DLD-067

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

C.A. No. **23-2974**

ROBERT SCOTT, Appellant

VS.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

(E.D. Pa. Civ. No. 2-20-cv-03497)

Present: JORDAN, PORTER, and PHIPPS, Circuit Judges

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect; and

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

This appeal is dismissed for lack of jurisdiction. Appellant appeals from the District Court's order dated March 30, 2023, denying his petition for a writ of habeas corpus. A notice of appeal in a civil case in which the United States is not a party must be filed within 30 days after entry of the judgment appealed from. See Fed. R. App. P. 4(a)(1)(A). In this case, although the District Court's order was entered onto the docket on March 30, 2023, judgment is not deemed entered until 150 days later, i.e., August 28, 2023 (August 27, 2023, was a Sunday). See Fed. R. Civ. P. 58(c)(2)(B); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 224 (3d Cir. 2007) (explaining that an order that includes the court's reasoning does not comply with the separate judgment rule). Appellant had 30 days from then to file his notice of appeal, or until September 27,

2023, but he did not file it until October 27, 2023. Therefore, the notice of appeal was untimely. Accordingly, we lack jurisdiction to consider this appeal. See Bowles v. Russell, 551 U.S. 205, 209 (2007) (stating that the time periods prescribed for filing a notice of appeal are mandatory and jurisdictional).

By the Court,

s/David J. Porter
Circuit Judge

Dated: April 1, 2024
JK/cc: Robert Scott
All Counsel of Record

A True Copy:

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

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

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RE: Robert Scott v. Commonwealth of Pennsylvania, et al
Case Number: 23-2974
District Court Case Number: 2-20-cv-03497

ENTRY OF JUDGMENT

Today, **April 01, 2024** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very Truly Yours,

s/ Patricia S. Dodszuweit
Clerk

By: s/ James King
Case Manager
Direct Dial: 267-299-4958

cc:
Mr.George V. Wylesol

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

| | | |
|---|---|---|
| ROBERT SCOTT | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| JOHN RIVELLO,[1] et al. | : | NO. 20-3497 |

**REPORT AND RECOMMENDATION**

ELIZABETH T. HEY, U.S.M.J. January 18, 2023

Robert Scott ("Scott") filed this pro se petition for writ of habeas corpus challenging his 2008 conviction for attempted murder and other offenses, and his 2010 conviction for first-degree murder. Commonwealth v. Scott, CP-51-CR-0010894-2007 (Phila. C.C.P.). For the reasons that follow, I recommend that the petition be denied.

## I. PROCEDURAL HISTORY

The charges against Scott arose from the July 12, 2007 shooting outside the Land and Sea Restaurant in the East Germantown/Belfield neighborhood of Philadelphia, resulting in the death of Kahlil Ragin and injuries to his brother, Jahmeil. Two trials were necessary to achieve a verdict on all charges. On July 24, 2008, a jury sitting before the Honorable Sheila Woods-Skipper found Scott guilty of attempted murder, aggravated assault, carrying a firearm without a license, and possession of an instrument of crime

[1]Scott named the Commonwealth of Pennsylvania as the respondent in the case. Doc. 1, Caption. The proper respondent is the state officer with current custody of the petitioner. Rule 2(a) of the Rules Governing Section 2254 Cases. Scott is incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania ("SCI Huntingdon"), the superintendent of which is John Rivello. Therefore, I have added John Rivello as the respondent in this case.

("PIC") (collectively "the lesser charges"). N.T. 7/24/08 at 27-28. The jury could not agree on a verdict on the murder charge. Id. at 27. On October 3, 2008, Judge Woods-Skipper sentenced Scott on the lesser charges to an aggregate term of 24½ -to- 49 years' incarceration.[2] N.T. 10/3/08 at 9-20.

Scott appealed the judgment on the lesser charges on sufficiency grounds. Commonwealth v. Scott, CP-51-CR-0010894-2007, Statement of Matters Complained of Pursuant to Rule of Appellate Procedure 1925(b) (Phila. C.C.P. Feb. 10, 2009). Judge Woods-Skipper filed an opinion recommending affirmance on appeal, Commonwealth v. Scott, CP-51-CR-0010894-2007, Opinion (Phila. C.C.P. Mar. 25, 2009), and the Pennsylvania Superior Court affirmed the judgment of sentence. Commonwealth v. Scott, No. 2977 EDA 2008, Memorandum, 990 A.2d 53 (Pa. Super. 2009) (table). On September 7, 2010, the Pennsylvania Supreme Court denied Scott's petition for allowance of appeal. Commonwealth v. Scott, 41 EAL 2010, Order, 8 A.3d 344 (Pa. 2010) (table).

Meanwhile, Scott was retried on the murder charge in May 2010, and a jury sitting before the Honorable Rose Marie Defino-Nastasi found him guilty of first-degree murder on May 27, 2010. N.T. 5/27/10 at 109-10. Judge Defino-Nastasi sentenced Scott to mandatory life to run concurrently to the sentences imposed by Judge Woods-Skipper.

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[2]Judge Woods-Skipper sentenced Scott to consecutive prison terms of 20 -to- 40 years for attempted murder, 3½ -to- 7 years for carrying a firearm without a license, and 1 -to- 2 years for PIC. N.T. 10/3/08 at 19-20. For purposes of sentencing, aggravated assault merged with attempted murder. Id. at 19.

Id. at 115. On appeal to the Superior Court, Scott argued that the evidence was insufficient to sustain the murder conviction. Commonwealth v. Scott, No. 1920 EDA 2010, Brief for Appellant, 2011 WL 4589738, at *3 (Pa. Super. Feb. 22, 2011). Judge DeFino-Nastasi filed an opinion recommending affirmance on appeal, Commonwealth v. Scott, CP-51-CR-0010894-2007, Opinion (Phila. C.C.P. Dec. 29, 2010), and the Superior Court affirmed the judgment of sentence. Commonwealth v. Scott, No. 1920 EDA 2010, Memorandum, 32 A.3d 827 (Pa. Super. 2011) (table) ("Pa. Super. – Direct, Murder"). On March 30, 2012, the Pennsylvania Supreme Court denied Scott's petition for allowance of appeal. Commonwealth v. Scott, 40 A.3d 1235 (Pa. 2012) (table).

