over the head repeatedly with various items including the kitchen coffee maker, and the other assailant was trying to gouge his eye out. Id. at 32-35. Mrs. Hevener jumped on the back of one of the assailants, trying to distract him from her husband. (Jury Trial, V. 2, 3/8/11 p. 179). The assailant was hitting Mrs. Hevener, but she was able to get away and ran to a neighbor's home. Id. at 180-181. Meanwhile, after hitting Mr. Hevener on the head with the coffee maker, the other assailant ran away. Both assailants escaped in Mr. Hevener's truck. (Jury Trial, V. 1, 3/7/11 p. 36). [Petitioner] was eventually linked to the crime, and was arrested on January 13, 2009.
>
> [Petitioner] had been represented by a series of counsel; however, [Petitioner] decided that he wanted to waive his right to counsel and to proceed *pro se*. Accordingly, on May 4, 2010, this Court conducted a colloquy pursuant to Pa. R. Crim. P. 121 to ensure that [Petitioner's] waiver of counsel was knowing, intelligent and voluntary. At the conclusion of the proceeding this Court determined that it was. Stand-by counsel was also appointed.
>
> On March 7, 2011, a Motions Hearing was held, in which [Petitioner's] *pro se* Omnibus Pretrial Motion and his *pro se* Motion to Dismiss Pursuant to Rule 600 were heard. Both motions were denied. On the same day, the three-day jury trial commenced. At the conclusion of trial, the jury found [Petitioner] guilty of [three counts of robbery-serious bodily injury, burglary, conspiracy to commit robbery and conspiracy to commit burglary.]

Commonwealth v. Lawson, CP-46-CR 542-2009, slip op. at 1-3 (Montgomery Cty. Sept. 14, 2011). Petitioner filed a timely direct appeal. *Id.* at 3. On August 7, 2012, the Pennsylvania Superior Court affirmed his judgment of sentence.[2] *Commonwealth v. Lawson*, No. 1705 EDA 2011, slip op. at 1-11 (Pa. Super. Ct. Aug. 7, 2012) ("2012 Super. Ct. Op."). The Pennsylvania

[2]On direct appeal, the Superior Court discerned the following claims: (1) whether the trial court improperly dismissed Petitioner's suppression motion as untimely; (2) whether the trial court improperly denied his speedy trial motion (filed pursuant to Pa. R. Crim. P. 600); (3) whether his claims of judicial and prosecutorial misconduct were properly raised; and (4) whether his challenge to his sentence was properly raised. 2012 Super. Ct. Op. at 2-3.

Supreme Court denied allowance of appeal ("*allocatur*") on January13, 2013. Petition ("Pet.") at 3.[3] The U.S. Supreme Court denied *certiorari* on June 10, 2013. *Id.*

On January 2, 2014,[4] Petitioner filed the instant habeas petition claiming that: (1) the trial court improperly denied him a hearing concerning his motion to suppress evidence; (2) his arrest and arrest warrants lacked probable cause, because the detective who submitted the affidavits of probable cause included false information; (3) he was denied his Sixth Amendment right to a speedy trial; and Petitioner's aggregate term of incarceration violates both his (4) Fifth Amendment right to be free from double jeopardy and (5) his Eight Amendment right to be free from cruel and unusual punishment. Pet. at 5, 7, 9, 10-11; Pet'r Mem. of Law at 8-22. The Commonwealth responds that all of Petitioner's claims are procedurally defaulted or meritless. Response ("Resp.") at 10-28. This court finds that Petitioner cannot obtain habeas relief based on his first two claims and his other claims are procedurally defaulted.

II. DISCUSSION

A. Suppression of Evidence and Probable Cause Claim – Claims One and Two

Petitioner first claims that the state court erred in denying him a suppression hearing on the ground that he had failed to timely file his suppression motion. Pet. at 5; Pet'r Mem. of Law at 8-11. Second, Petitioner claims that the search and arrest warrants procured in his case were devoid of probable cause, because the officer who prepared the affidavits of probable cause included materially false information. Pet. at 7; Pet'r Mem. of Law at 11-15. The Commonwealth responds to both claims collectively, asserting that they are procedurally

[3]The court uses the pagination the Clerk of Court imposed upon the habeas petition when it was scanned for purposes of electronic filing.

