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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-2599**

DANIEL J. ERB, Appellant

VS.

SUPERINTENDENT HUNTINGDON SCI; ET AL.

(E.D. Pa. Civ. No. 2:20-cv-03492)

Present: JORDAN, PORTER, and PHIPPS, 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

Appellant's request for a certificate of appealability is denied. Assuming for the sake of argument that reasonable jurists would debate the District Court's conclusion that it was not possible for Appellant to "meet the demands of equitable tolling," reasonable jurists would nevertheless agree with the conclusion that, for substantially the reasons set forth in the Magistrate Judge's Report and Recommendation, Appellant's habeas petition fails to "state[] a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Mag. J. R. & R. 15-25.

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: December 6, 2023
Tmm/cc: Daniel J. Erb
Robert M. Falin, Esq.

A True Copy:

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

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DANIEL J. ERB, Petitioner,	:	
v.	:	No. 2:20-cv-3492
KEVIN KAUFFMAN and DISTRICT ATTORNEY OF MONTGOMERY COUNTY, Respondents.	:	

OPINION
Report and Recommendation, ECF No. 33 - Adopted in Part

Joseph F. Leeson, Jr.
United States District Judge

August 10, 2023

I. INTRODUCTION

Petitioner Daniel Erb filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 2017 Montgomery County conviction. Magistrate Judge David R. Strawbridge issued a Report and Recommendation ("R&R") recommending that the habeas corpus claims be denied and dismissed, to which Erb has filed objections. For the reasons set forth below, the R&R is adopted in part and the habeas petition is dismissed as untimely.

II. BACKGROUND

Magistrate Judge Strawbridge thoroughly discussed the factual and procedural history of the case, which will not be repeated herein. *See* R&R 2-5, ECF No. 33. Of note, Erb pled guilty in the Montgomery County Court of Common Pleas on May 22, 2017, to one count of Involuntary Deviate Sexual Intercourse with a child ("IDSI"), one count of Endangering the Welfare of a Child, and one count of Indecent Assault of a complainant less than thirteen (13)

Rcd 8/15/23
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years of age.[1] These charges arose from Erb's repeated touching of his step-daughter's vaginal area, as well as a singular instance in which he placed his mouth on her vaginal area. At the time of the events, Erb's step-daughter was between eight and eleven years old. Erb was sentenced on May 22, 2017, to the parties' negotiated sentence of six (6) to fifteen (15) years of imprisonment on the IDSI count followed by two (2) concurrent sentences of five (5) years of probation on the Indecent Assault and Endangering the Welfare of a Child counts. Erb did not file a direct appeal.

On May 10, 2018, Erb filed a petition for writ of habeas corpus in the trial court, which the court construed as a petition pursuant to the Post Conviction Relief Act ("PCRA"). On or about September 24, 2018, the PCRA court issued notice of intent to dismiss the petition without a hearing and gave Erb twenty (20) days to respond. Erb filed a request for an extension of time, which was denied. The PCRA petition was dismissed on October 18, 2018. Seven (7) months later, on May 17, 2019, Erb inquired of the PCRA court the status of his petition and extension request. After receiving the PCRA court's response, Erb, on June 12, 2019, filed a notice of appeal from the PCRA court's order dismissing his PCRA petition. On June 11, 2020, the Pennsylvania Superior Court quashed the appeal as untimely, rejecting Erb's argument that he had not received the PCRA court's order of dismissal and, alternatively, finding that his petition was without merit. *See Commonwealth v. Erb*, 237 A.3d 1052 (Pa. Super. Ct. 2020).

On July 9, 2020, Erb filed a "Request for Stay, Extension of Time, and Amendment" in the above-captioned action seeking an extension of time to file a petition for habeas corpus and citing the unavailability of a typewriter, his unsuccessful attempts "to acquire the necessary means to perfect his legal documents," and prison shutdowns due to the coronavirus pandemic to

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[1] Pursuant to a plea agreement, the Commonwealth nolle prossed the remaining forty-five (45) counts.

Rcd 8/15/23
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explain his need for additional time. ECF No. 1. On August 13, 2020, Erb filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting fourteen (14) grounds for relief from his 2017 conviction and sentence. *See* Habeas, ECF No. 4. In Response, the Montgomery County District Attorney's Office argued the petition is untimely. *See* Resp., ECF No. 20. Erb filed a traverse in opposition to the Response and a Motion for Summary Judgment. *See* Traverse, ECF No. 23; SJ Mot., ECF No. 32. Despite being ordered to file a supplemental response addressing the merits, the District Attorney's Office failed to respond further.

On May 10, 2023, Magistrate Judge Strawbridge issued a R&R finding that the habeas petition is untimely, but that additional factual development of the record might[2] allow Erb to meet the demands of equitable tolling. *See* R&R 12-14. In lieu of scheduling a hearing to expand the record regarding the untimeliness issue, Magistrate Judge Strawbridge addressed the merits of the habeas claims. *See id.* 14-24 ("In the interests of judicial economy, however, we will instead present and address the claims raised, which may be resolved without need of a hearing or expansion of the record."). The R&R analyzes the claims and concludes that each of Erb's claims are meritless or procedurally defaulted. *See id.* Erb filed objections to the R&R on June 28, 2023. *See* Objs., ECF No. 36.

III. LEGAL STANDARDS

A. Report and Recommendation – Review of Applicable Law

When objections to a report and recommendation have been filed under 28 U.S.C. § 636(b)(1)(C), the district court must make a de novo review of those portions of the report to which specific objections are made. *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989);

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[2] The R&R states that "[w]ith sufficient development of the factual record, we view it as *possible*, although not *probable*, that Petitioner could meet the demands of the equitable tolling doctrine as to bring his federal filing within the AEDPA one-year limitations period." R&R 14.

Goney v. Clark, 749 F.2d 5, 6-7 (3d Cir. 1984) ("providing a complete de novo determination where only a general objection to the report is offered would undermine the efficiency the magistrate system was meant to contribute to the judicial process"). "District Courts, however, are not required to make any separate findings or conclusions when reviewing a Magistrate Judge's recommendation de novo under 28 U.S.C. § 636(b)." *Hill v. Barnacle*, 655 F. App'x. 142, 147 (3d Cir. 2016). The district "court may accept, reject, or modify, in whole or in part, the findings and recommendations" contained in the report. 28 U.S.C. § 636(b)(1)(C).