On February 22, 2013, Scott filed a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act, ("PCRA"), 42 Pa. C.S.A. §§ 9541-51, claiming that the prosecutor made improper remarks, challenging the weight and sufficiency of the evidence, and claiming ineffective assistance of counsel ("IAC") for failing to conduct an investigation. Commonwealth v. Scott, CP-51-CR-0010894-2007, Motion for Post Conviction Collateral Relief (Phila. C.C.P. Feb. 22, 2013).[3] Scott later filed an amended PCRA petition pro se,[4] claiming IAC for failing to request a jury charge pursuant to

[3]On the face sheet of the PCRA petition, Scott listed the convictions as murder, attempted murder, and possessing firearms without a license. Commonwealth v. Scott, CP-51-CR-0010894-2007, Motion for Post Conviction Collateral Relief, at 1 (Phila. C.C.P. Feb. 22, 2013). However, the Superior Court later noted that the PCRA petition and supplemental petition challenged only the murder conviction. Commonwealth v. Scott, No. 3630 EDA 2018, Memorandum, 2019 WL 4451355, at *2 & n.5 (Pa. Super. Sept. 17, 2019) ("Pa. Super. – PCRA").

[4]Scott was permitted to proceed pro se after the court held a hearing to determine that his decision to waive counsel was knowing and voluntary. See Commonwealth v.

Commonwealth v. Kloiber, 106 A.2d 820, 826-27 (Pa. 1954), as to the testimony of Jahmeil Ragin, and failing to use prior inconsistent statements to impeach the testimony of Reigna Jones. Commonwealth v. Scott, CP-51-CR-0010894-2007, Amended Petition under Post Conviction Relief Act (Phila. C.C.P. filed Sept. 26, 2017). After issuing a Notice of Intent to Dismiss, Commonwealth v. Scott, CP-51-CR-0010894-2007, Notice Pursuant to Pennsylvania Rule of Criminal Procedure 907 (Phila. C.C.P. Oct. 11, 2018), Judge DeFino-Nastasi dismissed the PCRA petition. Commonwealth v. Scott, CP-51-CR-0010894-2007, Order (Phila. C.C.P. Nov. 13, 2018).

On appeal, Scott claimed:

1. The trial court erred by permitting the Commonwealth to present the 911 calls claiming such testimony is not admissible, and

2. IAC for:
   a. failing to utilize witnesses' prior inconsistent statements for impeachment referring to Reigna Jones and Jahmeil Ragin, and
   b. failing to request a Kloiber charge with respect to Jahmeil Ragin's identification.

Pa. Super – PCRA, 2019 WL 4451355, at *3 (citing Appellant's Brief at 4-5). Judge DeFino-Nastasi filed an opinion recommending affirmance on appeal. Commonwealth v. Scott, CP-51-CR-0010894-2007, Opinion (Phila. C.C.P. Feb. 27, 2018). The Superior Court affirmed the denial of PCRA relief, finding Scott's first claim (involving the 911

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Scott, CP-51-CR-0010894-2007, Criminal Docket (Phila. C.C.P.) (entry dated Oct. 13, 2016). The state court record forwarded to the federal court does not include a transcript of the waiver hearing nor any order permitting Scott to proceed pro se.

calls) waived because he failed to present the issue on direct appeal of the murder conviction. Pa. Super. – PCRA, 2019 WL 4451355, at *3. The court also found the impeachment IAC claim with respect to Jahmeil Ragin waived because Scott failed to properly develop the claim in his brief. Id. at *4. Finally, the court concluded that the impeachment IAC claim with respect to Reigna Jones and the IAC claim for counsel's failure to request a Kloiber charge were meritless. Id. at *4-5.[5] On April 14, 2020, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Scott, 229 A.3d 567 (Pa. 2020) (table).

On June 29, 2020,[6] Scott filed this petition for habeas corpus claiming:

1. The trial court erred by permitting the Commonwealth to present the 911 calls claiming such testimony is not admissible, and

2. IAC for:
   a. failing to utilize Jahmeil Ragin's prior inconsistent statement for impeachment,
   b. failing to utilize Ms. Jones' prior statements for impeachment, and

[5]The Superior Court noted that Scott suggested in his argument that counsel was ineffective for failing to inform the jury that a material witness warrant had to be issued for Ms. Jones, arguing that "such information would have cast considerable doubt on the credibility of the witness" and "show[n] her motivation for testifying." Pa. Super. – PCRA, 2019 WL 4451355, at *4. Because Scott did not present this claim in his Statement of Issues on Appeal, the Superior Court found this claim waived. Id.

[6]Although Scott's petition was docketed on July 13, 2020, the court employs the "mailbox rule," deeming a pro se petition filed when given to prison authorities for mailing. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1988)). Here, Scott stated in his petition that he placed the petition in the prison mail system on June 29, 2020. Doc. 1 at 15 (ECF pagination). Therefore, I will accept this as the date of filing.

c. failing to question Ms. Jones about the fact that a bench warrant was issued for her to come to court or what she was offered for her testimony.

Doc. 1 ¶ 12, GROUNDS ONE – THREE.[7] The District Attorney filed a response, arguing that Scott's claims are procedurally defaulted, not cognizable, and/or meritless. Doc. 9. On September 29, 2022, Scott filed a memorandum of law, which I will construe as a reply, in which he raises a new claim, alleging IAC for failing to conduct "'DNA' and other tests on the physical evidence," Doc. 14 at 9, 13-21, and recasts his court error claim regarding the 911 tapes as an IAC claim. Id. at 11.[8] The Honorable Edward G. Smith referred the petition for a Report and Recommendation ("R&R"). Doc. 5.[9]

Before proceeding to discuss the legal standards applicable to consideration of Scott's claims, I must address their timeliness. See Fielder v. Varner, 379 F.3d 113, 118 (3d Cir. 2004) (timeliness is to be determined on a claim-by-claim basis) (citing 28 U.S.C. § 2244(d)(1)). The procedural history of Scott's convictions presents an unusual circumstance of convictions returned years apart, complicating the timeliness calculation.

