ALD-022 November 12, 2024

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 24-1436

ROBERT ALLEN BENNEY,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI, et al.

(W.D. Pa. Civ. No. 18-cv-01223)

Present: BIBAS, PORTER, and MONTGOMERY-REEVES, Circuit Judges

Submitted are

(1) By the Clerk for possible dismissal for jurisdictional defect;

(2) Appellant's response to the notice of possible dismissal for jurisdictional defect;

(3) Appellant's second response to the notice of possible dismissal for jurisdictional defect with affidavit;

(4) Appellant's corrected affidavit in support of his responses to the notice of possible dismissal for jurisdictional defect;

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

(6) Appellant's request to exceed the word limit for his application for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The motion to exceed the word limit for the application for a certificate of appealability is granted. The application for a certificate of appealability is denied because Benney does not make a substantial showing of the denial of a constitutional right in relation to the claims that he pursues in his application. *See* 28 U.S.C. § 2253(c)(2). In particular, largely for the reasons provided by the District Court, he cannot show that "jurists of reason would find it debatable whether [any of those claims] states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: November 13, 2024
Amr/cc: All counsel of record

A True Copy:

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

APPENDIX "A"

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

ROBERT ALLEN BENNEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Civil No. 18-cv-1223**
	)	
THOMAS McGINLEY, *et al.*,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION and ORDER

Robert Allen Benney (Petitioner) has filed a Petition for Writ of Habeas Corpus by a State Inmate pursuant to 28 U.S.C. § 2254, challenging his state court judgment of sentence following his 2009 conviction, in the Court of Common Pleas Washington County, for burglary, robbery involving threats of fear of immediate serious bodily injury, theft by unlawful taking, aggravated assault, rape by forcible compulsion, involuntary deviate sexual intercourse, terroristic threats, unlawful restraint, and criminal conspiracy. ECF No. 1. The case was referred to Magistrate Judge Maureen P. Kelly in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D. Magistrate Judge Kelly issued a Report and Recommendation, filed June 29, 2023, recommending that the Petition for Writ of Habeas Corpus be denied and that a certificate of appealability be denied. ECF No. 90.[1]

[1] This matter was stayed on October 8, 2018, shortly after it was filed, at the request of Petitioner, while Petitioner exhausted post-conviction proceedings in state court. ECF No. 3. This matter remained stayed until February 25, 2020. ECF No. 9.

Discussion

The factual background and procedural background of this case, described in the Opinions of the Pennsylvania Superior Court and the Washington County Court of Common Pleas, are presented at length in the Magistrate Judge's Report and will not be repeated here. ECF No. 90, at 2-8. An abbreviated factual background follows. Petitioner, and a coconspirator recruited by Petitioner, conspired to break into the victim's residence with the intent of stealing valuables, in particular, the victim's deceased spouse's coin collection. Petitioner knew about the coin collection, and that the victim lived alone, because he had previously worked inside the house when employed by a contractor. Pursuant to Petitioner's plan, the coconspirator broke a window at the back door to attract the victim and then the Petitioner broke in through the front door. Petitioner directed the coconspirator as to where to look for valuables. Petitioner stayed with the victim and proceeded to persecute and abuse her both sexually and physically. When the coconspirator returned to where Petitioner and the victim were, Petitioner directed the coconspirator to tie the victim's hands together. The coconspirator tied the victim's hands loosely and whispered to her that she was going to be alright. The two eventually left the house, leaving the victim tied up on a chair in her basement.

Objections

Petitioner requested, and was granted, an extension of time to file Objections. Thereafter, Petitioner timely filed Objections on August 30, 2023. ECF No. 93. Respondents filed a Response to the Objections on November 28, 2023. ECF No. 98. The filing of timely objections requires the district judge to "make a de novo determination of those portions of the report . . . to which objection is made." 28 U.S.C. § 636(b)(1); *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); Fed. R. Civ. P. 72(b)(3). In doing so, the district court "may accept, reject, or

modify, in whole or in part, the findings and recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Petitioner Objects to the Magistrate Judge's Report and Recommendation as to his claims set forth in Grounds Two, Four, Five, Six, Seven, and Eight. For the reasons that follow, after *de novo* review, the Court finds that Petitioner's Objections do not undermine the recommendation of the Magistrate Judge.

Ground Two (Objections 1, 2, and 3)

In Ground Two, Petitioner claims that his trial counsel was ineffective for failing to object to the testimony of investigating Detective Luppino's testimony that he had "[a]bsolutely no doubt" that the Petitioner was guilty. The relevant trial testimony occurred as follows:

> Q. You, as a seasoned investigator and detective, you have no doubt that [Petitioner] is the person who was there with [the second actor]?
> A. Absolutely no doubt.
> Q. I believe all points of your investigation lead[] you to [conclude that] these were the two actors in that home that evening?
> A. Absolutely.

See Report, ECF No. 90, at 33.

The Magistrate Judge found that the Pennsylvania Superior Court's disposition was not contrary to or an unreasonable application of Supreme Court precedent. 28 U.S.C. §§ 2254(d) & (e); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000). The Pennsylvania Superior Court majority concluded that Detective Luppino's testimony was properly admitted under Pennsylvania Rule of Evidence 701, and therefore, the Superior Court held that the trial court did not abuse its discretion in admitting the testimony. *Commonwealth v. Benney*, No. 680 WDA 2015, 2017 WL 527968, at *6 (Pa. Super. Ct. Feb. 8, 2017). In a concurring opinion, Judge Strassberger disagreed with the majority's conclusion that Detective Luppino's testimony was necessarily properly admitted and instead, would have proceeded to an examination of whether counsel was ineffective for failing to object to the testimony. *Id.* at *8. Judge Strassburger then concluded

that the claim would fail for failure to show that Petitioner was prejudiced by counsel's ineffectiveness. *Id.* Similarly, the Magistrate Judge reviewed the trial evidence to conclude that, even if this Court did not defer to the Superior Court's holding that the testimony was properly admitted, Petitioner was not prejudiced by his counsel's alleged ineffectiveness, given the strength of the evidence presented to the jury.

In Petitioner's present Objections, he challenges the Superior Court's holding that the trial court did not abuse its discretion in admitting the testimony, and he challenges the Magistrate Judge's reliance on said holding in determining that the Superior Court's decision was not unreasonable. In Objection 1, Petitioner complains that the Superior Court erred by applying an abuse of discretion standard to an ineffective assistance of counsel claim. The Court disagrees. Petitioner's ineffective assistance of counsel claim has two components: Detective Luppino's allegedly improper testimony and trial counsel's failure to object to said testimony. If Detective Luppino's testimony is admissible and is not contrary to law or the rules of evidence, then trial counsel cannot be deemed ineffective for failing to object at trial. The Superior Court deemed Detective Luppino's testimony admissible; therefore, trial counsel was not ineffective for failing to object to properly admitted testimony, as any objection would have been overruled.

In Objection 2, Petitioner argues that the Magistrate Judge erred by applying section 2254(d)(1)'s standard, which states, in part, that a habeas petition

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1). Petitioner argues that the Magistrate Judge should have applied the standard set forth in section 2254(d)(2), which states, in part, that a habeas petition

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(2). Petitioner argues that the Superior Court's decision is based upon an unreasonable determination of the facts. Specifically, the portion of the Superior Court's opinion referring to the basis for Detective Luppino's testimony:

> our review of the record indicates that the trial court did not abuse its discretion by admitting Sergeant Luppino's lay opinion testimony into evidence, as it was clearly *based upon his investigation of the crime scene and 17 years' experience as a police officer*. (See notes of testimony, 2/2–5/09 at 213–214, 228.) Accordingly, trial counsel was not ineffective for failing to object to this testimony.

Benney, No. 680 WDA 2015, 2017 WL 527968, at *6 (emphasis added). Petitioner specifically argues that the Superior Court's factual determination that the testimony "was based upon [Detective Luppino's] investigation of the crime scene," was unreasonable. Petitioner argues that Detective Luppino testified about a variety of matters other than his investigation of the crime scene. Furthermore, he argues that just prior to the question that elicited the "no doubt" response, Detective Luppino answered questions about the trial testimony of others.

The Magistrate Judge did not err by failing to conclude that the Superior Court issued an "unreasonable determination of the facts in light of the evidence presented." Initially, the Magistrate Judge's conclusion that the Superior Court's resolution of Petitioner's ineffectiveness claim was not contrary to or an unreasonable application of Supreme Court precedent, necessarily affirms that the Superior Court's factual determinations supporting its decision were not unreasonable. In any event, even if the Superior Court's factual determination was unreasonable, Petitioner's claim cannot succeed as he is unable to show that the outcome of the

proceeding would have been different had his trial counsel objected to Detective Luppino's "no doubt" response.

In Objection 3, Petitioner argues that the Magistrate Judge erred in concluding that Petitioner failed to prove prejudice. Petitioner analyzes extensive amounts of trial testimony to conclude that, regardless of the plethora of inculpatory evidence presented at trial, he was prejudiced by Detective Luppino's testimony that Petitioner was present at the home with the second actor. Petitioner's argument does not persuade the Court that the Magistrate Judge erred in her conclusion that Petitioner has failed to show prejudice. The Court agrees that the totality of the evidence against Petitioner was strong in general, and specifically, the totality of the evidence persuasively supports the conclusion that Petitioner was present in the house.

Ground Four (Objections 4 and 5)

In Ground Four, Petitioner claims that his due process rights were violated when the Commonwealth committed prosecutorial misconduct by introducing false testimony and misrepresentations to the trial court and jury. Specifically, Petitioner is referring to the in-court testimony of the victim, in which she identified a voice played on a recording in open court as being the voice of the less-culpable actor. Petitioner argues that the victim's in-court voice identification of the "less-culpable" assailant was false, primarily because of problems surrounding the pretrial voice identification procedure. The Magistrate Judge ruled that Ground Four had been procedurally defaulted and that the Petitioner had not met his burden to show cause and prejudice to set aside the default.

Petitioner raises two Objections to the Magistrate's report as to Ground Four. In Objection 4, Petitioner argues that the Magistrate Judge, as well as the Superior Court, misinterpreted his claim by focusing on the fact that the voice recording was not missing and was

in fact played at trial. Both the Magistrate Judge and the Superior Court concluded that the presence of the voice recording, played in open court while the victim testified, presented Petitioner with the opportunity to cross-examine both the victim and law enforcement regarding the recording and the voice identification procedure used by law enforcement. Petitioner explains that, rather than focusing on the voice recording played at trial, his claim in Ground Four is "premised off the conflicting records that created a dispute in a material factual issue as to WHO performed the codefendant's pretrial voice identification procedure." ECF No. 93, at 8. Petitioner submits that only after it is determined "who conducted the codefendant's pretrial voice identification procedure," and when, will Petitioner know "which avenue/claim ground 4 will go/expose." *Id.* Thus, Petitioner, in part, appears to be challenging the authenticity and validity of the voice recording, as well as the prosecution's use of the recording at trial, to obtain the victim's testimony identifying the voice as the less-culpable actor.

As an initial matter, the burden is on the Petitioner to accurately state his claims to the Superior Court and the District Court. Petitioner did not state his claim in Ground Four as one that was addressing "who" conducted the voice recording and "when." Petitioner framed his Ground Four Claim as a due process violation claim arising out of prosecutorial misconduct, the introduction of false testimony, and misrepresentations. Therefore, contrary to Petitioner's Objection, there is no error in the Magistrate Judge's overall analysis of Ground Four.

The Court also finds no error in the Magistrate Judge's determination that Petitioner has not shown cause to excuse his default, nor has he shown prejudice. Specifically, as to prejudice, the Magistrate Judge correctly focused on the fact that the victim identified the codefendant's voice from the recording played in open court in front of Petitioner and the jury. The victim identified the codefendant as the actor who did not rape her. Petitioner offers nothing but

speculation that he might eventually uncover some nefarious evidence once he finds out who conducted the initial voice identification, and when, that would somehow undermine the victim's actual testimony in response to the voice recording. Beyond the fact that Petitioner's argument is speculation, his argument fails to sufficiently address the fact that the victim testified at trial that it was the codefendant's voice on the voice recording, independent from any prior investigative procedures regarding who conducted the recording and when. Petitioner's remaining complaints on this subject lack merit.[2]

In Objection 5, Petitioner claims that he had raised an alternative claim within Ground Four. In the second-to-last paragraph of Ground Four, which spans twenty-three pages, Petitioner argues that his trial counsel was ineffective for failing to cross-examine the victim as to, "who performed the [co-actor's] pretrial identification procedure." ECF No. 8-1, at 51. Petitioner also argues that his PCRA counsel was ineffective for failing to raise an ineffective assistance of trial counsel claim on this basis. *Id.* However, said claim is defaulted for failure to be presented in Petitioner's Habeas Petition pursuant to Rule 2(c)(1) of the Rules Governing 2254 Cases (the petition must: (1) specify all the grounds for relief available to the petitioner). This claim is also procedurally defaulted insofar as it extends from the initial claim regarding false testimony. Petitioner has not met his burden to show cause and prejudice such that default of this issue should be set aside. Objection 5 is overruled.

[2] The Court notes that with respect to this Objection, and throughout Petitioner's Objections, he reviews and comments on a variety of evidence, as well as out of court and in court statements, to argue that such evidence is weak, questionable, contradictory, or false. However, after a defendant has been convicted by a jury, the presumption is that the jury accepted the prosecution's evidence supporting a conviction. Thus, even if a particular piece of evidence against the defendant is weak, questionable, or contradicted by other evidence, the jury's conviction of the defendant permits the presumption that the jury accepted such evidence as proven. Petitioner's nuanced arguments comparing and contrasting a large amount of the evidence does not persuasively support his arguments in this 2254 habeas proceeding.

Ground Five (Objections 6 & 7)

In Ground Five, Petitioner claims that his due process rights under the Fourteenth Amendment of the United States Constitution were violated by the following:

- the destruction of a partial fingerprint on a piece of duct tape,
- Detective Luppino's subsequent fraudulent testimony regarding the piece of tape,
- Detective Luppino's lack of qualifications regarding fingerprint examination, and
- The question of what Detective Luppino did with the piece of tape.

This claim was deemed to be procedurally defaulted. The Magistrate Judge concluded that Petitioner failed to demonstrate cause to set aside the default.

In Objection 6, Petitioner claims the Magistrate Judge erred by separating his claim into two parts: (1) the alleged destruction of the piece of duct tape with a partial fingerprint, and (2) Detective Luppino's alleged fraudulent testimony related to his qualifications to analyze fingerprints in the field and whether Detective Luppino submitted the piece of duct tape to the Pennsylvania State Police forensics services. Reviewing this claim in the manner in which Petitioner claims the Magistrate Judge should have analyzed it results in the same conclusion that the claim is procedurally defaulted, and cause and prejudice to excuse the default has not been demonstrated.

In Petitioner's Objection 7, he challenges, in general, the Magistrate Judge's analysis of the substance of his claim, particularly as to cause to excuse the default. None of the arguments raised by Petitioner undermine the Magistrate Judge's analysis.

Objection 6 and Objection 7 are overruled.