B. Equitable Tolling - Review of Applicable Law

The Supreme Court of the United States has held that the federal habeas statute of limitations is subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 648-49 (2010). Equitable tolling is allowed only if the petitioner shows: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). "The diligence required for equitable tolling purposes is 'reasonable diligence.'" *Id.* at 653. The reasonable diligence "obligation does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period appellant is exhausting state court remedies as well." *LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005). Whether a petitioner has been diligently pursuing his rights is a fact specific determination. *See Munchinski v. Wilson*, 694 F.3d 308, 331 (3d Cir. 2012). Equitable tolling is appropriate when, for example: (1) the state has actively misled the petitioner regarding his appellate rights; (2) the petitioner has in some extraordinary way been prevented from asserting his rights; or (3) the petitioner has timely asserted his rights but in a wrong forum. *See Urcinoli v. Cathel*, 546 F.3d 269, 272 (3d Cir. 2008); *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999). The Third Circuit Court of Appeals has emphasized

Rcd 8/15/23 DJE

that equitable tolling should be applied sparingly. *See LaCava*, 398 F.3d at 275; *Schlueter v. Varner*, 384 F.3d 69, 75–76 (3d Cir. 2004).

C. Certificate of Appealability – Review of Applicable Law

A certificate of appealability ("COA") should only be issued "if the petitioner 'has made a substantial showing of the denial of a constitutional right.'" *Tomlin v. Britton*, 448 F. App'x 224, 227 (3d Cir. 2011) (citing 28 U.S.C. § 2253(c)). "Where a district court has rejected the constitutional claims on the merits, . . . the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

IV. ANALYSIS

After de novo review, this Court agrees with Magistrate Judge Strawbridge that the § 2254 habeas petition is untimely. *See* R&R 12-13. Erb's conviction became final on June 21, 2017. Three hundred twenty-three (323) days later, he timely filed a PCRA petition on May 10, 2018. He therefore had forty-two (42) days after resolution of his PCRA petition to seek federal habeas review. *See* 28 U.S.C. § 2244(d) (providing that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court" and excluding the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending"). Erb's PCRA petition was dismissed on October 18, 2018, and his notice of appeal dated June 12,

2019, was untimely. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Accordingly, the time for Erb to seek federal habeas relief expired on December 31, 2018, but the instant action was not initiated until July 9, 2020.

This Court further agrees with the Magistrate Judge's suggestion that Erb did not act with due diligence between October 2018 and May 2019. *See* R&R 14 n.7. However, this Court finds it is *not* possible, with or without further factual development, that Erb can meet the demands of equitable tolling because even if he were able to show that extraordinary circumstances prevented his timely filing, he has not shown reasonable diligence. *See LaCava*, 398 F.3d at 276-78 (concluding without a hearing that even if LaCava's delayed notice constituted extraordinary circumstances, he did not exercise the requisite due diligence to ensure that his claims were proceeding through the state courts and instead allowed twenty-one (21) months to elapse before inquiring about the status of his appeal). Erb had only six (6) weeks remaining after his PCRA proceedings were complete to file a federal habeas petition. *See* 28 U.S.C. § 2244(d). With this knowledge and despite being advised by the PCRA court on October 2, 2018,[3] that it intended to dismiss his PCRA petition without a hearing, Erb waited until May 2019 to first inquire into the status of his case. Erb was not reasonably diligent during these seven (7) months. *See Pennington v. Tice*, 365 F. Supp. 3d 579, 586 (E.D. Pa. 2019) (determining that the petitioner's failure to contact anyone for more than four (4) months to inquire about the status of his appeal was not reasonable diligence and distinguishing the longer delay in *LaCava* due to the limited amount of time the petitioner had remaining on his one-year

[3] The PCRA court's notice of intent to dismiss is dated September 24, 2018, gave the parties twenty (20) days to respond, was mailed to the parties on September 27, 2018, and was admittedly received by Erb on October 2, 2018. *See* Notice, Ex. 12, ECF No. 4; Traverse, Ex. A.

limitations period), *COA denied Pennington v. Superintendent Smithfield SCI*, No. 19-2109, 2019 U.S. App. LEXIS 34053 (3d Cir. Sep. 5, 2019); *Brown v. Mason*, No. 20-5234, 2022 U.S. Dist. LEXIS 124476, at *9 (E.D. Pa. Mar. 30, 2022) (concluding that the petitioner's six-month delay before inquiring about the status of his PCRA petition after receiving the PCRA court's notice of intent to dismiss did "not establish the diligence necessary for equitable tolling"), *adopted* No. 20-5234 at ECF No. 69-70, *COA denied* No. 20-5234 at ECF No. 75.

Consequently, there is no need for an evidentiary hearing because Erb's lack of reasonable diligence precludes the application of equitable tolling. *See LaCava*, 398 F.3d at 276-78 (refusing to remand for an evidentiary hearing where the petitioner did not exercise the requisite due diligence). Erb's habeas corpus petition is dismissed as untimely. Erb's objections, which relate primarily[4] to the merits of his claims, are overruled.

V. CONCLUSION

After applying de novo review, this Court finds that Erb has not shown reasonable diligence to allow for equitable tolling. The habeas corpus petition is dismissed as untimely. There is no basis for the issuance of a certificate of appealability because jurists of reason would not find it debatable that the petition is time-barred and is not subject to equitable tolling.

A separate Order will be issued.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

[4] Erb also objects to the Magistrate Judge's findings of procedural default. Erb complains about his limited law library access and lack of trial court records the first four (4) months after his 2017 conviction. To the extent Erb may have intended this objection to also apply to the equitable tolling issue, it does not impact the reasonable diligence analysis because this Court is concerned with Erb's failure to act between October 2018 and May 2019.

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

DANIEL ERB, Petitioner,	:	CIVIL ACTION
v.	:	
KEVIN KAUFFMAN, *et al.*, Respondents	:	NO. 20-3492

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

May 10, 2023

Before the Court for Report and Recommendation is the *pro se* petition of Daniel Erb ("Petitioner") for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated at State Correctional Institute – Huntingdon. He was sentenced to six to fifteen years in state prison followed by two concurrent five-year terms of probation by the Montgomery County Court of Common Pleas on May 22, 2017 after pleading guilty to involuntary deviate sexual intercourse with a child, endangering the welfare of a child, and indecent assault of a complainant less than thirteen years of age. He seeks federal habeas relief on fourteen grounds. For the reasons set out below, we conclude that Petitioner's claims are either noncognizable, procedurally defaulted, or without merit, as well as potentially untimely. Accordingly, we recommend that the petition be denied and dismissed.