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[7]The petition identifies two IAC claims, but the second alleges that counsel failed to both impeach Ms. Jones with her prior inconsistent statements and question her about the warrant issued for her appearance in court or benefits she received for her testimony. I have broken these IAC claims apart for ease of discussion.

[8]Scott's reply was filed on October 4, 2022, but I will give him the benefit of the mailbox rule with respect to the claims raised therein. He states that he placed the reply in the mail on September 29, 2022. Doc. 14 at 59.

[9]Judge Smith referred the case to my colleague, the Honorable Henry S. Perkin to prepare an R&R. Doc. 5. Upon Judge Perkin's retirement, the case was reassigned to me. Doc. 12.

In his prayer for relief in his habeas petition, Scott asks this court to "grant an Arrest of Judgment, on all charges." Doc. 1 at 15. However, to the extent Scott is challenging his convictions for the lesser charges (attempted murder, aggravated assault, and weapons violations), the habeas petition is untimely. The conviction on the lesser charges became final on December 6, 2010, when the time for seeking certiorari in his direct appeal expired. See Gonzalez v. Thaler, 565 U.S. 134, 150 (2012) (when petitioner does not seek certiorari, conviction becomes final "at the expiration of the time for seeking such review"); S. Ct. R. 13.1 (allowing 90 days to file writ of certiorari). Scott never filed a PCRA petition challenging the conviction on the lesser charges.[10] Thus, any habeas petition challenging that conviction had to be filed by December 6, 2011.

To the extent Scott's habeas petition challenges his murder conviction, the claims contained in the petition are timely. The murder conviction became final on June 28, 2012, when the time for seeking certiorari in the United States Supreme Court expired. See Gonzalez, 565 U.S. at 150. He filed a PCRA petition, tolling the habeas limitations period, on February 22, 2013, 239 days later. The habeas limitations period resumed running on April 14, 2020, when the Pennsylvania Supreme Court denied Scott's petition for allowance of appeal. See Lawrence v. Florida, 549 U.S. 327, 332 (2007) (time for seeking certiorari is not tolled in the appeal of a state postconviction proceeding). With

[10]As previously noted, the Superior Court observed that Scott's PCRA petition (filed February 22, 2013) raised claims related only to Scott's 2010 murder conviction, and for that reason the court concluded that his petition was timely filed. Pa. Super. – PCRA, 2019 WL 4451355, at *2 & n.5.

126 days remaining, Scott had to file his petition on or before August 18, 2020, and the claims in the petition he filed on June 29, 2020, are timely with respect to the murder conviction.

As previously mentioned, in the reply memorandum he submitted to the court on September 29, 2022, Scott included a new claim (DNA and other tests) and recast his court error claim (911 calls) in terms of ineffective assistance of counsel. Both of these claims were filed more than two years after the habeas limitations period expired, and are untimely. Scott offers no explanation for his failure to present these claims in his original petition. Although the habeas limitations period offers alternative start dates, based on newly discovered evidence, a new constitutional right, or government interference, see 28 U.S.C. § 2244(d)(1)(B)-(D), these two claims do not fall into these alternatives.[11] Thus, these two claims are untimely filed. I am left with a petition presenting the original claims challenging Scott's murder conviction only.

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[11]Although Scott uses the phrase "new[ly] discovered evidence," referring to counsel's failure to obtain "'DNA' and other tests on the physical evidence," Doc. 14 at 9, Scott has no such evidence. He merely speculates that "DNA testing of the specific evidence, assuming exculpatory results, would establish [his] actual innocence." Doc. 14 at 16. This hypothetical evidence is insufficient to trigger a different start date as to the lesser charges. Similarly, Scott's speculation is insufficient to establish the actual innocence exception to the habeas limitations period recognized in McQuiggin v. Perkins, 569 U.S. 383 (2013). Any such evidence is not new, as Scott argues that he "consistently maintained his innocence and claimed the test results could exonerate him." Doc. 14 at 9-10. See Ross v. PA Dept. of Corr., Civ. No. 15-84, 2016 WL 5539595, at *4 (M.D. Pa. Sept. 28, 2016) ("[Petitioner] merely argues that there was DNA evidence available at the time of trial that should have been tested. It is clear that this evidence was previously available during trial.") (citing Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004); Meyers v. Lawler, Civ. No. 09-346, 2010 WL 3420059, at *6 (E.D. Pa. Aug. 26, 2010)).

## II. LEGAL STANDARDS

### A. Exhaustion and Default

Before the federal court can consider the merits of a habeas claim, a petitioner must comply with the exhaustion requirement of section 2254(b), which requires a petitioner to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Exhaustion requires the petitioner to present to the state courts the same factual and legal theory supporting the claim. Landano v. Rafferty, 897 F.2d 661, 669 (3d Cir. 1990). It also requires the petitioner to preserve each claim at the state appellate level. See Holloway v. Horn, 355 F.3d 707, 714 (3d Cir. 2004) (exhaustion satisfied only if claim fairly presented at each level of the state court system) (citing O'Sullivan, 526 U.S. at 844-45). The habeas petitioner has the burden of proving exhaustion. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

A petitioner's failure to exhaust his state remedies may be excused in limited circumstances on the ground that exhaustion would be futile. Lambert, 134 F.3d at 518-19. Where such futility arises from a procedural bar to relief in state court, the claim is subject to the rule of procedural default. See Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). In addition, if the state court did not address the merits of a claim because the petitioner failed to comply with the state's procedural rules in presenting the claim, and the state procedural rule is independent of the constitutional violation and adequate to support the decision, the claim is also procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Harris v. Reed, 489 U.S. 255, 262 (1989).

If a claim is defaulted, the federal court may address it only if the petitioner establishes cause for the default and prejudice resulting therefrom, or that a failure to consider the claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192. To meet the "cause" requirement to excuse a procedural default, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). Additionally, a petitioner can rely on post-conviction counsel's ineffectiveness to establish cause to overcome the default of a substantial claim of ineffective assistance of trial counsel. Martinez v. Ryan, 566 U.S. 1, 14 (2012). To establish prejudice, a petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Bey v. Sup't Greene SCI, 856 F.3d 230, 242 (3d Cir. 2017).