Ground Six (Objections 8 & 9)

In Ground Six, Petitioner claims that his trial counsel was ineffective for failing to object to, or seek suppression of, the unreliable and suggestive pretrial identification of the codefendant,

in violation of the Petitioner's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Ground Six has been deemed procedurally defaulted for failure to raise it in Petitioner's Rule 1925(b) statement in his first PCRA appeal. *Martinez v. Ryan*, 566 U.S. 1 (2012). In Objection 8, Petitioner cites to additional case law to support his argument that his claim is not defaulted; specifically, *Shinn v. Ramirez*, 142 S.Ct. 1718 (2022). A review of the *Shinn* opinion shows that it does not change the outcome, Petitioner's claim asserted in Ground Six is procedurally defaulted. Petitioner's Objection 8 is overruled.

In Objection 9, the Petitioner argues that the Magistrate Judge failed to address his multiple reasons he offered to show cause for his default. ECF No. 93, at 22-24. Such alternative bases for establishing cause for default are unpersuasive. Petitioner's Objection 9 is overruled.

Ground Seven (Objection 10)

In Ground Seven, Petitioner claims that his trial counsel was ineffective for failing to move for a judgment of acquittal on the rape charge, and alternatively, Petitioner claims his Fourteenth Amendment due process rights were violated. The Magistrate Judge found that Ground Seven was procedurally defaulted and there was no cause to excuse the default.

In Objection 10, Petitioner argues that he did raise the instant claim regarding the rape charge, he attempted to raise the claim, or the claim was not raised due to PCRA counsel and the Courts' failures. The Court finds no error with the Magistrate Judge's conclusion that Ground Seven was procedurally defaulted, and there was no cause to excuse the default.

Alternatively, assuming Petitioner was able to establish cause for his default, the Magistrate Judge found that the substance of his argument has no merit. The Magistrate Judge explained how the victim's testimony, that the intruder put his penis in her mouth, was sufficient

to support a charge of rape under applicable Pennsylvania law, as the jury was instructed. The Petitioner alleges that the Magistrate Judge's conclusion only raises confusion as to which criminal sexual act, rape or involuntary deviant sexual intercourse, went with which jury charge. There is no confusion. The prosecution introduced its evidence supporting a conviction as to each of the two criminal sexual acts. The jury was charged with applicable law to apply in arriving at a verdict on both the charge of rape and the charge of involuntary deviate sexual intercourse. The jury found Petitioner guilty on both counts. There is no need for further specification or speculation as to which jury charge went with which sexual act conviction. The convictions demonstrate that the jury found that the prosecution's evidence established all elements necessary to prove that each crime was committed by Petitioner. Objection 10 is overruled.

Ground Eight (Objection 11)

In Ground Eight, Petitioner claims that trial counsel was ineffective for failing to object to an allegedly erroneous jury instruction on the unlawful restraint charge, and alternatively, Petitioner claims his due process rights were violated. The Magistrate Judge found that Ground Eight was defaulted for failure to be presented to the Superior Court in a Rule 1925(b) statement. Furthermore, the Magistrate Judge found no cause to set aside default. As to the due process claim, the Magistrate Judge found that said claim was not fairly presented to the state courts. In Objection 11, Petitioner generally disagrees with the conclusion that his claim is defaulted. He does so by relying on the same evidence that was before the Magistrate Judge and considered by her. The Court finds no error with the Magistrate Judge's resolution of Ground Eight. Objection 11 is overruled.

Certificate of Appealability

The Magistrate Judge recommended that a certificate of appealability be denied. Petitioner specifically argues that a certificate of appealability should be issued as to Ground Two and Ground Four.

In Ground Two, Petitioner claims that his trial counsel was ineffective for failing to object to the portion of Detective Luppino's testimony, in which he testified that he had "[a]bsolutely no doubt" that the Petitioner was guilty. As stated above, and in the Magistrate Judge's Report, the Superior Court majority found that the testimony was properly admitted, and the concurrence, stated that he would have found that Petitioner was not prejudiced by counsel's ineffectiveness. Therefore, the Magistrate Judge's recommendation that a certificate of appealability be denied is proper as jurists of reason would not disagree with the decision on Ground Two.

Next, Petitioner argues that he is entitled to a certificate of appealability on Ground Four based on the presence of conflicting evidence as to *who* conducted the codefendant's pretrial identification procedure, as well as the existence of several pieces of evidence indicating that no one appears to have taken responsibility for the pretrial identification procedure. As already mentioned, Petitioner's arguments are based on speculation and the hope that evidence in his favor will be revealed. A certificate of appealability will be denied as jurists of reason would not disagree with the decision on Ground Four.

Accordingly, a certificate of appealability will be denied.

ORDER

After *de novo* review of the pleadings and the documents in the case, together with the Report and Recommendation, the following Order is entered:

AND NOW, this 22nd day of January 2024, IT IS HEREBY ORDERED that Petitioner's Objections are overruled and the Petition is DENIED.

IT IS FURTHER ORDERED that the Report and Recommendation, ECF No. 90, filed on June 29, 2023, by Magistrate Judge Kelly, is adopted as the opinion of the Court as supplemented by this Memorandum Opinion. A certificate of appealability is DENIED, as jurists of reason would not disagree with the analysis of the Report.

IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, if the petitioner desires to appeal from this Order he must do so within thirty days by filing a notice of appeal as provided in Rule 3, Fed. R. App. P.

Marilyn J. Horan
United States District Court Judge

cc: Robert Allen Benney, pro se
JB4701
SCI Fayette
48 Overlook Drive
LaBelle, PA 15450-1050

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

ROBERT ALLEN BENNEY, Petitioner, v. THOMAS MCGINLEY, ATTORNEY GENERAL OF PENNSYLVANIA, and WASHINGTON COUNTY DISTRICT ATTORNEY, Respondents.	)	Civil Action No. 18-1223 District Judge Marilyn J. Horan Magistrate Judge Maureen P. Kelly Re: ECF No. 1

REPORT AND RECOMMENDATION

I. RECOMMENDATION

For the reasons that follow, it is respectfully recommended that the Petition for a Writ of Habeas Corpus by a State Inmate under 28 U.S.C. § 2254 (the "Petition"), ECF No. 1, should be denied. It is further recommended that a certificate of appealability should be denied.

II. REPORT

Robert Allen Benney ("Petitioner") is a state prisoner currently incarcerated at the State Correctional Institution at Fayette ("SCI-Fayette") in LaBelle, Pennsylvania. At the time of filing, Petitioner was incarcerated at the State Correctional Institution at Coal Township ("SCI-Coal Township"). Id. at 60. Petitioner initiated the present matter by filing the Petition in which he challenges his 2009 conviction in the Court of Common Pleas of Washington County, Pennsylvania, for the following crimes:

- Burglary, in violation of 18 Pa C.S.A. § 3502(a);
- Robbery involving threats or fear of immediate serious bodily injury, in violation of 18 Pa. C.S.A. § 3701(a)(1)(ii);
- Theft by unlawful taking, in violation of 18 Pa. C.S.A. § 3921(a);

APPENDIX "C" at 1

- Aggravated assault, in violation of 18 Pa. C.S.A. § 2702(a)(4);
- Rape by forceable compulsion, in violation of 18 Pa. C.S.A. § 3121(a)(1);
- Involuntary deviate sexual intercourse, in violation of 18 Pa. C.S.A. § 3123(a)(1);
- Terroristic threats, in violation of 18 Pa. C.S.A. § 2706(a)(1);
- Unlawful restraint, in violation of 18 Pa. C.S.A. § 2902(a); and
- Criminal conspiracy, in violation of 18 Pa. C.S.A. § 903(a)(1).

Com. v. Benney, No. 168 WDA 2018, 2019 WL 2068505, at *1 (Pa. Super. Ct. May 10, 2019). See also Docket, Com. v. Benney, No. CP-63-CR-1104-2008 (available at https://ujsportal.pacourts.us/Report/CpDocketSheet?docketNumber=CP-63-CR-0001104-2008&dnh=DWHh9VE8PROLpPQVaq1kqg%3D%3D (last visited June 29, 2023)).

Petitioner was convicted on February 5, 2009 after a jury trial. Trial Tr. dated Feb. 02-05, 2009, ECF No. 30-6 at 166-67. On May 21, 2009, the trial court sentenced Petitioner to an aggregate term of imprisonment of 47-94 years. Benney, 2019 WL 2068505, at *1. See also Sentencing Ord. dated May 21, 2009, ECF No. 30-2 at 1677-85.

A. Factual History and Procedural Background

The Pennsylvania Superior Court summarized the relevant factual and procedural history of this case as follows in its opinion affirming the dismissal of Petitioner's second petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-46.

> This case arises out of a criminal complaint filed against [Petitioner] on April 17, 2008, whereby [Petitioner] was arrested and charged with Burglary, Criminal Conspiracy, Robbery, Rape, Involuntary Deviate Sexual Intercourse, Aggravated Assault, Terroristic Threats, Unlawful Restraint, [and] Theft by Unlawful Taking.
>
> These charges were filed as a result of an incident on March 22, 2008, when [Petitioner] convinced his younger, half-brother, Kevin Partozoti, to accompany him on what [Petitioner] claimed would be a burglary of an unoccupied house of a man who owed him money. The house was actually occupied by [the victim], an elderly widow.

> [Petitioner] was familiar with [the victim] and the house from a remodeling project that he had worked on in her home. [The victim] awoke to the sound of Mr. Partozoti['s] banging on the back door. When she retreated from the back door, [Petitioner] entered through the front door and accosted her. [Petitioner] forced his way into [the victim's] home and disabled her telephone.
>
> [Petitioner] subsequently led Mr. Partozoti into the home and directed Mr. Partozoti to search specific rooms in the home to look for valuables, while [Petitioner] remained in the kitchen with [the victim]. [Petitioner] forced a firearm into [the victim's] mouth, forced her to put his penis in her mouth, and told her to "suck on this, bitch." [Petitioner] raped [the victim] in the kitchen, forcing her to lower her pants, pouring vinegar down her back, and placing a plastic bag over his penis, prior to penetrating her anus with his penis. [The victim] was later tied to a chair in the basement of her home, where [Petitioner] defiled her by pouring spices and cat litter all over her. [Petitioner] continued to abuse and humiliate [the victim] until Mr. Partozoti yelled down that he had found some silver. Mr. Partozoti then convinced [Petitioner] to break off his assault and the burglars finally left the home.

Benney, 2019 WL 2068505, at *1 (bracketed "[Petitioner]" added; all other bracketed text as in the original).

The trial court issued a more detailed recitation of the facts underlying the crimes in its opinion on direct appeal. The recitation was explicitly adopted by the Superior Court in its opinion on direct appeal. See Super. Ct. Direct Appeal Op., ECF No. 30-2 at 1523. The recitation is as follows:

> The trial in this matter commenced on February 3, 2009. The relevant facts of this case were as follows. In its case in chief, the Commonwealth called Daniel Rush, a City of Washington Police Officer, who testified that [at] 2:37 a.m. on March 22, 2008 he received a 911 radio dispatch regarding a burglary. Officer Rush testified that he met the victim, Karen Osko, who resided at 65 East Katherine Avenue in the City of Washington, at a neighbor's house, also on East Katherine Avenue. Officer Rush took Ms. Osko's statement and observed that she was an elderly woman, who was visibly shaken and distraught. Officer Rush then took extensive photographs of the crime scene, which were introduced into evidence.

Officer Rush also testified to a later incident that was an important part of the City of Washington Police Department's investigation of the Defendant in this matter. On May 8, 2008, Officer Rush was approached by Larry McElhaney, a clerk at a convenience store in Washington. Mr. McElhaney gave Officer Rush three (3) coins that he believed might have been taken from Ms. Osko's home by the Defendant during the burglary. Officer Rush identified the coins given to him by Mr. McElhaney and they were introduced into evidence. The Commonwealth also called Mr. McElhaney, who testified that he received the coins in question from his wife, Karen McElhaney, and that he gave the coins to Officer Rush once he suspected they were related to this matter. The Commonwealth also called Mrs. McElhaney, who testified that she received the coins in question from Amy Wright, her sister, and the girlfriend of the Defendant; that she gave the coins to her husband, Larry McElhaney; and that Ms. Wright claimed the coins belonged to the Defendant. Lastly on this issue, the Commonwealth called Daniel Stanek, a City of Washington Police Officer, who testified that he took the coins in question to be inspected by Karen Osko, who recognized the coins as ones that were in her late husband's coin collection.

In its case in chief, the Commonwealth next called Kevin Partozoti, the co-defendant and half-brother of the Defendant, Robert Benny. Mr. Partozoti, who was 20 years old at the time of the incident, testified that he received a telephone call from the Defendant, requesting that he go with the Defendant to break into a house of a man who supposedly owed the Defendant money, and that he agreed to do so if the Defendant came to pick him up. The Defendant told Mr. Partozoti to bring gloves and his handgun with him, and after the Defendant picked him up, he was further directed to put on a mask. Mr. Partozoti recalled that he was wearing gloves, a mask and a black hooded sweatshirt and that the Defendant was wearing gloves, a mask and a white or gray hooded sweatshirt. Mr. Partozoti gave the Defendant the handgun after he demanded it in the vehicle. The Defendant again claimed that he had been to the house they were about to burglarize before; that he had done work for the man who lived there and that the man owed him money; and that the man was away on vacation. The Defendant parked the car along a street in the City of Washington and then the Defendant and Mr. Partozoti began to walk through several backyards before they arrived at a house.

Upon arriving at this house, Mr. Partozoti testified that the Defendant instructed him to wait at the backdoor and to break the

window on the door in a couple minutes. Mr. Partozoti complied, broke the window, and then began to yell for help from the Defendant because he did not know how to proceed. The back door was eventually opened from the inside by the Defendant, who had control of a woman, Ms. Osko, held by her hair. The Defendant directed Mr. Partozoti to search one of the rooms in the house for money while the Defendant remained in the kitchen with the woman. The Defendant than directed Mr. Partozoti to search other rooms in the house, pointing to the correct direction where each room, e.g. the living room, the bedroom, was located in the house. Mr. Partozoti returned to the kitchen, and at the direction of the Defendant, he tied the woman's hands. Mr. Partozoti testified that he tied the woman's hands very loosely and he whispered in her ear "everything was going to be fine" because he could tell that she was very upset and scared of the Defendant. Mr. Partozoti later observed the Defendant in the basement of house with the woman, who was now seated in a chair. Mr. Partozoti yelled to the Defendant "I found it" to convince the Defendant to come up from the basement and leave the house with him; however, Mr. Partozoti never actually found or took any cash or other property from the house.

In its case in chief, the Commonwealth next called Charles Earlywine, the brother-in-law of the Defendant, Robert Benny. The Defendant worked occasionally as a carpenter on a construction crew that Mr. Earlywine supervised. One day on the jobsite, the Defendant learned from his girlfriend that Detective Luppino of the City of Washington Police Department was looking for him at his home. Mr. Earlywine drove the Defendant from the jobsite in Pittsburgh back to Washington, during which time the Defendant was hysterical, stating "I don't know what I'm going to do." A few days later, the Defendant met Mr. Earlywine at his residence in the morning to get a ride with him to a jobsite. When the Defendant got into Mr. Earlywine's vehicle he had a newspaper article with him and he was acting hysterically. The article stated that the Defendant was being sought by the police regarding the crimes committed in this matter. The Defendant was reading the article to Mr. Earlywine and stated "I may have robbed the lady, but I didn't do all the things they're saying I did." Mr. Earlywine then stopped at a convenience store and the Defendant was subsequently arrested by the City of Washington Police Department.