I. FACTUAL AND PROCEDURAL HISTORY[1]

In 2016, Petitioner's step-daughter told her mother that Petitioner had been touching her on her private parts on the outside of and underneath her clothing. She said that this contact occurred between 2012 and 2015, when she was between eight and eleven years old, and that it occurred in previous family residences in York County, Pennsylvania as well as in the Montgomery County home to which they relocated in August 2015. On August 2, 2016, mother and child went to the local police department to report this behavior. Incident Report Form, Pet. Appx. B, Ex. 4. On that same day, police interviewed Petitioner, and he admitted to the sexual contact with his step-daughter, although he claimed that she initiated the touching by placing his hand in her crotch area. He denied engaging in oral sex or any act of penetration. Investigation Interview Record, Pet'r Reply, Ex. H. Based on the child's statements and Petitioner's admissions, he was immediately charged with multiple counts of indecent assault and endangering the welfare of a child. The charges reflected the view that Petitioner engaged in a continuing course of conduct that began in York County and continued to Montgomery County.

The day after the child spoke to police, she met with personnel at the Mission Kids Child Advocacy Center of Montgomery County. She again recounted her interactions with Petitioner in

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[1] In preparing this Report and Recommendation, we have considered: Petitioner's *pro se* petition dated August 13, 2020 with its appended exhibits (Doc. 4) ("Pet."); the Commonwealth's response filed on May 13, 2021 (Doc. 20) ("Resp."); Petitioner's Traverse in Response to the Commonwealth's Brief dated July 8, 2021 with appended exhibits (Doc. 23) ("Pet'r Reply"); and Petitioner's Motion for Summary Judgment and appended documents submitted on February 10, 2023 (Doc. 32). We have also reviewed the state court documents included in the parties' briefings, most significantly: the transcript of the guilty plea hearing, N.T. 5/22/17 appended to Petitioner's reply at Ex. D and at Doc. 32; the Superior Court's dismissal of Petitioner's appeal of the dismissal of his PCRA petition, *Commonwealth v. Erb*, No. 1725 EDA 2019, slip op. (Pa. Super. Ct. July 8, 2019) (Resp. Ex. A); and the PCRA court's opinion giving notice of its intent to dismiss the petition without a hearing. *Commonwealth v. Erb*, No. 6192-16 (Montg. Cty. Comm. Pl. Ct. Sept. 27, 2018) ("Rule 907 Notice") (Pet. Appx. B, Ex. 12).

which he would rub her external vaginal area with his hand. She also described a singular instance, during the time they lived in York County, in which Petitioner placed his mouth in her vaginal area. Pet. Appx. B, Ex. 4. Police then added a count of involuntary deviate sexual intercourse based upon the additional details provided by the victim during the Mission Kids interview.

A. Trial Court Proceedings

Petitioner was represented by the Public Defender's Office. On May 22, 2017, the date set for trial, he chose to plead guilty to the one count involuntary deviate sexual intercourse with a child, one count of endangering the welfare of a child, and one count of indecent assault of a complainant less than thirteen years of age. These were just three of 48 charges pending against him, the remainder of which were *nolle prossed*. The court accepted the plea and imposed a negotiated aggregate sentence that the parties presented: six to fifteen years of imprisonment on the IDSI count followed by two concurrent sentences of five years of probation on the indecent assault and child endangerment counts. Petitioner did not file a direct appeal of his sentence. *Commonwealth v. Erb*, No. 1725 EDA 2019, slip op. at 2 (Pa. Super. Ct. June 11, 2020), Resp. Ex. A.

B. PCRA Proceedings

On May 10, 2018, Petitioner filed a petition for writ of habeas corpus in the Court of Common Pleas, which the court construed as a PCRA petition. The PCRA Court appointed counsel who subsequently filed a *Finley* letter and moved to withdraw as counsel, laying out his assessment that Petitioner had no meritorious claims. (Pet. Appx. B, Ex. 8.)[2] The court granted the motion to withdraw and issued a Rule 907 notice of its intent to dismiss the petition without a hearing. The

[2] *See Commonwealth v. Finley*, 550 A.2d 213, 215 (Pa. Super. Ct. 1988) (permitting appointed counsel to withdraw for lack of merit where counsel files an appropriate letter and reviews the evidence).

notice was served upon Petitioner by mail on September 17, 2018 and received by him on October 2, 2018. (Pet. Appx. B, Ex. 12.) The notice advised him that he had 20 days to file a *pro se* response. Petitioner mailed a request for an extension of time to file a response, which the PCRA Court received on October 17, 2018. The PCRA Court, proceeded, however, to dismiss the PCRA petition on October 18, 2018, in accordance with the Rule 907 Notice and rationale. A few days later, on October 23, 2018, the PCRA Court also issued an order denying the extension Petitioner had requested to file his response to the Rule 907 Notice.

Prison mail logs indicate that Petitioner did not receive the October 18 final order nor the October 23 order denying his extension request.[3] After approximately seven months had elapsed since Petitioner had sought time beyond the statutory 20-day period to address the Rule 907 Notice, Petitioner mailed an inquiry to the Court of Common Pleas on May 17, 2019. He received a response on May 29, 2019 that alerted him to the fact that his extension request was denied and that his PCRA petition had been dismissed. (Pet'r Reply Ex. A.) On June 12, 2019, Petitioner filed a notice of appeal from the PCRA Court's order dismissing his PCRA petition. On July 2, 2019, Petitioner then filed a statement pursuant to Pa.R.A.P. 1925(b). *Id.* at 3-4. On June 11, 2020, the Superior Court quashed Petitioner's appeal as untimely. *Id.* at 7. It found that Petitioner's argument that he had not received the PCRA Court's order of dismissal was not dispositive and, alternatively, that his petition was without merit. *Id.* at 5-7 & n.9.

C. Federal Proceedings

On July 9, 2020, Petitioner filed a document entitled "Request for Stay, Extension of Time, and Amendment" (Doc. 1), indicating that he wished to file a habeas petition but had been unable

[3] The PCRA Court was unable to confirm that the copy of its final order that it had sent by certified mail was received by Petitioner, although neither was that copy or nor the copy sent by regular mail returned to the court.

to do so for a number of reasons set forth in his petition.[4] He ultimately filed a *pro se* form habeas petition, with a number of appended exhibits and asserting fourteen grounds for relief, on August 13, 2020. The claims concern the jurisdiction of the Montgomery County courts for the offenses charged; prosecutorial misconduct as to the offenses charged; the validity of the guilty plea colloquy; his designation as a sexually violent predator; ineffective assistance of trial counsel; and deficiencies in the PCRA process. On May 13, 2021, the Montgomery County District Attorney's Office filed a response, asserting that the petition was untimely. (Resp. at 2.) Respondents did not address the merits of the petition nor the question of whether Petitioner had satisfied the exhaustion requirement but offered to do so "if requested by the Court." (Resp. at 4 n.3.) Petitioner filed a reply to the Commonwealth's brief on July 8, 2021, asserting that the statute of limitations for filing should be equitably tolled. (Pet'r Reply at 1-5.)