**B. Merits Review**

Under the federal habeas statute, review is limited in nature and may only be granted if the state court's adjudication of the claim (1) "resulted in a decision 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)(1)-(2). Factual issues determined by a state court are presumed to be correct, rebuttable only by clear and

convincing evidence. Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000) (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

**C. IAC**

IAC claims are governed by Strickland v. Washington, 466 U.S. 668 (1984), in which the Supreme Court set forth a two-pronged test for the consideration of IAC claims. First, the petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as

"counsel" guaranteed the defendant by the Sixth Amendment. Id. at 687. Second, the petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair and reliable trial. Id. In determining prejudice, the question is whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see also Smith v. Robbins, 528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed"). Counsel will not be considered ineffective for failing to pursue a meritless argument. Real v. Shannon, 600 F.3d 302, 309 (3d Cir. 2010); McAleese v. Mazurkiewicz, 1 F.3d 159, 169 (3d Cir. 1993).

## III. DISCUSSION

### A. Factual Background

I begin by summarizing the relevant trial evidence including the Superior Court's synopsis set forth in its opinion on direct appeal from the murder conviction:

> [Scott] was a good friend and neighbor of Jahmeil Ragin for fifteen years. Jahmeil and Kahlil Ragin were brothers. On July 12, 2007, [Scott], Jahmeil Ragin, Kahlil Ragin, and [Scott's] girlfriend, Reigna Jones, went to an illegal bar to celebrate [Scott's] birthday. [Scott] and Kahlil Ragin engaged in an intense argument at the bar. The owner of the bar then told everyone to leave. [Scott] left the bar and took Ms. Jones home. Jahmeil Ragin called [Scott] to ask him why he left, to which [Scott] replied that he would drop off Ms. Jones and come back to pick up Jahmeil and Kahlil Ragin. Ms. Jones also testified that after the phone call [Scott] stated, "I'm going to see this nigga about something; he's not going to talk to me like that". N.T., 05/25/10, at 126. [Scott] later returned and shot both Kahlil and Jahmeil Ragin from a distance of a few feet. Kahlil Ragin was killed by a

> shot to the head; Jahmeil Ragin was shot in the shoulder and injured.

Pa. Super. – Direct, Murder, at 1-2.

According to the testimony of Jahmeil Ragin ("Jahmeil"), Kahlil Ragin ("Kahlil"), and Scott had worked together in an attempt to create rap music, with Khalil as rapper and Scott as producer. N.T. 5/25/10 at 26. In the argument in the bar, Jahmeil described that Scott and Khalil "were going back and forth" about what more Scott "could have done for Khalil" versus what more "Khalil could have done . . . for himself." Id. at 27. After Jahmeil and Kahlil came out of the bar and were waiting for Scott to return, Jahmeil and Kahlil began "tussling" because Khalil wanted to wait for a ride but Jahmeil thought they should leave, which escalated with the two throwing punches and wrestling. Id. at 36-37, 40-41. When Jahmeil had Kahlil up against a car, he saw Scott coming from around the car, pull out a gun, and start shooting, hitting Kahlil in the head. Id. at 44, 46. When Jahmeil and Kahlil fell to the ground, Scott started shooting at Jahmeil, hitting him in the shoulder. Id. at 47, 49. Jahmeil did not immediately tell police that Scott was the one who shot Khalil, but later in the emergency room did report Scott was the shooter. Id. at 53-55.

According to Ms. Jones' testimony, later that night at 3:19 a.m., Scott went to Ms. Jones' house and directed her to tell anyone that asked that they were together that night and that he had put her on a bus. N.T. 5/25/10 at 128-29. In the first statement Ms. Jones gave to the police on July 13, 2007, she followed Scott's direction and lied to the police. Id. at 132. She later contacted the District Attorney's Office and two officers came to her

house and took a second statement in July 2008, in which she admitted lying about how she got home from the bar after the argument and that Scott had directed her to lie. Id. at 133.

**B. Claims**

1. Procedurally Defaulted Claims

a. Court Error – 911 Recordings

Scott first argues that the court erred in permitting the Commonwealth to play the 911 calls to the jury. Doc. 1 ¶ 12, GROUND ONE. The District Attorney responds that the claim is not cognizable on habeas review and defaulted. Doc. 9 at 14-15.

During the trial, the prosecutor played audio tapes of the 911 calls received regarding the incident. See N.T. 5/25/10 at 202, 5/26/10 at 11, 13, 17-18, 41.[12] Scott maintains that the recordings were inadmissible and that he did not have the opportunity to cross-examine the callers. Doc. 1 ¶ 12, GROUND ONE. To the extent Scott is challenging the admissibility of the evidence, the claim is not cognizable in habeas. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas to reexamine state-court on state-law questions.").

Even if the claim were cognizable in the federal court, it would be procedurally defaulted. The Superior Court did not address the merits of the claim when Scott

[12]The 911 calls were not transcribed into the trial transcript and the recordings were not included in the record forwarded to the federal court. According to the prosecutor's characterization in her closing, in one of the calls, an unidentified person reports that "[t]wo guys are fighting, a guy just walked up and shot them." N.T. 5/27/10 at 67.

appealed the denial of PCRA relief, finding the claim waived because Scott failed to present the claim on direct appeal. Pa. Super. – PCRA, 2019 WL 4451355, at *3 (citing 42 Pa. C.S. § 9544(b) (issue is waived under PCRA if petitioner could have but failed to raise it on direct appeal)). This results in a procedural default. See Johnson v. Pinchak, 392 F.3d 551, 556 (3d Cir. 2004) ("Where a state court refuses to consider a petitioner's claims because of a violation of state procedural rules, a federal habeas court is barred by the procedural default doctrine from considering the claims . . . unless the habeas petitioner can show 'cause' for the default and 'prejudice' attributable thereto."); see also Patton v. Sup't Graterford SCI, C.A. No. 17-2142, 2017 WL 5624266, at *1 (3d Cir. Sept. 28, 2017) ("[T]he state court's reliance on 42 Pa. Cons. Stat. § 9544(b) provides an independent and adequate ground to support the judgment."). Scott does not provide any excuse for his failure to present the claim in his direct appeal and does not supplement the claim with any showing of actual innocence. Therefore, the claim remains defaulted.

b. IAC – Failure to Utilize Prior Inconsistent Statements to Impeach Jahmeil Ragin

Scott also claims that his trial counsel was ineffective for failing to utilize Jahmeil's prior inconsistent statements to impeach his testimony. Doc. 1 ¶ 12, GROUND TWO. The District Attorney responds that the claim is procedural defaulted and meritless. Doc. 9 at 16-18.

