

TAHREEL M. TOWNSEND, Appellant

VS.

SUPERINTENDENT GREENE SCI, ET AL.

C.A. No. 17-1784

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ORDER

The request for a certificate of appealability is denied. Essentially for the same reasons given by the Magistrate Judge in recommending the denial of Appellant's 28 U.S.C. § 2254 petition, Appellant has not shown that jurists of reason would find debatable the District Court's ruling that his claims are procedurally barred, non-cognizable, or lack merit. See Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003); Slack v. McDaniel, 529 U.S. 473, 484-85 (2000).

By the Court,

s/ D. Michael Fisher

Circuit Judge

Dated: June 22, 2017

JK/cc: Tahreel M. Townsend

Heather F. Gallagher, Esq.



A True Copy

Marcia M. Waldron

Marcia M. Waldron, Clerk

Certified order issued in lieu of mandate.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1784

TAHREEL M. TOWNSEND,
Appellant
v.

SUPERINTENDENT GREENE SCI; THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA; THE DISTRICT ATTORNEY OF THE LEHIGH COUNTY

(D.C. No. 5-15-cv-01475)

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ,
KRAUSE, RESTREPO, NYGAARD and FISHER*, *Circuit Judges*.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellant Tahreel M. Townsend in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the 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/ D. Michael Fisher
Circuit Judge

Dated: July 18, 2017
JK/cc: Tahreed Townsend
Heather F. Gallagher, Esq.

* Judges Nygaard and Fisher's votes are limited to panel rehearing only.

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

TAHREEL M. TOWNSEND

v.

ROBERT GILMORE, et al.

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CIVIL ACTION

NO. 15-1475

ORDER

AND NOW, this 15th day of March 2017, upon consideration of Petitioner Tahreel Townsend's Petition for a Writ of Habeas Corpus (Doc. No. 1), Response in Opposition to Petition for Writ of Habeas Corpus of the District Attorney of Lehigh County (Doc. No. 8), Petitioner's Traverse to Response (Doc. No. 12), Magistrate Judge Marilyn Heffley's Report and Recommendation (Doc. No. 15), Petitioner's Objection and Reconsideration to Report and Recommendation (Doc. No. 22), and an independent review of the record before the Court, it is hereby ORDERED as follows:

1. Petitioner's Objections to the Report and Recommendation (Doc. No. 22) are OVERRULED.

The Court adopts the Report and Recommendation ("R&R") by Magistrate Judge Heffley, and writes separately only to address Petitioner's objections to the R&R. In Petitioner's objection, Petitioner requests, generally, reconsideration of the Magistrate Judge's R&R. When reviewing an R&R to which a party has objected, a court must make "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). Townsend raises two objections.

First, Townsend argues the Magistrate Judge "is not authorized to hear nor recommend that Petitioner's case be dismiss[ed]." However, under 28 U.S.C. § 636 (b)(1)(B), a judge may "designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition" petitions for writ of habeas corpus. Here, this Court designated Magistrate Judge Heffley to submit to the Court recommendations for the disposition of the petition. Magistrate Judge Heffley did so, in accordance with § 636 (b)(1)(B). Therefore, Townsend's objection is overruled.

Second, Townsend argues that the Magistrate Judge erred in determining that Townsend's confession followed a valid waiver of Townsend's Miranda rights. In support of this claim, Townsend asserts, "Detective William J. Lake and Glenn Granitz, Jr., arranged for another officer to arrest [him], . . . specifically instructing the officer not to advise [Townsend] of his [M]iranda rights." Until now, Townsend has not argued that his confession should have been suppressed because he did not receive a Miranda warning. Instead, in his direct appeal to the Pennsylvania Superior Court and in his petition for writ of habeas corpus to federal court, he argued that his confession should have been suppressed because it was obtained through coercion. See R&R, 4 11-18; Superior Court Opinion, 2-6. Specifically, before the Pennsylvania Superior Court, Townsend asserted he was "startled by the search of the property and his arrest," and that "police had arrested him on a simple drug charge and so he was unprepared to answer questions about the murder of Jimmy Ortiz." Superior Court Opinion, 2-3. In his federal habeas corpus petition, Townsend maintained that the officers psychologically coerced him by depriving him of sleep and food; he was threatened with being charged with another homicide; and the confession was given after his arrest for a separate, unrelated crime. R&R, 7. Magistrate Heffley properly rejected these arguments.

In Townsend's objections to the R&R, Townsend changes his voluntariness argument, asserting, for the first time, that he was never given a Miranda warning in the initial, "informal," portion of the interview with the police, which lasted approximately two hours. Objection and Reconsideration to Report and Recommendation, 2-3. Townsend also raises a challenge under Missouri v. Seibert, 542 U.S. 600, 609 (2004), asserting, "[a]t trial detective Lake acknowledged that Townsend's ultimate statement was largely a repeat of information obtained prior to the [M]iranda warnings." Id. 3.

Petitioner's new arguments are deemed waived because he did not present these issues before the Magistrate Judge. "While the Magistrate Judge Act, 28 U.S.C. § 631 et seq., permits de novo review by the district court if timely objections are filed, absent compelling reasons, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate." Murr v. United States, 200 F.3d 895, 902 n.1 (6th Cir. 2000). "[I]ssues raised for the first time in objections to magistrate judge's report and recommendation are deemed waived." United States v. Waters, 158 F.3d 933, 936 (6th Cir. 1998) (citing Marshall v. Chater, 75 F.3d 1421, 1426-27 (10th Cir. 1996)); see also Lee v. Tennis, 2014 WL 3900230, at *7 (M.D. Pa. Aug. 8, 2014), aff'd sub nom. Han Tak Lee v. Houtzdale SCI, 798 F.3d 159 (3d Cir. 2015); Stromberg v. Varano, 2012 WL 2849266, at *2 (E.D. Pa. July 11, 2012); Winters v. Folino, 2012 WL 2812193, at *2 (M.D. Pa. July 10, 2012). Petitioner has not shown any compelling reason to belatedly raise the new arguments; these objections are deemed waived.

Even if not waived, the objections are without merit for three main reasons. First, Townsend fails to cite to the record or otherwise provide support for the claim that police officers failed to provide a Miranda warning at the beginning of the interview. Second, the record provides no basis for the inference that Townsend had spoken with detectives for two hours without receiving Miranda warnings, before receiving Miranda warnings and repeating his statement while being recorded. Third, although Townsend cites to the trial transcript for the assertion that Townsend's recorded statement was largely a repeat of information he had said to officers, Townsend mischaracterizes the transcript. Detective Lake testifies to the audio recording made of Townsend's statement, stating: "When Mr. Townsend first came into the interview room with us, we spoke to him without any audio recording. This lasted for approximately two hours . . . [H]is story had actually changed during that time, and progressed. We asked Mr. Townsend if he would be willing to memorialize his statement in some fashion. He advised us that he would prefer to go on tape . . . which we did." Notes of Testimony, vol. III, 150:17-151:4. Here, Detective Lake testifies that Townsend agreed to repeat his statement after the audio recording began, not that Townsend agreed to repeat his statement after being given his Miranda warnings. Accordingly, Townsend's objection is overruled.

