NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3330

DARYL COOK,
Appellant
v.

SUPERINTENDENT COAL TOWNSHIP SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-19-cv-02206)
District Judge: Honorable Edward G. Smith

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
June 24, 2024

Before: KRAUSE, RESTREPO, and MATEY, *Circuit Judges*

(Filed: July 11, 2024)

OPINION*

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*This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

APPENDIX A

MATEY, *Circuit Judge*.

Daryl Cook was convicted of third-degree murder. Because a rational jury could find that Cook did not act in self-defense, we will affirm the District Court's decision denying his petition for a writ of habeas corpus.

I.

Robert Daniels was stabbed in his Philadelphia apartment during an altercation with Cook and another man, Andrew Williams. Williams initially told the police he stabbed Daniels but later revised his story and said Cook killed Daniels. After his arrest, Cook confessed to stabbing Daniels. But at his trial, Cook argued that Williams was actually the killer. Alternatively, Cook argued that, if the jury found that he stabbed Daniels, they should also find that he acted in self-defense. The jury convicted Cook of third-degree murder, and his conviction was affirmed on appeal.[1] After exhausting his state remedies, Cook filed this petition, arguing the trial evidence was insufficient to support his conviction because the Commonwealth failed to prove malice (as required for third-degree murder convictions) and, alternatively, failed to disprove self-defense. The District Court denied Cook's petition, and we granted a Certificate of Appealability "with respect to Cook's claim challenging the sufficiency of the evidence against him for his third-degree murder conviction." App. 39–40.[2]

[1] *See Commonwealth v. Cook*, No. 2712 EDA 2010, 2014 WL 10965084 (Pa. Super. Ct. Mar. 21, 2014); *Commonwealth v. Cook*, 99 A.3d 75 (Pa. 2014) (unpublished table decision) (denying Cook's petition for review).

[2] The District Court had jurisdiction under 28 U.S.C. § 2254, and we have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Our review is plenary. *Kennedy v. Superintendent Dallas SCI*, 50 F.4th 377, 381 (3d Cir. 2022).

II.

A petitioner challenging a state criminal conviction under 28 U.S.C. § 2254 is entitled to relief only if "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). We look to state law to determine the elements of the charged offense. *See id.* n.16. When the defendant raises an affirmative defense that negates an element of the crime, the prosecution must disprove the defense as well. *See Smith v. United States*, 568 U.S. 106, 110 (2013).

Under Pennsylvania law, a self-defense claim requires evidence establishing: 1) the defendant "reasonably believed that he was in imminent danger of death or serious bodily injury and that it was necessary to use deadly force against the victim to prevent such harm"; 2) the defendant "was free from fault in provoking the difficulty which culminated in the slaying"; and 3) the defendant "did not violate any duty to retreat." *Commonwealth v. Mouzon*, 53 A.3d 738, 740 (Pa. 2012) (internal quotation marks and citation omitted). If the prosecution can disprove at least one of these elements beyond a reasonable doubt, the self-defense claim is negated. *See Commonwealth v. Burns*, 416 A.2d 506, 507 (Pa. 1980).

Cook cannot meet his burden to show the jury's verdict lacked a rational basis. First, a rational jury could conclude that Cook violated his duty to retreat. The Superior Court found that "the record establishe[d] [Cook] could have retreated once he gained control of the knife" but instead stabbed Daniels, violating his duty to retreat. *Commonwealth v. Cook*, No. 2712 EDA 2010, 2014 WL 10965084, at *6 (Pa. Super. Ct.

Mar. 21, 2014) (citation omitted). This finding is subject to deference under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), so Cook must show that the Superior Court's decision was "objectively unreasonable" to obtain habeas relief. *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) (internal quotation marks and citations omitted); *see also* § 2254(d). Cook has made no such showing.

As a trespasser in Daniels's home, Cook had a duty to retreat "if the retreat c[ould] be performed safely." *Commonwealth v. Yanoff*, 690 A.2d 260, 264 (Pa. Super. Ct. 1997). No matter how the fight began, Cook and Williams's statements agree that Cook disarmed Daniels before Daniels was stabbed. Indeed, Cook recounted in his statement to the police that he "was able to get the knife away from the old man" before he "stabbed him twice in the stomach." App. 422. Based on these statements, the jury could have reasonably concluded that Cook could have safely exited the residence, particularly since Cook suffered only minor injuries. This conclusion would have been especially reasonable because Cook was younger, taller, and heavier than Daniels. The Superior Court's conclusion that Cook violated his duty to retreat was therefore not objectively unreasonable.

Second, a rational jury could conclude that Cook's use of force was unreasonable.[3] A medical investigator testified Daniels was unarmed when he was stabbed and that several of Daniels's wounds resembled defensive injuries. *See Commonwealth v. Smith*, 97 A.3d 782, 788 (Pa. Super. Ct. 2014) (noting that "whether [a] complainant was

[3] The Superior Court did not reach the use-of-force issue, so no AEDPA deference is warranted on that point.

armed" is a relevant factor "when determining the reasonableness of a defendant's belief that the use of deadly force was necessary to protect against death or serious bodily injuries"). Cook was both younger, taller, and heavier than Daniels; such "size and strength disparities" are relevant when determining whether the defendant's belief that deadly force was necessary was reasonable. *Id.* And expert testimony indicated that both of Daniels's stab wounds were deep in his chest, with one wound piercing a lung and the other penetrating the other lung and his heart, which a reasonable juror could have viewed as unnecessary in light of the evidence that Daniels, a smaller and older man, was unarmed when Cook stabbed him. A reasonable juror could also have found Cook's conduct after the stabbing, including his immediate flight from the scene and his attempt to get rid of the murder weapon, to be suspicious and indicative of guilt.

Cook argues that his own injuries from the fight show a reasonable fear of serious bodily harm. But we cannot reweigh the evidence the jury evaluated. *See United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc).

* * *

For these reasons, we will affirm the District Court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3330

DARYL COOK,
Appellant
v.

SUPERINTENDENT COAL TOWNSHIP SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-19-cv-02206)
District Judge: Honorable Edward G. Smith

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
June 24, 2024

Before: KRAUSE, RESTREPO, and MATEY, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record on appeal from the United States District Court for the Eastern District of Pennsylvania and was submitted on June 24, 2024. On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the judgment of the District Court entered on December 9, 2021, is hereby **AFFIRMED**. Costs shall not be taxed.

All of the above in accordance with the Opinion of the Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 11, 2024

Andre Williams 911 Calls

First Call

Police 119

Hi can you send uh police to uh 2038 – ambulance – somebody was stabbed

2038 where?

West Tioga

Tioga?

Yes

The person that's been stabbed, now, is the person that stabbed them still there?

Yeah, two people fightin'. I don't wanna go to jail, I...

Cuts off and hangs up

Second Call

Fire department, dispatcher 911, where is the emergency?

2038 West Tioga

2038 West Tioga?

Yeah

Is that a house or an apartment sir?

It's an apartment building.

What's your apartment number?

Uh, second floor

Ok is this a fire or a medical emergency?

Look, all I know I'm telling you, I'm not tryin' to be involved [car alarm]. There was an altercation with two people fighting, both of them got stabbed.

And they're on the second floor right now?

Yes, the one [intelligible], the other one left. Shit. I don't want to have shit to do with this.

I understand. The person who got stabbed, where did they get stabbed sir?

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Say that again?

The person who was stabbed, where, what part of the body?

There was two people stabbed.

Ok.

I don't know. I went in there and broke it up and one of them left. Ok. The door is open.

On the second floor right?

Yeah.

Ok sir, you're out of breath what's going on with you?

I broke it up!

Ok they're on their way out there now

I'm the one who called y'all so you know I don't want no problems.

I understand sir. 2038 West Tioga is that right?

Yes.

They're on their way now sir.

UNITED STATES COURT OF APPEALS
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v.

SUPERINTENDENT COAL TOWNSHIP SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil No. 2-19-cv-02206)
District Judge: Honorable Edward G. Smith

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant Daryl Cook in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the

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Court en banc. It is now hereby **ORDERED** that the petition is **DENIED**.

BY THE COURT

s/ Paul B. Matey
Circuit Judge

Dated: October 15, 2024

kr/lmr/cc: Claudia B. Flores, Esq.
Katherine E. Ernst, Esq.
Anthony Salzetta, Esq.
Ronald Eisenberg, Esq.