The Superior Court found this claim waived, noting that Scott's appellate brief contained a heading alleging that counsel was ineffective because he "failed to . . . challenge Jahmeil Ragin, inconsistent statements for impeachment," but little more.

> Under that heading, he includes only one sentence about Jahmeil Ragin's alleged prior inconsistent statements: "Trial counsel did not motion the court to impeach Mr. Ragin for his inconsistent statements, and Mr. Ragin admitted that he lied to police." . . . [Scott] makes no further mention of trial counsel being ineffective for failing to use Jahmeil Ragin's alleged prior inconsistent statements to impeach him beyond those two sentences. . . . As [Scott's] brief presents no case law, citations to the record as to what these allegedly inconsistent statements even were, or other support for this claim, this issue is thereby waived.

Pa. Super. – PCRA, 2019 WL 4451344, at *4. Pennsylvania Rule of Appellate Procedure 2119 requires citation and development of legal authority and reference to the record pertinent to the issues raised in the appellate brief. Pa. R.A.P. 2119 (b) and (c). The courts of this circuit have repeatedly found Rule 2119 to be an independent and adequate state rule to support a procedural default. See Leake v. Dillman, 594 F. App'x 756, 759 (3d Cir. 2014); Kirnon v. Klopotoski, 620 F. Supp.2d 674, 683-84 (E.D. Pa. 2008) (collecting cases and holding that Rule 2119 "offer[s] clear guidelines for compliance, and careful review confirms that state and federal courts have applied these rules consistently").[13] Thus, the IAC claim concerning the failure to impeach Jahmeil is defaulted.

The claim is also meritless. During the trial, the jury learned that Jahmeil did not immediately identify Scott as the shooter, despite being questioned by police. N.T. 5/25/10 at 219 (Sergeant William Prince), 5/26/10 at 67 (Officer Gordon Andrew) & 72

[13]Although the Superior Court did not cite Rule 2119 directly, cases it relied on in finding this issue waived did rely on Rule 2119. Pa. Super – PCRA, 2019 WL 4451344, at *4 (citing, inter alia, In re Estate of Whitley, 50 A.3d 203, 209 (Pa. Super. 2012); Commonwealth v. Sullivan, 864 A.2d 1246, 1249 *Pa. Super. 2004)).

(Officer Brian Geer). Defense counsel questioned Jahmeil extensively about failing to tell the police that Scott shot him when he was at the scene, in the police car going to the hospital, or in the emergency room. N.T. 5/25/10 at 69, 96. It was only after the police brought another possible suspect into the emergency room for Jahmeil to identify that he told the police that Scott was the one who shot him. Id. at 97.

In addition, Jahmeil admitted in his testimony that in his first statement to police, he gave false information regarding the location of the original argument. N.T. 5/25/10 at 61-62.[14] Defense counsel followed up this point in cross examination as well, questioning Jahmeil about lying in the statement he gave at 7:00 a.m. about the location of the argument, and the fact that the police actually confronted him about the inconsistency with their investigation, which caused him to give a second statement. Id. at 72-74.

During closing argument, defense counsel focused both on Jahmeil's failure to identify Scott as the shooter to the police on the scene, in the police car, or at the hospital, and on the fact that he lied to the police when he gave his first statement. N.T. 5/27/10 at 13-17. Thus, Scott accuses defense counsel of failing to do exactly what he did do – impeach Jahmeil with his prior inconsistent statement and his failure to immediately identify the shooter. Scott is not entitled to relief on this claim.

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[14]Jahmeil explained that he did not want to tell the police about the bar because it was owned by a friend and he did not want to get the friend in trouble because there were slot machines in the bar. N.T. 5/25/10 at 61-62.

c. IAC – Failure to Question Ms. Jones about a Bench Warrant

Scott also claims that his counsel was ineffective for failing to question Ms. Jones about a bench warrant required to secure her attendance at trial and failing to determine during questioning if she was offered something in return for her testimony. Doc. 1 ¶ 12, GROUND THREE. Although the District Attorney argues that this aspect of Scott's third claim is meritless, Doc. 9 at 20, I find that it is procedurally defaulted.

The Superior Court found that Scott waived his allegation regarding the bench warrant.

> In the argument section of his brief, [Scott] . . . suggests that trial counsel was ineffective for not informing the jury that a material witness warrant had to be issued for Ms. Jones, because, he claims, "such information would have cast considerable doubt on the credibility of the witness" and "show[n] her motivation for testifying." Appellant's Brief at 11. However, [Scott] makes no reference to the material witness warrant for Ms. Jones in his statement of questions involved, id. at 4-5, and "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby." Pa. R.A.P. 2116(a).

Pa. Super. – PCRA, 2019 WL 4451355, at *4; see also id. at *4 n.8 (noting another basis for waiver because Scott failed to include this issue in his concise statement of errors complained of on appeal pursuant to Pa. R.A.P. 1925(b)). The Superior Court's reliance on Rule 2116 precludes review of this claim because the courts of this circuit have found that Rule 2116 is an independent and adequate state court ground precluding federal review. See Davis v. McGinley, Civ. No. 16-3807, 2018 WL 3596867, at *18 (E.D. Pa. Feb. 21, 2018) (collecting cases), R&R adopted, 2018 WL 3585171 (E.D. Pa. July 25, 2018); Kirnon, 620 F. Supp.2d at 696; see also Buck v. Colleran, 115 F. App'x 526, 528

(3d Cir. 2004) (finding failure to present claims in 1925(b) statement resulted in default in the federal court). Therefore, the claim is defaulted.