2. The Report and Recommendation (Doc. No. 15) is APPROVED and ADOPTED.
3. The petition for a writ of habeas corpus (Doc. No. 1) is DISMISSED without an evidentiary hearing. See Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000).
4. No certificate of appealability shall issue because reasonable jurists would not debate the correctness of this Court's ruling and Petitioner has failed to make a substantial showing of the denial of a constitutional right. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).
5. The Clerk of Court is directed to close this matter for statistical purposes.

BY THE COURT:

/s/ Legrome D. Davis

Legrome D. Davis, J.

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

TAHREEL TOWNSEND,

Petitioner,

v.

ROBERT GILMORE, et al.,

Respondents.

CIVIL ACTION

NO. 15-1475

ORDER

LEGROME D. DAVIS, J.,

AND NOW, this day of , 2016, upon careful and independent consideration of the Petition for Writ of Habeas Corpus and after review of the Report and Recommendation of United States Magistrate Judge Marilyn Heffley, IT IS HEREBY ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Petition for Writ of Habeas Corpus is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

LEGROME D. DAVIS, J.

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

TAHREEL TOWNSEND,	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	
v.	:	
	:	NO. 15-1475
ROBERT GILMORE, et al.,	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION

MARILYN HEFFLEY, U.S.M.J.

September 30, 2016

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Tahreel Townsend (“Townsend” or “Petitioner”), a prisoner incarcerated at the State Correctional Institution in Waynesburg, Pennsylvania. For the following reasons, I recommend that the petition be denied.

I. FACTUAL AND PROCEDURAL HISTORY

On October 1, 2009, after a jury trial in the Court of Common Pleas of Lehigh County, Pennsylvania, Townsend was convicted of criminal conspiracy to commit homicide and first-degree murder. Commonwealth v. Townsend, No. 3427 EDA 2009, at 1 (Pa. Super. Ct. Aug. 11, 2011) [hereinafter “Superior Court Opinion”]. On October 30, 2009, Townsend was sentenced to life imprisonment for the first-degree murder charge and 10 to 20 years’ imprisonment for the criminal conspiracy charge. Id. at 1-2. In an opinion issued pursuant to Pennsylvania Rule of Appellate Procedure 1925,¹ the trial court summarized the facts underlying Townsend’s

¹ Under Pennsylvania Rule of Appellate Procedure 1925, “upon receipt of the notice of appeal, (Footnote continued on next page)

conviction as follows:

On May 10, 2008, Melissa Negrete, the twenty-three (23) year old girlfriend of Jimmy Ortiz, was attending a college graduation party for Jimmy Ortiz's brother, Umberto Ortiz, at 446 North Ninth Street, Allentown, Lehigh County, Pennsylvania. Ms. Negrete arrived at said location at approximately 6:00 P.M. with Jimmy Ortiz and her three (3) year old son and Jimmy Ortiz's three (3) year old son. . . .

Ms. Negrete called her mother at 8:00 P.M. to arrange for her mother to pick up her . . . son from the graduation celebration. Ms. Negrete's mother arrived at 446 North Ninth Street, Allentown, at 9:00 P.M. to retrieve her grandson. . . . As Ms. Negrete was positioning her son's car seat in her mother's vehicle, Jimmy Ortiz walked out to the porch of the residence After securing her child in the car, and as her mother was pulling away, Ms. Negrete returned to the porch area. Within a second of her mother's departure, Ms. Negrete heard gunshots. One of the cousins screamed for them to "get down." Ms. Negrete observed Jimmy Ortiz fall to the ground as she ran into the house. Realizing what had happened, Ms. Negrete returned to the porch area and observed Jimmy Ortiz lying on the ground with a large amount of blood. . . .

. . . An ambulance transported Jimmy Ortiz to the Lehigh Valley Hospital—Cedar Crest Campus where he succumbed to his injuries. Jimmy Ortiz's cause of death was determined to be a gunshot wound to the head. . . .

. . . Defendant Tahreel Townsend was arrested on the charge of Possession of a Small Amount of Marijuana, and transported to Allentown Police Department Headquarters. Upon his arrival at the Allentown Police Department at 1:05 A.M. on May 22, 2008, Defendant Townsend was placed in a temporary holding cell. On May 22, 2008, at approximately 7:00 A.M., Defendant Townsend . . . was also interviewed by Defendant William J. Lake and Detective Glenn Granitz, Jr. at the Allentown Police Department Headquarters with regard to the homicide of Jimmy Ortiz. . . .

At the commencement of the interview, Detective Lake read Miranda warnings to Defendant Townsend. . . . Detective Lake gave Defendant Townsend an opportunity to read the Miranda waiver form on his own. Defendant Townsend indicated a willingness to sign the Advice of Rights Form and did so at 7:17 A.M. in the presence of Detective Lake and Detective Granitz.

the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of" Pa. R. App. P. 1925(a)(1). This rule also allows the trial court to order the appellant to submit a concise statement of matters complained of on appeal to guide its Rule 1925 Opinion. Pa. R. App. P. 1925(b).

... At first the Defendant indicated that he had no knowledge of the homicide However, upon further questioning, the Defendant . . . stated that he had been in Allentown on May 10, 2008, and had gone to a location at 424 North Penn Street, Allentown, which he referred to as the “honeycomb.” Defendant Townsend indicated that he was with Co-Defendants, Tariq Bailey . . . and Brandon Anthony Figueroa At the “honeycomb,” the three (3) Co-Defendants engaged in a conversation about the homicide of a man called “Day-Day” Defendant Townsend stated that he and Co-Defendant Bailey and Co-Defendant Figueroa were going to take a “G stroll”² to the area of Ninth and Liberty Streets. The Defendant further reported that Co-Defendant Bailey and Co-Defendant Figueroa were armed with .38 caliber revolvers. Defendant Townsend stated that he was positioned at a location near Lumber and Liberty Streets The Defendant indicated that he acted as a “lookout” for any members of a rival gang or the police.

Mem. Op., Commonwealth v. Townsend, No. CP-39-CR-3136-2008, at 2-10 (Pa. Ct. Com. Pl. Dec. 17, 2009) [hereinafter “Rule 1925 Opinion”] (internal citations and footnotes omitted).