On November 8, 2022, this Court ordered the District Attorney's Office to file a supplemental response addressing the merits of Petitioner's claims by December 8, 2022. (Doc. 26.) When the District's Attorney's Office failed to meet that deadline, this Court entered an order on January 30, 2023 requiring that the supplemental response be filed by February 13, 2023. (Doc. 30.) On February 10, 2023, Petitioner submitted a "Motion for Summary Judgment," arguing that he was entitled to judgment as a matter of law under Fed. R. Civ. Proc. 56 due to the failure of the District Attorney's Office to provide a further response to his petition as ordered by the Court. (Doc. 32.)[5] The District Attorney's Office did not respond to the summary judgment motion, and it still has not filed a supplemental response as we requested.

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[4] These related to a disruption in access to a personal typewriter in his prison unit beginning in 2019 and the reduced access to typewriters available in the law library with the onset of the COVID-19 crisis beginning in March 2020.

[5] The motion referred to an attached affidavit dated February 10, 2023 but no such document was included in Petitioner's filing.

II. LEGAL STANDARDS

Before we begin our discussion of Petitioner's grounds for relief, we set out the legal standards that govern our review. We first set out a petitioner's obligation to timely file an application for a writ of habeas corpus, the statutory tolling provision that extends the filing period during a period of collateral review, and the doctrine of equitable tolling, which may render an otherwise untimely petition to be timely filed. Next, we explain a petitioner's obligation to exhaust available state court remedies as to his claims and the consequences of a failure to do so. Finally, we review the standard for ineffective assistance of counsel claims, which forms the basis of several of Petitioner's claims.

A. AEDPA Timeliness Requirements

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year period of limitation for filing an application for a writ of habeas corpus. The statute provides, in relevant part:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> > **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The statute also allows for tolling of this one-year period: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." § 2244(d)(2).

For the statute of limitations period to toll upon state review of a post-conviction application, it is essential that the application be "properly filed." The determination of whether a state post-conviction application was properly filed is entirely a question of state law. As the Supreme Court has stated, "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S. 408, 413-14 (2005) (citing *Carey v. Saffold*, 536 U.S. 214, 226 (2002)).

B. Equitable Tolling

In the event a petitioner's filing is untimely even with any applicable period of statutory tolling, the AEDPA's one-year deadline may be tolled on an equitable basis. Such tolling is proper "only when the principles of equity would make the rigid application of a limitation period unfair." *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999) (internal citations omitted) (internal quotation marks omitted). The "unfairness" that would warrant tolling in this manner "generally occurs when the petitioner has in some extraordinary way been prevented from asserting his or her rights." *Id.* The Supreme Court has explained that to be entitled to equitable tolling, a habeas petitioner must show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). It is the petitioner's burden to establish both elements of the equitable tolling standard. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

There is no bright line rule for the diligence element of this standard. *Munchinski v. Wilson*, 694 F.3d 308, 331 (3d Cir. 2012). Rather, "the diligence inquiry is fact-specific and depends on

the circumstances faced by the particular petitioner." *Id.* In *Pace*, the Supreme Court found that a delay of five months after post-conviction proceedings, combined with years of earlier delay after the conviction had become final before the petitioner took action to protect his right to habeas review, did not constitute reasonable diligence. *Pace*, 544 U.S. at 419. The Third Circuit has found that a delay of eight months after post-conviction proceedings combined with a year of delay after the conviction became final also did not constitute reasonable diligence. *Scatterfield v. Johnson*, 434 F.3d 185, 196 (2006). As these cases demonstrate, the obligation to pursue one's rights diligently "does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period the prisoner is exhausting state court remedies as well." *LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005).

With respect to the extraordinary circumstances prong, the Third Circuit Court of Appeals has recognized three situations in which equitable tolling was appropriate: (1) where the petitioner has actively been misled, (2) where the petitioner has been prevented in some "extraordinary way" from asserting his rights, and (3) where the petitioner had timely filed his petition but in the wrong forum. *Johnson v. Hendricks*, 314 F.3d 159, 162 (3d Cir. 2002) (citing *Fahy*, 240 F.3d at 244).

C. Exhaustion Requirement; Procedural Default

Federal habeas review involving a person in custody pursuant to a state court judgment is necessarily limited to grounds that the person is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The review of such claims is further limited, however, such that an application for a federal writ of habeas corpus may not be granted unless: "(A) the applicant has exhausted the remedies available in courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). This exhaustion requirement gives the state courts "an opportunity to act on [the petitioner's] claims before he

presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 843 (1999). A petitioner satisfies that exhaustion requirement if the legal theory and facts of the alleged violation were "fairly presented" to the state court, "alerting that [state] court to the federal nature of the claim" and allowing the State to correct the alleged violation. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). This "fair presentation" requirement obligates the petitioner to present his claims in one complete round of the state's established appellate review process. *O'Sullivan*, 526 U.S. at 844-45. If the state court declined to review the merits of the habeas petitioner's claim due to his failure to comply with a state rule of procedure, we consider the claim to have been procedurally defaulted and barred. *Gray v. Netherland,* 518 U.S. 152, 161-62 (1996).

D. Standards for State-Adjudicated Claims

Where a claim presented in the habeas petition was properly presented to and adjudicated on the merits in the state courts, the application for habeas relief may not be granted by a federal court unless the state 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).