As the District Attorney argues, this claim is also meritless. Doc. 9 at 20. During his cross-examination of Ms. Jones, defense counsel confronted her with the fact that she changed her statement just a week before Scott was scheduled to go to trial, and that she was brought to court for her testimony by detectives. N.T. 5/25/10 at 161-62. "Q. Because they issued a a bench warrant for you to come in? A. Sort of, somewhat." Id. at 162. On redirect, the prosecutor asked Ms. Jones about the bench warrant and she explained that she had received a subpoena to come to court, but had "some issues going on," and she acknowledged that a bench warrant was issued, but stated that she had contacted the prosecutor's office about a dentist appointment and "wasn't trying to be combative." Id. at 171. Thus, defense counsel made the jury aware that Ms. Jones was appearing in court after the issuance of a bench warrant and her transportation was provided by detectives, and there is no factual basis for this claim.

Scott also complains that his counsel did not ask Ms. Jones if she was offered something in return for her testimony. Doc. 1 ¶ 12, GROUND THREE. Scott has offered no evidence to support a theory that Ms. Jones was testifying in exchange for something. In his reply memorandum, he suggests that because Ms. Jones gave two different statements, admitting she lied to police, she faced charges for perjury and obstruction and thus had a motive to "testify in a way that pleased the Commonwealth -

so they wouldn't charge her." Doc. 14 at 44-46.[15] But Scott has nothing other than supposition that any charges were ever contemplated against Ms. Jones. As such, Scott's speculation is insufficient to support a claim of IAC. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) ("[The petitioner] cannot meet his burden to show that counsel made errors so serious that his representation fell below an objective standard of reasonableness based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense. Rather he must set forth facts to support his contention.").

2. Exhausted Claim – IAC Failure to Properly Utilize Inconsistent Statements to Impeach Ms. Jones

Finally, Scott claims that his counsel was ineffective for failing to properly utilize Ms. Jones' prior statements to impeach her. Doc. 1 ¶ 12, GROUND THREE. The District Attorney responds that the Superior Court's determination of the claim was consistent with federal law. Doc. 9 at 18-20.

In considering this claim, the Superior Court found that, contrary to Scott's claim, defense counsel cross-examined Ms. Jones about her conflicting statements.

> After a thorough review of the record, we note that trial counsel did not have to impeach Ms. Jones about her prior inconsistent statement, because the jury already knew about her conflicting statements, as they were presented and discussed on direct examination. N.T., 5/25/10, at 131-34. Nevertheless, even though it may have been redundant, "[t]his issue was effectively addressed by trial counsel in his

[15]Scott also argues that the prosecutor knew that Ms. Jones was going to testify falsely, but again he has no evidence to support his argument other than the fact that Ms. Jones admittedly lied in her first statement. Doc. 14 at 46-49.

> cross examination of Reigna Jones," because trial counsel "did effectively utilize the witness's prior inconsistent statement to impeach her." PCRA Court Opinion, filed February 27, 2019, at 6-7 (citing N.T., 5/25/2010, at 136-41). [Scott] has consequently failed to prove that "the underlying legal claim is of arguable merit:" ergo, we reject this claim of ineffective assistance for this reason as well.

Pa. Super. – PCRA, 2019 WL 4451355, at *4.[16] This conclusion is factually accurate and consistent with Strickland.

During her direct examination, the prosecutor asked Ms. Jones about the statement she gave on July 13, 2007, at 8:15 a.m. (the morning after the shooting). N.T. 5/25/10 at 132. Ms. Jones admitted that she lied in that statement about how she had gotten back to her house from the bar. Id. at 134. On cross-examination, defense counsel questioned her in detail about the inconsistencies in the two statements and her delay in coming forward to correct her first statement. Id. at 136-42, 146-47.[17] During closing argument,

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[16]The Superior Court also found that Scott failed to plead prejudice as required to establish IAC. Pa. Super. – PCRA, 2019 WL 4451355, at *3. Scott has not raised any error in the Superior Court's prejudice determination. Either the Superior Court's deficiency analysis or its prejudice finding is sufficient for this court to deny relief. See Strickland, 466 U.S. at 697 ("no reason . . . to address both components of the inquiry if the defendant makes an insufficient showing on one").

[17]When initially asked about her first statement, Ms. Jones testified that she "lied through the whole statement." N.T. 5/25/10 at 132. During cross-examination, Ms. Jones stated that she only lied in the first statement about being with Scott and him putting her on a bus. Id. at 136. Thereafter, defense counsel confronted Ms. Jones and she admitted that Scott and Kahlil Ragin did not shake hands as she had indicated in her first statement. Id. at 140-41. In addition, based on defense counsel's questioning, Ms. Jones admitted that she had not told the police in her first statement that, after Scott spoke to Jahmeil on the phone, Scott closed the phone and said "I'm going to see that nigga about something because he ain't going to talk to me like that." Id. at 146.

defense counsel reiterated many of the falsehoods contained in Ms. Jones' first statement for the jury and also reiterated Ms. Jones' own testimony that her first statement was "all lies." N.T. 5/27/10 at 19-22. Thus, defense counsel did exactly what Scott claims he did not – utilize Ms. Jones' earlier statement to impeach her. Scott is not entitled to relief on this claim.

## IV. CONCLUSION

Any habeas challenge to Scott's lesser offenses is untimely and Scott has failed to provide any basis to excuse his failure to timely challenge the convictions arising from his earlier trial. Scott's petition is timely as to his claims challenging his murder conviction, but the claims presented for the first time in Scott's reply brief are untimely.

Three of Scott's claims are procedurally defaulted. The claim challenging the admission of the 911 calls was never presented on direct appeal and thus waived. The claims regarding counsel's failure to impeach Jahmeil Ragin and impeach Ms. Jones with the fact that the court issued a warrant to ensure her appearance at trial are defaulted because the Superior Court found Scott had not properly presented the claims in either his 1925 statement or in his appellate brief. The claim regarding counsel's failure to impeach Ms. Jones with her prior statement was properly exhausted and the Superior Court's determination of the claim was consistent with federal law and a reasonable determination of the facts.