3 copies front & back

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

DARYL COOK,	:	
	:	
Petitioner,	:	CIVIL ACTION NO. 19-2206
	:	
v.	:	
	:	
THOMAS S. MCGINLEY, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this 15th day of November, 2021, after considering (1) the petition under 28 U.S.C. § 2254 for a writ of habeas corpus filed by the *pro se* petitioner, Daryl Cook (Doc. No. 2), (2) the response in opposition to the petition filed by the respondents (Doc. No. 13), (3) the petitioner's reply in support of his petition for a writ of habeas corpus (Doc. No. 21), (4) the petitioner's motion for speedy disposition or release on own recognizance pending disposition (Doc. No. 23), (5) United States Magistrate Judge Henry S. Perkin's report and recommendation (Doc. No. 24), (6) the petitioner's objections to the report and recommendation (Doc. No. 28), (7) the petitioner's amended objections to the report and recommendation (Doc. No. 30), (8) the petitioner's documentary evidence, facts, and law in support of the petitioner's habeas corpus claims and amended objections (Doc. No. 31), (9) the petitioner's motion for emergency release on nominal bail (Doc. No. 34), and (10) the petitioner's motion for speedy disposition of habeas petition or nominal bail (Doc. No. 35); accordingly, it is hereby **ORDERED** as follows:

1. The clerk of court is **DIRECTED** to **REMOVE** this action from civil suspense and **RETURN** it to the court's active docket;

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2. The petitioner's objections to the report and recommendation (Doc. No. 28) are **OVERRULED** as moot;

3. The petitioner's amended objections to the report and recommendation (Doc. No. 30) are **OVERRULED**;[1]

4. The Honorable Henry S. Perkin's report and recommendation (Doc. No. 24) is **APPROVED** and **ADOPTED**;

5. The petitioner's petition for a writ of habeas corpus (Doc. No. 2) is **DENIED**;

6. The petitioner has not made a substantial showing of the denial of a constitutional right and is therefore not entitled to a certificate of appealability, 28 U.S.C. § 2253(c)(2);

7. The petitioner's motion for speedy disposition or release on own recognizance pending disposition of the petition for a writ of habeas corpus (Doc. No. 23) is **DENIED AS MOOT**;

8. The petitioner's motion for emergency release (Doc. No. 34) is **DENIED**;[2]

9. The petitioner's motion for speedy disposition of habeas petition or nominal bail (Doc. No. 35) is **DENIED**;[3] and

10. The clerk of court shall mark this case as **CLOSED**.

BY THE COURT:

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

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[1] The *pro se* petitioner in this habeas action seeks to have his conviction of third-degree murder overturned. *See* Pet. for Writ of Habeas Corpus ("Pet.") at ECF p. 3, Doc. No. 2. In 2010, after a trial in the Court of Common Pleas of Philadelphia County, a jury found the petitioner guilty of third-degree murder. *Id.* The trial court sentenced the petitioner to a period of incarceration for a minimum of 20 years to a maximum of 40 years. *Id.*

The petitioner subsequently appealed to the Superior Court of Pennsylvania, which affirmed his judgment of sentence on March 21, 2014. Pet. at ECF p. 3. Following this affirmance, the petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. *Id.* at ECF p. 4. On August 26, 2014, the Supreme Court of Pennsylvania denied the petition. *Id.*

The petitioner then filed a petition for collateral relief under Pennsylvania's Post-Conviction Relief Act ("PCRA"), which the PCRA court dismissed on May 16, 2017. *Id.*; *see also* Resp't's Resp. to Pet. for Writ of Habeas Corpus ("Resp. to Pet.") at 5, Doc. No. 13. Although the petitioner appealed *pro se* from this dismissal to the Superior Court, the Superior Court affirmed the PCRA court's order on June 26, 2018. *See Commonwealth v. Cook*, No. 1757 EDA 2017, 2018 WL 3122067 (Pa. Super. June 26, 2018). The petitioner then filed a petition for allowance of appeal with the Supreme Court, but the Court denied the petition on January 9, 2019. *See Commonwealth v. Cook*, 200 A.3d 436 (Pa. 2019) (table decision).

On May 20, 2019, the petitioner filed the instant petition for writ of habeas corpus. Doc. No. 2. This court referred this matter to the Honorable Henry S. Perkin for the preparation of a report and recommendation on May 28, 2019. Doc. No. 6. On January 29, 2021, Judge Perkin issued a report and recommendation that the petition should be denied with prejudice and dismissed without an evidentiary hearing. Doc. No. 24. Since the issuing of that recommendation, the petitioner has filed initial objections, amended objections, evidence in support of his amended objections, a letter, a motion for emergency release, and a motion for speedy disposition of habeas petition or nominal bail. Doc. Nos. 28, 30–35. The court now considers the report and recommendation and the petitioner's objections.

Upon timely and specific objection by a party to a portion of a report and recommendation issued by a magistrate judge, the district court "is obliged to engage in *de novo* review of only those issues raised on objection." *Morgan v. Astrue*, Civ. A. No. 08-2133, 2009 WL 3541001, at *2 (E.D. Pa. Oct. 30, 2009) (citing 28 U.S.C. § 636(b)(1) and *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989)). In conducting this review, the court may "accept, reject, or modify, in whole or in part," the report's findings and recommendations. *Id.* (quoting 28 U.S.C. § 636(b)(1)). Additionally, "[o]bjections which 'merely rehash an argument presented to and considered by a magistrate judge are not entitled to *de novo* review.'" *Bedolla Camacho v. Garman*, Civ. A. No. 19-3454, 2021 WL 1105047, at *4 (E.D. Pa. Mar. 23, 2021) (citation omitted).

In his amended objections to the report and recommendation, the petitioner makes a blanket objection to "the Report and all of the Recommendations therein" on the grounds that Judge Perkin "merely re-stated the Commonwealth's position without considering Petitioner's Expanded Facts, And Law, In Support of Grounds for Relief." *See* Am. Objs. to R. & R. ("Am. Objs.") at 6–7, Doc. No. 30. The court has reviewed the report and is sensitive to the petitioner's concern that the report re-states the Commonwealth's position. That said, the court is satisfied that the report has addressed both parties' positions, including the petitioner's reply.

The petitioner's general objection to the entire report and all the recommendations is improper and insufficient to warrant a *de novo* review of the entire report (or all recommendations) because "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." *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984); *see Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011) ("We have provided that § 636(b)(1) requires district courts to review such objections de novo unless the objection is not timely or not specific." (citation and internal quotation marks omitted)); *Arnold v. Superintendent SCI Frackville*, 322 F. Supp. 3d 621, 629 (E.D. Pa. 2018) ("The district court does not . . . review objections that are generalized." (citing *Brown*, 649 F.3d at 195)). Despite the fact that the petitioner is proceeding *pro se*, it is his responsibility to review the report and identify specific portions of the report with which he disagrees. Simply stating the equivalent of "I object to everything" is wholly insufficient. Accordingly, the court has not conducted a *de novo* review of the entirety of the report and recommendation based on the petitioner's blanket, non-specific objection to the entirety of the report and recommendation.

In contrast to this improper, generalized objection to all aspects of the report and recommendation, the court has conducted a *de novo* review of the petitioner's specific objection to Judge Perkin's findings regarding his ineffective assistance of counsel claim. *See* Am. Objs. at 1–6. In his amended objections, the petitioner argues that the record clearly demonstrates that "Petitioner was constructively denied counsel at the time of sentencing, and all other appointed counsels w[ere] ineffective in not raising trial counsel's ineffectiveness even though the issues regarding trial counsel's ineffectiveness may have changed the outcome of Petitioner's trial." *Id.* at 3. Specifically, he argues that trial and appellate counsel were ineffective for failing: (1) to argue at the suppression hearing that the petitioner's arrest was illegal; (2) to present the recordings of his call with Ms. Bert; (3) failing to call Ms. Bert as a witness; (4) present his medical records at trial and the suppression hearing; (5) failing to present the 911 tape recording at trial, which allegedly would have shown that two people were stabbed; and (6) to raise in a motion that the verdict was against the great weight of the evidence. *Id.* at 2–3.

The court notes as an initial matter that, to the extent the petitioner argues that the ineffectiveness of his PCRA counsel is grounds for habeas relief, that argument is meritless. *See* 28 U.S.C. § 2254(i); *see also Colon v. Kerestes*, Civ. A. No. 16-5564, 2020 WL 1239472, at *11 (E.D. Pa. Jan. 14, 2020) ("It is well-established that claims of ineffective assistance of PCRA counsel cannot state a basis for federal habeas relief."). Moreover, the petitioner's ineffective assistance of counsel claim is procedurally defaulted. On post-conviction appeal, the petitioner raised only a single issue in his appellate brief:

> Did the PCRA court err or abuse its discretion in failing to grant Appellant the relief requested in his *pro se* PCRA petition and discharge him and release him from custody or appoint new counsel to conduct a thorough investigation and file an amended PCRA petition based on the issues raised in the *pro se* PCRA petition and/or based on the issues set forth herein [that] Appellant discovered upon review of the trial transcripts during the remand?

Cook, 2018 WL 3122067, at *2 (citing Appellant's Br. at 3).

This claim makes no mention of the ineffective assistance of counsel the petitioner allegedly received at trial. As a general matter, a federal habeas court may not grant relief unless the petitioner has first exhausted his state remedies. *See Arnold*, 322 F. Supp. 3d at 637 (citing *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)). To do so, he must "'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of his claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995)). To "fairly present" a claim, it is not sufficient merely to present the claim in a Rule 1925(b) statement; rather, the claim must be presented in the petitioner's briefs before the state court. *See Saunders v. Mahally*, Civ. A. No. 16-CV-2690, 2016 WL 11267192, at *5 n.6 (finding petitioner's prosecutorial misconduct claim to be unexhausted despite being mentioned in Rule 1925(b) statement because it was not raised in petitioner's appellate brief before Superior Court), *report and recommendation approved and adopted* 2017 WL 359644 (E.D. Pa. Jan. 25, 2017); *see also Glenn v. Wynder*, Civ. A. No. 06-513, 2012 WL 4107827, at *42 (W.D. Pa. Sept. 19, 2012) (determining that claim raised in Rule 1925(b) statement was unexhausted because petitioner "did not pursue it on appeal by including it within his appellate brief"). Because the only claim the petitioner presented to the state courts in his appellate brief was unrelated to his ineffective assistance of counsel claim, and the time for the petitioner to present the claim has expired due to the PCRA's time bar and waiver provisions, the ineffective assistance of counsel claim is procedurally defaulted. *See McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999). Although procedural default may be overcome by a showing of "cause and prejudice" or a "fundamental miscarriage of justice," *Lines v. Larkins*, 208 F.3d 153, 166 (3d Cir. 2000), the petitioner does not argue—and the court does not find—that circumstances exist such as to excuse the default.