"[C]learly established law" means the "governing legal principle or principles set forth by the United States Supreme Court," and is limited to law that existed at the time the state court rendered its decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). A writ may issue if a state court decision was "contrary to" established federal law if it contradicts Supreme Court precedent "or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from that reached by the Supreme

Court.'" *Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013) (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A writ may issue under the "unreasonable application clause" if "the state court correctly identifies the governing legal principle from the Supreme Court, but the state court unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

When we examine whether the state court acted "reasonably" under § 2254(d)(1), we are "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). If the state court's decision required making a factual determination, the state court's factual finding enjoys a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). The petitioner bears the burden to rebut this presumption by presenting the Court with "clear and convincing evidence" to the contrary. *Id.*

E. Ineffective Assistance of Counsel: The *Strickland* Standard

A claim for ineffective assistance of counsel is grounded in the Sixth Amendment right to counsel, which exists "'in order to protect the fundamental right to a fair trial.'" *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)). To prevail on a claim for ineffective assistance of counsel, a habeas petitioner must demonstrate both that (1) his attorney's performance was deficient, *i.e.*, that the representation "fell below an objective standard of reasonableness" as measured against prevailing professional norms, and (2) that he was prejudiced by his attorney's performance. *Strickland*, 466 U.S. 668, 687-88, 690-92. Counsel's deficiencies must be "so serious" that he "was not functioning as the 'counsel' guaranteed" to the petitioner by the Sixth Amendment. *Id.* at 687. This standard is "highly deferential" to defense counsel, as "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 689-90. It is presumed that "counsel's conduct might have been part of a sound strategy," and "if the Commonwealth can show that counsel actually pursued an informed strategy (one decided upon after a thorough

investigation of the relevant law and facts), the 'weak' presumption becomes a 'strong' presumption, which is 'virtually unchallengeable.'" *Thomas v. Varner*, 428 F.3d 491, 500 (3d Cir. 2005) (quoting *Strickland*, 466 U.S. at 690).

Prejudice is proven if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Consequently, counsel cannot be found to be ineffective for failing to pursue a meritless claim. *See United States v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015).

III. DISCUSSION

Petitioner asserts fourteen grounds for relief: (1) The trial court's plea colloquy was insufficient as it failed to provide a "verbatim citation of the statute" for IDSI; (2) the trial court erred in assuming jurisdiction over conduct occurring outside of Montgomery County; (3) the trial court erred in adjudicating the filing of a state petition for writ of habeas corpus as a PCRA petition; (4) the trial court erred in determining that Petitioner was a Sexually Violent Predator allegedly without conducting a required risk assessment; (5) the PCRA Court erred in accepting appointed PCRA counsel's *Finley* letter; (6) the PCRA Court erred in failing to produce documents for PCRA litigation; (7) the PCRA Court erred in denying Petitioner's request for an extension of time to file objections to its Rule 907 Notice; (8) the PCRA Court erred in entering a civil judgment allegedly "without allowance to defend;" (9) the Commonwealth committed "misconduct through falsely charging[,] overcharging, and assuming jurisdiction of alleged out-of-county crimes;" (10) trial counsel was ineffective "in failing to prepare an adequate defense and refusing to litigate the claims or errors" listed in this petition; (11) trial counsel "deliberately provide[d] false and/or misleading information to PCRA counsel, therefore, by proxy, provide[d] same to the trial court;" (12) PCRA

counsel was ineffective "in refusing to obtain documentation, investigate, and litigate the claims" asserted by Petitioner; (13) "PCRA counsel deliberately [misled] and/or provide[d] false information to the trial court;" and (14) "the cumulative effect of the claims or errors prejudice[d] the Defendant and create[d] a miscarriage of justice." Pet. at ECF pp. 10-41.

Respondents argue that the petition was untimely and so barred by AEDPA's statute of limitations. Resp. at 2-4. Petitioner argues in response that he meets the standard for equitable tolling. Pet'r Reply at 1-5. We first provide an analysis of the timeliness issues but then proceed with an analysis of the merits of the claims asserted. Based upon these two approaches it is clear to us that the petition may be denied and dismissed.

A. Timeliness

Petitioner's conviction became final on June 21, 2017, upon the expiration of the thirty days in which he had the right to file an appeal under Pennsylvania Rule of Appellate Procedure 903(a) following his judgment of conviction and sentence on May 22, 2017. This circumstance marked the commencement of the AEDPA limitations period as of June 22, 2017 pursuant to 28 U.S.C. § 2244(d)(1)(A).[6] When Petitioner filed a petition in state court 323 days later, on May 10, 2018, the state court construed it as a timely-filed PCRA petition. Given that determination, the AEDPA limitations period entered a period of tolling, following which Petitioner would have 42 days remaining to bring his habeas petition.

[6] Section 2244(d)(1) provides for the commencement of the limitations period as of "the latest" date rendered by four circumstances. None of the remaining circumstances, however, are implicated in Petitioner's case. Petitioner is not entitled to a later date under § 2244(d)(1)(B), as he was not "prevented from filing" his habeas petition due to an "impediment to filing ... created by State action in violation of the Constitution or laws of the United States[.]" 28 U.S.C. § 2244(d)(1)(B). In addition, neither § 2244(d)(1)(C) nor § 2244(d)(1)(D) apply to him, in that none of the claims he presents in his petition were based on constitutional rights "newly recognized by the Supreme Court" or predicated on newly discovered facts that could not have been discovered with the exercise of due diligence until sometime after the June 22, 2017 date rendered by § 2244(d)(1)(A). *See* 28 U.S.C. § 2244(d)(1)(C), (D).

On October 18, 2018, the PCRA Court dismissed the petition. After the lapse of the thirty-day period in which Petitioner had the right to appeal that final order, and accounting for the fact that the 30th day fell on a Saturday, the collateral review process concluded on Monday, November 19, 2018. Approximately seven months later, on June 12, 2019, Petitioner sought to effectuate an appeal of the dismissal of his PCRA petition, but the Superior Court quashed the appeal on June 11, 2020 as untimely. *Commonwealth v. Erb*, No. 1725 EDA 2019, slip op. at 4-7 (Pa. Super. Ct. June 11, 2020) [Resp. Ex. A]. Petitioner filed a placeholder motion in our Court on July 9, 2020, seeking to preserve his right to federal review. (Doc. 1.)

While Petitioner's initiation of state collateral review was timely, the pendency of that review was short-lived where, as the Superior Court specifically determined, he did not file a timely appeal of the dismissal of his PCRA petition. Accordingly, the period of time during which the AEDPA statute of limitations was tolled by the filing of the state petition extended only until November 19, 2018, and the clock resumed its 365-day countdown — now down to 42 days — thereafter. The limitations period of § 2244(d) expired on December 31, 2018. The placeholder motion that Petitioner filed in this Court on July 9, 2020, assuming it would suffice for purposes of initiating a federal habeas petition, came 556 days too late. *See also* Resp. at 4 (providing these same calculations).

B. Equitable Tolling

In his reply brief, Petitioner defends the timeliness of his petition but also responds that, even if it did not meet the requirements of 28 U.S.C. § 2244(d), the period should be equitably tolled. He contends that, despite the significant periods in which he was not seeking post-conviction review in either the state or federal courts, he was reasonably diligent in the filing of his various motions and, more specifically, as reasonably diligent as he could have been considering the various circumstances that impeded his activities. Pet'r Reply at 1-5. He argues

that these impediments rose to the level of extraordinary circumstances that would justify equitable tolling, including that: (1) he had limited access to prison law libraries, (2) he "faced numerous hurdles" in "obtaining the necessary documents" to properly file his post-conviction petitions, and (3) he did not receive proper notice of the PCRA Court's October 18, 2018 dismissal of his petition and the October 23, 2018 denial of his request for extension of time to file a response to its Rule 907 Notice. Pet'r Reply at 1-5. For the third point, he presents records from the Pennsylvania Department of Corrections indicating that there is no record of the receipt of court mail for him during that time. *Id.* at Ex. A.