Therefore, I make the following:

## RECOMMENDATION

AND NOW, this 18th day of January, 2023, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. 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/ Elizabeth T. Hey

ELIZABETH T. HEY, U.S.M.J.

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

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| ROBERT SCOTT | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| JOHN RIVELLO, et al. | : | NO. 20-3497 |

**ORDER**

AND NOW, this day of , 2023, upon careful and independent consideration of the petition for writ of habeas corpus, the response, reply, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED AND ADOPTED.
2. The petition for writ of habeas corpus is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
EDWARD G. SMITH, J.

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

1/18/2023

RE: SCOTT VS RIVELLO ET AL
CA No.: 20-3497

## NOTICE

Enclosed please find a copy of the Report and Recommendation filed by United States Magistrate Judge ELIZABETH T. HEY on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file with the clerk and serve upon all other parties' written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

**GEORGE WYLESOL**
Clerk of Court

By: Joseph Gerard Lavin
Joseph Gerard Lavin, Deputy Clerk

civ623.frm (11/07)_

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

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| ROBERT SCOTT, | : | |
| | : | |
| Petitioner, | : | CIVIL ACTION NO. 20-3497 |
| | : | |
| v. | : | |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA and the ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, | : | |
| | : | |
| Respondents. | : | |

**ORDER**

**AND NOW**, this 30th day of March, 2023, after considering the petition for a writ of habeas corpus under 28 U.S.C. § 2254 filed by the *pro se* petitioner, Robert Scott ("Scott") (Doc. No. 1), the state court record, the respondents' response to the habeas petition (Doc. No. 9), Scott's reply memorandum in support of his habeas petition (Doc. No. 14), the report and recommendation by United States Magistrate Judge Elizabeth T. Hey (Doc. No. 16), and Scott's timely objections to the report and recommendation (Doc. No. 19),[1] it is hereby **ORDERED** as follows:

1. Scott's objections to the report and recommendation (Doc. No. 19) are **OVERRULED**;[2]

2. The Honorable Elizabeth T. Hey's report and recommendation (Doc. No. 16) is **APPROVED** and **ADOPTED**;

3. The petition for a writ of habeas corpus is **DENIED WITH PREJUDICE**;

4. The court **DECLINES** to issue a certificate of appealability;[3] and

5. The clerk of court shall **MARK** this matter as **CLOSED**.

BY THE COURT:

*/s/ Edward G. Smith*
EDWARD G. SMITH, J.

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[1] Judge Hey filed the report and recommendation on January 18, 2023. *See* Doc. No. 16. Per the applicable statute and Local Civil Rule, Scott had 14 days from the date of filing to file objections to the report and recommendation. *See* 28 U.S.C. § 636(b)(1) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court."); E.D. Pa. Loc. Civ. R. 72.1(IV)(b) ("Any party may object to a magistrate judge's proposed findings, recommendations or report . . . within fourteen (14) days after being served with a copy thereof."). Thus, he had until February 1, 2023, to file objections.

Although the clerk of court did not docket Scott's objections until February 2, 2023, it appears that the envelope containing those objections has a time stamp of January 31, 2023. *See* Doc. No. 19 at ECF p. 12. Therefore, under the prisoner mailbox rule, the court considers the objections to have been timely filed. *See Houston v. Lack*, 487 U.S. 266, 275–76 (1988) (concluding that *pro se* prisoner's petition is deemed filed "at the time petitioner delivered it to the prison authorities for forwarding to the court clerk").

[2] By way of brief background, on July 24, 2008, a jury sitting in the Court of Common Pleas of Philadelphia County convicted Scott of carrying a firearm without a license, possession of instruments of crime, criminal attempt to commit murder, and aggravated assault, after Scott had shot two brothers, Kahlil and Jahmeil Ragin, killing the former and injuring the latter. *See* R. & R. at 1; *Commonwealth v. Scott*, No. 3630 EDA 2018, 2019 WL 4451355, at *1 (Pa. Super. Sept. 17, 2019). Nevertheless, the jury could not reach a verdict on first-degree murder. *Scott*, 2019 WL 4451355, at *1. Soon thereafter, the trial court sentenced Scott to 24½ to 49 years' incarceration. *See* R. & R. at 2. Scott appealed his sentence on sufficiency grounds, though the Pennsylvania Superior Court ultimately affirmed it. *See id.*; *Commonwealth v. Scott*, No. 2977 EDA 2008, 990 A.2d 53, 53 (Pa. Super. 2009). On September 7, 2010, the Pennsylvania Supreme Court denied Scott's petition for allowance of appeal. *See Commonwealth v. Scott*, No. 41 EAL 2010, 8 A.3d 344, 344 (Pa. 2010).

Meanwhile, in May 2010, a jury found Scott guilty of first-degree murder after he was retried on the charge. *Scott*, 2019 WL 4451355, at *2. Scott received a mandatory life sentence to run concurrently with the sentence imposed for the aforementioned lesser crimes. *Id.* On August 10, 2011, the Pennsylvania Superior Court affirmed this sentence on appeal. *Id.* The Pennsylvania Supreme Court denied Scott's petition for allowance of appeal on March 30, 2012. *Id.* Then, on February 22, 2013, Scott filed a *pro se* petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), claiming prosecutorial misconduct and ineffective assistance of counsel ("IAC") and challenging the weight and sufficiency of the evidence for his first-degree murder conviction. *See id.*; R. & R. at 3. Despite being initially appointed counsel, Scott motioned in October 2016 to proceed with his PCRA petition *pro se*, which the PCRA court granted. *Scott*, 2019 WL 4451355, at *2. On September 26, 2017, Scott filed an amended PCRA petition with additional IAC claims. *Id.* On November 13, 2018, the PCRA court dismissed Scott's amended petition, a holding that the Pennsylvania Superior Court upheld on appeal. *See id.* at *2, *5. The Pennsylvania Supreme Court denied Scott's petition for allowance of appeal on April 14, 2020. *See Commonwealth v. Scott*, 229 A.3d 567, 567 (Pa. 2020).