[4]The Clerk of Court docketed this habeas corpus petition on January 9, 2014. However, Petitioner is a *pro se* inmate, hence, his petition is deemed filed on the date he gave it to prison officials for mailing. *See Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Under penalty of perjury, Petitioner stated that he placed his habeas petition in the prison mailing system on January 2, 2014. Pet. at 16. Hence, this court will deem January 2, 2014 as the filing date pursuant to *Burns*.

defaulted. Resp. at 10-14. This court finds that the *Stone v. Powell*, 428 U.S. 465 (1976) prevents this court from providing Petitioner relief on his second claim and that the first claim does not avoid the *Stone v. Powell* bar.

In *Stone*, the Supreme Court concluded that, if a state provides a full and fair opportunity to litigate a Fourth Amendment claim, later federal habeas relief may not be granted on that claim. *Stone*, 428 U.S. at 494. In the Third Circuit, a full and fair opportunity to litigate exists so long as there is no structural defect in the state system that prevents Fourth Amendment claims from being considered. *Marshall v. Hendricks*, 307 F.3d 36, 82 (3d Cir. 2002) (citing *Boyd v. Mintz*, 631 F.2d 247, 250-51 (3d Cir. 1980)). Furthermore, this circuit has held that a state court's incorrect or summary resolution of Fourth Amendment claims does not amount to a structural defect that surmounts the *Stone* bar. *Marshall*, 307 F.3d at 82 (citing *Gilmore v. Marks*, 799 F.2d 50, 57 (3d Cir. 1986)).

Petitioner's second claim seeks to have this court determine that his Fourth Amendment rights were violated. *Stone* clearly precludes this court from doing so. 428 U.S. at 494. In his first claim, Petitioner seeks to avoid the *Stone* bar by arguing that the state court's refusal to conduct a suppression hearing meant that he did not have a full and fair opportunity to litigate his Fourth Amendment claim. However, the state court denied him a hearing, because it found that he had failed to comply with the deadline imposed by the state rules of criminal procedure for filing his suppression motion. *See* 2012 Super. Ct. Op. at 3-4. This is a state law determination, which this court must accept, s*ee Estelle v. McGuire*, 502 U.S. 62, 67-68 (1990), and which precludes this court from finding that there is a structural defect that prevented litigation of Petitioner's Fourth Amendment claim. *See Marshall*, 307 F.3d at 82. Further, the Superior Court actually determined that there was probable cause to support the search and arrest warrants

Petitioner challenges herein. *See* 2012 Super. Ct. Op. at 4-5. Hence, the *Stone* bar cannot be surmounted. *See Gilmore*, 799 F.2d at 57.

B. Exhaustion and Procedural Default

A habeas petitioner must exhaust state court remedies before obtaining habeas relief. 28 U.S.C. § 2254(b)(1)(A). The traditional way to exhaust state court remedies in Pennsylvania was to fairly present a claim to the trial court, the Pennsylvania Superior Court and the Pennsylvania Supreme Court. *See Evans v. Court of Common Pleas, Delaware County*, 959 F.2d 1227, 1230 (3d Cir. 1992). However, in light of a May 9, 2000 order of the Pennsylvania Supreme Court, it is no longer necessary for Pennsylvania inmates to seek *allocatur* from the Pennsylvania Supreme Court in order to exhaust state remedies. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004).