Townsend filed a notice of appeal on November 19, 2009. Notice of Appeal, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Nov. 19, 2009). On direct appeal, he alleged that the trial court erred in: (1) failing to suppress or otherwise limit the use of his confession “taken when he was arrested for a separate and unrelated case”; (2) permitting the Commonwealth to use his confession when his arrest “in the separate case was done without probable cause, was done only to obtain information regarding the homicide, or was otherwise illegal”; and (3) permitting the admission of his confession because “the basis for the search or any warrant was pretextual in nature, was not supported by proof of the reliability of and [sic] confidential informant, or did not allow the questioning of the defendant.” Statement of Matters Complained of on Appeal, Commonwealth v. Townsend, No. CP-39-CR-3136-2008

² “Defendant Townsend explained a ‘G-stroll’ to be an instance where a group of blood gang members would walk to a location and represent their gang, possibly becoming involved in a fight or other related incidents.” Mem. Op., Commonwealth v. Townsend, No. CP-39-CR-3136-2008, at 8 n.16 (Pa. Ct. Com. Pl. Dec. 17, 2009)

(Pa. Ct. Com. Pl. Dec. 10, 2009). On December 17, 2009, the trial court issued an opinion recommending the denial of Townsend's appeal. Rule 1925 Opinion. On direct appeal, the Pennsylvania Superior Court adopted the reasoning of the trial court and rejected Townsend's claims, finding that his confession had been voluntary, Superior Court Opinion at 2-6, and that his contentions that the police had lacked probable cause for the search warrant and for his arrest were meritless, id. at 7. Townsend filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on March 15, 2012. Commonwealth v. Townsend, No. 668 MAL 2011 (Pa. Mar. 15, 2012).

On June 15, 2012, Townsend filed a pro se petition for post-conviction collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 et seq. PCRA Pet., Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. June 15, 2012). On June 25, 2012, the PCRA court issued an order appointing Robert Long, Esquire ("Long") to represent Townsend in the PCRA proceeding. Order, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. June 25, 2012). On July 26, 2012, Long filed an amended PCRA petition. Am. PCRA Pet., Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. July 26, 2012). On October 11, 2012, Long filed a second amended PCRA petition raising the following issues: (1) ineffective assistance of trial counsel for failing to call witnesses requested by Townsend; (2) ineffective assistance of trial counsel for failing to adequately cross-examine Townsend's co-defendant concerning his bias at trial; (3) ineffective assistance of trial counsel for talking Townsend out of accepting a plea to third-degree murder; and (4) newly discovered evidence establishing Townsend's innocence based upon his co-defendant's admission of having given false testimony at trial. Second Am. PCRA Pet., Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Oct. 11, 2012).

On October 18, 2012, the PCRA court held an evidentiary hearing regarding Townsend's PCRA petition. Transcript of Record, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Oct. 18, 2012) [hereinafter "PCRA TR"]. The PCRA court denied the petition in an opinion issued on November 9, 2012. Opinion, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Nov. 9, 2012) [hereinafter "PCRA Court Opinion"].

On November 29, 2012, Townsend filed a notice of appeal of the denial of his PCRA petition with the Pennsylvania Superior Court. Notice of Appeal, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Nov. 29, 2012). On appeal, Townsend argued that the PCRA court erred in: (1) failing to find trial counsel ineffective for not calling witnesses he had requested; and (2) failing to grant him a new trial based on newly-discovered evidence. PCRA Appeal Rule 1925(b) Statement, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Nov. 29, 2012). On September 25, 2013, the Superior Court denied Townsend's appeal. Commonwealth v. Townsend, No. 3271 EDA 2012 (Pa. Super. Ct. Sept. 25, 2013) [hereinafter "Superior Court PCRA Opinion"]. Townsend filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on March 25, 2014. Commonwealth v. Townsend, No. 792 MAL 2013 (Pa. Mar. 25, 2012).

On May 27, 2014, Townsend filed a pro se second PCRA petition. Second PCRA Pet., Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. May 27, 2014) [hereinafter "PCRA Pet. 2"]. In his petition, Townsend raised the following issues: (1) whether counsel was ineffective in failing to provide him with a copy of the trial court proceedings; and (2) whether PCRA counsel was ineffective in "failing to address and redress the claims raised" in his PCRA petition by filing a brief "which did not substantiate the legal claims in which Petitioner sought relief on." Id. at 7. Townsend filed a memorandum of law in support of his

second PCRA petition in which he appears to have alleged that his sentence was invalid due to the lack of a sentencing order. Mem. of Law, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. May 27, 2014). On May 29, 2014, the PCRA court issued an order explaining its intent to dismiss Townsend's second PCRA petition and providing Townsend with 20 days to respond. Order, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. May 29, 2014). On June 17, 2014, Townsend filed an objection to the PCRA court's notice of intent to dismiss his petition. Obj. and Mot., Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. June 17, 2014). On June 26, 2014, the court denied Townsend's second PCRA petition. Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. June 26, 2014).

On July 14, 2014, Townsend filed a pro se notice of appeal with the Pennsylvania Superior Court. Notice of Appeal, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. July 14, 2014). Townsend raised the following issues on appeal: (1) whether trial counsel was ineffective; (2) whether the trial court committed error in sentencing him to an "illegal" sentence of life without parole "without any statutory authorization"; (3) whether the trial court violated his right to procedural and substantive due process when it failed to follow sentencing procedures for first-degree murder; (4) whether the trial court committed error when it sentenced him to a life sentence "to be 'illegally' carried out in the state correctional facility without a signed notarized authenticated sentencing court order"; (5) whether PCRA counsel was ineffective; and (6) whether the PCRA court erred in dismissing his petition without conducting an evidentiary hearing. Statement of Matters Complained of on Appeal, Commonwealth v. Townsend, No. 2112 EDA 2014 (Pa. Super. Ct. July 16, 2014). On February 20, 2015, the Superior Court affirmed the dismissal of Townsend's second PCRA petition. Commonwealth v.

Townsend, No. 2112 EDA 2014 (Pa. Super. Ct. Feb. 20, 2015). On February 25, 2015, Townsend filed a petition for allowance of appeal with the Pennsylvania Supreme Court. That petition was denied on August 4, 2015. Commonwealth v. Townsend, No. 276 MAL 2015 (Pa. Aug. 4, 2015).