Scott filed the present petition for a writ of habeas corpus under 28 U.S.C. § 2254 on June 29, 2020. *See* Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody at ECF p. 15, Doc. No. 1. In the petition, Scott asserted three grounds for habeas relief: (1) error of the trial court in permitting the Commonwealth to present at trial 911 calls that Scott argues were inadmissible, (2) IAC regarding defense counsel failing to use a prior inconsistent statement of Jahmeil Ragin for impeachment purposes, and (3) IAC regarding defense counsel both failing to use a prior inconsistent statement of Reigna Jones, Scott's ex-girlfriend, for impeachment purposes and failing to question Jones about a bench warrant being issued to get her to come to court. *See id.* at ECF pp. 5–10.

This court referred the petition to United States Magistrate Judge Henry S. Perkin for a report and recommendation on September 21, 2020. *See* Doc. No. 5. However, on October 6, 2021, the matter was reassigned to Judge Hey. *See* Doc. No. 12. On October 4, 2022, Scott filed a memorandum replying to the Commonwealth's response in opposition to his petition, in which he raised a new claim alleging IAC for failure to conduct "'DNA' and other tests on . . . physical evidence" and recast as an IAC claim his claim regarding the 911 calls evidence. *See* Doc. No. 14 at ECF pp. 9, 11. As noted above, Judge Hey filed a report on January 18, 2023, in which she, *inter alia*, recommended that the court deny the petition for a writ of habeas corpus with prejudice. *See* R. & R. at 23. As also noted above, Scott timely filed objections to the report and recommendation. *See* Doc. No. 19.

In analyzing Scott's objections, the court conducts a *de novo* review and determination of the portions of the report and recommendation by the magistrate judge to which there are objections. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); *see also* E.D. Pa. Loc. R. Civ. P. 72.1(IV)(b) (providing requirements for filing objections to magistrate judge's proposed findings, recommendations, or report).

Here, Scott raises two substantive objections to Judge Hey's report. First, Scott objects to Judge Hey's finding that his habeas petition is untimely regarding the lesser charges of which a jury found him guilty on July 24, 2008. *See* R. & R. at 7; Pet'r's Objs. to Report of Magistrate Judge ("Objs.") at 2–5, Doc. No. 19. Second, Scott objects to Judge Hey's finding that the two new claims raised in his reply memorandum are untimely. *See* R. & R. at 8; Objs. at 6–9. The court finds neither objection sufficient to reject the report and recommendation.

To begin, Scott's first objection is without merit because it is premised on claims that have not been raised by Scott at any time prior to now. In the report, Judge Hey found that "to the extent Scott is challenging his convictions for lesser charges[,] . . . the habeas petition is untimely" because Scott never filed a PCRA petition challenging the charges, meaning his conviction for said charges became final on December 6, 2010. *See* R. & R. at 7; *see also* 28 U.S.C. § 2244(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."). Notably, Scott's objection does not dispute this finding. Instead, Scott contends that his failure to file a PCRA petition for the lesser charges was due to ineffective assistance from his counsel at that time. *See* Objs. at 2–5. This argument cannot prevail, however, as Scott never raised this specific IAC claim at any other time prior to the filing of his objections. *See Jimenez v. Barnhart*, 46 F. App'x 684, 685 (3d Cir. 2002) (holding that an argument raised for the first time in objections to a report and recommendation is deemed waived). Thus, the court overrules Scott's first objection.

For similar reasons, the court finds Scott's second objection without merit as well. In the report, Judge Hey found Scott's new claims raised in his reply memorandum—the DNA test claim and the recasting of the 911 calls evidence claim as an IAC claim—untimely because Scott filed his reply memorandum more than two years after the habeas limitations period expired on August 18, 2020. *See* R. & R. at 8. Again, Scott does not challenge the substance of this finding. Rather, Scott claims IAC by alleging that his counsel at the time failed to put all of Scott's claims into his PCRA petition, hence the two new claims arising for the first time in the reply memorandum. *See* Objs. at 6–9. As the court has explained above, though, because Scott is only now raising this IAC claim for the first time in his objections, the court must "deem this argument waived." *Jimenez*, 46 F. App'x at 685. Thus, the court overrules Scott's second objection.

The court notes that Scott included a third objection in his objections filing, though it appears to be a *pro forma* objection to the entirety of the report rather than a substantive objection to any particular findings. Indeed, the third objection in its totality reads as follows: "Petitioner objects to the conclusion of the RMJ, based on the foregoing reasons stated herein, and respectfully moves this court to reject the RMJ findings and recommendation and remand for an evidentiary hearing before a new Magistrate Judge." Objs. at 10. Courts will typically overrule objections that "do[] not address the magistrate judge's reasoning." *See, e.g.*, *Dye v. Hatton*, No. 17-CV-10183, 2018 WL 3219752, at *1 (E.D. Mich. July 2, 2018); *Laurence v. Wall*, No. CA 08-109, 2011 WL 835499, at *1 (D.R.I. Mar. 4, 2011); *Barton v. Walker*, No. 99Civ.12016, 2003 WL 22118967, at *2 (S.D.N.Y. Sept. 12, 2003). Accordingly, to any extent that Scott has raised a third objection, this court overrules it.

Since none of Scott's objections pertain to the report's findings regarding Scott's three original claims in his petition for writ of habeas corpus as they apply to Scott's first-degree murder conviction, the court reviews the remainder of the report for plain error. *See Oldrati v. Apfel*, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998) ("In the absence of a timely objection, . . . this Court will review [the magistrate judge's] Report and Recommendation for clear error." (internal quotation marks omitted)). The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The court has reviewed the portion of Judge Hey's report addressing these original claims for plain error and has ultimately found none.

For these reasons, the court will approve and adopt Judge Hey's report and deny the claims contained in the habeas petition with prejudice.

[3] A court should only issue a certificate of appealability if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits . . . [t]he 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). If, however, 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.* Here, Scott has not demonstrated that reasonable jurists would find the issues discussed above to be debatable.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 23-2974

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ROBERT SCOTT
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA;
ATTORNEY GENERAL PENNSYLVANNIA
DISTRICT ATTORNEY PHILADELPHIA

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(E.D. Pa. No. 2-20-cv-03497)

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SUR PETITION FOR REHEARING

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Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES and CHUNG, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled 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