Even if the claim was not procedurally defaulted, the court finds that the petitioner's ineffective assistance of counsel claim is so vague and conclusory that dismissal of the claim is warranted. Although Judge Perkin understood the petitioner to be arguing, as part of his fourth catch-all claim for habeas relief, that his trial counsel was ineffective for failing to investigate Ms. Bert as a potential witness, R. & R. at 26, the court notes that "it is [the p]etitioner's burden to articulate his allegations in a clear and concise manner." *Bush v. Lamas*, Civ. A. No. 12-2723, 2012 WL 6969745, at *8 (E.D. Pa. Nov. 30, 2012). In his habeas petition, the petitioner refers only vaguely to "all counsel[s'] failure to raise or investigate unspecified "witnesses" and "issues." *See* Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Pet.") at ECF p. 35, Doc. No. 2. The court is unable to understand, based on these vague and generalized allegations, the basis for the petitioner's claim that his counsel was ineffective, and finds that dismissal of this claim is proper. *See Keeling v. Shannon*, Civ. A. No. 02-4626, 2003 WL 22158814, at *10 (E.D. Pa. Aug. 20, 2003) (approving and adopting report and recommendation which explained that, *inter alia*, "[a] federal district court should dismiss habeas corpus claims that are based on vague and conclusory allegations. When claiming that counsel was ineffective, a habeas petitioner must allege facts to identify precisely how his counsel failed to fulfill his or her obligations. Absent such specifics, the court should summarily dismiss the claim." (citing *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993)). Even if the court were to look beyond the petition to the petitioner's reply brief, any claims regarding ineffective assistance of counsel raised therein would be waived. *See Thomas v. Giroux*, Civ. A. No. 2:15-cv-447, 2018 WL 3150264, at *15 n.7 (W.D. Pa. Apr. 23, 2018) ("In his traverse reply brief, [the petitioner] appears to be contending for the first time that he is entitled to habeas relief based upon the 'cumulative' prejudicial effect of all of his trial counsel's errors in this case. This is improper as Thomas cannot amend or supplement his petition by raising a new claim in a traverse." (internal citation omitted)). The petitioner's specific objection to the report and recommendation's analysis of his ineffective assistance of counsel claim is therefore overruled.

As a final note, although this court will not conduct a *de novo* review of the entire report based on the petitioner's general objection to the report, this court recognizes that "the better practice is for the district judge to

afford some level of review to dispositive legal issues raised by the report." *Henderson*, 812 F.2d 874, 878 (3d Cir. 1987) (footnote omitted). As such, the court reviewed the uncontested portions of the report for clear error or manifest injustice. *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 has reviewed the remainder of the report for clear error and has found none. Accordingly, the court will approve and adopt the report and recommendation.

[2] The court denies the petitioner's motion for emergency release (Doc. No. 34) for the same reasons it denies the habeas petition.

[3] The court also denies this motion for the reasons stated in this order and in Magistrate Judge Perkin's report and recommendation as, contrary, to the petitioner's assertion, "the record thus far [does not] show that he is entitled to habeas relief." Mot. for Speedy Disposition of Habeas Pet. or Nominal Bail Mot. at 1, Doc. No. 35.

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

DARYL COOK, Petitioner,	:	CIVIL ACTION
v.	:	NO. 19-2206
THOMAS S. McGINLEY, et al., Respondents.	:	

Henry S. Perkin, M.J. January 29, 2021

REPORT AND RECOMMENDATION

Presently before the Court is the *pro se* Petition for Writ of Habeas Corpus filed by the Petitioner, Daryl Cook ("Petitioner"), pursuant to 28 U.S.C. section 2254. For the reasons that follow, this Court respectfully recommends that the Petition should be denied with prejudice and without an evidentiary hearing.

I. PROCEDURAL HISTORY.

Petitioner was convicted of third-degree murder, criminal conspiracy, and possession of an instrument of crime on August 18, 2010, following a jury trial before the Honorable Jeffrey P. Minehart in the Court of Common Pleas of Philadelphia for the killing of Robert Daniels.[1] Judge Minehart, in his opinion for the benefit of the Pennsylvania Superior Court on post-conviction appeal, set forth the facts underlying Petitioner's conviction:

> On March 13, 2008, at approximately 8:43 p.m., Philadelphia Police responded to a radio call of a stabbing on the second floor of an apartment building located at 2038 West Tioga Street. Upon arrival,[fn] police officers discovered [the] victim, Mr. Daniels, suffering from multiple stab wounds to the chest and arms. The victim was transported to Temple Hospital where he was subsequently pronounced dead at 9:38 p.m. An autopsy revealed that the victim

[1] Petitioner was originally tried before a jury on August 7, 2009, which resulted in a mistrial – hung jury.

APPENDIX D

suffered a total of eight wounds, two of which were to his right chest that caused fatal injury to his heart and both lungs. The manner of death was deemed to be homicide.

[fn] Police obtained a search warrant prior to entering the premises.

Subsequent investigation revealed that the victim made a dying declaration at the apartment and told Officer Clarence Irvine that a male named A.J., who was later identified as Andre Williams (hereinafter "A.J."), from downstairs, stabbed him.[fn] On March 18, 200[8], Detective Rodden, the assigned investigator, secured an arrest warrant to apprehend A.J. Three days later, members of the Fugitive Squad arrested A.J. and transported him to the Homicide Unit. DNA swabs were taken from A.J. While detectives were unable to take a

[fn] Testimony from Tiffany Daniels, daughter to the victim, explained that the victim was the building manager at the apartment and that he resided on the second floor. Ms. Daniels spoke with her father and asked him to ask the landlord if A.J. could rent an apartment on the first floor. A.J. thereafter was permitted into the building and he resided on the first floor for one to two months before the stabbing. Two weeks prior to the stabbing, someone broke into A.J.'s apartment. During this time, A.J. and the victim had several arguments regarding the break-in, which resulted in the victim telling A.J. three days before the stabbing to vacate the apartment.

formal statement from A.J. because he invoked his right to counsel, he gave the detectives an oral statement.[fn] In it, A.J. identified his uncle, [Appellant], as the one who stabbed and killed the decedent. Initially detectives were unable to locate the whereabouts of [Appellant]. On June 6, 200[8], Amir Williams, [Appellant's] uncle and A.J.'s father, flagged down Officer Clarence Irvine around 5th and Olney and told him that [Appellant] was located inside a deli and was wanted for a homicide. Amir Williams led Officer Irvine to the deli at which time the officer asked [Appellant] for his ID. Upon ascertaining that [Appellant] had an open warrant for a summary offense and that he was wanted for questioning in a homicide matter, Officer Irvine arrested
defendant.

[fn] Detective Cummins took an oral statement from A.J. He was advised of his rights and recounted his version of the stabbing. A.J. stated he heard a commotion on the second floor and upon entering the victim's room, he observed [Appellant] and the victim fighting. As A.J. broke up the fight, he observed [Appellant] stab the victim several times. While placing a call to 9-1-1, A.J. observed [Appellant] fleeing the area. A.J. also fled the area.

[Appellant] was transported to Homicide Unit located at the Roundhouse where, Detective John McNamee tried to speak to [Appellant] about the death of the victim, but he refused to talk about the case. Subsequently, Detective

McNamee obtained a search warrant to take DNA from [Appellant] for DNA comparison. Two days later, Detective Rodden again came in contact with [Appellant], who was being held pursuant to the open warrant, and explained to him why he was there and asked if he would like to make a statement. Initially [Appellant] was unwilling to make a statement. Then, after the detective provided [Appellant] with food and beverages, Detective Rodden explained to [Appellant] that A.J. had been arrested and that he denied that he had killed the victim. The detective continued and stated that if [A.J.] had not killed the victim then [Appellant] had to have done so. At first, [Appellant] denied any involvement with the stabbing, but approximately fifteen minutes later, he agreed to give a statement. However, before Miranda [v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] warnings could be administered, [Appellant] volunteered that he had stabbed the victim. [Appellant] then gave a formal statement after he was given and waived the rights protected by the Miranda decision.

In his statement, [Appellant] stated that he went to A.J.'s apartment and A.J. told him to wait downstairs. Upon hearing an argument on the second floor, he proceeded upstairs. As he entered the apartment, he observed A.J. in the front room arguing with the victim. A.J. was upset that [Appellant] had entered the apartment and went into the kitchen, leaving [Appellant] and the victim alone in the front room. After A.J. left, the victim said, "fuck this," walked away, bent down, and grabbed a knife from underneath the mattress of his bed. The victim approached [Appellant] and swung the knife at him, at which time both men began to struggle. Both men then fell on the ground, where, according to [Appellant], he was able to gain control of the knife, which he used to stab the victim.