Townsend filed a pro se petition for writ of habeas corpus with this Court on March 23, 2015. Pet. (Doc. No. 1). In support of his request for habeas relief, Townsend alleges that: (1) his confession was involuntary and should have been suppressed at trial; (2) PCRA counsel was ineffective in not arguing that trial counsel was ineffective in failing to present Townsend as a witness at the suppression hearing to support a claim that the confession was involuntary; (3) trial counsel was ineffective in failing to call witnesses that Townsend had requested; and (4) “after-discovered evidence” proves that he is actually innocent. Id. at 5-9.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Issuance of a Writ of Habeas Corpus

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), significantly limited the federal courts’ power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

1. Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
2. Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court has made clear that a writ may issue under the “contrary to” clause of Section 2254(d)(1) only if the “state court applies a rule different from

the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.” Bell v. Cone, 535 U.S. 685, 694 (2002). A writ may issue under the “unreasonable application” clause only where there has been a correct identification of a legal principle from the Supreme Court, but the state court “unreasonably applies it to the facts of the particular case.” Id. This requires a petitioner to demonstrate that the state court’s analysis was “objectively unreasonable.” Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

State court factual determinations are also given considerable deference under the AEDPA. Palmer v. Hendricks, 592 F.3d 386, 391-92 (3d Cir. 2010). A petitioner must establish that 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).

B. Exhaustion and Procedural Default

“[A] federal habeas court may not grant a petition for writ of habeas corpus unless the petitioner has first exhausted the remedies available in the state courts.” Lambert v. United States, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The procedural default barrier, in the context of habeas corpus, also precludes federal courts from reviewing a state petitioner’s habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). “[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . .

there is procedural default for the purpose of federal habeas” Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

To survive procedural default in the federal courts, a petitioner must either “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.

1. Cause and Prejudice Exception

In order to show “cause,” a petitioner must point to the existence of some objective, external factor that impeded his or her efforts to comply with Pennsylvania’s procedural rules. Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; or (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable. Coleman, 501 U.S. at 753-54. “Prejudice” can be established if the petitioner can demonstrate that the outcome of the state proceeding was unreliable or fundamentally unfair as a result of a violation of federal law. See Lockhart v. Fretwell, 506 U.S. 364, 366 (1993).

2. Fundamental Miscarriage of Justice Exception

To establish the fundamental miscarriage of justice exception, the petitioner must demonstrate his or her “actual innocence.” Calderon v. Thompson, 523 U.S. 558, 559 (1998); Schlup v. Delo, 513 U.S. 298, 324 (1995). A demonstration of actual innocence requires the petitioner to present new, reliable evidence of his or her innocence that was not presented at trial. Schlup, 513 U.S. at 324. The new evidence must be considered along with the entire record, including that which was excluded or unavailable at trial. Id. at 327-28. Once such evidence is presented, the petitioner’s defaulted claims can only be reviewed if “it is more likely than not

that no reasonable juror would have found petitioner guilty beyond a reasonable doubt” in light of the new factual evidence. Id. at 327. The Schlup standard is “highly demanding and permits review only in the ‘extraordinary case.’” House v. Bell, 547 U.S. 518, 538 (2006).

C. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that “counsel’s representation fell below an objective standard of reasonableness” and that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 686-88, 693-94.

To satisfy the reasonable performance prong of the analysis, a petitioner must show “‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 687). In evaluating counsel’s performance, the reviewing court “must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance” and that there are “‘countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.’” Id. at 106 (quoting Strickland, 466 U.S. at 689). The reviewing court must “‘reconstruct the circumstances of counsel’s challenged conduct’ and ‘evaluate the conduct from counsel’s perspective at the time.’” Id. at 107 (quoting Strickland, 466 U.S. at 689). “[I]t is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” Id. at 111.

To satisfy the prejudice prong of the analysis, a petitioner must demonstrate that counsel's errors were "so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable." Id. at 104 (quoting Strickland, 466 U.S. at 687). Thus, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome." Id. at 104 (quoting Strickland, 466 U.S. at 694). This determination must be made in light of "the totality of the evidence before the judge or jury." Strickland, 466 U.S. at 695.

III. DISCUSSION

A. Townsend's Claim that His Confession Should Have Been Suppressed is Meritless

Townsend begins his habeas petition with a claim titled "Motion to Suppress Evidence," in which he argues that his confession should have been suppressed at trial. Pet. at 5. He contends that his "original arrest . . . was done without probable cause or was otherwise illegal" and that his "statement was taken after [that] arrest for a separate and unrelated case." Id. Townsend also argues that his confession should have been suppressed because it was involuntary. Id.; Traverse (Doc. No. 13) at 5-16. While it is less than clear from his habeas submissions, Townsend appears to be asserting two claims: that his confession should have been suppressed based on a violation of the Fourth Amendment and that his confession was involuntary under the Fifth Amendment. Because Townsend is entitled to some leniency as a pro se petitioner, this Court will assume that he intends to challenge his confession on each of these grounds.³ However, as discussed below, Townsend's Fourth Amendment claim is not

³ "A pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007); see also

(Footnote continued on next page)

cognizable on federal habeas review and his Fifth Amendment claim is meritless. For these reasons, Townsend's claims should be dismissed.

**1. Townsend's Fourth Amendment Argument is Not
Cognizable on Habeas Review**

Townsend appears to argue that his confession violated the Fourth Amendment and should have been suppressed under the exclusionary rule because it was the fruit of his allegedly illegal arrest. Pet. at 5. He does not advance specific reasons for this argument, other than to state that the arrest was completed "without probable cause or was otherwise illegal." *Id.* This Court does not need to reach the merits of Townsend's exclusionary rule claim because it does not raise cognizable grounds for habeas relief.

The exclusionary rule generally prohibits the admission of any evidence obtained in violation of the Fourth Amendment. *Gouled v. United States*, 255 U.S. 298, 312-13 (1921) (establishing the exclusionary rule in federal prosecutions). Because the Fourth Amendment binds the states through the Due Process Clause, *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), the exclusionary rule applies to trials in state courts. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). However, in *Stone v. Powell*, the United States Supreme Court found that, as to collateral review, the costs of the exclusionary rule—namely, that it "deflects the truth-finding process and often frees the guilty"—outweigh the benefits of its application. 428 U.S. 465, 490 (1976). As a result, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at

Haines v. Kerner, 404 U.S. 519, 520 (1972) (noting that where a petitioner is *pro se*, a court must apply a more liberal standard of review of the claims than it would to a petition filed with the aid of counsel).

his trial.” Id. at 494. To raise a Fourth Amendment habeas claim, a petitioner must show that a violation occurred and that he or she was denied an opportunity to fully and fairly litigate the Fourth Amendment issue.⁴ Id. at 494 n.37.