If a habeas petitioner has presented his claim to the state courts, but the state courts have declined to review the claim on its merits, because the petitioner failed to comply with a state rule of procedure when presenting the claim, the claim is procedurally defaulted. *See Harris v. Reed*, 489 U.S. 255, 262-63 (1989). When a state court has declined to review a claim based on a procedural default and the claim is not later addressed on the merits by a higher court, the habeas court must presume that the higher state court's decision rests on the procedural default identified by the lower state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Finally, when a habeas petitioner has failed to exhaust a claim and it is clear that the state courts would not consider the claim because of a state procedural rule, the claim is procedurally defaulted.[5] *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

[5] A common reason the state courts would decline to review a claim that has not been presented previously is the expiration of the statute of limitations for state collateral review. *See Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001).

Procedurally defaulted claims cannot be reviewed unless "the [petitioner] can 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. In order to demonstrate cause, the petitioner must show that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the state's procedural rule." *Id.* at 753 (citation omitted). Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; (3) attorney error that constitutes ineffective assistance of counsel. *Id.* at 753-54.

The fundamental miscarriage of justice exception is limited to cases of "actual innocence." *Schlup v. Delo*, 513 U.S. 298, 321-22 (1995). In order to demonstrate that he is "actually innocent," the petitioner must present new, reliable evidence of his innocence that was not presented at trial.[6] *Id.* at 316-17, 324. The court must consider the evidence of innocence presented along with all the evidence in the record, even that which was excluded or unavailable at trial. *Id.* at 327-28. Once all this evidence is considered, the petitioner's defaulted claims can only be reviewed if the court is satisfied "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

1. Sixth Amendment Violation - Claim Three

Petitioner claims that he was denied his Sixth Amendment right to a speedy trial. Pet. at 9; Pet'r Mem. of Law at 15-20. The Commonwealth argues that Petitioner did not exhaust, and procedurally defaulted, his Sixth Amendment claim, because, in the state court, he relied solely

[6]This evidence need not be directly related to the habeas claims the petitioner is presenting, because the habeas claims themselves need not demonstrate that he is innocent. *See Schlup*, 513 U.S. at 315.

upon the state criminal procedure rule ("Rule 600") governing speedy trials. Resp. at 15-18. This court agrees that Petitioner failed to exhaust a Sixth Amendment speedy trial claim on direct appeal.

In his direct appeal brief to the Superior Court, Petitioner asserted that the delay in bringing him to trial violated, *inter alia*, his Sixth Amendment right to a speedy trial. *See Commonwealth v. Lawson*, Brief of Appellant at 20.[7] However, Petitioner relied solely upon Pa. R. Crim. P. 600, which invokes a defendant's state law speedy trial rights, not the U.S. Supreme Court's speedy trial jurisprudence. *See id.* at 20-23. The Third Circuit has held that the speedy trial right afforded by the Pennsylvania rule of criminal procedure is not consistent with the Sixth Amendment right to a speedy trial, as defined by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). *See Wells v. Petsock*, 941 F.2d 253, 256 (3d Cir. 1991). Hence, by raising a Rule 600 claim, Petitioner did not exhaust a Sixth Amendment claim. *See Wells*, 941 F.2d at 256.

Petitioner can no longer exhaust his Sixth Amendment speedy trial claim, because the time to file a Post Conviction Relief Act ("PCRA") petition has expired.[8] Therefore, claim three is procedurally defaulted. *See Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001). Petitioner has not advanced cause and prejudice, nor provided new, reliable evidence of his innocence. Instead, he, incorrectly, asserts that, despite relying upon Rule 600 and failing to rely upon *Barker v. Wingo* or any other U.S. Supreme Court cases, he exhausted a Sixth Amendment speedy trial claim. Pet'r Response to the Respondent's Answer ("Reply") at 17-23. This argument by Petitioner does not excuse the default, so he cannot obtain relief on his Sixth

[7]The Commonwealth has provided the court with a copy of the Petitioner's direct appeal brief to the Superior Court.
[8]Petitioner's conviction became final on direct appeal when the U.S. Supreme Court denied *certiorari* on June 10, 2013. *See* 42 Pa. Cons. Stat. Ann. § 9545(b)(3). The statute of limitations expired one year later, on June 10, 2014. *See id.* § 9545(b)(1).