[Appellant] stated that he only stabbed the victim twice in the stomach. He further stated that at some point, he saw A.J. in the kitchen placing a call for medical attention for the victim so he decided to flee. As [Appellant] left the apartment, he threw the knife away, and proceeded to walk toward Broad and Wingohocking. He claimed he suffered a cut on his face and lip and three cuts on his chest. He did not seek medical attention and explained to the detectives that he did not wish to go to jail for stabbing the victim.

[Appellant] indicated that he was aware that A.J. had been arrested and charged for the stabbing but did not come forward because he wanted nothing to do with the matter. He had hoped that once the truth was discovered that A.J. did not stab the man, the case would be thrown out. He claimed he was worried about holding onto his "freedom" as long as he could and that he decided to give the statement because he felt guilty that someone else had been charged with the crime.

PCRA Ct. Op., 6/28/17, at 2-5. The jury found Petitioner guilty of third-degree murder, and on August 26, 2010, the Petitioner was sentenced to twenty to forty years' imprisonment. No post-sentence motions were filed.

On September 14, 2010, Petitioner filed a timely notice of appeal to the Pennsylvania Superior Court. After the appeal was filed, the trial court directed Petitioner to file a statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b) ("1925(b) statement"). Petitioner filed a 1925(b) statement on October 27, 2010 and then filed several *pro se* petitions. For reasons that are not clear from the record, on January 10, 2011, the trial court directed Petitioner to file a 1925(b) statement on or before January 31, 2011.

On May 4, 2011, Attorney Heather Sias entered her appearance on Petitioner's behalf. On January 11, 2012, Attorney Sias filed a 1925(b) statement and on January 27, 2012, Attorney Sias filed a petition to withdraw her appearance. On April 4, 2012, the Superior Court granted counsel's petition to withdraw and remanded this matter to the trial court for the appointment of new counsel. On April 20, 2012, Attorney David Rudenstein entered his appearance on behalf of Petitioner. Thereafter, Petitioner filed multiple *pro se* motions that were denied without prejudice to his right to reapply for relief through counsel.

Petitioner filed a counseled direct appellate brief on August 6, 2012; however, Attorney Rudenstein also filed a petition for remand averring that Attorney Sias failed to raise additional issues on appeal in the 1925(b) statement. Application for Remand, 8/6/12. On August 27, 2012, the Pennsylvania Superior Court granted Attorney Rudenstein's application for remand and provided Petitioner an opportunity to file a supplemental 1925(b) statement. In a motion for extraordinary relief filed on December 24, 2012, Petitioner's counsel sought additional time in which to file the 1925(b) statement. On January 16, 2013, the Superior Court granted the motion

for an extension of time. Petitioner's supplemental 1925(b) statement was filed on February 4, 2013. In a supplemental opinion filed on February 6, 2013, the trial court addressed the additional issues raised by Appellant in the supplemental 1925(b) statement. On June 25, 2013, the Superior Court vacated the briefing schedule to permit Petitioner to file a supplemental brief "due to a breakdown in the operation of the Court," because the right to file a supplemental brief had not been reinstated following the order granting Petitioner's petition to file the supplemental 1925(b) statement. Petitioner's supplemental brief was filed on August 26, 2013 raising two claims: that the evidence was insufficient to sustain Petitioner's convictions and the trial court erred in denying Petitioner's motion for mistrial which was based on several people chanting "not guilty, not guilty" as the jurors passed them in the hallway on their way to deliberate. The Commonwealth sought an extension to file a brief, but ultimately did not file a brief.

The Pennsylvania Superior Court affirmed Petitioner's judgment of sentence on March 21, 2014.[2] *Commonwealth v. Cook*, (Pa. Super. 2014)(No. 2712 EDA 2010); Resp., ECF No. 13, Exs. A, A2. The Supreme Court of Pennsylvania denied Petitioner's petition for allowance of appeal on August 26, 2014. *Commonwealth v. Cook*, (Pa. 2014) (No. 214 EAL 2014).

On March 5, 2015, Petitioner timely filed a *pro se* petition pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541, *et seq*. On August 11, 2016, Petitioner filed a *pro se* Writ of Habeas Corpus. Counsel was appointed and on March 5, 2017,

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[2] Former Justice Fitzgerald who was specially appointed to the Superior Court, filed a dissenting opinion in which he opined that the record did not support the trial court's findings of fact regarding the totality of the circumstances surrounding Petitioner's confession. Justice Fitzgerald recognized that Petitioner's specific challenge to his pre-confession detention was arguably waived for failure to identify it in his pretrial motion to suppress, but he noted that the Commonwealth was on notice that it bore the burden of proving that Petitioner's confession was voluntary and the Commonwealth did not object to a lack of notice of Petitioner's specific arguments at the suppression hearing, but did not file an appellate brief in this case. *See* Resp., Ex. A2. The Notes of Testimony from the suppression hearing are missing from the state court record.

counsel filed a no-merit letter.[3] On March 13, 2017, Petitioner filed a Motion for Appointment of New Counsel which the PCRA court denied on April 11, 2017. On April 11, 2017, the PCRA court sent Petitioner a Notice of Intent to Dismiss pursuant to Pa. R. Crim. P. 907, to which Petitioner filed a response on April 24, 2017. On May 16, 2017, after reviewing the entire record and determining that the raised issues lacked merit, the PCRA court issued an order dismissing the PCRA petition without a hearing and permitting PCRA counsel to withdraw. On June 28, 2017, the PCRA court issued its opinion for the benefit of the Superior Court. Resp., Ex. B. The Pennsylvania Superior Court affirmed the denial of PCRA relief on June 26, 2018. *Commonwealth v. Cook*, No. 1757 EDA 2017, 2018 WL 3122067 (Pa. Super. June 26, 2018); Resp., Ex. C.

Petitioner then filed the instant Petition for Writ of Habeas Corpus, raising the following claims:

> (1) conviction obtained in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. I was arrested without probable cause and subsequently subjected to a search of my blood for a DNA sample without probable cause (i.e. I was arrested and charged with murder based on hearsay, without a warrant, and I was subjected to the search based on hearsay;
>
> (2) conviction obtained in violation of Fifth, Sixth, and Fourteenth Amendments to U.S. Constitution. I was assaulted (i.e., beaten, choked and threatened) by Homicide Detective Gregory Rodden until I gave in after I said I did not have any knowledge of the alleged incident and I wanted to talk to a lawyer but was refused my request and then did everything he forced me to do (i.e. signed a statement he made and a non-consent to videotape/audiotape statement form) and after being held in the Homicide Unit for over two days without a warrant for my arrest issued or a criminal complaint filed against me;
>
> (3) insufficient evidence or weight of the evidence. The Commonwealth did not prove beyond a reasonable doubt that I was the perpetrator; did not prove malice, did not prove that the statement was voluntary or reliable; did not prove that I did not act in self-defense or that in light of the dying declaration I was the person who he said stabbed him. My alleged statement only indicate that I stabbed the

[3] The no-merit letter is missing from the state court record.

decedent twice in the stomach but he was not stabbed in the stomach, and he stabbed me;

(4) conviction obtained in violation of Fifth, Sixth, and Fourteenth Amendments to U.S. Constitution. My right to remain silent was used against me at trial by the Commonwealth's witness' testimony (i.e. the detective testified that I had refused to speak to another detective who first questioned me, however, my trial counsel failed to object and thus prejudiced right to appellate relief/a fair trial. Furthermore, I was denied a fair trial when the trial court did not grant a mistrial after the detective testified that when somebody gives and is willing to sign a statement, that shows that they are telling the truth. Also, I was subjected to double jeopardy at the time of my first trial when the trial court granted me a mistrial instead of acquit[ting] me and my trial counsel was ineffective for not requesting that I be acquitted. Moreover, I was subjected to double jeopardy at the second trial when the foreperson announced that I was not guilty and I was not guilty of all charges and the trial court stated you can't do that, etc. and sent the jury back to deliberate again without polling the jurors, and my trial counsel prejudiced me by not objecting and not raising that I should have been acquitted. I was denied a speedy trial, and all counsel were ineffective for not raising/investigating my witnesses, issues indicated in my PCRA petition and brief on appeal from the order dismissing my PCRA petition.

See Pet., pp. 8, 10, 12, 13. Respondents contend that Petitioner is not entitled to federal habeas relief because . . . . Petitioner filed a Reply Brief in response.

II. STANDARD OF REVIEW.

A. Petitions for Writ of Habeas Corpus.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that a writ of habeas corpus for a person serving a state court sentence shall not be granted unless the state court's resolution of the claim "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" and (ii) the claim is exhausted.[1] *See* 28 U.S.C. § 2254(d)(1);

[1] Exhaustion requires that the claims have been presented at all available levels of the state judicial system before being presented in a habeas corpus petition. *See Anderson v. Harless*, 459 U.S. 4, 7 (1982). If a petition's claims have not been exhausted, and a petitioner is time-barred from presenting those claims in state court, the

Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002); *Berryman v. Morton*, 100 F.3d 1089, 1103 (3d Cir. 1996). "As long as the reasoning of the state court does not contradict relevant Supreme Court precedent, AEDPA's general rule of deference applies." *Priester v. Vaughn*, 382 F.3d 394, 398 (3d Cir. 2004) (citing *Early v. Packer*, 537 U.S. 3 (2002) and *Woodford*, 537 U.S. 19)).

An objectively unreasonable application does not require merely that a state court's decision be erroneous or incorrect, but also that it be unreasonable. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). Clearly established federal laws are the holdings, not the dicta of the Supreme Court. *Id.* at 390.

B. Exhaustion and Procedural Default.

A petitioner may only succeed in a habeas corpus petition if he has first exhausted all remedies available in the state courts. 28 U.S.C. § 2254(b)(1)(A). To satisfy this requirement the petitioner must "fairly present" his claims to the state courts allowing the state courts a meaningful opportunity to correct alleged constitutional violations. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)(requiring "one complete

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claims are procedurally defaulted and will not be reviewed on the merits. 28 U.S.C. § 2254(b)(1)(A); *see O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

However, a procedurally defaulted claim may still succeed where a petitioner can show either (I) cause for the default and actual prejudice, or (ii) that the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 749 (1991). Cause exists when a petitioner demonstrates "some objective factor external to the defense impeded efforts to comply with the State's procedural rule." *Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *Cristin v. Brennan*, 281 F.3d 404, 412 (3d Cir.), *cert. denied*, 537 U.S. 897 (2002) (quoting *Coleman*, 501 U.S. at 753). Prejudice means that the alleged error worked to the petitioner's actual and substantial disadvantage. *United States v. Rodriguez*, 153 F. Supp. 2d 590, 594 (E.D. Pa. 2001) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

A fundamental miscarriage of justice occurs if a petitioner presents new evidence and shows that "it is [now] more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Keller v. Larkins*, 251 F.3d 408, 415-416 (3d Cir. 2001). The burden is on the petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 513 U.S. at 327.

round" of the state's appellate procedures). Petitioner bears the burden of proving the exhaustion of all available remedies for each claim. *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993).

Claims that are not exhausted will become procedurally defaulted, and the petitioner is not entitled to a review on the merits. *O'Sullivan*, 526 U.S. at 848. Review of a procedurally defaulted claim is permitted in extremely narrow circumstances, where the petitioner can show either (1) cause for the default and actual prejudice or (2) the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

"Cause" for procedural default is shown when the petitioner demonstrates "some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). "Actual prejudice" occurs when the errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494 (quoting *United States v. Frady*, 456, U.S. 152, 179 (1982)). A "fundamental miscarriage of justice" occurs when a petitioner presents new evidence of his actual innocence such that "it is [now] more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

In *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the Supreme Court examined whether ineffective assistance at the initial review of a collateral proceeding on a claim of ineffective assistance at trial can provide cause for a procedural defect in federal habeas proceedings. *Id.* at 1315. This case recognized a narrow exception to the *Coleman* rule (that ineffective assistance of counsel at the state collateral review level could not establish cause to excuse procedural default), holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 132 S.Ct. at 1315.

Thus, a PCRA claim for ineffective trial counsel during an initial state collateral review may qualify as "cause" to excuse the default if: (1) as a threshold matter, the state requires a prisoner to bring an ineffective counsel claims in a collateral proceeding; (2) the state courts did not appoint counsel at the initial review collateral proceeding for an ineffective-assistance-at-trial claim; (3) where appointed counsel at the initial-review collateral proceeding was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) and (4) the underlying ineffective-assistance-at-trial claim is substantial. *Martinez*, 132 S.Ct. at 1315-18.

C. Ineffective Assistance of Counsel.

Claims for ineffectiveness of counsel are governed by *Strickland v. Washington*, 466 /U.S, 668 (1984).[2] Under *Strickland*, counsel is presumed effective, and to prevail on an ineffectiveness claim, a petitioner must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. Given this presumption, a petitioner must first prove that counsel's conduct was so unreasonable that no competent lawyer would have followed it, and that counsel has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. In addition, a petitioner must prove prejudice. In order to do so, the petitioner must demonstrate that "counsel's errors were so serious as to deprive [petitioner] a fair trial, a trial whose result is reliable." *Id.* Thus, a petitioner must show a reasonable probability that, but for counsel's "unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome." *Id.* at

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[2] In *Harrington v. Richter*, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the United States Supreme Court reaffirmed the continued applicability of the *Strickland* standard in federal habeas corpus cases. *See also Premo v. Moore*, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

694. This determination must be made in light of "the totality of the evidence before the judge or jury." *Id.* at 695.

The United States Court of Appeals for the Third Circuit has cautioned that "[o]nly the rare claim of ineffectiveness should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." *Beuhl v. Vaughn*, 166 F.3d 163, 169 (3d Cir.), *cert. denied*, 527 U.S. 1050 (1999) (quoting *U.S. v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989)). Under the revised habeas corpus statute, such claims can succeed only if the state court's treatment of the ineffectiveness claim is not simply erroneous, but objectively unreasonable as well. *Berryman v. Morton*, 100 F.3d 1089, 1103 (3d Cir. 1996). Recently, the Supreme Court acknowledged that "[s]urmounting *Strickland*'s high bar is never an easy task." *Premo v. Moore*, 131 S. Ct. 733, 739 (2011) (quotation omitted). The Supreme Court explained that the relevant "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* at 740 (citing *Strickland*, 466 U.S. at 690).

Petitioner must show not only that counsel's conduct was improper, but also that it amounted to a constitutional deprivation. Petitioner must also show that the prosecutor's acts so infected the trial as to make his conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987) (citation omitted). Petitioner must show that he was deprived of a fair trial. *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Ramseur v. Beyer*, 983 F.2d 1215, 1239 (3d Cir. 1992), *cert. denied*, 508 U.S. 947 (1993) (citations omitted) (stating court must distinguish between ordinary trial error, and egregious conduct that amounts to a denial of due process).

Where the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the previous decision, pursuant to 28 U.S.C. § 2254(d)(1). If a state

court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Where the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable. *Yarborough v. Gentry*, 540 U.S. 1, 4, 124 S. Ct. 1 (2003) (*per curiam*) (citations omitted). The Supreme Court recently elaborated on this standard:

> Establishing that a state court's application of *Strickland* was unreasonable under §2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7, 117 S. Ct. 2059 . . . , and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S. at 123, 129 S. Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Premo, 131 S. Ct. at 740 (citations omitted).

III. DISCUSSION.

A. Petitioner's Search and Seizure Claim

Petitioner first claims that his conviction should be invalidated because it allegedly rests upon an illegal search and seizure. He contends that he "was arrested without probable cause and subsequently subjected to a search of my blood for a DNA sample without probable cause." (Pet., p. 29.) This claim is procedurally defaulted because it was not presented to the state courts and may not be brought before the state courts now due to the Pennsylvania Post-Conviction Relief Act's time bar and waiver provisions. Petitioner moved to suppress his confession in state court on the basis that it was coerced. Respondents contend that Petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court, therefore it is not cognizable

on federal habeas review. *See Stone v. Powell*, 428 U.S. 465, 494 (1976) ("where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial").

The PCRA court stated:

> [T]he record herein shows that defendant was arrested on an active bench warrant after a family member of defendant advised police that defendant was wanted for a homicide and was then inside a delicatessen. (N.T. 8/10/09, 4-5.) The record also shows that this Court rejected defendant's claims that he was physically coerced to give a statement by the interviewing detective on credibility grounds because defendant did not have any physical evidence to sustain his allegation that he was assaulted by the interviewing detective and that a validly issued search warrant was obtained for purposes of securing a sample of defendant's blood. (N.T. 8/10/09, 45-51.)

Resp., Ex. B, p. 10. The record reflects that Petitioner had an active bench warrant on an unrelated offense, and that he was arrested pursuant to that warrant even before he was questioned by Homicide detectives in connection with this case. (N.T., 7/9/10, 16.) The record also reflects that police obtained a search warrant for Petitioner's blood so that they could conduct a DNA comparison with blood samples taken from the crime scene. (*Id.*) Petitioner's contention that the warrants were based on "hearsay" lacks merit. A statement contained in an affidavit supporting a warrant cannot be hearsay, as it is not being offered as evidence in court to prove the truth of the matter asserted therein. Because valid warrants were obtained for both Petitioner's arrest and the search of his DNA, it is respectfully recommended that this claim should be denied.

B. Petitioner's Claim Relating to His Allegedly Coerced Confession

Petitioner's second claim is that his conviction was "obtained in violation of [the] 5th, 6th, and 14th Amendments to [the] U.S. Constitution." (Pet. at 31.) Petitioner contends that his conviction was wrongly based on his allegedly coerced confession to Detective Rodden, which

he believes should have been suppressed because he contends that it was obtained as the result of coercion after he was allegedly "beaten, choked, and threatened" by the detective. (*Id.*) This claim was rejected by the state courts.

On direct appeal before the Superior Court, Petitioner asserted that his confession had been coerced, and that the trial court erred when it admitted the confession into evidence. The Superior Court noted that the trial court's ruling relied upon its factual finding that Petitioner's story was not credible:

> In his fourth issue, Appellant argues that he is entitled to a new trial because the suppression court erroneously ruled that an out of court statement was admissible. We disagree.
>
> In reviewing the denial of a motion to suppress, we must determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. *Commonwealth v. Harrell*, 65 A.3d 420, 433 (Pa. Super. 2013)(citation omitted). Where the suppression court finds in favor of the prosecution, this Court shall consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. *Id.* When the factual findings of the suppression court are supported by the evidence, the appellate court may reverse only if there is an error in the legal conclusions drawn from those factual findings.
>
> In determining the voluntariness of a confession and the waiver of *Miranda* rights, a court must consider and evaluate the totality of the circumstances attending the confession and the waiver of the rights. *Commonwealth v. Gwynn*, 943 A.2d 940, 946 (Pa. 2008).
>
> > A reviewing court is to examine the following in determining the independence of a confession: 1) the voluntariness of the confession, including whether *Miranda* warnings were given; 2) the temporal proximity of arrest and confession; 3) the presence of intervening circumstances; and 4) the purpose and flagrancy of the official misconduct.
>
> *Id.* at 946 (citation omitted). The Commonwealth bears the burden of establishing that the defendant knowingly and voluntarily waived his *Miranda* rights. *Harrell*, 65 A.3d at 433.

In the instant case, the trial court, in reviewing [petitioner's] motion to suppress, chose to credit the testimony of Detective Gregory Rodden. The trial court addressed this issue as follows:

> Here, [Appellant's] claim that he was interviewed over the course of two and one-half days and that he was physically abused by the interviewing detectives is belied by the record. [The record] demonstrates that [Appellant's] statement was voluntary, meeting the criteria set forth in *Gwynn*. Prior to receiving his *Miranda* rights, defendant told Detective Rodden that he had stabbed the victim. Detective Rodden then left the room and brought in his partner, Detective Hesser, to advise Mr. Cook of his *Miranda* rights. Prior thereto, defendant was not interviewed or harassed by police, who left him alone and provided him with food and drink. According to the testimony from Detective Rodden, being held for an extended period of time in the interview room is not uncommon. Those held, including the defendant, are free to knock on the door to ask for an opportunity to eat or drink, place a phone call, or use the bathroom. The record is clear that the two days [Appellant] was kept in custody was due to an active bench warrant for a summary offense. There is simply no evidence to support [Appellant's] assertion that his decision to give a statement was the product of abusive interrogation practices or the result of an extended custodial period. The record reflects that [Appellant] remained calm throughout the entire statement, he did not ask the detectives to stop the interview, and was freely permitted to decline to have his statement videotaped or audiotaped. Regarding [Appellant's] formal statement, the record shows that the interview of defendant lasted approximately two hours following [Appellant's] waiver of the *Miranda* rights. [Appellant] was not handcuffed during the interview and he did not appear to be under the influence of alcohol or narcotics.
>
> Trial Court Opinion, 2/24/12, at 9. We agree with the trial court's assessment, and we conclude that the record supports the trial court's conclusion. *See* N.T., Suppression Hearing, 8/10/09, at 6-26 (testimony of Detective Rodden). Appellant is entitled to no relief on this claim.

Resp., Ex. A, pp. 11-12.

Petitioner's claim amounts to a bald assertion that the trial court's credibility-based factual determinations are wrong. As Respondents note, the determination of witness credibility, the resolution of evidence conflicts, and the drawing of reasonable inferences from proven facts

fall within the exclusive province of the fact-finder, and are therefore beyond the scope of federal habeas review. *Herrera v. Collins*, 506 U.S. 390, 401-402 (1993). Because the state court's resolution of the claim does not appear to have "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" the decision is entitled to deference and this claim must be denied. *See* 28 U.S.C. § 2254(d)(1); *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002); *Berryman v. Morton*, 100 F.3d 1089, 1103 (3d Cir. 1996).

C. Petitioner's Challenge to the Sufficiency and Weight of the Evidence

Petitioner next asserts that the jury's verdict was founded on insufficient evidence and was against the weight of the evidence. To the extent that Petitioner alleges the jury's verdict was against the weight of the evidence, his claim is procedurally defaulted due to Petitioner's failure to file a post-verdict motion for a new trial based on the weight of the evidence. The Superior Court found on appeal that:

> a claim that the verdict was against the weight of the evidence is waived unless it is raised in the trial court in a motion for a new trial, in a written or oral motion before the court prior to sentencing, or in a post-sentence motion. Pa. R.Crim.P. 607(A)(1)-(3). While the record reflects that Appellant filed numerous *pro se* motions in this matter, there was no post-verdict motion for a new trial based on the weight of the evidence. Accordingly, Appellant's challenge to the weight of the evidence is waived. *Commonwealth v. Griffin*, 65 A.3d 932, 938 (Pa. Super. 2013)

Resp., Ex. A, p. 9. Failure to comply with these procedural requirements operates as an independent and adequate state law ruling prohibiting habeas review. *See Walker v. Martin*, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment") (internal citations and quotations omitted).

A weight of the evidence claim requires an evaluation of the credibility of the evidence presented at trial, and a state court's credibility findings are binding on a federal habeas court. *See Marshall v. Lonberger*, 459 U.S. 422, 434-435 (1983). Thus, challenges to the weight of the evidence produced at trial are not cognizable claims on habeas review.

To the extent that petitioner's claim challenges the sufficiency of the evidence, it was reasonably rejected by the state courts on grounds supported by the facts of record and compatible with relevant federal law. The Superior Court, after reciting the relevant standards of review and the elements required to establish the crime of third-degree murder under Pennsylvania law, held:

> Third degree murder is defined as an unlawful killing with malice but without the specific intent to kill. *Commonwealth v. Dunphy*, 20 A.3d 1215, 1219 (Pa. Super. 2011); 18 Pa. C.S.A. § 2502 (c). Malice is defined as:
>
> > A wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured . . . . Malice may be found where the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury.
>
> *Id.* (internal citations and quotation marks omitted). "Malice may be inferred from the use of a deadly weapon on a vital part of the victim's body." *Commonwealth v. Gooding*, 818 A.2d 546, 550 (Pa. Super. 2003).
>
> Upon applying the aforementioned standard of review, we conclude that the evidence was sufficient to prove that Appellant had the requisite malice to support a conviction for third-degree murder. The evidence, when viewed in the light most favorable to the Commonwealth, established that Appellant stabbed the victim six times, and the two stab wounds to the heart and lungs, vital parts of the victim's body, were fatal. Accordingly, there was sufficient evidence to establish malice and support the conviction for third-degree murder.

Resp., Ex. A at 8-9. Petitioner's argument consists of bald assertions, among them that the prosecution failed to prove that he was the perpetrator despite his confession to stabbing the victim and the DNA evidence of his blood spatter around the crime scene, that the prosecution

failed to prove that he did not act in self-defense which is an argument that was rejected by the state courts, and that petitioner's admission to stabbing the decedent twice in the stomach, and not six times as the forensic examination showed, he presumably therefore could not be guilty of killing the victim.

None of these allegations is sufficient to carry petitioner's burden of proving that the state courts' ruling was either unreasonable in light of the facts, or contrary to binding United States Supreme Court precedent. It is respectfully recommended, therefore, that this claim should be denied.

D. Petitioner's Catch-All Claim

Petitioner's fourth claim, that his "conviction [was] obtained in violation of [the] 5th, 6th, and 14th Amendments to [the] U.S. Constitution," is comprised of five sub-parts. (Pet. at 34.) These subparts are:

> (1) trial counsel was ineffective for failing to object to Detective Rodden's comment on Petitioner's refusal to speak to another Homicide detective who tried to question him earlier, resulting in the claim being waived on state-court appeal;
>
> (2) Petitioner was denied his right to a fair trial when the trial court declined to grant a mistrial based on Detective Rodden's expressed personal opinion regarding the import of a signed statement;
>
> (3) Petitioner was subjected to double jeopardy "when the foreperson announced that [he] was not guilty of all charges";
>
> (4) Petitioner was denied his right to a speedy trial; and
>
> (5) all prior counsel were ineffective for failing to adequately investigate witnesses and failing to litigate Petitioner's preferred issues on appeal and/or on PCRA review.

Respondents contend that all of these claims are procedurally defaulted, unreviewable, and/or meritless. This Court construes Petitioner's claims as raising the same issues presented to the state courts on direct appeal and/or collateral review. To the extent that Petitioner intended to

raise different claims not previously presented to the state courts for review, those claims would be procedurally defaulted.

1. Petitioner's Ineffectiveness Claim Relating to Detective Rodden's Comment Concerning Petitioner's Refusal to Speak to Another Homicide Detective

On direct appeal, Petitioner alleged that he was entitled to a new trial because Detective Rodden allegedly made an impermissible comment about Petitioner's refusal to speak to another Homicide detective when he was initially questioned. Resp., Ex. A at 12-13. Because defense counsel did not object to this testimony at trial and Petitioner was attempting to raise the issue for the first time on appeal, the state courts determined that it was waived. (*Id.*).

On PCRA review, Petitioner alleged that trial counsel was ineffective for failing to make a trial objection that would have preserved the issue for appeal. The PCRA court determined that the underlying allegation of error was meritless and that Petitioner could not show he was prejudiced by counsel's inaction. Resp., Ex. B, pp. 12-13. The PCRA court specifically stated:

> Defendant's seventh PCRA claim alleges that trial counsel was ineffective for failing to object to a comment made by Detective Rodden, which defendant claims violated his right to remain silent.[fn1] This Court denied relief on this claim because defendant failed to establish that the claim possesses arguable merit: In [t]his Court's Supplemental Opinion, this Court concluded that any error was harmless. Supplemental Opinion, at 1-3. Based on the analysis set forth therein, this Court deemed defendant's current claim lacking in merit because it is clear that defendant cannot establish prejudice. It is clear that had counsel objected the jury would not have rendered a different verdict.[fn2]
>
> [fn1] The complained of comment is the following:
>
> > Well, [what] Detective McNamee put on his activity sheet was that he would speak to [defendant]. [Defendant] refused to talk to him about the case and subsequently Detective McNamee got a search warrant for his blood.
>
> N.T. 7/9/10, 16.
>
> [fn2] The Superior Court deemed the issue waived on direct appeal. See Superior Court's Memorandum. 3/21/14, at 12-13.

Resp., Ex. C, pp. 12-13. To prevail on his ineffective assistance of counsel claim, Petitioner must demonstrate that: (1) his trial counsel had no reasonable basis for not objecting to the comment by Detective Rodden; and (2) counsel's errors were so egregious they effectively denied Petitioner a fair trial. *Harrington v. Richter*, 131 S. Ct. 770, 787-788 (2011); *Strickland*, 466 U.S. at 687-688. Where the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the previous decision, pursuant to 28 U.S.C. § 2254(d)(1). Petitioner does not explain how the state courts' resolution of this claim was unreasonable in light of the facts or contrary to *Strickland*. Accordingly, it is recommended that this claim should be denied.

2. Petitioner's Due Process Claim Relating to Detective Rodden's Remark Concerning the Import of a Signed Statement

Petitioner contends that his due process rights were infringed when the trial court declined to grant a mistrial based on Detective Rodden's expressed personal opinion regarding the import of a signed statement. The Superior Court affirmed the trial court on direct review:

> We turn now to the issues Appellant raised in his supplemental brief, wherein Appellant claims that he is entitled to a new trial. Appellant first claims that he deserves a new trial because the trial court erred in permitting Detective Rodden's testimony wherein he said that Appellant refused to speak to another homicide detective at the time that he was being questioned. Appellant's Supplemental Brief at 3. However, before we reach the merits of this issue we must point out that it is not properly before our Court. It is well settled that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). The "[f]ailure to raise a contemporaneous objection to the evidence at trial waives that claim on appeal." *Commonwealth v. Thoeun Tha*, 64 A.3d 704, 713 (Pa. Super. 2013) (citation omitted). The record reveals that no objection was made to the allegedly improper testimony, and Appellant concedes as much in his supplemental brief. Appellant's Supplemental Brief at 6. Accordingly, this issue is waived.
>
> In his final issue on appeal, Appellant contends the trial court erred in denying his motion for a mistrial. Appellant claims that a mistrial was warranted because of a response Detective Rodden gave at trial regarding a signed statement. Appellant's Supplemental Brief at 3. We disagree.

The standard of review we apply for determining whether the trial court erred in denying a motion for a mistrial is as follows:

> The trial court is in the best position to assess the effect of an allegedly prejudicial statement on the jury, and as such, the grant or denial of a mistrial will not be overturned absent an abuse of discretion. A mistrial may be granted only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. Likewise, a mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice.

Commonwealth v. Parker, 957 A.2d 311, 319 (Pa. Super. 2008) (citation omitted).

Here, the testimony at issue, which concerned a statement Andre Williams, Appellant's nephew, gave to the police regarding the murder, came during the following exchange:

> [PROSECUTOR] Q: If there's not a written statement, why is it, Detective Rodden, that you can't use that as a basis for a warrant?
>
> [APPELLANT'S COUNSEL]: Note my objection.
>
> [DETECTIVE RODDEN]: Because he can't substantiate what the statement is, truth or not. Usually when somebody gives a statement and willing to sign it, it shows that they are telling the truth.
>
> [APPELLANT'S COUNSEL]: Your Honor, I'm going to object to that. Move for mistrial.
>
> THE COURT: Mistrial denied. Objection is sustained.

N.T., Trial, 7/9/10, at 78.

Appellant claims that this testimony emphasized that all signed statements are credible in general, thereby bolstering the veracity of Appellant's signed statement to police wherein he admitted the killing. Appellant's Supplemental Brief at 3. After review, we conclude that Detective Rodden improperly vouched for the credibility of Mr. Williams' statement.[fn] However, while Detective Rodden's statement was improper, a mistrial was not warranted.

> [fn] *See Commonwealth v. Tedford*, 960 A.2d 1, 31-32 (Pa. 2008) (it is improper for the prosecutor or a witness for the prosecution to vouch for the credibility of the Commonwealth's evidence).

> As noted, the trial court immediately sustained the objection. The record also reveals that the trial court instructed the jury that when an objection is sustained, the jury is to disregard the testimony. N.T., Trial, 7/8/10, at 10. It is well settled that the jury is presumed to follow the trial court's instructions. *Commonwealth v. Teems*, 74 A.3d 142, 148 (Pa. Super. 2013). Ultimately, we cannot agree that the statement's unavoidable effect was to deprive Appellant of a fair trial by preventing the jury from weighing and rendering a true verdict. Moreover, the evidence of Appellant's guilt in this matter was overwhelming. Appellant's defense was not that someone else did the killing; rather, Appellant chose to claim self-defense, and the jury was well within its rights to find Appellant's version of events incredible. Therefore, we conclude that the trial court did not abuse its discretion in denying the motion for a mistrial.

Resp., Ex. A, pp. 13-15. As in the previous claim, Petitioner does not explain how the state courts' resolution of this claim was unreasonable in light of the facts or contrary to relevant federal law. Accordingly, it is recommended that this claim should be denied.

3. Petitioner's Double Jeopardy Claim

Petitioner next alleges that his Double Jeopardy protections were violated because, supposedly, a juror declared him "not guilty" and then he was convicted. He specifically claims:

> Also, I was subjected to double jeopardy at the time of my first trial when the trial court granted me a mistrial instead of acquit[ting] me and my trial counsel was ineffective for not requesting that I be acquitted. Moreover, I was subjected to double jeopardy at the second trial when the foreperson announced that I was not guilty and I was not guilty of all charges and the trial court stated you can't do that, etc. and sent the jury back to deliberate again without polling the jurors, and my trial counsel prejudiced me by not objecting and not raising that I should have been acquitted.

Pet., p. 14. Petitioner did not present this claim to the state courts for review, and pursuant to the PCRA's time bar and waiver provisions may not do so now. It is therefore procedurally defaulted on habeas review.

This claim appears to be a combination of two separate claims raised in state court by Petitioner. On PCRA review, Petitioner alleged that his double jeopardy rights were violated because his prior trial ended in a hung jury and mistrial on August 12, 2009, and he was subsequently retried in 2010. He also alleged that the second jury declared him "not guilty," and that trial counsel was ineffective for failing to request a mistrial on the basis of this comment. The PCRA court rejected both claims as meritless:

> In claim six, defendant . . . .claims that his second trial violated double jeopardy because his first trial was terminated in the absence of manifest necessity. . . . Defendant's double jeopardy claim did not entitle him to relief because a mistrial was declared because the jury indicated on August 12, 2009, that it was hopelessly deadlocked. A genuine inability of a jury to agree constitutes "manifest necessity" to declare a mistrial over a defendant's objection without offending a defendant's Fifth Amendment rights not to be twice placed in jeopardy. *See Commonwealth v. Buffington*, 828 A.2d 1024, 1029 (Pa. 2003) ("It is well settled . . . that a defendant may be retried without violating double jeopardy principles, after a first trial yields a deadlocked jury"); *Commonwealth v. Murry*, 447 A.2d 612 (Pa. 1982) ("Our cases leave no doubt . . . that manifest necessity justifies discharge of a jury, when it appears that there is no reasonable probability of agreement on a verdict"). Based on the foregoing, it is clear that this claim lacked merit.

Resp., Ex. B, pp. 11-12. The PCRA court also rejected Petitioner's additional double jeopardy claim:

> Defendant's tenth claim asserts that trial counsel failed to object and move for an acquittal or a mistrial because the jury foreman announced a verdict of not guilty on the charge of third-degree murder. Defendant presented an affidavit from a relative wherein the relative averred that she heard the foreman announce a verdict of not guilty. Relatedly, Defendant contends that the transcript is incorrect as it does not contain everything that was said when the jury allegedly acquitted him of the crime of third-degree murder.
>
> Relief was denied with respect to this claim because the record does not support Defendant's assertion. After jury deliberations commenced, the jurors sent out a request that appeared to request that they be re-instructed, inter alia, on malice and voluntary manslaughter. (N.T. 7/13/10, 13-14). In an effort to ascertain exactly what the jury was requesting, this Court asked the foreperson, "How about third degree?" In response, the foreperson said, "With innocence, yes, not guilty. Not guilty, right." (N.T. 7/13/10, 14). The foregoing clearly

demonstrates that the jury had not reached a verdict and that the foreperson, as spokesperson for the jury, was simply clarifying the legal terms upon which it needed further instruction. In fact, following the giving of the requested supplemental instructions, the jury rendered its verdict and each juror stood by the verdict when each of them was polled. (N.T. 7/13/10, 28-30).

With regard to the contention that there is an omission in the record, there is no evidence to support the claim other than Defendant's bald assertion. Had the jury found Defendant not guilty[,] it is beyond belief that this Court, the prosecutor, and defense counsel all would have ignored the pronouncement and not said something. The fact is that the transcript accurately reflects what occurred in court and any claim that it does not is preposterous. Given the foregoing, it is clear that Defendant's assertion that he was acquitted was erroneous and that trial counsel had no ground upon which to move for an acquittal or a mistrial.

Resp., Ex. B at 15-16. The Superior Court affirmed the PCRA court's decision:

In Appellant's first sub-claim, he alleges that at the end of his trial, the jury announced that he was not guilty of third-degree murder. According to Appellant, the trial court responded by stating, "you can't do that, you must be confused," and the court purportedly told the jury "you need to go back and think some more...." Appellant's Brief at 14. Appellant claims that the jury returned to its deliberations, and ultimately convicted him of the murder offense. Appellant argues that his trial counsel was ineffective for not objecting or requesting a mistrial when this transpired, and he also maintains that his PCRA counsel was ineffective for concluding that this issue has no merit. Additionally, Appellant stresses that, attached to his petition, he included "a sworn affidavit from his sister, Marilyn Cook, stating that she witnessed the jury foreperson announce that Appellant was found not guilty of all charges," yet "PCRA counsel failed to investigate trial counsel, the prosecutor, Appellant's sister and/or the jurors, and the PCRA court failed to direct PCRA counsel to investigate them regarding the not guilty issue or appoint new counsel to investigate [the] same...." *Id.* at 14-15.

. . . .

The record supports the PCRA court's conclusion that the jury did not acquit Appellant of third-degree murder, nor any of the other offenses with which he was charged. Therefore, we discern no error in the court's rejecting Appellant's claim to the contrary.

In Appellant's next issue, he argues, generally, that his PCRA counsel, and the PCRA court, erred by concluding that the other issues presented in his *pro se* petition are meritless. However, Appellant offers no specific discussion

> of those issues, nor citation to any legal authority that would demonstrate their merit. Notably, the PCRA court set forth a thorough review of each of Appellant's claims in its Rule 1925(a) opinion, and it discussed why they are meritless. *See id.* at 5-19. Nevertheless, Appellant does not identify how the court erred, or why the record does not support the court's decision to deny his petition. Consequently, he has failed to demonstrate any basis for this Court to disturb the PCRA court's order.

Resp., Ex. C, pp. 4-6. Because the record contains no support for the factual predicate of this procedurally defaulted claim, it is meritless. It is respectfully recommended that this claim should be denied.

4. Petitioner's Speedy Trial Claim

Petitioner next alleges that his federal right to a speedy trial was violated. This claim is procedurally defaulted because Petitioner never raised a federal speedy trial claim in state court, and time-bar and waiver provisions in state court would now prevent Petitioner from presenting such a claim.

On PCRA review, Petitioner presented a state speedy trial claim and an ineffective assistance of counsel claim for failing to raise the speedy trial claim. The PCRA court rejected this claim:

> The record herein shows that this Court declared a mistrial on August 12, 2009, and that defendant's second trial commenced on July 6, 2010. Although the date defendant's second trial commenced is more than 120 days beyond the date the mistrial was declared, a cursory review of the record shows that the delay was caused mainly by this Court's busy trial schedule, which could not be altered because of the scheduling of other homicide matters for trial. Delay caused by judicial scheduling issues "is a justifiable basis for an extension of time if the Commonwealth is ready to proceed." *Commonwealth v. Wroten*, 451 A.2d 678., 681 (Pa. Super. 1982). Moreover, there is no evidence that the Commonwealth failed to exercise due diligence. This decision that defendant's Rule 600 claim did not entitle him to relief was not erroneous.

Resp., Ex. B, p. 14. The Superior Court affirmed the PCRA court:

> In Appellant's next issue, he argues, generally, that his PCRA counsel, and the PCRA court, erred by concluding that the other issues presented in his *pro se* petition are meritless. However, Appellant offers no specific discussion

> of those issues, nor citation to any legal authority that would demonstrate their merit. Notably, the PCRA court set forth a thorough review of each of Appellant's claims in its Rule 1925(a) opinion, and it discussed why they are meritless. *See id.* at 5-19. Nevertheless, Appellant does not identify how the court erred, or why the record does not support the court's decision to deny his petition. Consequently, he has failed to demonstrate any basis for this Court to disturb the PCRA court's order.

Resp., Ex. C, pp. 4-6. Because Petitioner does not show that that the state courts' rulings were flawed or that he was prejudiced by any delay, this claim is both defaulted and meritless. Moreover, counsel cannot be ineffective for failing to pursue a meritless claim. Accordingly,it is recommended that the claim should be denied.

5. Petitioner's Ineffective Assistance Claim Relating to Unspecified "Witnesses" and "Issues"

Petitioner asserts that trial counsel was ineffective for failing to adequately investigate witnesses, and appellate/PCRA counsel were ineffective for failing to litigate issues. In his Reply, Petitioner identifies Mrs. Bert, now deceased, as a witness who he believes trial counsel was ineffective for not investigating. Reply, ECF p. 22. Petitioner contends that if trial counsel had obtained her telephone record and the telephone records of the Homicide Unit, the records would show that Detective Rodden committed perjury when he testified that Petitioner did not make or request to make a phone call while he was in custody. *Id.* Petitioner contends that he made two telephone calls from the Homicide Unit to Mrs. Bert in which he told her that he was being forced to make a statement about a murder. *Id.* at 23. Petitioner contends that trial counsel ignored this witness who Petitioner identified in a *pro se* Omnibus Pre-Trial motion. *Id.*

If a petitioner can make a rare and extraordinary showing of actual, factual evidence so compelling that, in light of it, it is at least more likely than not that no juror, acting reasonably, would find him guilty, it would demonstrate that his habeas claims of constitutional

error at trial are entitled to be reviewed on the merits, even if they would otherwise be time-barred or inexcusably procedurally defaulted. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Petitioner asserts that trial counsel rendered ineffective assistance by failing to call Ms. Bert as a witness, which claim is procedurally defaulted. Petitioner would have to establish that it is at least more likely than not that no juror acting reasonably would find him guilty. His argument in his Reply does not meet that standard because a reasonable juror could continue to credit the testimony given by Detective Rodden.

To establish review of this claim under *Martinez*, Petitioner would have to show that his underlying claim is "substantial" or has merit, and that his PCRA counsel was ineffective under *Strickland* for not advancing that claim. His PCRA counsel was not obligated to raise every colorable, non-frivolous claim at his disposal. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (explaining appellate counsel is not required to raise every non-frivolous claim); *Buehl v. Vaughn*, 166 F.3d 163, 174 (3d Cir. 1999)(same). Moreover, *Strickland* requires this Court to "strongly" presume that PCRA counsel's performance, including his decision as to which issues to raise, was objectively reasonable. *Strickland*, 466 U.S. at 689 (internal citation and quotation omitted). Petitioner can only rebut the presumption of effectiveness by demonstrating that the issue he says his PCRA counsel should have raised – that trial counsel was ineffective for not calling witnesses - was so "clearly stronger" than the defense that his trial counsel chose to assert, that no competent counsel would have made the same choice as his counsel. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (generally, appellate counsel can only be found ineffective when ignored issues are clearly stronger than those presented) (internal quotation omitted).

To prevail on his underlying *Strickland* claim, Petitioner must demonstrate that:

(1) his trial counsel had no reasonable basis for not calling witnesses; and (2) counsel's error was so egregious it effectively denied Petitioner a fair trial. *Harrington v. Richter*, 131 S. Ct. 770, 787-788 (2011); *Strickland*, 466 U.S. at 687-688. Ineffectiveness for failure to call a witness is especially difficult for a petitioner to establish. The United States Constitution does not require counsel to call or interview every witness suggested to him by his client. *United States v. Ciancaglini*, 945 F.Supp. 813, 823 (E.D. Pa. 1996); *United States v. Jones*, 785 F.Supp. 1181. 1183 (E.D. Pa. 1992). Witness selection is among the non-fundamental decisions that counsel is entitled to make at trial, and courts generally "will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses." *Government of Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1434 (3d Cir. 1996); *Henderson v. DiGuglielmo*, 138 F. App'x 463, 469 (3d Cir. 2005). Thus, a decision not to use certain witnesses does not constitute ineffective assistance of counsel if it "amounted to a tactical decision within the parameters of reasonable judgment." *Duncan v. Morton*, 256 F.3d 189, 201 (3d Cir. 2001). Furthermore, even if counsel should have called a witness to testify, a petitioner must show "a reasonable likelihood that . . . information [not presented] would have dictated a different trial strategy or led to a different result at trial." *Lewis v. Mazurkiewicz*, 915 F.2d 106, 115 (3d Cir. 1990). Petitioner does not meet this burden. Accordingly, it is respectfully recommended that this claim should be denied as procedurally defaulted.

IV. CERTIFICATE OF APPEALABILITY.

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. A Certificate of Appealability ("COA") is a "jurisdictional prerequisite" to an appeal on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA can issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [if] jurists of reason would

find it debatable whether the district court was correct in its [] ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court is of the view that reasonable jurists would not debate the court's determinations, and a COA should not be granted.

Because there is no other basis for federal jurisdiction, I make the following:

RECOMMENDATION

AND NOW, this 29th day of January, 2021, IT IS RESPECTFULLY RECOMMENDED that the instant Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 should be DENIED WITH PREJUDICE and DISMISSED without an evidentiary hearing. There is no probable cause to issue a certificate of appealability.

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

BY THE COURT:

/s/ Henry S. Perkin
HENRY S. PERKIN
United States Magistrate Judge

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