In its case in chief, the Commonwealth next called Karen Osko, the victim in this matter. Ms. Osko testified that she was 62 years old and resided by herself at 65 East Katherine Avenue, Washington, Pennsylvania. On the evening in question, Ms. Osko went to sleep around 8:30-9:00 p.m. Ms. Osko awoke from her sleep in the middle

of the night when she heard something break in her home. Ms. Osko got out of bed to investigate, and upon coming into her kitchen she observed someone in a dark hooded sweatshirt at her back door. She heard this individual state "I need help". Ms. Osko, simultaneously while trying to call 911 on her telephone, attempted to exit her home through the front door, but she was met by another individual in a white hooded sweatshirt when she opened the front door. The individual in the white hooded sweatshirt walked into the house, grabbed the telephone from Ms. Osko's hand, and threw the telephone to the ground, breaking it. The individual in the white hooded sweatshirt forced Ms. Osko to get on her knees, pulled down his pants, and forced Ms. Osko to put his penis in her mouth.

The next thing that Ms. Osko recalled was that the individual in the dark hooded sweatshirt was at the kitchen door. The individual in the dark hooded sweatshirt stated "Somebody told us that you had old coins here." Ms. Osko recounted that her late husband had collected old coins. The individual in the white hooded sweatshirt was directing the actions of the individual in the dark hooded sweatshirt, telling him where to search in the house.

The individual in the white hooded sweatshirt asked Ms. Osko "Do you want to die?" The individual in the white hooded sweatshirt had the handgun in his hand during this entire time and pointed the handgun at Ms. Osko's head several times. At one point the individual in the white hooded sweatshirt put the handgun inside Ms. Osko's mouth and said "Suck on this, bitch." Once in the kitchen with the individual in the white hooded sweatshirt, Ms. Osko was forced by him to bend over the counter and remove her pajama pants. The individual in the white hooded sweatshirt demanded to know where he could find a sandwich bag and oil in the kitchen. Not finding exactly what he was looking for, the individual in the white hooded sweatshirt did find vinegar, which he poured on Ms. Osko's head and back, and a plastic bread bag, which he placed over his penis. The individual in the white hooded sweatshirt put his penis inside Ms. Osko's buttocks, touching her anus. The individual in the white hooded sweatshirt also poured pills and vitamins over the Ms. Osko's head and stated: "How do you like this, bitch?"

The individual in the white hooded sweatshirt demanded money from the Ms. Osko and she gave him some cash and her MAC card. Ms. Osko testified that the individual in the dark hooded sweatshirt tied her hands at the direction of the individual in the white hooded sweatshirt; however he tied them loosely, and whispered into her ear that she wasn't going to die. The individual in the white hooded sweatshirt eventually took the [*sic*] Ms. Osko to the basement of the

house. Ms. Osko was forced to sit on a rocking chair, where she was tied up. The assailant in the white hooded sweatshirt poured spices and cat litter all over the victim. The other assailant then yelled from the top of the basement stairs: "I found them" and the assailant went up the stairs. After the assailant left the basement it was quiet for several minutes before Ms. Osko freed herself and went upstairs to discover that the intruders had left. The victim took a shower to remove all of the cat litter and vinegar from her person.

Although Ms. Osko could not identify her assailants because of their masks, she continued her testimony by stating that she had hired a contractor named Mark Andrews to do some construction work in her home and that one of the workers that Mr. Andrews sent to her home was the Defendant, Robert Benny. The Defendant had full access to Ms. Osko's home during the construction process.

Ms. Osko again identified the coins that had been turned over to the City of Washington Police Department and introduced into evidence as the type of coins belonging to her late husband. The Commonwealth played a tape of a police interview with Mr. Partozoti and Ms. Osko identified his voice as the same voice as the individual in the dark hooded sweatshirt.

In its case in chief, the Commonwealth next called Christopher Luppino, a City of Washington Police Detective. Detective Luppino testified regarding how the course of his investigation led him to the Defendant, referring to the phone call he received from Cynthia Drazik, implicating the Defendant, which he previously testified about in camera on October 14, 2008.[1] Detective Luppino received another phone call implicating Mr. Partozoti in this matter and subsequently learned that the Defendant and Mr. Partozoti were half-brothers. Eventually Mr. Partozoti confessed to taking part in the burglary along with the Defendant.

The Commonwealth never introduced into evidence the Defendant's 1995 conviction, previously testified about by Detective Hutter in camera on February 2, 2009. The Commonwealth did call several witnesses to directly testify about the uncharged, prior bad acts,

[1] The trial court's discussion of pre-trial hearings regarding evidence of Petitioner's prior bad acts will be reproduced in Section II.D.3.b., infra. It is not included here because it is not part of the trial court's opinion that the Superior Court explicitly adopted as the factual and procedural background of the case on direct appeal. Super. Ct. Direct Appeal Op., ECF No. 30-2 at 1523. That said, the Superior Court explicitly relied on the trial court's discussion of the pre-trial hearings as a basis for its decision. Id. at 1526-27.

> previously testified about by Detective Luppino in camera on October 14, 2008.
>
> Marlene McFeeley testified that had several items stolen from her purse, while it was at one of her rental properties, and that her driver's license and a couple credit cards were later recovered. Mrs. McFeeley also testified that the Defendant was one of her tenants, and that the Defendant was present when the items disappeared from her purse. Richard McFeeley, the husband of Mrs. McFeeley, testified that he was the one who retrieved his wife's driver's license from the individual who recovered them along the side of the road on Route 18 near Hickory, Washington County, Pennsylvania. Mr. McFeeley began to search the general area where this person found his wife's driver's license when he found several credit cards belonging to his wife as well as credit cards belonging to Cynthia Drazick. Mr. McFeeley then called Mrs. Drazick. The Defendant was never charged for the theft of the Mrs. McFeeley's property.
>
> Cynthia Drazick testified that she lived along Route 18 near Hickory, Washington County, Pennsylvania. Mrs. Drazick read in the local newspaper about the burglary that occurred in this matter before anyone was named as a suspect. Mrs. Drazick testified about how she had been the victim of a burglary on February 3, 2008. In Mrs. Drazick's situation two men broke into her home at night, they were both wearing gloves, masks and hooded sweatshirts, they disabled her telephone, and they were carrying firearms. Mrs. Drazick testified that items were taken from her home during the burglary and that she was contacted by Mr. McFeeley after some of these items were recovered. The perpetrators were looking for a specific item of property. Mrs. Drazick knew the Defendant, who had done some construction work in her home, also on behalf of contractor Mark Andrews. Mrs. Drazick called the City of Washington Police Department to reveal that she thought there were similarities between her burglary and the burglary in this matter and that the Defendant may have been involved in both. The Defendant was never charged or arrested for the burglary of the Drazick residence.

Trial Ct. Direct Appeal Op., ECF No. 30-2 at 1563-81 (footnotes omitted).

Petitioner was granted new counsel on direct appeal. Sentencing Tr. dated May 21, 2009, ECF No. 37-7 at 37. He raised the following four issues in his timely-filed direct appeal.

> 1. [Whether the] trial court erred in granting the Commonwealth's Motion in limine to permit "prior bad acts" testimony regarding

> [Benney] during his jury trial, and more specifically the trial court erred in allowing the testimony of [Detective Chris] Luppino[2] ["Detective Luppino"] with regard to the uncharged prior bad acts as they related to his investigation ... and [] Drazick's' [*sic*] and the McFeeley[s'] testimony regarding their beliefs/allegations that [Benney] had perpetrated uncharged crimes against them and why or how they believed the crimes against them were related to the instant case[?]
>
> 2. [Whether the] evidence ... presented at the time of trial was insufficient to warrant a finding of guilt on all charges [Benney] was convicted of[?]
>
> 3. [Whether the] weight of the evidence at the time of trial was inadequate to warrant [Benney's] conviction on all crimes charged[?]
>
> 4. [Whether the] trial court erred in denying [Benney's] request [for] the appointment of new counsel prior to trial based upon a conflict in representation with a Commonwealth witness as well as direct testimony from [Benney] that his counsel had only met with him briefly before trial, had never discussed trial strategy with him and that he was uncomfortable with proceeding with him as counsel[?]

Super. Ct. Direct Appeal Op., ECF No. 30-2 at 1523-24. The Superior Court affirmed Petitioner's conviction and sentence on direct appeal on June 14, 2011. Id. at 1523. Petitioner sought allowance to appeal from the Pennsylvania Supreme Court, but *allocatur* was denied on October 25, 2011. Com. v. Benney, 31 A.3d 744 (Pa. 2011).

The record does not indicate that Petitioner filed a petition for writ of *certiorari* with the United States Supreme Court. Thus, his conviction became final 90 days after denial of *allocatur* – on January 23, 2012 – when the time for filing the same had lapsed. See U.S. Sup. Ct. R. 13; see also Jenkins v. Sup't of Laurel Highlands, 705 F.3d 80, 84 (3d Cir. 2013) ("On direct review, the Pennsylvania Supreme Court denied Jenkins's petition for allowance of appeal on September

[2] Throughout the lengthy briefing and record in this matter, "Detective Luppino" is, at various times, also identified as "Officer Luppino," "Sergeant Luppino," and "Chief Luppino." All of these refer to the same individual. For convenience, this Court will use the appellation "Detective."

28, 2007.... Because Jenkins had ninety days to petition for certiorari to the United States Supreme Court, his conviction became final on December 27, 2007.").

Petitioner filed his first *pro se* PCRA petition in the Court of Common Pleas on March 14, 2012. Com. v. Benney, No. 680 WDA 2015, 2017 WL 527968, at *2 (Pa. Super. Ct. Feb. 8, 2017). See also ECF No. 30-2 at 1505. On April 9, 2012, PCRA counsel was appointed. ECF No. 30-2 at 1501. On February 28, 2013, PCRA counsel filed a no-merit letter, ECF No. 43-1 at 80-94, and a Petition for Leave to Withdraw Appearance, id. at 95-98. Petitioner responded to the no-merit letter and filed a first amended *pro se* PCRA petition on April 25, 2013. ECF No. 30-2 at 1399-1419 and 1421-29. The first amended *pro se* PCRA petition expressly incorporated the claims of the initial *pro se* PCRA petition. Id. at 1399.

On April 28, 2013, Petitioner also filed a motion for discovery, in which he sought his co-defendant, Kevin Partozoti's "full discovery including but not limited to information pertaining to his alleged voice identification by [the] victim[.]" Id. at 1379 and 1385.

The first PCRA trial court issued its notice of intent to dismiss on June 19, 2013. Id. at 1377. Petitioner responded thereto on December 8, 2013. Id. at 1061. With the trial court's permission, Petitioner filed two more amended *pro se* amended PCRA petitions. Id. at 903, 1083, and 1137. Petitioner's second amended petition explicitly was "intended to entirely replace all pending, previously filed PCRA Petitions in the above-captioned matter, whereby, no facts or claims are incorporated herein by reference therefrom." Id. at 1139. Petitioner explicitly waived all issues not pleaded therein. Id. The third amended *pro se* petition explicitly was styled as a supplement to the second amended *pro se* petition. Id. at 905.

The first PCRA trial court dismissed the case on June 6, 2014 without a hearing or addressing Petitioner's arguments in the second and third *pro se* petitions. Id. at 871. Petitioner timely filed a *pro se* notice of appeal to the Superior Court on July 7, 2014. Benney, 2017 WL 527968, at *2.

Petitioner also filed a "Praecipe to Enter Pro-Se Appearance as Counsel of Record" on June 15, 2014, in which he stated that he intended to proceed without counsel. ECF No. 30-2 at 867. The first PCRA trial court granted PCRA counsel's motion to withdraw – which had been filed on February 28, 2013, see ECF No. 43-1 at 80 – on August 1, 2014. ECF No. 30-2 at 833. In the same order, Petitioner was directed to file a Concise Statement of Matters Complained of on Appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. Id. Petitioner was warned explicitly that "[a]ny issue not properly in [Petitioner's] Statement or failure to file [his] Statement of record and to serve a copy on the [first PCRA trial court] shall be deemed a waiver of those issues." Id.

Petitioner submitted his initial Rule 1925(b) statement on August 24, 2014, in which he reiterated that his second and third *pro se* PCRA petitions were the operative petitions in the first PCRA proceedings. ECF No. 30-2 at 817, 819, and 821. The trial court appointed new counsel on June 16, 2015, but reduced that counsel's involvement to the role of standby counsel on July 14, 2015, after Petitioner moved to rescind the appointment of counsel. Id. at 707, 711. Petitioner submitted an amended *pro se* Rule 1925(b) statement on August 23, 2015, in which he both incorporated his initial statement, and recognized that some claims were waived. Id. at 679 and 681 n.4. The first PCRA trial court issued its opinion pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure on November 13, 2015. Id. at 641.

On December 28, 2015, the Superior Court remanded the first PCRA proceedings to the trial court in order for it to conduct a hearing on whether Petitioner was entitled to counsel on appeal, and to ensure that Petitioner had all of the materials necessary to prosecute his appeal. Id. at 579. See also Docket, Benney, No. 680 WDA 2015 (available at https://ujsportal.pacourts.us/Report/PacDocketSheet?docketNumber=680%20WDA%202015&dnh=qw6CaHrQrKLbVFoKuCMVWg%3D%3D (last visited June 29, 2023)).

On April 4, 2016, the first PCRA trial court conducted the hearing during which Petitioner unequivocally stated that he did not want counsel on appeal. ECF No. 68 at 4. During the hearing, Petitioner also sought evidence related to the coins raised at trial, public records related to sentences of Partozoti and Earlywine, as well as a copy of the "compete record" in his criminal case. Id. at 8 and 11-14. It appears that Petitioner had at least some of the transcripts in his possession at the time of the hearing. The only specific transcript that he claimed was missing was from a pretrial hearing dated October 9, 2008 – of which Petitioner admitted to having partial transcription. Id. at 17-19. It appears that part of the court reporter's notes from the pretrial hearing never were transcribed. ECF No. 84 at 3. The untranscribed portion allegedly related to "two of the claims about Officer Rush testifying in an expert capacity and the training that he received to recognize victims' behavior and sexual assaults."[3] ECF No. 68 at 17.

Petitioner also sought transcripts of pretrial discussions that occurred on October 14, 2008, opening statements at trial on February 3, 2009, and the tapes from his preliminary hearing – which may or may not exist. Id. at 19-20 and 24. But see Hr'g Tr. dated Oct. 14 and 15, 2009, ECF No 30-3 at 46-48 (in which Petitioner explicitly refuses to delay trial to locate a copy of the preliminary

[3] But see ECF No. 74 at 2 (in which Petitioner claims that the transcribed portion was a "side bar or discussion about presenting multiple defense[s] or theories to a jury").

hearing tapes for transcription despite trial counsel's advice). See also Pet'r's correspondence dated July 1, 2012, ECF No. 30-2 at 1495 (in which he indicates that he has "fairly complete" transcripts, with the exception of a partial transcript of proceedings dated October 9, 2008).

On April 4, 2016, the first PCRA trial court issued an order that authorized Petitioner to proceed *pro se* on appeal. ECF No. 43-1 at 115. The trial court returned the record to the Superior Court on April 12, 2016. Docket, Benney, No. 680 WDA 2015. On April 22, 2016, Petitioner moved to remand again so he could receive the complete record. Id. That request was denied by the Superior Court on April 28, 2016 – although Petitioner was given permission to "argue the lack of access to documents in his appellate brief." Id.

In his appeal brief, Petitioner raised the following issues before the first PCRA Superior Court.

I. Was trial counsel ineffective for failing to object when the Commonwealth presented inadmissible and improper opinion testimony that impermissibly bolstered the victim's credibility?