With sufficient development of the factual record, we view it as *possible*, although not *probable*, that Petitioner could meet the demands of the equitable tolling doctrine as to bring his federal filing within the AEDPA one-year limitations period.[7] In the interests of judicial economy, however, we will instead present and address the claims raised, which may be resolved without need of a hearing or expansion of the record.

[7] We note, however, that Petitioner used up the bulk of his 365 days prior to the initiation of state collateral review and thus should have known that he would need to act quickly to preserve his right to federal review upon the conclusion of the PCRA process. He received notice that he was unlikely to receive relief from the PCRA Court when he received the Rule 907 Notice of Intent to Dismiss, which the PCRA Court mailed on September 27, 2018 and which he received on October 2, 2018. This Notice gave him a preview of the PCRA Court's final decision. By that time he also knew that counsel had been permitted to withdraw such that it was his responsibility to monitor his case to ensure that any objections he wished to register to the proposed dismissal were transmitted and that any appeal from a final dismissal was timely filed. While he made a timely request for an extension of time to file objections, he had not been given reason to believe that an extension to the 20-day deadline would be granted. He certainly had no reason to expect that, having already prepared an explanation for the dismissal of his PCRA petition, the PCRA Court would take many months to rule on his request for additional time to brief those same issues himself. Having not received a ruling on his extension request, it was incumbent upon him to inquire of the PCRA Court. He did not do so until May 2019 after seven months had gone by. It is difficult for us to see the diligence in Petitioner's course of conduct between October 2018 and May 2019.

C. **Merits**

We conclude that the most expedient resolution of this petition, even without benefit of the briefing we requested of Respondents, is to address the merits of Petitioner's claims. Inasmuch as we find that Petitioner's claims are either not cognizable, procedurally defaulted, or without merit, we recommend that his habeas petition be denied and dismissed. We group these claims into seven categories based on the nature of the claims asserted.

1. **Claims of trial court error (Grounds 2 & 4)**

Petitioner asserts in two claims that the trial court violated state law in some manner. Specifically, he asserts that the trial court erred when it: (1) assumed jurisdiction over conduct occurring outside of Montgomery County (Ground 2); and (2) determined that Petitioner was a Sexually Violent Predator without undertaking a risk assessment as required by law (Ground 4). (Pet. at ECF pp. 14-19.)

On habeas review, we are limited to consideration of federal constitutional claims collateral to the state court conviction. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam). "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The grounds listed above are based on violations of state law without any further assertions of violation of federal law.

With respect to the claim concerning jurisdiction, we recognize that it could sound in due process. Petitioner argues that, because part of the criminal conduct for which he was convicted occurred in York County, Montgomery County did not have jurisdiction to prosecute those acts. Pet. at 14-15. The PCRA Court, however, determined that all of the conduct "constitute[d] a single criminal episode" under state law and thus gave the Montgomery County courts jurisdiction over all of the acts. *See* Rule 907 Notice at 5-6 [Pet., Appx. B, Ex. 12] (quoting *Commonwealth v. Whitmayer*, 144 A.3d 939, 946 (Pa. Super. Ct. 2016)). Various federal courts that have addressed

this issue have determined that this type of jurisdictional challenge is a noncognizable state law issue. *See Lambert v. Blackwell*, No. 01-CV-2511, 2003 WL 1718511, at *20, n. 21 (E.D. Pa. Apr. 1, 2003) (citing *Poe v. Caspari*, 39 F.3d 204, 207 (8th Cir. 1994)); *Wright v. Angelone*, 151 F.3d 151, 158 (4th Cir. 1998); *Wills v. Egeler*, 532 F.2d 1058, 1059 (6th Cir. 1976) ("A federal habeas court lacks authority to review a state court's determination that it has jurisdiction based on state law. A state court's determination of jurisdiction based on that state's law is binding on a federal court.").

With respect to the claim concerning the SVP designation, we note that this designation is a matter of state law. It is not cognizable on habeas review inasmuch as it does not relate to "custody" in violation of the Constitution. *See, e.g., Webster v. Tice*, Civ. No. 20-476, 2020 WL 3549685 (E.D. Pa. Feb. 7, 2020), *approved and adopted* (E.D. Pa. June 3, 2020); *Donahue v. Souders*, Civ. No. 10-2761, 2011 WL 1838780 (E.D. Pa. Apr. 20, 2011), *approved and adopted* (E.D. Pa. May 16, 2011). *See also Mundo-Violante v. Warden Loretto FCI*, 654 Fed. Appx. 49, 51 (3d Cir. 2016) (noting that has statute does not encompass security designation within prison, which is beyond "the basic fact or duration of his imprisonment, which is 'the essence of habeas'"). As the jurisdiction claim and the SVP designation claim implicate state law and are not matters with constitutional dimensions recognized by the Supreme Court, we conclude that habeas relief must be denied on these grounds.

2. Claims of state court error on collateral review (Grounds 3 & 5-8)

Petitioner brings five claims concerning the evaluation and adjudication of his PCRA petition. Specifically, he asserts that the PCRA Court erred in: (1) construing Petitioner's state petition for habeas corpus as a PCRA petition (Ground 3); (2) accepting PCRA counsel's *Finley* letter (Ground 5); (3) failing to produce documents to Petitioner for his use in the PCRA litigation

(Ground 6); (4) denying his request for an extension of time to file a response to the 907 Notice (Ground 7); and (5) entering "Civil Judgment without allowance to defend" (Ground 8). Pet. at ECF pp. 22-29.

On habeas review, we are limited to reviewing federal constitutional claims collateral to the challenged state court conviction. *Swarthout*, 562 U.S. at 219. We are not able to review alleged errors in the PCRA process. *Hassine v. Zimmerman*, 160 F.3d 941, 954 (3d Cir. 1998) ("[T]he federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation."). For this reason, these five claims are not cognizable and cannot provide a ground for habeas relief.