Here, Townsend makes no argument that he was denied the opportunity to fully and fairly litigate his claim. See Pet. at 5. In fact, the record indicates that Townsend presented this claim to the state courts on more than one occasion. Townsend first raised his Fourth Amendment claim by seeking to suppress the confession in an omnibus pretrial motion. Pretrial Mot., Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Sept. 25, 2008). After an evidentiary hearing, the trial court denied Townsend’s motion on all grounds, Opinion, Commonwealth v. Townsend, No. CP-3136-2008 (Pa. Ct. Com. Pl. Sept. 30, 2008), and specifically found that Townsend’s arrest was performed legally and was based on probable cause. Id. at 17; see also Rule 1925 Opinion at 12 (also finding confession voluntary). Townsend raised this claim again on direct appeal and the appellate court upheld the trial court’s ruling. Id. When a petitioner has raised an issue in both pretrial motions and on direct appeal, they have been granted the opportunity to fully and fairly litigate their claim. See Smith v.

⁴ Although the Stone Court left “fully and fairly litigated” undefined, our Court of Appeals has identified certain instances where the opportunity to fully and fairly litigate was denied. See Marshall v. Hendricks, 307 F.3d 36, 82 (3d Cir. 2002). Federal habeas relief may be warranted where the state provides the process to litigate the Fourth Amendment claim but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process. Boyd v. Mintz, 631 F.2d 247, 250 (3d Cir. 1980) (citing Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977)). A state’s “failure to give at least colorable application of the correct Fourth Amendment constitutional standard” may also indicate that the petitioner has not received the opportunity to fully and fairly litigate their Fourth Amendment claim. Gilmore v. Marks, 799 F.2d 51, 57 (3d Cir. 1986). Nevertheless, an ordinary Fourth Amendment habeas claim will be unable to overcome the Stone v. Powell bar; even an erroneous resolution by a state court of a Fourth Amendment claim does not alone overcome it. Marshall, 307 F.3d at 82. Here, Townsend has not argued that any such events interfered with his opportunities to litigate the suppression issue at trial or on appeal.

Giroux, No. 14-1765, 2015 WL 2417542, at *1 n.2 (E.D. Pa. May 13, 2015); Warren v. Glunt, No. 14-552, 2015 WL 1741238, at *3 (E.D. Pa. Apr. 16, 2015). Thus, Townsend's claim under the exclusionary rule does not raise a legitimate due process issue but asserts only a claim that the state courts erred in applying the rule. Therefore, it is not cognizable on habeas review.

**2. Townsend's Claim that His Confession Was Involuntary
is Not Supported by the Record**

Townsend also contends that his confession was involuntary in violation of his Fifth Amendment rights. In determining the voluntariness of a confession, a court must consider the totality of the circumstances. Miller v. Fenton, 796 F.2d 598, 604 (3d Cir. 1986). If the circumstances surrounding the confession indicate that the defendant's will was overborne, then the confession was involuntary and should be suppressed. Id.; Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973). In making such a determination, courts should consider the following factors:

the youth of the accused; his lack of education or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

Schneckloth, 412 U.S. at 226.

Although the Commonwealth bears the burden at trial of proving that a confession was voluntary, this burden shifts on collateral review; a habeas petitioner must prove by a preponderance of the evidence that his or her confession was involuntary. Miller, 796 F.2d at 604. On collateral review, the reviewing court has a duty "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Davis v. North Carolina, 384 U.S. 737, 741-42 (1966); accord Beckwith v. United States, 425 U.S. 341, 348 (1971). In fulfilling this duty, the reviewing court must "accept state court findings of fact unless they are clearly erroneous." United States v. Swint, 15 F.3d 286, 288 (3d Cir. 1994). Where the

state court's "account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it" even when "convinced that, had it been sitting as the trier of fact, it would have weighted the evidence differently." Id.

Townsend claims that his confession was involuntary on the following grounds: (1) the officers psychologically coerced him to confess by depriving him of sleep and food; (2) he was threatened "with being charged with another homicide"; and (3) the confession was given after his arrest for a separate, unrelated crime. Pet. at 5; Traverse at 13, 20. After an evidentiary hearing, the trial court rejected Townsend's claims and found that his confession was voluntary. Opinion, Commonwealth v. Townsend, No. CP-3136-2008, at 7-10, 17 (Pa. Ct. Com. Pl. Sept. 30, 2008); Rule 1925 Opinion at 10. Because the trial court's determination of the facts was not unreasonable or "clearly erroneous," see 28 U.S.C. § 2254(d)(2); Swint, 15 F.3d at 288, Townsend's claim is meritless and should be denied.

Here, the trial court applied the totality of the circumstances test and concluded that Townsend's confession was voluntary. Rule 1925 Opinion at 10. The court specifically explained:

In the instant case, this Court found Defendant Townsend's confession to be voluntary, knowingly and intelligently made based on the totality of the circumstances. The record is void of evidence to indicate that the police utilized any coercive tactics to persuade him to make a statement. At the time of the pretrial evidentiary hearing, Detective Lake testified to the circumstances surrounding the Defendant's statements. Detective Lake indicated that Defendant Townsend arrived at Allentown Police Department Headquarters at 1:05 A.M. on May 22, 2008. The Defendant was interviewed at 7:00 A.M. on the same day. The delay in interviewing Defendant Townsend was due to the large number of people taken into custody that evening as a result of the drug raid. Furthermore, Defendant Townsend was not tethered or shackled during his interview The interview room was similar to a conference room, having a large table with chairs surrounding [it]. . . . The detectives presented themselves calmly and never issued threats to Defendant Townsend. The detectives were dressed in plain clothes and did not display a firearm. During the interview process, Defendant Townsend was provided the opportunity to drink, eat, smoke and use the restroom facilities.

Consequently, this Court concluded that Defendant Townsend's statements made to the police should not be suppressed.

Id. at 10-11.

Thus, the trial court, after a hearing, found that Townsend's allegations that he was threatened with additional charges or denied food, water and sleep were unsupported by the evidence. Id. at 7, 10-11. The trial court credited the testimony of Detective Lake that no threats were made to Townsend during the interview, Transcript of Record at 9, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Oct. 27, 2008) [hereinafter "Oct. 27 TR"], and that Townsend was offered food and drink, id. at 10. Rule 1925 Opinion at 7. Although Townsend's counsel cross-examined Detective Lake, Townsend did not present any evidence to contradict his testimony. As to Townsend's claim that he was denied sleep, the trial court noted that the evidence showed he was left in a holding cell from 1:05 A.M. until he was interviewed beginning at 7:00 A.M. Id. at 6. Townsend has not explained how he was prevented from sleeping during that time. Townsend recorded his confession at 9:00 A.M., and the interview terminated at 11:00 A.M. Id. at 8. Thus, Townsend's allegations do not fit the pattern of severe exhaustion or sleep deprivation that has led courts to conclude that a confession resulted from "a process of interrogation . . . so prolonged and unremitting . . . as to accomplish extortion of an involuntary confession." Stein v. New York, 346 U.S. 156, 184 (1953). See, e.g., Blackburn v. Alabama, 361 U.S. 199, 204 (1960) (eight or nine hours of questioning); Reck v. Pate, 367 U.S. 433, 441-42 (1961) (four consecutive days of six- to seven-hour continuous

interrogation); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (petitioner held 36 hours with no sleep or rest and near-constant interrogation).⁵

Also lacking in merit is Townsend's contention that his statement regarding Ortiz's murder should be suppressed because he had been arrested on drug charges. This argument appears to focus less on the voluntariness of Townsend's confession and more upon whether Townsend's Miranda waiver and subsequent statement should be considered valid.⁶ Under Miranda v. Arizona, any waiver of the Fifth Amendment privilege against self-incrimination must be knowing, voluntary and intelligent. 384 U.S. 436, 444 (1966). A waiver is knowing and intelligent where it is "made with a full awareness both of the right being abandoned and the consequences of the decision to abandon it." Colorado v. Spring, 479 U.S. 564, 573 (1987) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). However, a "valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affect his decision to confess.'" Id. at 576 (alteration in original) (quoting Moran, 475 U.S. at 422). For this reason, a suspect's awareness of all the crimes about which he or she may be questioned is not a relevant consideration in determining whether a waiver of his or her Fifth Amendment rights was voluntary. Id. at 577. Thus, a failure of the officers to explicitly state that they would be questioning Townsend about the Ortiz murder

⁵ Moreover, cases in which confessions have been found involuntary generally have involved significant additional coercive factors beyond just sleep deprivation or exhaustion. See, e.g., Reck, 367 U.S. at 441 (19 year-old defendant of subnormal intelligence held incommunicado, without food, physically weakened and in intense pain); Blackburn, 361 U.S. at 207-08 (insane defendant held incommunicado in small room surrounded by three officers); see also Schneckloth, 412 U.S. at 226 (decisions finding confessions involuntary have not turned on a single criterion, such as sleep deprivation, but on a totality of the circumstances sufficient to show that the will of the defendant had been overborne).

⁶ In order to properly evaluate Townsend's claim, I will construe it as a Miranda waiver claim rather than a voluntariness claim.

would be irrelevant in determining the voluntariness of Townsend's waiver or confession. See Id. (police not informing suspect that he would be questioned about other crimes did not render his Miranda waiver involuntary); Arizona v. Richardson, 486 U.S. 675, 684 (1988) (recognizing rule that a suspect's awareness of all crimes about which he or she may be interrogated does not impact the validity of his or her Fifth Amendment waiver). The fact that Townsend was brought into the station on drug charges but was questioned regarding the homicide has no impact on the validity of his waiver of rights or the admissibility of his statements.

Moreover, the trial court specifically found that the officers' questions made clear that they were interested in discussing the Ortiz murder—a finding supported by Detective Lake's testimony. Rule 1925 Opinion at 7; Oct. 27 TR at 12-13. On direct appeal, the Pennsylvania Superior Court agreed. Superior Court Opinion at 6. This Court may not overturn such a factual finding unless it is "objectively unreasonable" in light of the evidence. 42 U.S.C. § 2254(d)(2); Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). The trial court's acceptance of the detective's testimony on this point was not unreasonable. Thus, even if a failure to inform Townsend that he would be questioned about the Ortiz murder were relevant to the voluntariness of his confession, his argument would fail because he was so informed.

For these reasons, Townsend's arguments in support of his claim that his confession should have been suppressed are meritless and provide no basis for habeas relief.

B. Townsend's Contention that PCRA Counsel Was Ineffective in Failing to Challenge as Ineffective Trial Counsel's Alleged Refusal to Present Townsend as a Witness at the Suppression Hearing Fails Because He Did Not Exhaust it in the State Courts and Because it is Meritless

Townsend contends that he "never got the opportunity to develop" his claim that his confession was involuntary because trial counsel did not allow him to testify at the pretrial suppression hearing. Traverse at 13-16. He argues that PCRA counsel was ineffective in not

arguing in the PCRA proceeding that trial counsel was ineffective in not presenting him as a witness at the suppression hearing to testify that the police had coerced his confession. Id. This claim, however, is precluded from habeas relief because Townsend failed to raise it in the Pennsylvania courts. Pursuant to 28 U.S.C. § 2254(b)(1)(A), a federal court may grant a state prisoner's habeas petition only if the petitioner "has exhausted the remedies available in the courts of the State." The AEDPA's exhaustion requirement mandates that the claim "must have been 'fairly presented' to the state courts." Bronshtein v. Horn, 404 F.3d 700, 725 (3d Cir. 2005) (quoting Picard v. Connor, 404 U.S. 270 (1971)). Townsend did not raise the issue that he should have been called to testify at the pretrial hearing in his initial pro se PCRA petition. Mot. for Post Conviction Collateral Relief at 3, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. June 15, 2012). Townsend's PCRA counsel did not include the argument in his amended PCRA petition. Second Am. PCRA Petition at 1-2, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. Oct. 11, 2012). Townsend also did not include that argument in his second PCRA petition, which he filed pro se. PCRA Pet. 2 at 7-8, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. May 27, 2014), or in the memorandum of law he filed in support of that petition, Mem. of Law at 1-3, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com. Pl. May 27, 2014). Thus, Townsend has never presented his claim regarding the failure of trial counsel to call him to testify at the suppression hearing to the Pennsylvania courts and consequently, it is unexhausted.

Townsend contends, however that he should be permitted to raise the ineffectiveness of PCRA counsel in failing to argue that trial counsel was ineffective with respect to the suppression hearing based on Martinez v. Ryan, 132 S. Ct. 1309 (2012). In Martinez, the United States Supreme Court noted that when a state requires a petitioner to raise an ineffective

assistance claim on post-conviction review, rather than on direct appeal, a post-conviction relief hearing is the first opportunity the petitioner has to have his or her ineffective assistance claim heard. Id. at 1316-17. The Court, therefore, concluded that in such a state,⁷ a habeas petitioner may establish cause and prejudice to allow a court to hear a defaulted ineffective assistance claim by showing that his or her post-conviction relief counsel was ineffective in failing to properly raise that claim in the post-conviction relief proceeding. Id. at 1318.

To pursue such a claim, however, a petitioner must show that his or her underlying ineffective assistance of counsel claim “is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit” as defined by reference to the standard applicable to determining whether to grant certificates of appealability. Id. (citing Miller-El, 537 U.S. at 327); see also Valentin-Morales v. Mooney, No. 13-3271, 2015 WL 617316, at *4 (E.D. Pa. Feb. 11, 2015) (Miller-El standard applies to Martinez merit analysis). A claim meets that standard if “jurists of reason could disagree with the [state] court’s resolution of his constitutional claims or [if] jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” Miller-El, 537 U.S. at 327.

“Ineffective assistance claims brought pursuant to habeas petitions follow the same standards as ineffective-assistance-of-counsel claims brought independently.” Spann v. Shannon, No. 12-4007, 2012 WL 8699981, at *7 (E.D. Pa. Jul. 29, 2013). A petitioner must show that counsel’s conduct fell below “prevailing professional norms,” Strickland, 466 U.S. at 690, and must demonstrate actual prejudice by establishing that “there is a reasonable probability

⁷ In Pennsylvania, ineffective assistance claims cannot be brought on direct appeal. Torres-Rivera v. Bickell, No. 13-3292, 2014 WL 5843616, at *16 (E.D. Pa. Nov. 10, 2014) (citing Commonwealth v. Grant, 813 A.2d 767, 738 (Pa. 2002)).

that, but for counsel's unprofessional errors, the result of the proceedings would have been different," id. at 694.

Townsend's pretrial hearing claim cannot meet the Martinez standard. "Martinez places an affirmative burden upon habeas petitioners to show that the underlying claim has some merit." Lloyd v. Bickell, No. CIV. A. 11-4306, 2013 WL 1972198, at *19 (E.D. Pa. Feb. 19, 2013) (citing Martinez, 132 S. Ct. at 1318), report and recommendation adopted, No. CIV. A. 11-4306, 2013 WL 1979490 (E.D. Pa. May 14, 2013). To meet that standard, Townsend would have to show "a reasonable probability" that if PCRA counsel had raised the argument regarding the suppression hearing, "the result of the proceedings would have been different." Strickland, 466 U.S. at 694. The only evidence that Townsend submits in support of his argument is his affidavit stating that "he suffered inhuman treatment at the hands of Detective Lake" because he was sleep deprived and because the police threatened to "starve [him] to death" if he did not confess.⁸ Traverse at 20. Townsend's affidavit raises no reasonable probability that the result of the PCRA proceeding would have been different if PCRA counsel had presented the suppression hearing argument. As discussed supra in Section III(A)(2), Townsend was not deprived of sleep to any constitutionally relevant extent. Additionally, Townsend's argument that he gave an involuntary confession because his "will was overborne," Schneekloth, 412 U.S. at 225, by hunger due to the detectives' alleged failure to feed him between his 1:00 A.M. arrest and his videotaped confession at 9:00 A.M. is untenable.

⁸ The sole evidence that Townsend ever informed trial counsel about his claim that the police coerced him into confessing is the affidavit Townsend now submits for the first time on habeas review in which he asserts that he did so. He has not presented an affidavit of trial counsel to support that contention.

Moreover, the PCRA court was presented with evidence that Townsend asked his trial counsel to present several alibi “witnesses” who had not been present at the events in question, to whom he had provided scripted, false alibi testimony, and some of whom he had coerced into agreeing to testify through threats of violence. PCRA TR at 79-86; see also Transcript of Record at 11-17, 84-86, Commonwealth v. Townsend, No. CP-39-CR-3136-2008 (Pa. Ct. Com.Pl. Sept. 30, 2009) (trial testimony regarding instructing witnesses and coercion to testify) [hereinafter “Sept. 30 TR”]. In addition, the PCRA court found Townsend’s testimony that trial counsel had not consulted him regarding the decision not to call those witnesses was not credible. PCRA Court Opinion at 13 n.26. The PCRA court also discredited Townsend’s effort to present it with a recantation letter, supposedly written by his co-defendant, who was imprisoned in the same facility. The co-defendant allegedly had addressed the letter to the PCRA court, sealed it and mailed it to the court, but the court never received it. PCRA Court Opinion at 10, 15-16. Townsend claimed to have obtained possession of the letter when another inmate somehow obtained it and provided it to him. Id. The trial court found Townsend’s and his codefendant’s testimony regarding the recantation letter “ridiculous at best.” Id. at 10. Against this record of Townsend’s lack of credibility, there is no reason to believe that had Townsend testified at the suppression hearing that he had been coerced into confessing, it would have changed the trial court’s findings that the police officers’ contrary testimony was credible and that his will was not overborne in obtaining his confession. Rule 1925 Opinion at 6-10.

Furthermore, Townsend had the opportunity to raise his argument regarding his alleged desire to testify at the suppression hearing in his second PCRA petition, which he drafted himself, and did not choose to do so. See PCRA Pet. 2 at 7-8 (arguing ineffective assistance of PCRA counsel solely on other grounds). Townsend’s affidavit, drafted almost three years after

the first PCRA hearing and more than two years after he filed the second PCRA petition pro se, raising for the first time his contention that his confession was extracted from him involuntarily does not raise any reasonable probability that the PCRA court would have granted him relief. Townsend's argument regarding his desire to testify at the suppression hearing is not an argument "adequate to deserve encouragement to proceed further," Miller-El, 537 U.S. at 327, and consequently, does not satisfy Martinez's requirements to overcome his failure to exhaust it in the state courts.

C. The State Courts Properly Rejected Townsend's Argument that Trial Counsel Was Ineffective in Failing to Call Witnesses that Townsend Requested

Townsend contends that his trial counsel was ineffective in failing to call several alibi witnesses, who allegedly would have testified that he was not present at the time of the murder. Pet. at 7. The PCRA court conducted an evidentiary hearing on that contention and found it meritless. PCRA Court Opinion at 11-14. The Pennsylvania Superior Court upheld that ruling. Superior Court PCRA Opinion at 4-6. In evaluating an ineffective assistance of counsel claim, the role of this Court is to determine whether the state court's application of the Strickland standard was "unreasonable."⁹ Harrington, 562 U.S. at 101.

⁹ The Pennsylvania courts applied Pennsylvania's version of the ineffective assistance standard, PCRA Court Opinion at 11; Superior Court PCRA Opinion at 4, which requires a petitioner to show that:

(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance.

Commonwealth v. Williams, 980 A.2d 510, 520 (Pa. 2009). A decision under that standard is a decision on the merits to which the limitations of federal habeas review stated in 28 U.S.C. § 2254(d)(1) apply. Priester v. Vaughn, 382 F.3d 394, 397-98 (3d Cir. 2004); Rompilla v. Horn, 355 F.3d 233, 248 (3d Cir. 2004), rev'd on other grounds

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Here, the state courts' application of the Strickland standard to Townsend's ineffective assistance argument was reasonable beyond doubt. As discussed supra in Section III(B), the PCRA Court was presented with the testimony of Townsend's trial counsel that he had not called the witnesses because they had recanted or because the Commonwealth had evidence that Townsend had presented them with written instructions to provide scripted, false testimony that he had been with them at the time of the murder and had not participated in it as a lookout. PCRA Court Opinion at 12-13; see also PCRA TR at 79-86 (trial counsel's PCRA hearing testimony); Sept. 30 TR at 11-17, 84-86 (witness's trial testimony). Indeed, the Commonwealth presented as exhibits at trial copies of those written instructions and the testimony of one such witness that Townsend had threatened him with violence if he did not testify to the false alibi and convince the other witnesses also to testify to the alibi. Sept. 30 TR at 11-17, 84-86 and Exhibits C-12 to C-15. The Pennsylvania courts properly determined that trial counsel did not perform below the requisite standard of reasonableness in declining to call those witnesses and that Townsend did not suffer prejudice as a result of trial counsel's decision not to do so. PCRA Court Opinion at 11-14; Superior Court PCRA Opinion at 4-6.

D. Townsend's Claim Based on New Evidence Does Not Provide Any Basis for Habeas Relief

Townsend claims that he is entitled to habeas relief because he presented new evidence of his innocence discovered after his trial, namely the recantation of his co-defendant, Brandon Figueroa ("Figueroa"). Figueroa testified at the PCRA hearing, recanting the testimony that he had given at trial that Townsend had ordered and participated in the murder. See PCRA Court

sub nom., Rompilla v. Beard, 545 U.S. 374 (2005).

Opinion at 10, 14-16. In considering Figueroa's recantation testimony, the PCRA court applied Pennsylvania law, which requires that, for a petitioner to obtain relief based on evidence that became newly-available after conviction, the new evidence "must be of a nature that would have compelled a different outcome if a new trial were granted." Id. at 14 (citing Commonwealth v. Albrecht, 720 A.2d 693, 707 (Pa. 1998)). The PCRA court, which had heard Figueroa's trial testimony and considered the evidence corroborating it, also heard Figueroa's recantation testimony and found that it was not credible. Id. at 14-16. The Superior Court upheld that determination, stating that it was "amply supported by the record." Superior Court Opinion at 9. Federal courts do not review state courts' application of state law on habeas review. Swarthout v. Cooke, 562 U.S. 216, 219 (2011); see 42 U.S.C. § 2254(d)(1). Accordingly, to the extent Townsend claims that Figueroa's recantation entitles him to relief under Pennsylvania law, his argument fails because it is not cognizable on habeas review.

To the extent Townsend contends that he is entitled to relief as a matter of federal law, his argument likewise fails. To establish a right to relief under federal law based on newly-discovered evidence, Townsend must, at a minimum, present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial" and must show that "in the light of the new evidence, . . . no reasonable juror would have found the defendant guilty." Schlup, 513 U.S. at 324, 329.¹⁰

¹⁰ Schlup did not decide whether a claim that new evidence established that a petitioner was actually innocent stated a cognizable constitutional claim that could entitle the petitioner to habeas relief. 315 U.S. at 315. Instead it ruled on the standard by which a petitioner could use a claim of actual innocence as a "gateway" to obtaining consideration on the merits of other constitutional claims that otherwise were barred as procedurally defaulted. Id. Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit have clarified whether a freestanding claim of actual innocence based on newly-discovered evidence

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Figueroa's recantation testimony cannot meet that requirement. The PCRA court's factual determination that Figueroa's recantation was not credible may not be overturned unless it was "objectively unreasonable" in light of the evidence. 42 U.S.C. § 2254(d)(2); Miller-El, 537 U.S. at 340. Witness recantation is "the least reliable form of proof," particularly when it involves an admission of perjury. Teagle v. Diguglielmo, 336 F. App'x 209, 213 (3d Cir. 2009) (quoting Commonwealth v. Henry, 706 A.2d 313, 321 (Pa. 1997)). The PCRA court heard Figueroa testify both at trial and at the PCRA hearing and was best situated to judge his credibility. It heard testimony that Townsend previously had suborned perjury from supposed alibi witnesses and had threatened the witnesses with violence in order to obtain it. PCRA TR at 79-86; Sept. 30 TR at 11-17, 84-86 and Exhibits C-12 to C-15. It also was aware of Figueroa's status as a convicted murderer and as a lesser-ranking member of the "Bloods" gang than Townsend. Further, the PCRA court had heard Townsend's testimony, both at trial and at the PCRA hearing. It heard Townsend deny at trial that he had written the letters that were admitted into evidence that instructed the alibi witnesses what their testimony should be. Sept. 30 TR at 1. The PCRA court rejected that denial as not credible. See PCRA Court Opinion at 12-13. The PCRA court's determination that Figueroa's recantation of his trial testimony was not credible is amply supported by the record, and Townsend cannot meet his burden to show that, if presented with that testimony, "no reasonable juror would have found the defendant guilty." Schlup, 513 U.S. at 329. Thus, Townsend's argument based on the recantation as newly-acquired evidence is

could be cognizable on habeas review. See McQuiggan v. Perkins, 133 S. Ct. 1924, 1931 (2013); Herrera v. Collins, 506 U.S. 390, 400, 417 (1993); Sistrunk v. Rozum, 674 F.3d 181, 187 n.2 (3d Cir. 2013). The Supreme Court has held, however, that if such a claim were cognizable as a freestanding claim, it would require the petitioner to meet an even higher standard of proof than is required for a "gateway" claim under Schlup. House v. Bell, 547 U.S. 518, 555 (2006).

meritless and provides no basis for habeas relief.

IV. CONCLUSION

For the foregoing reasons, I recommend that Townsend's petition be denied.¹¹

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 30th day of September, 2016, IT IS RESPECTFULLY

RECOMMENDED that the petition for writ of habeas corpus be DENIED and DISMISSED.

There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. The Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ Marilyn Heffley
MARILYN HEFFLEY
UNITED STATES MAGISTRATE JUDGE

¹¹ Along with his habeas petition, Townsend included a request that this action be stayed pending the resolution of the appeal of the denial of his second PCRA petition in the Pennsylvania courts. Doc. No. 14. The Pennsylvania Superior Court denied that appeal on February 20, 2015, PCRA 2 Superior Court Opinion, and the Pennsylvania Supreme Court denied Townsend's petition for allowance of appeal on August 4, 2015, Commonwealth v. Townsend, No. 276 MAL 2015 (Pa. Aug. 4, 2015). Therefore, his request to stay is denied as moot.