II. Was PCRA counsel ineffective for failing to raise or preserve issues 3-9? Alternatively, should the apparent waiver of issues 3-9 be excused under Martinez v. Ryan[, 132 S. Ct. 1309 (2012)]?

III. Was trial counsel ineffective for failing to impeach a major Commonwealth witness with his prior *crimen falsi* convictions?

IV. Was trial counsel ineffective due to a conflict of interest?

V. Was trial counsel ineffective for failing to object when a Commonwealth witness invaded the province of the jury and gave inadmissible testimony that he had "absolutely no doubt" that [appellant] was guilty?

VI. Was trial counsel ineffective for failing to file a motion to suppress the voice identification or otherwise object to the voice identification?

VII. Was trial counsel ineffective for failing to object to the jury instruction on the charge of Unlawful Restraint?

> VIII. Was trial counsel ineffective for failing to object when the se[n]tencing court improperly considered [appellant's] silence against him at sentencing?
>
> IX. Was trial counsel ineffective for failing to object at sentencing to the [trial] court's imposition of an unconstitutional and illegal sentence when the court found [appellant] to be a "high risk dangerous offender" in violation of Commonwealth v. Butler[, 760 A.2d 385 (Pa. 2000)]?
>
> X. Did the PCRA court err by effectively denying [appellant] counsel by failing to refer the amended petitions to counsel, or by allowing improper hybrid representation that may have caused [appellant's] pro se filings to be legal nullities?

Benney, 2017 WL 527968, at *3. See also Pet'r's first PCRA Appeal Br., ECF No. 43-1 at 116, 124-25. In his brief, Petitioner conceded that Issues 3-9 were waived, but asserted that waiver should be forgiven due to PCRA counsel's alleged ineffectiveness "in failing to investigate, raise, or preserve them[.]" ECF No. 43-1 at 129. See also, id. at 141 ("The only reason Benney can be barred from raising the claims herein is that they are waived and defaulted because PCRA counsel failed to raise them."). Despite the Superior Court's order of April 28, 2016, Petitioner did not argue that he lacked access to transcripts in his brief.

On February 8, 2017, the Superior Court affirmed the dismissal of the first PCRA proceeding. Benney, 2017 WL 527968, at *1. In its Memorandum opinion, the Superior Court addressed Issues I, II, III, and V on the merits. Id. at*4-8. The Superior Court found that Issues VI, VII, VIII, and IX were waived due to Petitioner's failure to raise them in his Rule 1925(b) statements. Id. at *6. Issue X was addressed on the merits in part, and found to have been waived in part. Id. at *7-8 and n.7. Petitioner moved for reargument on February 22, 2017, which was denied on April 20, 2017. Docket, Benney, No. 680 WDA 2015.

Petitioner filed a Petition for Allowance to Appeal to the Pennsylvania Supreme Court on May 22, 2017, which was denied on November 1, 2017. Com. v. Benney, 176 A.3d 836 (Pa.

2017). See also ECF No. 43-1 at 226-265. See also Docket, Benney, No. 202 WAL 2017 (available at https://ujsportal.pacourts.us/Report/PacDocketSheet?docketNumber=202%20WAL%202017&dnh=d9XqVdYGR%2FIqTDJOOtwVvQ%3D%3D (last visited June 29, 2023)). Petitioner applied for reconsideration on November 13, 2017, which was denied December 6, 2017. Docket, Benney No. 202 WAL 2017.

Petitioner filed a second *pro se* petition for PCRA relief on December 30, 2017. Com. v. Benney, No. 168 WDA 2018, 2019 WL 2068505, at *2 and n.2 (Pa. Super. Ct. May 10, 2019). See also ECF No. 30-2 at 69. The second PCRA trial court denied the petition without a hearing on January 17, 2018. ECF No. 30-2 at 67. See also Docket, Benney, No. CP-63-CR-1104-2008.

Petitioner timely appealed to the Superior Court on January 29, 2018. Id. See also Docket, Benney, No. 168 WDA 2018 (available at https://ujsportal.pacourts.us/Report/PacDocketSheet?docketNumber=168%20WDA%202018&dnh=sKziDk9ia1sB%2BeNNFhQIyA%3D%3D (last visited June 29, 2023)). On appeal, Petitioner raised the following issues.

> 1. Did the PCRA court err in determining that Appellant did not meet the after-discovered facts exception to the PCRA timeliness requirements [for] his claim of [p]rosecutorial [m]isconduct, where Appellant discovered evidence that the Commonwealth presented false evidence regarding a pretrial identification?
>
> 2. Did the PCRA court err in determining [that] Appellant did not meet the after-discovered facts exception to the PCRA timeliness requirements [for his] claim that the Commonwealth destroyed potentially exculpatory fingerprint evidence, where Appellant discovered that a Commonwealth witness lied about the analysis/results of the fingerprint evidence?

Benney, 2019 WL 2068505, at *2. On May 10, 2019, the Superior Court affirmed dismissal of both issues as untimely, and held that Petitioner had failed to establish an exception from the PCRA's time-limit for filing. Id. at *1 and 3-6.

Petitioner sought reargument before the Superior Court on July 19, 2019. The motion was dismissed as untimely on August 16, 2019. Docket, Benney, No. 168 WDA 2018.

Petitioner sought leave to submit a petition for allowance of appeal *nunc pro tunc* on October 17, 2019. The Pennsylvania Supreme Court denied that motion on December 26, 2019. See Docket, Com. v. Benney, No. 98 WM 2019 (available at https://ujsportal.pacourts.us/Report/PacDocketSheet?docketNumber=98%20WM%202019&dnh=29wqiFlRCV%2BZ2OCgeTisWg%3D%3D (last visited June 29, 2023)).

On September 18, 2018, this Court received the instant Petition requesting federal habeas relief. ECF No. 1. The proof of mailing on the Petition is dated September 6, 2018. Id. at 60. Pursuant to the prison mailbox rule, September 6, 2018 is presumed to be the effective filing date of the Petition. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998).

Petitioner filed a motion to stay this federal action pending the exhaustion of post conviction proceedings in state court. ECF No. 2. On October 5, 2018, the motion to stay was granted and Petitioner was ordered to notify the Court following the exhaustion of his state court remedies. ECF No. 3.

On February 14, 2020, Petitioner filed a Motion to Reopen Case. ECF No. 7. He also filed an Amended Memorandum of Law in Support of Petition for Habeas Relief on the same date. ECF No. 8. Thereafter, the Court granted the motion, reopened the case, and listed the stay on February 25, 2020. ECF No. 9.

Respondents filed their initial Answer to the Petition on July 24, 2020. ECF No. 30. Respondents failed to comply with the Service Order requiring them to file certain parts of the state court record with their Answer but, after two extensions of time, they filed a Supplemental Response to Answer on October 27, 2020. ECF No. 41. See also ECF Nos. 10, 31, 33, 34, 37,

and 38. Because of deficiencies with that filing, the Court ordered Respondents to file a second supplement. ECF No. 42. Respondents filed the second Supplemental Response to Answer on December 11, 2020. ECF No. 43. This Court finally received the physical state court record on December 29, 2020. ECF No. 44.

The record reflects that Petitioner was not served the Answer immediately. ECF Nos. 35, 36, 39, 40, 49, 51, and 52. The Answer and supporting documents were re-served on March 9, 2021. ECF Nos. 51 and 52. Petitioner was granted additional extensions of time to file a traverse, ECF Nos. 53, 54, 56, 58, and 59. Petitioner submitted his initial Traverse on September 20, 2021. ECF No. 60. On December 2, 2021, Petitioner supplemented his Traverse without leave of court. ECF No. 61.

On May 9, 2022, this Court ordered supplemental briefing in light of deficiencies identified by the Court in the initial Answer. ECF No. 62. After one missed deadline, a substitution of attorney, and two extensions of time, ECF Nos. 62, 63, 64, 65, 66, and 67, Respondents submitted their Supplemental Brief on October 7, 2022. ECF No. 71. Plaintiff filed his Reply on February 3, 2023. ECF No. 86.

The Petition now is ripe for consideration.

B. Federal Habeas Claims

Petitioner raises eight grounds for relief in the Petition.

Ground One: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE COMMONWEALTH PRESENTED INADMISSIBLE OPINION TESTIMONY THAT IMPERMISSIBLY BOLSTERED THE VICTIM'S CREDIBILITY.

ECF No. 1 at 6. Petitioner refined this somewhat in his brief.

> Trial counsel was ineffective under Strickland v. Washington, 466 U.S. 688 (1984) for failing [t]o object when the Commonwealth presented inadmissible opinion testimony that impermissibly bolstered the victim's credibility.

ECF No. 8 at 16.

> Ground Two: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN A COMMONWEALTH WITNESS INVADED THE PROVINCE OF THE JURY AND GAVE INADMISSIBLE TESTIMONY THAT HE HAD "ABSOLUTELY NO DOUBT" THAT PETITIONER WAS GUILTY.

ECF No. 1 at 10. Again, Petitioner refined this ground in his brief.

> Trial counsel was ineffective under Strickland for failing to object when a Commonwealth witness (Detective Luppino) invaded the province of the jury and gave inadmissible testimony that he had "Absolutely no doubt" Petitioner was guilty.

ECF No. 8 at 16.

> Ground Three: PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE COMMONWEALTH'S USE OF PRIOR BAD ACTS EVIDENCE THAT WAS NOT ADMISSIBLE.

ECF No. 1 at 14. Petitioner restates this ground without substantive change in his brief.

> Petitioner's due process rights were violated by the Commonwealth's use of prior bad acts evidence.

ECF No. 8 at 16.

> Ground Four: PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT WAS VIOLATED WHEN THE COMMONWEALTH COMMITTED PROSECUTORIAL MISCONDUCT BY INTRODUCING FALSE TESTIMONY AND MISREPRESENTATIONS TO THE TRIAL COURT.

ECF No. 1 at 17. Petitioner restates this ground without substantive change in his brief.

> Petitioner's due process rights were violated when the Commonwealth committed prosecutorial misconduct by introducing false testimony and misrepresentations to the jury/court.

ECF No. 8 at 16.

Ground Five: PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE DESTRUCTION OF FINGERPRINT EVIDENCE.

ECF No. 1 at 23. Petitioner expands the scope of this ground somewhat in his brief.

> Petitioner's due process rights were violated by the destruction of fingerprint evidence and false testimony related to it.

ECF No. 8 at 16.

Ground Six: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT, OR SUPPRESS PRETRIAL IDENTIFICATION WHICH VIOLATED PETITIONER'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

ECF No. 1 at 30. Petitioner refines this ground in his brief.

> Trial counsel was ineffective under Strickland for failing to object or suppress unreliable and suggestive pretrial identification of the codefendant, which violated Petitioner's 4th, 5th, and 14th Amendment Rights.

ECF No. 8 at 16.

Ground Seven: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A JUDGMENT OF ACQUITTAL ON THE RAPE CHARGE. ALTERNATIVELY, PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED.

ECF No. 1 at 38. Petitioner restates this ground without substantive change in his brief.

> Trial counsel was ineffective under Strickland for failing to move for a judgment of acquittal on Petitioner's rape charge. Alternatively, Petitioner's due process rights (14th) were violated.

ECF No. 8 at 16.

Ground Eight: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO [OBJECT TO] AN ERRONEOUS JURY INSTRUCTION ON THE UNLAWFUL RESTRAINT CHARGE. ALTERNATIVELY, PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED.

ECF No. 1 at 45. Petitioner restates this ground without substantive change in his brief.

> Trial counsel was ineffective under Strickland for failing to object to an erroneous jury instruction on the unlawful restraint charge. Alternatively, Petitioner's due process rights were violated.

ECF No. 8 at 16.

C. Legal Standard

1. The AEDPA statute of limitations

In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress set forth procedural requirements that a Petitioner must meet before receiving relief on the merits of a federal habeas claim. The first consideration in reviewing a federal habeas corpus petition is whether the petition was timely filed within the applicable statute of limitations. The AEDPA generally established a strict one-year statute of limitations for the filing habeas petitions pursuant to 28 U.S.C. § 2254. The applicable portion of the statute is as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

> judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The United States Court of Appeals for the Third Circuit has held that the statute of limitations set out in Section 2244(d) must be applied on a claim-by-claim basis. Fielder v. Varner, 379 F.3d 113, 122 (3d Cir. 2004), cert. denied sub nom. Fielder v. Lavan, 543 U.S. 1067 (2005). Thus, in analyzing whether a petition for writ habeas corpus has been timely filed under the one-year limitations period, a federal court must undertake a three-part inquiry. First, the court must determine the "trigger" date for the individual claims raised in the petition. Typically, this is the date that the petitioner's direct review concluded and the judgment became "final" for purposes of triggering the one-year period under Section 2244(d)(1)(A). Second, the court must determine whether any "properly filed" applications for post-conviction or collateral relief were pending during the limitations period that would toll the statute pursuant to Section 2244(d)(2). Third, the court must determine whether any of the other statutory exceptions or equitable tolling should be applied on the facts presented.

In the instant case, Respondents concede that Petitioner's claims are timely filed. ECF No. 30 at 7. A review of the record, as set forth above, supports this conclusion. Accordingly, the Court finds that Petitioner's grounds are timely.

2. Exhaustion and procedural default

The provisions of the federal habeas corpus statute at 28 U.S.C. § 2254(b) require a state prisoner to exhaust available state court remedies before seeking federal habeas relief. To comply with the exhaustion requirement, a state prisoner first must have fairly presented his constitutional and federal law issues to the state courts through direct appeal, collateral review, state habeas proceedings, mandamus proceedings, or other available procedures for judicial review. See, e.g.,

Castille v. Peoples, 489 U.S. 346, 351 (1989); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996) (abrogated on other grounds by Beard v. Kindler, 558 U.S. 53, 60-61 (2009)); Burkett v. Love, 89 F.3d 135, 137 (3d Cir. 1996).

Moreover, a petitioner must present every claim raised in a federal habeas petition to the state trial court, intermediate appellate court, and highest available court before exhaustion will be considered satisfied. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Lambert v. Blackwell, 387 F.3d 210, 234 (3d Cir. 2004). In Pennsylvania, petitioners afford the state courts that opportunity by fairly presenting their claims to the Superior Court, either on direct review or on appeal from a petition for relief under the PCRA. Lambert, 387 F.3d at 232-34; see also Rodland v. Sup't of SCI Houtzdale, 837 F. App'x 915, 919 (3d Cir. 2020).

A petitioner shall not be deemed to have exhausted state remedies if he has the right to raise his claims by any available state procedure. 28 U.S.C. § 2254(c). A petitioner bears the burden of establishing that the exhaustion requirement has been met. Ross v. Petsock, 868 F.2d 639, 643 (3d Cir. 1989); O'Halloran v. Ryan, 835 F.2d 506, 508 (3d Cir. 1987).

In the case at issue, it is clear that Petitioner's asserted grounds are exhausted at the state court level at the very least in the sense that there is no state avenue for relief available to him due to the PCRA's one-year statute of limitations. See 42 Pa. C.S.A. § 9545(b)(1).

Beyond the question of exhaustion, a federal court may be precluded from reviewing habeas claims under the "procedural default doctrine." Gray v. Netherland, 518 U.S. 152, 162 (1996); Coleman v. Thompson, 501 U.S. 722, 732 (1991); Doctor, 96 F.3d at 678; Sistrunk v. Vaughn, 96 F.3d 666, 675 (3d Cir. 1996). This doctrine is applicable where, *inter alia*, a petitioner's claims are "deemed exhausted because of a state procedural bar[.]" Lines v. Larkin, 208 F.3d 153, 160 (3d Cir. 2000). Like the exhaustion requirement, the procedural default doctrine

was developed to promote our dual judicial system and, in turn, it is based upon the "independent and adequate state law grounds" doctrine, which dictates that federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law that is "independent" of the federal question and "adequate" to support the judgment. Coleman, 501 U.S. at 750.

The PCRA's one-year statute of limitations has been held to be an "independent and adequate" state law ground for denying habeas relief. Whitney v. Horn, 280 F.3d 240, 251 (3d Cir. 2002).

The United States Supreme Court has held that where a petitioner has to follow state procedure within a required time period, the "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750; see also Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (failure to follow state's procedural rules results in procedural default, which bars federal review of petitioner's claims unless he can show cause and prejudice); Hull v. Freeman, 991 F.2d 86, 90-91 (3d Cir. 1993) (same). The Supreme Court in Coleman further stated that it recognized "the important interest in finality served by state procedural rules and the significant harm to the States that results from the failure of federal courts to respect them." 501 U.S. at 750.

The Supreme Court has defined "cause" as "some objective factor external to the defense." Murray v. Carrier, 477 U.S. 478, 488 (1986). "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or . . . some interference by officials" are two examples, but not an exhaustive list. Id.

A petitioner satisfies the "prejudice" requirement by establishing that the trial was "unreliable or ... fundamentally unfair" because of a violation of federal law. Lockhart v. Fretwell, 506 U.S. 364, 372, (1993) (discussing prejudice in the context of an ineffective assistance of counsel claim). See also Werts v. Vaughn, 228 F.3d 178, 193 (3d Cir. 2000) ("With regard to the prejudice requirement, the habeas petitioner must prove not merely that the errors at trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions[,] resulting in a denial of fundamental fairness at trial.") (internal citations and quotations omitted).

In order to show a fundamental miscarriage of justice, the United States Supreme Court requires a petitioner to demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 321 (quoting Murray, 477 U.S. at 496). Under this standard, a petitioner must "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Schlup, 513 U.S. at 324. Once such evidence is presented, a petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 327.

The burden lies with a petitioner to demonstrate circumstances that would serve to excuse a procedural default. Sweger v. Chesney, 294 F.3d 506, 520 (3d Cir. 2002).

3. Merits standard of review

Where the state court has reviewed a federal issue presented to it and disposed of the issue on the merits, and that issue is also raised in a federal habeas petition, the AEDPA provides the applicable deferential standard by which the federal habeas court is to review the state court's disposition of that issue. See 28 U.S.C. § 2254(d) and (e).

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court expounded upon the standard found in 28 U.S.C. § 2254(d). The Supreme Court explained that Congress intended that habeas relief for errors of law may only be granted in two situations: 1) where the state court decision was "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States" or 2) where that state court decision "involved an unreasonable application of[] clearly established Federal law as determined by the Supreme Court of the United States." Id. at 404-05 (emphasis deleted).

A state court decision can be contrary to clearly established federal law in one of two ways. First, the state courts could apply a wrong rule of law that is different from the rule of law required by the United States Supreme Court. Second, the state courts can apply the correct rule of law but reach an outcome that is different from a case decided by the United States Supreme Court where the facts are indistinguishable between the state court case and the United States Supreme Court case. Lambert, 387 F.3d at 234 (quoting Williams, 529 U.S. at 405-06)

In addition, the United States Court of Appeals for the Third Circuit has explained that "Circuit precedent cannot create or refine clearly established Supreme Court law, and lower federal courts 'may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct.'" Dennis v. Sec., Pa. Dep't of Corrs., 834 F.3d 263, 368 (3d Cir. 2016) (quoting Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam)). As the Supreme Court has further explained: "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." White v. Woodall, 572 U.S. 415, 428 (2014).

The AEDPA also permits federal habeas relief where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Specific factual determinations by the state court that are subsidiary to the ultimate decision to grant post-conviction relief are subject to the presumption of correctness, and must be overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). See also Lambert, 387 F.3d at 235-236. The Third Circuit has declined to adopt a "rigid approach to habeas review of state fact-finding." Id. at 236 n.19. If a state trial court and appellate court make conflicting factual findings, the habeas court must defer to the findings of the higher court – regardless of the propriety of those findings under state law – unless they are rebutted by clear and convincing evidence. See Rolan v. Vaughn, 445 F.3d 671, 680 (3d Cir. 2006).

Finally, it is a habeas petitioner's burden to show that the state court's decision was contrary to or an unreasonable application of United States Supreme Court precedent and/or an unreasonable determination of the facts. Ross v. Atty. Gen. of Pennsylvania, No. 07-97, 2008 WL 203361, at *5 (W.D. Pa. Jan. 23, 2008). This burden means that Petitioner must point to specific caselaw decided by the United States Supreme Court and show how the state court decision was contrary to or an unreasonable application of such United States Supreme Court decisions. Owsley v. Bowersox, 234 F.3d 1055, 1057 (8th Cir. 2000) ("To obtain habeas relief, Mr. Owsley must therefore be able to point to a Supreme Court precedent that he thinks the Missouri state courts acted contrary to or unreasonably applied. We find that he has not met this burden in this appeal. Mr. Owsley's claims must be rejected because he cannot provide us with any Supreme Court opinion justifying his position."); West v. Foster, No. 07-21, 2010 WL 3636164, at *10 n.20 (D. Nev. Sept. 9, 2010) ("petitioner's burden under the AEDPA is to demonstrate that the decision of

the Supreme Court of Nevada rejecting her claim '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) (emphasis added). Petitioner has not even begun to shoulder this burden with citation to apposite United States Supreme Court authority."), aff'd, 454 F. App'x 630 (9th Cir. 2011).

D. Legal Analysis of Petitioner's Grounds for Relief

The Court now will consider the grounds for relief raised by Petitioner, *seriatim*.

1. Ground One

At Ground One, Petitioner states:

> Ground One: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE COMMONWEALTH PRESENTED INADMISSIBLE OPINION TESTIMONY THAT IMPERMISSIBLY BOLSTERED THE VICTIM'S CREDIBILITY.

ECF No. 1 at 6. Petitioner refined this somewhat in his brief.

> Trial counsel was ineffective under Strickland v. Washington, 466 U.S. 688 (1984) for failing To object when the Commonwealth presented inadmissible opinion testimony that impermissibly bolstered the victim's credibility.

ECF No. 8 at 16. This ground was exhausted in state court as Issue I in Petitioner's first PCRA appeal. See Benney, 2017 WL 527968, at *3.

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." Lockhart, 506 U.S. at 368 (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)). The United States Supreme Court has formulated a two-part test for determining whether counsel rendered constitutionally ineffective assistance: (1) counsel's performance must have been unreasonable; and (2) counsel's unreasonable performance must have actually prejudiced the defense. Strickland, 466 U.S. at 687. To determine whether counsel performed below the level

expected from a reasonably competent attorney, it is necessary to judge counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. Id. at 690.

The three-part test applied by the state courts of Pennsylvania for ineffectiveness of counsel has been found by the Third Circuit not to be contrary to Strickland. Werts, 228 F.3d at 204. Thus, the Pennsylvania state court's application of that test in Petitioner's PCRA proceedings is not contrary to Strickland.[4]

The first prong of the Strickland test requires a petitioner to establish that his or her attorney's representation fell below an objective standard of reasonableness by committing errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 688. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, a petitioner must overcome the presumption that, under the totality of the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689. The question is not whether the defense was free from errors of judgment, but whether counsel exercised the customary skill and knowledge that normally prevailed at the time and place. Id. A petitioner is required to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the

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[4] To plead and prove ineffective assistance of counsel [under Pennsylvania's analogous three-part test] a petitioner must establish: "(1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." Com. v. Stewart, 84 A.3d 701, 706 (Pa. Super. Ct. 2013) (*en banc*). The failure to meet any of these aspects of the ineffectiveness test results in the claim failing. Id.

Future v. Ferguson, No. 16-2346, 2022 WL 2307095, at *8 (M.D. Pa. June 27, 2022), certificate of appealability denied sub nom. Future v. Sup't Benner Twp. SCI, No. 22-2419, 2022 WL 18536146 (3d Cir. Dec. 6, 2022).

defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. 86, 104 (2001) (quoting Strickland, 466 U.S. at 687).

The second prong requires a petitioner to demonstrate that errors by counsel deprived him of a fair trial and the result was unfair or unreliable. Strickland, 466 U.S. at 689. To prove prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A "reasonable probability" is one that is sufficient to undermine confidence in the outcome. Id.

In the instant case, Petitioner alleges at Ground One that his trial counsel was ineffective for failing to object to the testimony of Officer Rush regarding his belief, allegedly based upon his personal training, experience, and education, that the victim's demeanor when she was interviewed by the police was not inconsistent with the victim of a sexual assault. ECF No. 1 at 6-7. Petitioner asserts that Officer Rush was not an expert in such matters. Id. at 7.

In his Petition and supporting brief, Petitioner, cites to several snippets from Officer Rush's testimony as bases for relief on this ground. Id. at 6-7; see also ECF No. 8 at 24-26. The Superior Court explicitly reproduced the following portion of Officer Rush's testimony in its opinion, which is representative of Petitioner's argument with respect this ground.

> Q. You talked about [the victim's] condition when you interviewed her, she was distraught, shaky, things like that. She had bathed, showered. Based upon your background, training and experience did you believe that she had been the victim of a sexual assault?
>
> A. **I did. That's why I asked before I proceeded with the rest of my investigation while I was at the house of the neighbor, if she had been assaulted sexually [or] otherwise. Again, that would have led me to collect other evidence in addition to that at the house.**
>
> Q. Based on you[r] background, training and experience, sometimes it happens that women who are victims of sexual assault like this do not want to tell you?

A. Yes.

Q. For the reasons of embarrassment, humiliation?

A. All of the above.

Q. It is common, not unusual sometimes?

A. **It's not unusual. Any psychologist will tell you that. As I said, I've attended courses and seminars and through my college education have studied things similar to it.**

Benney, 2017 WL 527968, at *4-5 (emphasis in opinion). See also Trial Tr. dated Feb. 2-5, 2009, at 72-73, ECF No. 30-4 at 72-73. See also Pet'r's first PCRA Super. Ct. Br., ECF No. 43-1 at 126 and 132-37.

In its opinion denying relief in the first PCRA proceedings, the Superior Court found that there was not merit to Petitioner's ineffective assistance of counsel claim. It explicitly found that Officer Rush did not improperly vouch for the credibility of the victim, inject personal opinion as to her credibility, or improperly testify as an expert. Instead, "Officer Rush merely testified about his course of conduct in processing the crime scene and related it to his background, training, and experience in handling sexual assault investigations. Accordingly, trial counsel was not ineffective in failing to object to Officer Rush's testimony on this meritless basis." Benney, 2017 WL 527968, at *5.

In their Answer, Respondents largely mirror the reasoning of the Superior Court as to this ground, but add that opinion testimony by a lay witness is permitted by the Rule 701 of the Pennsylvania Rules of Evidence. ECF No. 30 at 11-14. Petitioner responds in his Traverse that Office Rush's testimony must be expert testimony because it invokes specific training not available to the public. ECF No. 60 at 9-10. Petitioner relies on a response to a Right to Know Request, dated February 25, 2015, which indicated that Office Rush "was never qualified" in the "Field for

Identification of Behavior and Psychological patterns and or effect or Characteristics of victims of Sexual Assault." ECF No. 43-1 at 175-76.

As to Ground One, Petitioner has failed to establish that the Superior Court's holding was contrary to, or an unreasonable application of, Supreme Court precedent, or due to an unreasonable determination of the facts. Despite Petitioner's protestations to the contrary, Officer Rush's testimony is, as the Superior Court construed it, an explanation of his course of conduct in handling the crime scene and his reasoning underlying the same. See Trial Tr. dated Feb. 2-5, 2009 at 46-47, ECF No. 30-4 at 46-47 (Officer Rush testifying that the victim's appearance and demeanor was consistent with having been physically or sexually assaulted; that he asked about an assault because of his experience and training; that the victim denied the same when asked; and that Officer Rush did not collect evidence from the victim's home that he otherwise would have had she indicated that she had been assaulted). See also id. at 67, ECF No. 30-4 at 67("Q [from Petitioner's trial counsel] She didn't make any indications at that time that she was sexually assaulted? A No sir. I asked her just because of her demeanor.").

Additionally, it is worth noting that Officer Rush further testified that the victim denied having been sexually assaulted during her interview shortly after the crime. Trial Tr. dated Feb. 2-5, 2009, at 47, ECF No. 30-4 at 47. Petitioner's counsel elicited testimony from Officer Rush indicating that he did not make a note of his suspicions or relay them to Detective Luppino, as well as that the victim had "reaffirmed it with a followup question that she had not been assaulted in any way; that she had taken a bath simply because she had these things dumped on her[.]" Id. at 74.

Moreover, Rush's testimony aside, the victim herself testified to a sexual assault having occurred. Trial Tr. dated Feb. 2-5, 2009, at 171 and 201, ECF No. 30-5 at 56 and 86 (victim's

testimony regarding being forced to perform oral sex). Id. at 178-80, ECF No. 30-5 at 63-65 (victim's testimony regarding the extent that her anus was touched or penetrated during commission of sexual assault). Further, the jury was given a so-called "prompt complaint" instruction after closing arguments concluded, which instructed it to consider the delay in the victim's complaint that a sexual assault had occurred when deciding whether such an act actually occurred. Id. at 399, ECF No. 30-6 at 149.

Therefore, even if AEDPA deference were to be set aside, it is clear from the record as a whole that Petitioner has not met the prejudice prong of the Strickland analysis in order to establish that trial counsel was ineffective for failing to object to Officer Rush's testimony. Accordingly, federal habeas relief should be denied as to Ground One.

2. Ground Two

In Ground Two, Petitioner makes another assertion of ineffective assistance of trial counsel.

> Ground Two: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN A COMMONWEALTH WITNESS INVADED THE PROVINCE OF THE JURY AND GAVE INADMISSIBLE TESTIMONY THAT HE HAD "ABSOLUTELY NO DOUBT" THAT PETITIONER WAS GUILTY.

ECF No. 1 at 10. Again, Petitioner refined this in his brief.

> Trial counsel was ineffective under Strickland for failing to object when a Commonwealth witness (Detective Luppino) invaded the province of the jury and gave inadmissible testimony that he had "Absolutely no doubt" Petitioner was guilty.

ECF No. 8 at 16. This claim was addressed by the Superior Court as Issue V in Petitioner's first PCRA appeal. Benney, 2017 WL 527968, at *3 and 6.

In the testimony at issue, Detective Luppino expressed his opinion that he had "[a]bsolutley no doubt" that Petitioner and Partozoti were the individuals in the victim's home on the evening of the crime.

> Q. You, as a seasoned investigator and detective, you have no doubt that [appellant] is the person who was there with Kevin Partozoti?
>
> A. Absolutely no doubt.
>
> Q. I believe all points of your investigation leads [sic] you to these were the two actors in that home that evening?
>
> A. Absolutely.

Id. at *6. See also Trial Tr. dated Feb. 2-5, 2009, at 228, ECF No. 30-5 at 113.