3. Claims of PCRA counsel ineffectiveness (Grounds 12-13)

Petitioner brings two claims that allege that his appointed PCRA counsel was ineffective in his representation. He asserts that PCRA counsel was ineffective: (1) "in refusing to obtain documentation, investigate, and litigate the claims" in the various claims he sets out in his habeas petition, and (2) when PCRA counsel "deliberately [misled] and/or provide[d] false information to the trial court." Pet. at ECF pp. 36-39.

Pursuit to the explicit terms of the statute, we may not grant habeas relief based on ineffectiveness of post-conviction counsel. 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 [habeas] proceeding."); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). For that reason, the Court must deny habeas relief on these grounds.

4. Error in guilty plea colloquy (Ground 1)

Petitioner brings one claim alleging that there was a defect in his guilty plea. He alleges that the trial court's plea colloquy was insufficient as it failed to provide a "verbatim citation of the statute" under which he was convicted for the crime of IDSI. Pet. at 10-12. The PCRA Court considered this claim when presented on collateral review and determined that there was no basis to set aside the conviction where "it [was] clear from the record" and "the lengthy colloquy" "that Defendant's guilty plea and sworn testimony of Defendant was knowing and voluntary." Rule 907 Notice at 3 [Pet. Appx B., Ex. 12].

The Supreme Court has held that "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). We do not know of any case law that requires an exact reading of the statute on the record as part of the colloquy, nor does Petitioner cite any.

The PCRA Court did consider whether there were errors in the colloquy procedures, although it did not go into any extensive detail in its analysis. *See* Rule 907 Notice at 3-4 [Pet. Appx. B, Ex. 12]. It found that the plea colloquy was sufficient to inform Petitioner of the charges against him to meet the requirements of a knowing and voluntary plea. We see nothing suggesting that the PCRA Court unreasonably applied federal law in reviewing the colloquy as it did, nor did it take an approach that was contrary to any federal law. Moreover, our review of the explanation of the IDSI offense and what would have been required to prove them was set forth by Petitioner's counsel on the record and accurately explained the law in sufficient detail, as the following excerpt demonstrates:

> [Plea counsel]: It's my understanding you wish to plead guilty and accept the plea agreement as announced by the District Attorney, the gentleman to my left?
>
> [Erb]: Yes, sir.
>
> Q. That is to involuntary deviate sexual intercourse, which means you did engage in deviate sexual intercourse with an individual who is less than 13. Deviate sexual intercourse can occur by putting mouth to the sexual organ of another person. . . .

N.T. 5/22/2017, at 6 [Pet'r Reply Ex. D]. Petitioner acknowledged that he understood and engaged in the conduct. Petitioner thus admitted to conduct that conforms to the statutory definitions of the offenses, which provides that: "A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age." 18 PA. CONS. STAT. § 3123(b). Further, "Deviate Sexual Intercourse" is defined, *inter alia,* as: "Sexual intercourse per os [by mouth] or per anus between human beings[.]" *Id.* § 3101.[8]

Petitioner was also asked after each of the crimes described by his attorney: "Do you understand that?," to which he replied yes. *Id.* at 6, 7. *See also id.* at 15 (answering in the affirmative that he was admitting to deviate sexual intercourse with the victim while she was under 13). Based on this portion of the colloquy on the record,[9] it was not unreasonable for the PCRA Court to determine that Petitioner had "an understanding of the law in relation to the facts"

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[8] The statute also defines "deviate sexual intercourse" to include "penetration, however slight, of the genitals or anus of another person with a foreign object" (apart from medical or other legitimate reasons), as well as sexual acts with an animal. 18 Pa. Cons. Stat. § 3101.

[9] This fact was founded upon the victim's statement in the Mission Kids interview, notwithstanding Petitioner's denial in his initial police interview on August 2, 2016 that he had engaged in oral sex or did anything other than manually touching the child's genital area. Petitioner continues to cite to his police interview denial, yet that statement, which pre-dated the guilty plea colloquy, does not amount to clear and convincing evidence that what he admitted to under oath at the guilty plea was not factual.

sufficient to voluntarily and intelligently plead guilty. *See McCarthy*, 394 U.S. at 466. As this determination by the PCRA Court is not unreasonable as a matter of law or fact, habeas relief is precluded. *See* 28 U.S.C. § 2254(d)(1)-(2).

5. Ineffectiveness of trial counsel (Grounds 10-11)

Petitioner brings two claims alleging that his plea counsel was ineffective in that he allegedly: (1) failed "to prepare an adequate defense and refus[ed] to litigate the claims or errors" that he identifies earlier in his habeas petition; and (2) "deliberately provide[d] false and/or misleading information to PCRA counsel, therefore, by proxy, provide[d] same to the trial court." Pet. at ECF pp. 32-35.

The second ground is not cognizable because it concerns counsel's actions in post-conviction proceedings. *See Hassine*, 160 F.3d at 954 ("[T]he federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation."). However, the claim that plea counsel was ineffective for failing to raise an adequate defense is cognizable because it is an assertion of a violation of the Sixth Amendment in relation to the proceedings giving rise to his conviction. *See Swarthout*, 562 U.S. at 219. The Sixth Amendment right to effective assistance of counsel extends to the circumstance in which a defendant pleads guilty. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To satisfy the prejudice prong for a guilty plea following upon ineffective assistance of counsel, Petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

Petitioner presented this ineffectiveness claim on PCRA review. The PCRA Court observed that "[t]here is nothing in the record to indicate that there were any errors by guilty plea

counsel in his representation of Defendant," and noted that "[i]n order to assure that there was adequate representation and preparation," both Attorney Kravitz and Carol Sweeney, Esquire, who was Chief of Trials in the Public Defender's Office at the time and was familiar with the case, "also conferred with Defendant prior to his guilty plea." Rule 907 Notice at 4-5 [Pet. Appx. B, Ex. 12]. The Superior Court observed that Petitioner's ineffectiveness claims included assertions that counsel "coerced him" to plead guilty to crimes he had not committed, that counsel failed to seek suppression of a statement he gave to police, and "engag[ed] in the prosecutions threats to seek a maximum sentence." *Commonwealth v. Erb*, No. 1725 EDA 2019, slip opin. at 7 n.9 (Pa. Super. Ct. July 8, 2019) [Resp. Ex. A]. As the PCRA Court and the Superior Court recognized, however, Petitioner was bound by his statements under oath at the guilty plea hearing that he committed these acts and that he was satisfied with counsel. *Id.*