Amendment speedy trial claim.

2. Double Jeopardy - Claim Four

Petitioner's fourth claim is that the trial court's imposition of consecutive (rather than concurrent) sentences for the charges of which he was convicted violates his Double Jeopardy Clause right to be free from consecutive punishment. Pet. at 10-11; Pet'r Mem. of Law at 20-22. The Commonwealth maintains that Petitioner's sentencing claim is procedurally defaulted, because the Superior Court found that he had failed to comply with Pa. R. App. P. 2119(f). Resp. at 27-29. This court agrees that claim four is procedurally defaulted.

On direct appeal, the Superior Court refused to consider any of Petitioner's challenges to his sentence, because they addressed the discretionary aspects of his sentence and Petitioner had failed to comply with Pa. R. App. P. 2119(f)'s requirement that he file an appellate brief that contains a concise statement of reasons for allowance of appeal of the sentence. 2012 Super. Ct. Op. at 10-11. Failure to comply with Pa. R. App. P. 2119(f) is a procedural default, barring habeas review. *See Miles v. Lamas*, Civ. A. No. 12-6839, 2013 WL 2237582, *10 (E.D. Pa. May 21, 2013); *Bookard v. Tennis*, Civ. A. No. 05-5740, 2001 WL 20222097, *6 (E.D. Pa. July 10, 2007).

Petitioner has not advanced cause and prejudice, nor provided new, reliable evidence of his actual innocence to excuse the default. Instead, Petitioner argues that, inasmuch as he is challenging the legality of his sentence, not the discretionary aspects of his sentence, the Superior Court was incorrect to impose the requirements of Pa. R. App. P. 2119(f) on his Double Jeopardy Clause claim. Reply at 24-25. However, this court lacks authority to consider whether the Superior Court properly applied its own procedural rule. *Tillery v. Horn*, 142 Fed. Appx. 66, 68 (3d Cir. 2005) (non precedential). Rather, this court must accept that Pa. R. App. P. 2119(f)

did apply to Petitioner's claim and, since he has failed to present a proper reason to excuse the procedural default, may not consider his claim on its merits. *Id.*

3. Eighth Amendment - Claim Five

Petitioner further asserts that the trial court's imposition of consecutive (rather than concurrent) sentences for the charges of which he was convicted violates his Eight Amendment right to be free from cruel and unusual punishment. Pet. at 10; Pet'r Mem. of Law at 20-22. The Commonwealth responds that Petitioner failed to present this claim to any state court. Resp. at 26-27. Petitioner correctly concedes that he failed to exhaust his Eighth Amendment claim. Reply at 23.

Petitioner cannot now return to state court to exhaust his Eighth Amendment claim, because the time to file a PCRA petition has expired. *See infra* n.8. Hence, the claim is procedurally defaulted. *See Keller*, 251 F.3d at 415. Petitioner has not advanced cause and prejudice, nor provided new, reliable evidence of his innocence. He merely contends that, because his sentence was excessive, his Eighth Amendment claim should be heard, notwithstanding his failure to properly exhaust it. Reply at 23-25. This court holds, however, that, since Petitioner cannot excuse the default, this claim must be dismissed on procedural grounds.

III. CONCLUSION

All of Petitioner's claims are barred from habeas review by *Stone v. Powell*, 428 U.S. 465 (1976), or procedural default. Reasonable jurists would not debate this court's procedural dispositions of Petitioner's claims; therefore a certificate of appealability should not issue for any claim. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, I make the following:

ECOMMENDATION

AND NOW, this 26th day of February, 2015, for the reasons contained in the preceding Report, it is hereby **RECOMMENDED** that Petitioner's claims be **DISMISSED,** without an evidentiary hearing. Petitioner has neither demonstrated that any reasonable jurist could find this court's rulings debatable, nor shown denial of any federal constitutional right; hence, there is no probable cause to issue a certificate of appealability.

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

It be so **ORDERED**.

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

Additional material from this filing is available in the Clerk's Office.