Petitioner asserts that this testimony essentially was Detective Luppino's opinion that Petitioner was guilty of the crimes for which he was being tried. ECF No. 8 at 52. Because Detective Luppino was portrayed as a "seasoned investigator," his opinion testimony unfairly stigmatized Petitioner in the eyes of the jury. Id. at 53.

A majority of the panel of the Superior Court found that this testimony was properly admitted a lay opinion under Rule 701 of the Pennsylvania Rules of Evidence. As such, trial counsel was not ineffective for failing to object. Benney, 2017 WL 527968, at *3. Judge Strassburger disagreed; and instead would have held that the claim failed because Petitioner had failed to show prejudice arising from trial counsel's failure to object to Detective Luppino's testimony. Id. at *8. In their initial Answer, Respondents essentially mirror the analysis of the majority opinion of the Superior Court. ECF No. 30 at 12.

In his Traverse, Petitioner largely concerns himself with the exhaustion of this ground in the state court. ECF No. 60 at 13-14. This is despite the fact that the Superior Court addressed the corresponding claim on the merits in his PCRA appeal. Benney, 2017 WL 527968, at *6.

When Petitioner does reply on the merits, he reiterates that Detective Luppino's testimony was not admissible lay opinion. ECF No. 60.

While Petitioner argues as though the admission of Detective Luppino's testimony is the constitutional issue before this Court, it is important to remember that Ground Two is an ineffective assistance of counsel claim, and thus requires the application of a "doubly deferential" review of the state court's determination. Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

Here, Petitioner has not established ineffective assistance of trial counsel under the Strickland standard. The Superior Court determined that the trial court did not abuse its discretion in admitting Detective Luppino's testimony under state law, and Petitioner has not met his burden to show that this determination is contrary to or an unreasonable application of the precedent of the Supreme Court of the United States.

Furthermore, even if the undersigned were to find that the determination of a lack of merit by the majority of the Superior Court triggered *de novo* review, Petitioner still has failed to demonstrate prejudice. The jury was instructed that counsel's questions were not evidence, and that it was for the jury alone to weigh the evidence and the facts. Trial Tr. dated Feb. 2-5, 2009, at 389 and 392, ECF No. 30-6 at 139 and 142. Further, the testimony of Partozoti placed Petitioner at the scene and implicated him in the crimes,[5] the victim's testimony explained that Petitioner had been in her home before the crimes and identified coins that had been taken from her home, and the testimony of the McElhaneys tied Petitioner to the coins.

In light of the strength of the evidence against Petitioner, he has not established that he suffered prejudice due to counsel's failure to object to Detective Luppino's testimony. Buehl v.

[5] The jury was given a corrupt source instruction with respect to Partozoti's testimony. Trial Tr. of Feb. 2-5, 2009, at 397-98, ECF No. 30-6 at 147-48.

Vaughn, 166 F.3d 163, 172 (3d Cir. 1999) (a court must take into account strength of evidence when performing the Strickland analysis). Therefore, federal habeas relief should be denied as to Ground Two.

3. Ground Three

Petitioner next asserts the following ground for relief:

Ground Three: PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE COMMONWEALTH'S USE OF PRIOR BAD ACTS EVIDENCE THAT WAS NOT ADMISSIBLE.

ECF No. 1 at 14. Petitioner restates this ground without substantive change in his brief.

> Petitioner's due process rights were violated by the Commonwealth's use of prior bad acts evidence.

ECF No. 8 at 16.

a. Ground Three is procedurally defaulted

Plaintiff asserts that he raised this ground on direct appeal at Issue 1. ECF No. 8-1 at 1. See also ECF No. 60 at 16 ("On direct appeal, Petitioner raised a claim related to the trial courts [sic] decision to allow the 404(b) evidence . . . effectively stripped him of the presumption of innocence." (citing Pet'r's Br. at 101, and 107-24, ECF No. 8-1 at 1 and 7-24). See also Super Ct. Direct Appeal Op., ECF No. 30-2 at 1523-24. In support of this assertion, Petitioner invokes Taylor v. Kentucky, 436 U.S. 478, 490 (1978), in which the United States Supreme Court held that a "trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."). The Supreme Court in Taylor is clear that the petitioner therein explicitly invoked his right to due process under the Fourteenth Amendment in state court. Id. at 482.

But unlike Taylor, a review of Petitioner's opening and reply briefs on direct appeal indicate that this issue was presented in terms of state law. See Appellant's Br., No. 1038 WDA 2009, 2010 WL 6647254, at *7 and 12-15; see also Appellant's Reply Br., No. 1038 WDA 2009, 2010 WL 6647255, at *4-6.

A state prisoner may "fairly present" a federal claim to state courts without specifically referencing the federal Constitution or a federal statute in four ways: (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation. Wilkerson v. Sup't Fayette SCI, 871 F.3d 221, 229 (3d Cir. 2017). Applying this standard, a review of Petitioner's briefing on direct appeal fails to establish that he presented Issue 1 as a constitutional claim.

In his briefing, Petitioner argued that the Superior Court on direct appeal should apply a state-law abuse of discretion test for erroneously-admitted evidence, and does not address the standard of review for due process claim. See Appellant's Br., No. 1038 WDA 2009, 2010 WL 6647254, at *11-12. See also Duncan v. Henry, 513 U.S. 364, 366 (1995) (a claim presented to the state court premised solely on violation of state evidentiary rules would not be the substantial equivalent of a claim of a federal constitutional violation based on the exact same facts.) The federal constitution is not mentioned in either of Petitioner's direct appeal briefs; nor is federal case law cited with respect to this Issue 1.

While each of Petitioner's filings on direct appeal mentions a single time that the admission of prior bad acts testimony, absent special circumstances, "may result in effectively stripping the accused of the presumption of innocence[,]" this argument was not expounded upon by Petitioner

in his direct appeal except as a state law evidentiary ruling. Appellant's Br., No. 1038 WDA 2009, 2010 WL 6647254, at *12; see also Appellant's Reply Br., No. 1038 WDA 2009, 2010 WL 6647255, at *4.

Further, the case cited after Petitioner's single invocation of the term "presumption of innocence" in each filing, Commonwealth v. Morris, 425 A.2d 715 (Pa. 1981) does not mention the federal Constitution, due process, or even the "presumption of innocence." That state case does mention "fair trial," but in the context of a rejected argument of when appellate relief is appropriate for a trial court's refusal to sever separate indictments. Id. at 719-20. The holding of that case establishes the circumstances under Pennsylvania state law when evidence of a prior crime may be admitted. Id. at 720.

Additionally, at least one trial court within the Third Circuit has recognized that a single, passing reference to being stripped of presumption of innocence and being denied due process of law, without elaboration, was insufficient to fairly present a constitutional claim in the context of an appeal from an evidentiary ruling involving Rule 404(b) of the Pennsylvania Rules of Evidence. Becker v. Wetzel, No. 19-1032, 2020 WL 4674118, at *24 and n.180 (E.D. Pa. Aug. 12, 2020).

Petitioner failed to exhaust Ground Three because he did not present it as a constitutional claim on direct appeal.[6] Consequently, it is procedurally defaulted, and should be denied.

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[6] In the Petition, and as discussed more thoroughly below, Petitioner argues prejudice on this issue due to the failure of the prosecution to introduce testimony regarding his 1995 conviction, and with respect to Osko's identification of Partozoti, and that the limiting instruction given by the trial court was insufficient. But Petitioner did not raise these arguments on direct appeal. Appellant's Br., 2010 WL 6647254, at *7 and 12-15 (focusing on the differences between the facts of the crimes testified to by Drazik and the McFeeleys differed factually from the crimes of which Petitioner was convicted); see also Appellant's Reply Br., 2010 WL 6647255, at *4-6 (same). Petitioner also did not present any substantive argument with respect to Detective Luppino's testimony. Super. Ct. Direct Appeal Op., ECF No. 30-2, at 1523 n.3 (noting that no arguments were present in Petitioner's appeal brief regarding Detective Luppino's testimony, and (continued . . .)

b. Ground Three lacks merit.

Even if Ground Three were not defaulted, it should be denied on the merits.

Petitioner's briefing with respect to Ground Three is lengthy, disjointed, and difficult to follow. As best as can be discerned after a thorough review of the parties' briefing and the record in this case, Petitioner's bases for Ground Three include that he suffered unfair prejudice due to the admission of evidence of two prior bad acts, as well as the prosecution's failure to present testimony regarding a third prior bad act.

The first prior bad act was the burglary of the Drazicks' home, which was admitted by way of the testimony of Cynthia Drazik at trial. Trial Tr. dated Feb. 2-5, 2009 at 325-39, ECF No. 30-6 at 75-89. Petitioner refers to this as "**act 1**" in his briefing. ECF No. 8 at 3. Detective Luppino testified about this prior bad act at trial in the context of how he conducted his investigation. Trial Tr. dated Feb. 2-5, 2009 at 249, ECF No. 30-5 at 134

The second prior bad act is the theft from the McFeeleys' wallet, which was entered into evidence via the testimony of the McFeeleys at trial. Trial Tr. dated Feb. 2-5, 2009 at 254-69, ECF No. 30-6 at 4-19. Petitioner refers to this as "**act 2**" in his briefing. ECF No. 8 at 95 n.98. Petitioner never was charged with a crime with respect to "act 1" or "act 2."

The third prior bad act was a conviction for a burglary in 1995 that was factually similar to the crimes for which he was tried in 2009. Petitioner refers to this as "**act 3**" in his briefing. Id. at 4. "Act 3" never was introduced at trial.

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determining that that issue was waived). See Allison v. Sup't Waymart SCI, 703 F. App'x 91, 95 (3d Cir. 2017) ("Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts [for exhaustion].")(internal citation and quotes omitted.). Petitioner's arguments before this Court were not presented to the Superior Court – further underscoring that Ground Three, as presented here, is defaulted.

In addition to the factual summary set forth in Part II.A, supra, the trial court's opinion on direct appeal, which was relied upon by the Superior Court when it denied Petitioner's direct appeal, see ECF No. 30-2 at 1527, summarizes the procedural and factual background leading to the admission of evidence of Petitioner's alleged prior bad acts at trial as follows:

> On October 14, 2008, the Court addressed the Commonwealth's motion in limine regarding the proposed introduction at trial of prior bad acts testimony regarding the Defendant. At the hearing on the Commonwealth's motion, Detective Chris Luppino of the City of Washington Police Department testified regarding the series of events that led to the identification of the Defendant as a suspect in this matter. Detective Luppino testified that he received a telephone call from Cynthia Drazik, who, after reading about the Ms. Osko incident, had relayed that she had been the victim of a home invasion and robbery similar to the crime committed in this matter,[7] and that she believed the Defendant was involved in both crimes. Detective Luppino testified how Mrs. Drazik had come to this conclusion, i.e. items that were stolen from her house were recovered along with a driver's license belonging to Marlene McFeeley. Upon being contacted by Mrs. McFeeley, Mrs. Drazik learned that Mrs. McFeeley was the victim of a burglary and that she believed the Defendant, a former tenant of hers, had been involved.[8] Upon learning this information, Mrs. Drazik recalled that the Defendant had previously worked as a contractor on her home. In the course of his investigation, Detective Luppino then learned of a 1995 home invasion in Washington County, for which the Defendant had been convicted, and which was nearly identical to the crime committed in this matter.[9] At this point in his investigation, Detective Luppino asked the victim, Ms. Osko, whether she recently had any contractors in her home and learned that the Defendant had also performed work in Ms. Osko's home.
>
> On October 15, 2008, the Court resumed pre-trial hearings on this matter. At this time, the Court indicated that it was inclined to allow the prior bad acts testimony into evidence, but that it would reserve its final decision until trial to give the Commonwealth further opportunity to show need and to give the Defendant further

[7] This is Petitioner's "act 1."

[8] This is Petitioner's "act 2."

[9] This is Petitioner's "act 3."

> opportunity to show undue prejudice. This matter was continued until the Court's February 2009 trial term, beginning February 2, 2009.
>
> On February 2, 2009, this matter reconvened and another jury was selected. After the jurors were excused, the Court continued its pretrial discussion with the Commonwealth and the Defendant regarding the prior bad acts testimony that the Commonwealth intended to introduce. The Commonwealth had Detective Keith Hutter testify regarding his previous employment with the Chartiers Township Police Department and the facts surrounding the Defendant's previous conviction for the 1995 home invasion. Detective Hutter testified that the victim in this previous matter was sixty (60) years of age and lived alone. The Defendant forced his way into the victim's home and cut the phone cords so that she could not call for help. The Defendant threatened to rape his victim, but was persuaded to not do so by the victim. The Defendant took money and credit cards from the victim before leaving. Detective Hutter testified that he had contacted Detective Luppino because of the similarities between the two cases. At this time, the Court again indicated that it was inclined to allow the prior bad acts testimony into evidence, but that it would reserve its final decision until trial.

Direct Appeal Trial Ct. Op., ECF No. 30-2 at 1559-63.

In his federal habeas Petition, Petitioner contends that the admission of evidence of "act 1" and "act 2" did not meet the standard of Pennsylvania Rule of Evidence 404(b), and that the prejudice he incurred outweighed the probative value of the evidence. ECF No. 1 at 16. Additionally, Petitioner argues that the cautionary instruction provided to the jury regarding the prior bad acts evidence "amalgamated" the Rule 404(b) exceptions. Id.

In his brief, Petitioner asserts that the prosecution had argued in prior hearings that the prior bad act evidence was necessary in order to identify Petitioner as the victim's main assailant. ECF No. 8 at 96-98. It also showed the progression of Detective Luppino's investigation to identify Petitioner. Id. at 96-97. The prosecution also offered to use "act 2" and "act 3" to show Petitioner's *modus operandi*. Id. a 96. They also were necessary because the victim could not identify her assailants. Id. at 98.

At trial, "act 1" and "act 2" were offered into evidence, but "act 3" was not. Petitioner asserts that the failure to enter his 1995 conviction was error, because it was the only prior bad act that actually identified him as the victim's main assailant. Id. at 99; ECF No. 8-1 at 2-3 and 16-18. He asserts that "act 1" and "act 2" were inadmissible under Pennsylvania evidentiary rules. Id. at 105.

Petitioner also asserts that the need to identify him was obviated by the fact that the victim was able to identify the voice of her assailant who did not rape her on the night of the crime. ECF No. 8 at 99; ECF No. 8-1 at 3. Although this was not disclosed to Petitioner by the prosecution prior to trial, the victim apparently did so based on a recording of an interview of Partozoti by the police. ECF No. 8 at 99. See also Trial Tr. dated Feb. 2-5, 2009, at 182-84 and 204-06, ECF No. 30-5 at 67-69 and 89-91. See also id. at 224, ECF No 30-5 at 109. There is no indication on the record that the victim was able to identify Petitioner as one of her assailants; however, she did recognize him from having worked on her house as a contractor prior to the rape and burglary. Id. at 193, ECF No. 30-5 at 78.

Petitioner also argues that the trial court conducted an incorrect analysis on the admission of prior bad acts evidence, and did not articulate the exceptions that they fell into with sufficient specificity. ECF No. 8-1 at 11-12. The prosecution also allegedly misled the trial court in attempting to admit the evidence. Id. at 13. The limiting instruction provided to the jury also was improper because it was not sufficiently precise. Id. at 14-16. Petitioner argues that these alleged deficiencies unfairly prejudiced him and stripped him of the presumption of innocence. Id. at 25.

In their Answer, Respondents generally state that the introduction of evidence of prior bad acts by Petitioner did not violate due process, and then quote several pages from the trial court's opinion on direct appeal. ECF No. 30 at 14-19.

Habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Taylor v. Horn, 504 F.3d 416, 448 (3d Cir. 2007); Smith v. Horn, 120 F.3d 400, 426 (3d Cir. 1997). Petitioner may obtain habeas review only of federal constitutional claims. 28 U.S.C. § 2254(a). Claims of state court error in interpreting or applying state evidentiary rules, are not cognizable here. See Wells v. Petsock, 941 F.2d 253, 256 (3d Cir. 1991) ("We can take no cognizance of non-constitutional harm to the defendant flowing from a state's violation of its own procedural rule, even if that rule is intended as a guide to implicate a federal constitutional guarantee."); Bisaccia v. Att'y Gen. of New Jersey, 623 F.2d 307, 312 (3d Cir. 1980) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974)).

The United States Court of Appeals for the Third Circuit has held that "evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." Bisaccia, 623 F.2d at 312. The Supreme Court has acknowledged its "traditional reluctance to impose constitutional restraints on ordinary evidentiary rulings by state trial courts." Crane v. Kentucky, 476 U.S. 683, 689 (1986). That said, state evidentiary rules cannot be inflexibly applied in such a way as to violate fundamental fairness. See Chambers v. Mississippi, 410 U.S. 284, 299-302 (1973).

With respect to erroneously admitted evidence

> To constitute the requisite denial of fundamental fairness sufficient to issue a writ of habeas corpus, the erroneously admitted evidence must be material in the sense of a crucial, critical, highly significant factor, and the probative value of the evidence must be so conspicuously outweighed by its inflammatory content that a defendant's constitutional right to a fair trial has been violated.

Peterkin v. Horn, 176 F. Supp. 2d 342, 364 (E.D. Pa. 2001). "Admission of 'other crimes' evidence provides a ground for federal habeas relief only if the evidence's probative value is so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial." Bronshtein v. Horn, 404 F.3d 700, 730 (3d Cir. 2005) (internal quote and citation omitted).

With respect to alleged erroneously excluded evidence, Petitioner must demonstrate "[f]irst, that [he] was deprived of the opportunity to present evidence in his favor; second, that the excluded testimony would have been material and favorable to his defense; and third, that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." Gov't of Virgin Islands v. Mills, 956 F.2d 443, 446 (3d Cir. 1992).

Petitioner simply has not made this showing with respect to Ground Three. First, for the reasons articulated by the Superior Court, it is clear that the trial court's rulings with respect to this evidence were correct under Pennsylvania law. Super Ct. Direct Appeal Op., ECF No. 30-2 at 1524-27. Second, despite Petitioner's lengthy briefing, the record does not indicate that the fundamental fairness of Petitioner's criminal trial was in any way undermined by the admission of the evidence at issue, or the failure of the prosecution to present evidence regarding "act 3." Thus, this ground is not cognizable on habeas review and should be dismissed.

4. Ground Four

Petitioner raises the following ground for relief, which corresponds to Issue 1 in Petitioner's Second PCRA appeal.

Ground Four: PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT WAS VIOLATED WHEN THE COMMONWEALTH COMMITTED PROSECUTORIAL MISCONDUCT BY INTRODUCING FALSE TESTIMONY AND MISREPRESENTATIONS TO THE TRIAL COURT.

ECF No. 1 at 17. Petitioner restates this ground without substantive change in his brief.

> Petitioner's due process rights were violated when the Commonwealth committed prosecutorial misconduct by introducing false testimony and misrepresentations to the jury/court[.]

ECF No. 8 at 16.

This ground is based on the victim's pretrial identification of Partozoti's voice from a recorded interview, as discussed above, at Ground 3, and Detective Luppino's testimony regarding the procedure. ECF No. 1 at 17-19. See also Trial Tr. dated Feb. 2-5, 2009, at 182-84 and 204-206, ECF No. 30-5 at 67-69 and 89-91 (testimony of victim). See also id. at 224, ECF No 30-5 at 109 (testimony of Detective Luppino). See also id. at 307, 322-23, ECF No. 30-6 at 72-73 (additional testimony of Detective Luppino).

In a response to a request for information under Pennsylvania's Right to Know law submitted on July 27, 2015, the Washington Police Department indicated the "[Detective] Luppino has never given a voice line-up." ECF No. 1 at 20. Subsequent responses from Detective Luppino and the Washington County District Attorney indicated that they do not perform voice identification line-ups or voice identification show-ups. Id. at 20-21. The district attorney's office apparently responded after the second PCRA appeal was pending. Id. at 21. See also ECF No. 1-6 at 1; ECF No. 1-7 at 1; ECF No. 1-9 at 1.

In their initial Answer, Respondents argue that Ground Four is procedurally defaulted. ECF No. 30 at 9.

The Superior Court affirmed the trial court's order dismissing this ground. The reasoning was that the second PCRA petition was untimely because it was filed more than a year after Petitioner's conviction became final, and it did not fall into the "newly-discovered fact" exception because Petitioner did not establish due diligence in presenting his claim. Benney, 2019 WL 2068505, at *3-4.

In making its determination, the Superior Court recognized that part of the recording on which the identification was based was played at trial, and that the victim identified the voice on the recording as the assailant wearing a dark sweatshirt – i.e., Partozoti. Id. at *4. Petitioner could have questioned the victim about the process by which she was first presented the recording at trial. Id. "We reiterate that he has known about the recording and the victim's resulting identification since at least the time of trial. Thus, we conclude that Appellant's first claim does not meet the newly discovered fact exception." Id. As such, this ground has been procedurally defaulted.

Petitioner argues that his default should be excused because he can demonstrate cause and prejudice. ECF No. 86 at 2-6. He argues that cause exists because there was no evidence at trial indicating that someone at the district attorney's office did not perform the identification procedure. Id. at 3. He argues that prejudice exists because his physical appearance is so different from Partozoti's that the jury would not have believed that Petitioner was the assailant who raped the victim without the victim's identification of Partozoti's voice as that of the assailant who did not rape her. Id. at 5.

Upon review, Petitioner has not met his burden to demonstrate cause and prejudice. As to cause, none of Petitioner's arguments undercut the facts that Petitioner knew of the recording at least at the time of trial because it was played in open court. See Trial Tr. dated Feb. 2-5, 2009, at 204-206, ECF No. 30-5 at 89-91. Petitioner's trial counsel received a copy of the interview prior to trial. Id. While it is not disputed that Petitioner did not receive responses to his Right to Know requests until well after trial, nothing stopped him from enquiring as to the circumstances underlying the identification on cross examination of the victim of Detective Luppino.

As to prejudice, the victim identified Partozoti's voice as that of the individual who did not rape her at trial, in the courtroom, based on the recording that was played in front of her and the jury, as part of her testimony. Id. at 204-206, ECF No. 30-5 at 89-91

Further, to the extent that Petitioner asserts that the differences in physical appearance between himself and Partozoti undercut the victim's identification, ECF No. 86 at 5, both Petitioner and Partozoti were in the court room and in front of the jury during Petitioner's trial. It is unclear how their different physical characteristics could not have been presented to the jury at that time. The victim's identification Partozoti could have been impeached at trial on that very basis. This further weighs against a finding of cause and prejudice to set aside his default of the ground.

Petitioner provides no new, reliable evidence that a miscarriage of justice occurred to set aside default. Schlup, 513 U.S. at 324

Accordingly, Petitioner's Ground Four is procedurally defaulted, and Petitioner has not met his burden to show that default should be set aside. Federal habeas relief should be denied as to Ground Four.

5. Ground Five

Next, Petitioner raises the following ground for relief, which corresponds to Issue 2 in Petitioner's Second PCRA appeal.

> Ground Five: PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE DESTRUCTION OF FINGERPRINT EVIDENCE.

ECF No. 1 at 23. Petitioner expands the scope of this ground somewhat in his brief.

> Petitioner's due process rights were violated by the destruction of fingerprint evidence and false testimony related to it.

ECF No. 8 at 16.

This ground is properly analyzed as two distinct claims. The first relates to the alleged destruction of a piece of duct tape that had been used to bind the victim to a chair, upon which was a partial fingerprint that was never identified as belonging to any specific individual.

Petitioner concedes that he obtained a photo of the duct tape showing the partial finger print sometime "after trial." ECF No. 43 at 351. He does not provide a date, but it appears that it was some time on or before December 11, 2009. ECF No. 1 at 25. A copy of the photograph is provided as an exhibit to the Petition. ECF No. 1-11 at 1. In his second PCRA appeal, Petitioner indicated that the alleged detail of the partial print was apparent even to his untrained eye. ECF No. 43-1 at 358. He began filing Right to Know requests related to the partial print on December 11, 2009. ECF No. 1 at 25.

The second part of Ground Five to relates to allegedly false testimony by Detective Luppino related to his qualifications to analyze fingerprints in the field, as well as whether Detective Luppino submitted the piece of tape with the partial print to the Pennsylvania State Police forensics services for analysis. ECF No. 1 at 24. The relevant testimony is as follows.

> [The Prosecution] Did you have any findings in the basement?
>
> [Detective Luppino] At that time[,] I took a piece of duct tape. We have sometimes success [*sic*] with duct tape because ... you take a roll of duct tape, obviously you have to touch the other side to pull the duct tape off. So what we do is a process called sticky side powder and we actually print the sticky side of the tape and we have a little success on prints. The problem with this duct tape was when the victim took it off, as we all know[,] that duct tape tends to almost stick together. Once the tape sticks together[,] even when you pull it off[,] the prints are ruined. So there was a small section of duct tape that I actually packaged and took back to the station for later process[ing].
>
> Q Were you at all successful with that?
>
> A I got a partial print. When I say partial print, it wasn't a print that I felt I could talk to an expert about. It wasn't good enough to send into the AFUS system. The AFUS system is a system where

you send a fingerprint into. If you've ever[ ] been arrested, then that's how you find a match. I couldn't find any centers on the print. The centers are points, is how you compare fingerprints. Normally[,] the[re] are anywhere between [7] and 12 points. I think there was one point on this partial. So about all you could tell from the print was the loop pattern of the fingerprint. That's the only thing to compare. So you couldn't match it up to anybody's fingerprint. The most you can say is: you know what, that is their loop pattern. So it ended up not being any good.

Q You didn't have enough to compare it?

A No.

Q You've done this comparison on fingerprints before?

A Sure. Many times.

Q In doing this[,] did you find any other fingerprints or useable prints in the home?

A No. For one, the victim had initially told the officers and Lieutenant [Daniel] Stanek when he reinterviewed her that day, that the assailants were wearing gloves. You're not going to find fingerprints when they're wearing gloves.

* * *

[Petitioner's Attorney] Your testimony was there was a partial print on the duct tape that was not useable?

[Detective Luppino] Correct.

Q Did you send it to an expert like you did the DNA?

A Yes. I did send it to an expert. I sent it to Trooper [Robert] Liebhart, Forensic State Police.

Q Did he give you a report?

A No, he did not.

Q Did he discuss it with you verbally?

A Yes.

Q There was no blood at the scene?

A No.

Q And the rest of the home wasn't dusted for fingerprints?

A It was unnecessary because of the gloves.

Q The glove you found[,] was that sent to an expert?

A It was.

Q And the DNA came back inconclusive?

A Correct.

Trial Tr. dated Feb. 2-5, 2009, at 215-17 and 228-29; ECF No. 30-5 at 100-02 and 113-14. See also Benney, 2019 WL 2068505, at *5-6.

Petitioner provides several requests submitted under the Pennsylvania Right to Know law, and responses thereto, which Petitioner argues indicate that Detective Luppino was unqualified to analyze the partial fingerprint, and contradict his testimony that he submitted the piece of tape to the state police for analysis. ECF No. 1 at 25-26 and 29. See also ECF No. 43-1 at 360. These include:

- A Right to Know request dated February 25, 2015, asking, in pertinent part, "2.) If Detective Chris Luppino was ever qualified in the Field of Fingerprint Identification and or Examiner, and Proficiancy [*sic*] Examination Scores. Please provide the date he was Qualified" ECF No. 1-1 at 1.

- An affidavit signed by Detective Luppino, dated July 7, 2015, stating, in pertinent part, that "Detective Luppino is a Qualified Evidence Technician only[.]" Id. This appears to be responsive to the Right to Know request dated February 25, 2015.

- A Right to Know request dated July 27, 2015, asking for, in pertinent part, "g.) Qualification showing Detective Luppino is Qualified to compare Fingerprint in order to determine their usability." ECF No. 1-4 at 1.

- An undated page entitled "Robert Benney Right To Know Request" stating, in pertinent part, that "g. Detective Luppino is not qualified to compare fingerprints[.]" Id.

- A Right to Know request dated September 28, 2015 requesting, in pertinent part, that the respondent thereto "1) List how many request for Forensic testing involving Fingerprints on DUCT TAPE were submitted by WASHINGTON COUNTY CITY POLICE DEPARTMENT and/or DETECTIVE CHRIS LUPPINO BADGE# 35 between the dates JAN. 2008 thru DEC 2008." and "5) When a police dept. submits

fingerprint evidence for development and/or examination, List all forms and/or reports that are issued to the requesting police dept. regardless of results. I.E match, inconclusive, unable to develop ETC [*sic*]." ECF No. 1-13 at 1

- A Right to Know request dated May 8, 2017, asking, in pertinent part, about state police policies on issuing reports. Id.

- A response, dated November 9, 2015, to "PSP/RTKL Request No. 2015-0714" stating, in pertinent part, "Lastly, in response to item 5 the responsive two page document titled PSP Request for Forensic Analysis (marked for identification as PSP/RTK000003-PSP/RTK000004). The responsive one page document titled PSP Forensic Services Evidence Examination Report (marked for identification as PSP/RTK000005), and the responsive one page document titled PSP Forensic Services Latent Print Worksheet (marked for identification as PSP/RTK000006)." It goes on to state "4. In addition, in response to item 1, there were no submissions for forensic testing involving fingerprints on duct tape submitted by Washington county City Police Department and/or Detective Chris Luppino between January 200 [*sic* thru December 2008." ECF No. 1-14 at 1.

- Policy and examples of forms provided by the State Police. ECF No. 1-15 at 1-2.

- A response, dated June 16, 2017, to a Right to Know request received May 10, 2017, indicating that the requested documents are unavailable because they are contrary to policy. ECF No. 1-17 at 1-2.

- A Right to Know request dated May 8, 2017, to which no response had been received at the time of filing of the Petition. ECF No. 1-19.

Many of these filings were not cited or provided in Petitioner's brief in support of his Second PCRA appeal. Compare with ECF No. 43-1 at 359, 374-80.

In the second PCRA appeal, the Superior Court analyzed Ground Five as a single claim, and found it to be untimely under the PCRA. Benney, 2019 WL 2068505, at *4-6. Petitioner had not demonstrated the diligence necessary to trigger the PCRA's timeliness exception for newly discovered evidence. Id. *6. With respect to the State Police's response, dated November 9, 2015, to Petitioner's Right to Know request (reproduced at ECF No. 1-14 at 1), the Superior Court also found that:

> Further, with respect to Appellant's claim that the forensic state police disclosed that it did not receive duct tape evidence from either Sergeant Luppino or the WPD, it is unclear to us if the Right to Know response that Appellant relies on even contradicts Sergeant

> Luppino's testimony at trial. The Right to Know response, which was from the Pennsylvania State Police, expressed that "there were no submissions for forensic testing involving fingerprints on duct tape submitted by [the WPD] and/or [Sergeant] ... Luppino between January 200 [*sic*] thru December 2008." Exhibit O to Appellant's Brief. At trial, Sergeant Luppino did not testify that the fingerprints were submitted for forensic testing, but instead conveyed that he sent the duct tape to the forensic state police. N.T. Trial at 228. Thus, Appellant has not proven that Sergeant Luppino falsely testified regarding this evidence.

Benney, 2019 WL 2068505, at *6.

With respect to the duct tape containing the partial print, it is apparent from the record that Petitioner was aware of its existence at least at the time of Detective Luppino's testimony at trial. Trial Tr. dated Feb. 2-5, 2009, at 215-17 and 228-29; ECF No. 30-5 at 100-02 and 113-14. But see ECF No. 1 at 25, n.12 (stating that it was "unclear if trial counsel possessed or saw these pictures [of the partial print].") While Petitioner argues that he had no motivation at the time of trial to challenge the veracity of Detective Luppino's testimony, ECF No. 1 at 29, none of that has any bearing on Petitioner's ability to object to not having been notified of the partial print's existence in a timely manner, or to seek to have it analyzed by his own expert, or to raise the issue on direct appeal. Given Petitioner's assertion as to the alleged obviousness of the detail of the print in the photo, as well as the fact that he began investigating it at least as early as December 2009, during the pendency of his direct appeal, ECF No. 1 at 25, ECF No. 30-2 at 1523, he has failed to demonstrate cause to set aside his procedural default of this claim. Murray, 477 U.S. at 488 (1986).

As to Petitioner's assertion of a miscarriage of justice, see ECF No. 8-1 at 54, He has provided no evidence of the character necessary to support such a claim. See Schlup, 513 U.S at 324. He also has not presented any expert evidence in his federal Petition or elsewhere in the record indicating that the partial print cannot be his own; nor does he explain why he did not seek

to do so in state court at least in his first PCRA petition. He is precluded developing the record as to that issue now. 28 U.S.C. § 2254(e)(2).

As to the allegedly perjured testimony of Detective Luppino at trial, even if default is set aside, he cannot prevail on the merits of such a claim. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

In order to make out a constitutional violation related to Detective Luppino's alleged perjury, Petitioner must show that (1) Detective Luppino committed perjury; (2) the government knew or should have known of his perjury; (3) the testimony went uncorrected; and (4) there is any reasonable likelihood that the false testimony could have affected the verdict. Lambert, 387 F.3d at 242-43. Here, he fails at least at elements (2) and (4). Petitioner has not shown that the prosecution knew or should have known of the alleged falsehoods in Detective Luppino's testimony.

And even if he could impute this knowledge on the prosecution, Petition fails to show materiality. As shown above, Detective Luppino never testified that the partial print could be used to identify either Petitioner or Partozoti. Instead, he testified that the print could not be used to identify anyone. If Luppino had testified that he never submitted the partial print for testing, or that he was unqualified to opine on the quality of the partial print, the effect would have been the same – the partial print would not be evidence of anyone's identity.[10]

[10] Hypothetically, with the information that Detective Luppino allegedly was unqualified to opine on the quality of the partial print and allegedly did not submit it to the state police for forensic analysis, Petitioner could have attempted obtain his own expert analysis of the partial print. But he could have done the same anyway under the extant facts when he became aware of the partial print's existence – or argued the same on direct appeal or in his first PCRA proceedings, as discussed above. To the extent that Petitioner's position is that his rights were violated simply (continued . . .)

For the foregoing reasons, federal habeas relief should be denied with respect to Ground Five.

6. Ground Six

In Ground Six, Petitioner alleges the following:

> Ground Six: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT, OR SUPPRESS PRETRIAL IDENTIFICATION WHICH VIOLATED PETITIONER'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

ECF No. 1 at 30. Petitioner refines this ground in his brief.

> Trial counsel was ineffective under Strickland for failing to object or suppress unreliable and suggestive pretrial identification of the codefendant, which violated Petitioner's 4th , 5th , and 14th Amendment Rights.

ECF No. 8 at 16.

This ground corresponds to Issue VI in Petitioner's first PCRA appeal, and was deemed waived due to Petitioner's failure to include it in his Rule 1925(b) statement. Benney, 2017 WL 527968, at *6. Dismissal on this basis has been held by courts within this Circuit to be an independent and adequate state law ground supporting a finding a procedural default. See, e.g. Deep v. Wingard, No. 14-831, 2020 WL 908259, at *13 (W.D. Pa. Feb. 25, 2020). See also Haddock v. Keresta, No. 12-175, 2016 WL 7669857, at *8 (W.D. Pa. May 12, 2016), report and recommendation adopted, 2:12-CV-0175, 2017 WL 89041 (W.D. Pa. Jan. 10, 2017). Thus, Petitioner's Ground Six was procedurally defaulted in state court.

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because the police did not analyze the partial print with his own prints or those of Partozoti, the United States Supreme Court has recognized that "the police do not have a constitutional duty to perform any particular tests." Arizona v. Youngblood, 488 U.S. 51, 59 (1988)

Petitioner asserts that his default should be set aside under the equitable rule set forth in Martinez v. Ryan, 566 U.S. 1 (2012). ECF No. 1 at 30. The United States Supreme Court held in Martinez that the negligence of the prisoner's state post-conviction counsel during initial collateral proceedings can furnish cause to excuse procedural default of a claim of ineffective assistance of trial counsel if state post-conviction proceedings provide the first opportunity to raise such a claim. 566 U.S. at 17.

Petitioner concedes that Ground Six was raised in his first *pro se* first PCRA petition, ECF No. 86 at 16. See also ECF No. 30-2 at 1423. He attempts to pin his failure to raise it in his *pro se* Rule 1925(b) statement on appeal on PCRA counsel. ECF No. 86 at 16 ("because ground 6 & 8's procedural defaults were attributed to a *pro-se* petitioner on appeal, which is outside the gammit [*sic*] of Martinez's narrow scope of review, petitioner needs to explain how PCRA counsels deficient performance during initial collateral review, was the objective external factor that impeded petitioner's efforts to comply with the 1925(b) rule[.]"). Despite his verbose briefing, Petitioner's basis for doing so is unclear. As best as this Court can discern, Petitioner argues that his PCRA trial counsel is at fault for Petitioner's deficient 1925(b) statement because the PCRA trial counsel did not address this ground in his no-merit letter, and the PCRA trial court did not formally grant leave for Petitioner's counsel to withdraw until after the notice of appeal was filed. Id. at 16-19.

It is not necessary to parse Petitioner's arguments on this issue for two reasons. First, PCRA trial counsel had been granted leave to withdraw August 1, 2014.[11] ECF No. 30-2 at 833.

[11] In that same order granting PCRA trial counsel leave to withdraw, Petitioner was directed to file a Concise Statement of Matters Complained of on Appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. ECF No. 30-2 at 833. Petitioner was warned explicitly that "[a]ny issue not properly in [Petitioner's] Statement or failure to file [his] Statement (continued . . .)

Petitioner was proceeding *pro se* at the time that he filed his Rule 1925(b) statement on August 24, 2014. Id. at 817, 819, and 821.

The second reason is that – even if Petitioner had been represented by counsel at the time of the filing of his Rule 1925(b) statement in his first PCRA proceeding, – any error therewith is beyond the scope of Martinez. Courts within this Circuit have recognized that "initial collateral review proceedings" cease at the moment that the PCRA court dismisses the PCRA petition and actions taken thereafter, such as the filing or failing to file a notice of appeal or actions in connection with the filing of a statement of matters complained of on appeal all constitute actions of PCRA counsel acting in an appellate capacity and, therefore, fall outside of the Martinez exception." See Deep, 2020 WL 908259, at *13 (internal quotation omitted) (citing McKinnon v. Harlow, No. 12-6308, 2015 WL 400471, at *6 (E.D. Pa. Jan. 28, 2015)).

Petitioner failed to exhaust Ground Six because he failed to raise it in his Rule 1925(b) statement in his first PCRA appeal. That ground now is procedurally defaulted, and Martinez does not provide cause to set that default aside. Petitioner has failed to provide another basis for cause under these circumstances – especially given that he admits that he raised in in a *pro se* petition in his first PCRA proceedings. He also has not shown a miscarriage of justice. Habeas relief should be denied as to Ground Six.

7. Ground Seven

At Ground Seven, Petitioner asserts:

Ground Seven: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A JUDGMENT OF ACQUITTAL ON THE RAPE CHARGE. ALTERNATIVELY, PETITIONER'S DUE PROCESS RIGHTS

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of record and to serve a copy on the [first PCRA trial court] shall be deemed a waiver of those issues." Id.

> UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED.

ECF No. 1 at 38. Petitioner restates this ground without substantive change in his brief.

> Trial counsel was ineffective under Strickland for failing to move for a judgment of acquittal on Petitioner's rape charge. Alternatively, Petitioner's due process rights (14th) were violated.

ECF No. 8 at 16.

It appears that this ground was not raised in either of Petitioner's PCRA proceedings. Petitioner claims that he forwarded this ground to his PCRA counsel. ECF No. 86 at 16. If so, he does not adequately explain how he was unable to raise it himself in his multiple *pro se* amended PCRA petitions, or in his Rule 1925(b) statement in his first PCRA proceeding.

Petitioner argues that he raised the due process portion of Ground Seven on direct appeal. However, a review of Petitioner's initial and reply briefs on direct appeal indicate that his sufficiency arguments were based on state law. Benney, 2010 WL 6647254, at *15-25; see also 2010 WL 6647255, at *6-8. See, e.g. Fortney v. Wainwright, No. 20-339, 2021 WL 9096694, at *9 (W.D. Pa. Aug. 11, 2021), report and recommendation adopted, 2022 WL 2790711 (W.D. Pa. July 15, 2022) ("Fortney's sufficiency claim was characterized and argued in terms of a violation of state evidentiary rules. It made no mention of a due process violation and thus cannot be considered to have put the state court on notice that he was raising a federal claim. *Id.* Thus, it is not properly exhausted."). Accordingly, Ground Seven is procedurally defaulted, and Petitioner provides no basis to excuse the default.

Additionally, it is noted that Petitioner's argument with respect to this claim is that the victim's testimony that he entered the folds of her buttocks and touched her anus with his penis was insufficient to demonstrate the penetration element of rape under Pennsylvania law. ECF No. 8-1 at 95-100; ECF No. 60 at 27; ECF No. 86 at 13-14. See also Trial Tr. dated Feb. 2-5, 2009, at

178-79, ECF No. 30-5 at 63-64 (in which the victim describes Petitioner entering inside the "folds of [her] buttocks" with his penis.)

Presuming for the sake of argument that Petitioner is correct on this point, he ignores the victim's testimony that Petitioner forced his penis into her mouth, which supports the "penetration" required for rape under Pennsylvania law. See 18 Pa. C.S.A. § 3101 (defining sexual intercourse as "[i]n addition to its ordinary meaning, includes intercourse per os [i.e., orally] or per anus, with some penetration however slight; emission is not required."). This is consistent with the jury instruction regarding Petitioner's rape charge at trial. Trial Tr. dated Feb. 2-5, 2009, at 404-06, ECF No. 30-6 at 154-56.

At trial, the victim testified:

> A He told me to put his penis in my mouth.
>
> Q He told you to put his penis in your mouth?
>
> A Yes.
>
> Q Did that happen?
>
> A Yes.

Id. at 171, ECF No. 30-5 at 56. Additionally:

> Q This is the room where you were first forced onto your knees?
>
> A Yes.
>
> Q And this is the room where he forced you to perform oral sex?
>
> A Yes.
>
> Q Is this also the room where he had on multiple occasions pointed the gun at you?
>
> A Yes.

Id. at 201, ECF No. 30-5 at 86.

Accordingly, even if Petitioner somehow were able to overcome his default of this ground, his argument is meritless. Federal habeas relief as to Ground Seven should be denied.

8. Ground Eight

Petitioner asserts the following as Ground Eight.

> Ground Eight: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO [OBJECT TO] AN ERRONEOUS JURY INSTRUCTION ON THE
>
> UNLAWFUL RESTRAINT CHARGE. ALTERNATIVELY, PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED.

ECF No. 1 at 45. Petitioner restates this ground without substantive change in his brief.

> Trial counsel was ineffective under Strickland for failing to object to an erroneous jury instruction on the unlawful restraint charge. Alternatively, Petitioner's due process rights were violated.

ECF No. 8 at 16. This ground corresponds to Issue VII in Petitioner's first PCRA appeal. Like Ground Six, this issue was dismissed by the Superior Court due to Petitioner's failure to raise it in his Rule 1925(b) statement. Benney, 2017 WL 527968, at *6.

Petitioner admits that this claim was not presented in any PCRA petition or his Rule 1925(b) statement on appeal. ECF No. 86 at 16. He claims that this is because he was not in possession of the relevant transcripts until after his Rule 1925(b) statement was filed in his first PCRA proceedings.[12] Id. This assertion is belied by the record. The jury instruction relating to the unlawful restraint charge is in the transcript dated February 2-5, 2009. Trial Tr. dated Feb 2-5, 2009 at 410, ECF No. 30-6 at 160. The record before this Court also includes a letter from Petitioner to his PCRA counsel, dated July 1, 2012 – shortly after his counsel's appointment – indicating that Petitioner had received his transcripts, which he described as "fairly complete

[12] Petitioner was explicitly permitted by the Superior Court to argue lack of access to his transcripts in his brief. See Order dated April 28, 2016, Docket, No. 680 WDA 2015. He did not do so. ECF No. 43-1 at 121-69.

except for Oct 9 2008 it is only a partial scribed record." ECF No. 30-2 at 1495. Thus, the record indicates that Petitioner had reviewed the transcripts that would have provided the basis for this claim at least as of July 1, 2012 – during the pendency of his firs PCRA proceeding.

In any event, Petitioner's default of the ineffective assistance of counsel claim here was for failing to raise this claim in his Rule 1925(b) statement. For the reasons stated with respect to Ground Six, Martinez provides no cause to set aside default. Further, there is no indication that a due process claim was fairly presented to the state courts. See Part II.D.6, supra (discussing Petitioner's sufficiency of evidence claim on direct appeal).

Furthermore, Petitioner has not established any other source of cause to excuse his procedural default. Nor has he submitted new, reliable evidence that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup, 513 U.S. at 321 and 324. Therefore, federal habeas relief should be denied as to Ground Eight.

E. Certificate Of Appealability

A certificate of appealability should be denied, as jurists of reason would not debate that Petitioner has failed to show entitlement to relief. See also Slack v. McDaniel, 529 U.S. 473, 484-85 (2000).

III. CONCLUSION

For the reasons that follow, it is respectfully recommended that the Petition, ECF No. 1, be denied. It is further recommended that a certificate of appealability be denied.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street,

Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Dated: June 29, 2023

BY THE COURT:

Maureen P. Kelly

MAUREEN P. KELLY
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Marilyn J. Horan
United States District Judge

Robert Allen Benney
JB 4701
SCI Fayette
50 Overlook Drive
LaBelle, PA 15450

All counsel of record (*via* CM/ECF)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1436

ROBERT ALLEN BENNEY,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI; ATTORNEY GENERAL PENNSYLVANIA; DISTRICT ATTORNEY WASHINGTON COUNTY

(D.C. No. 2:18-cv-01223)

SUR PETITION FOR REHEARING

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

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

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: March 4, 2025

APPENDIX "D"

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