Here Petitioner asserts only generally that his counsel "fail[ed] to prepare an adequate defense," by "refusing to litigate" that nine issues he asserts elsewhere in this petition. Pet. at ECF p. 32. As we have set forth above, no particularly strong or obvious defenses are apparent on this record. The victim accused Petitioner of touching her vagina with his hand and his mouth, and he admitted to the police to the manual contact over a lengthy period of time. There was no question of mistaken identity, as the victim and Petitioner lived in the same household and the conduct occurred repeatedly. Petitioner suggests no motive for fabrication, yet he could, of course, have opted to go to trial for his accuser's testimony to be evaluated by a jury. Petitioner has also not shown that but for *any* actions taken by, or specific omissions attributable to, his counsel, he would have opted to go to trial instead of pleading guilty. Moreover, all of the expected subjects of the colloquy undermine his contention that counsel's lack of preparation or motion practice led to his guilty plea. During the colloquy, his counsel told him "You don't have to plead guilty. You do

have a right to a trial. You have a right to a trial by jury." N.T. 5/22/2017, at 8. When asked, "Do you understand that?" Petitioner responded "Yes." *Id.* He was then asked, "And it is your decision to plead guilty; is that correct?" and responded "Yes." *Id.* at 9. When asked if he was satisfied with the representation of his attorney, he responded "Yes." *Id.* at 14. When asked if he was doing this "of [his] own free will?" he responded "Yes, sir." *Id.* at 14-15. He was later asked by the court, "based on all the questions asked of you and all of the information given to you, is it still your wish to plead guilty today?" *Id.* at 21. He responded, "Yes, sir." *Id.*

Based on this colloquy, we see no basis to find the PCRA Court's resolution of this ineffectiveness claim was constitutionally effective was an unreasonable application of federal law or based on an unreasonable determination of fact. The record confirms that it was Petitioner's decision to plead guilty, and he has not pointed to any instances of deficiency by his counsel that would undermine the notion that his plea was voluntary and intelligent. For this reason, we recommend that this claim be denied, notwithstanding Petitioner's failure to have presented it to the Superior Court in accordance with the timing provisions of the Pennsylvania Rules of Appellate Procedure. *See* 28 U.S.C. § 2254(b)(2) (permitting federal court to deny claim on the merits notwithstanding failure to exhaust).

6. Prosecutorial misconduct (Ground 9)

Petitioner brings one claim of prosecutorial misconduct, specifically "misconduct through falsely charging[,] overcharging, and assuming jurisdiction of alleged out-of-county crimes." Pet. at ECF pp. 30-31.

The Supreme Court has stated that prosecutorial misconduct will only be grounds for relief from a conviction where it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). When he presented

this claim on PCRA review, the PCRA Court found that his allegations of prosecutorial misconduct were without merit "as [he] admitted to the charges against him both on the record and to the ... Police Department." Rule 907 Notice at 6 [Pet., Appx. B; Ex. 12]. The PCRA Court specifically cited to his acknowledgement at the guilty plea hearing that he performed oral sex on the victim. *Id.* (citing N.T. 5/22/17 at 15-16). As we consider whether his criminal process was infected by unfairness, we note that he was ultimately permitted to plead guilty to only three counts in exchange for the dismissal of 45 other counts and that his aggregate prison term was 6-15 years instead of the more than 100 years that he faced. By his own admission to police, he engaged in touching of the victim's genital area around twice a week during the time that they lived in Montgomery County, which alone could have resulted in a large number of counts. Moreover, the trial court agreed that it was appropriate for the Montgomery County prosecution to encompass the earlier York County incidents in the continuing pattern of abuse that came to light when the family lived in Montgomery County. We find that this determination is neither contrary to nor an unreasonable application of the standard described in *Donnelly*. We would be hard pressed to say that the trial process was infected by violations of his rights in these circumstances. We consider that the PCRA Court's determination that there was no prosecutorial misconduct here to be neither an unreasonable application of nor contrary to federal law and so recommend that Petitioner not be granted relief on this ground.

7. Miscarriage of justice (Ground 14)

Lastly, Petitioner asserts that "the cumulative effect of the claims or errors prejudice[d] the Defendant and create[d] a miscarriage of justice." Pet. at ECF p. 38. We question whether this is a viable claim, and note that it was not exhausted before the PCRA Court, and so would be considered procedurally defaulted and subject to dismissal. Moreover, however, inasmuch as we

have found that none of Petitioner's claims reflected violations of his rights by the trial court, prosecutor, or deficient counsel, we do not see how there could be a cumulative error that created a miscarriage of justice. Therefore, this claim cannot give rise to habeas relief.

IV. CONCLUSION

Because Petitioner's claims fail either procedurally or on the merits, we need not resolve the question of whether equitable tolling might render his otherwise untimely petition reviewable. All but three of Petitioner's claims are either noncognizable on federal habeas review or procedurally defaulted. The three claims that are reviewable — the challenge to the sufficiency of the plea colloquy, the claim of ineffectiveness of plea counsel as to the preparation of defenses, and the assertion of prosecutorial misconduct — fail on the merits because the PCRA Court's legal determinations were neither contrary to nor an unreasonable application of federal law, and the PCRA Court did not make any unreasonable factual determination. The plea colloquy was sufficient to inform Petitioner of the nature of the charges against him, and his factual admissions and entry of a guilty plea were voluntary and intelligent. There is no indication on the record of any deficiency of plea counsel, nor any evidence that Petitioner would have opted to go to trial but for any of his counsel's actions. Similarly, we see no evidence that any prosecutorial misconduct infected his trial rights. For these reasons, we recommend that this petition be denied and dismissed. Regarding Petitioner's "Motion for Summary Judgment," we recommend that it be denied as well, despite the fact that the District Attorney's Office did not file a supplemental response as this Court ordered, as summary judgment is not appropriate in federal habeas cases.

Pursuant to Local Appellate Rule 22.2 of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to determine whether a Certificate of Appealability (COA) should be issued. Under 28 U.S.C.

§ 2253(c), a habeas court may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We would not recommend that a COA issue unless we believed that jurists of reason would find it to be debatable whether the petition stated a valid claim for the denial of a constitutional right. As to claims that are dismissed on procedural grounds, the petitioner bears the additional burden of showing that jurists of reason would also debate the correctness of the procedural ruling. *Id.* Here, for the reasons set forth above, we do not believe a reasonable jurist would find the Court erred in denying the present petition, even if jurists might debate the question of the timeliness of the petition. Accordingly, we do not believe a COA should be issued. Our recommendation follows.

RECOMMENDATION

AND NOW, this 10th day of May, 2023, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED** and **DISMISSED.** It is **FURTHER RECOMMENDED** that a Certificate of Appealability should **NOT ISSUE**, as we do not believe that Petitioner has demonstrated that reasonable jurists would debate whether his petition states a valid claim.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE