

IN THE SUPREME COURT FOR THE UNITED STATES

No. _____

JASON KOKINDA, PETITIONER

-VERSUS-

ROBERT GILMORE, *ET AL.*, RESPONDENTS

VOLUMINOUS APPENDIX

/s/ Jason Kokinda 308

Jason Kokinda, AR
38 N. Main St., #1028
Waterbury, VT 05676
802-391-0921

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*All of these opinions are digressive sophistries. Their only value is as evidence of crimes by the officials. The Nazi Party had likewise made immaculate records of each Execution, with similar sophisms used to explain each cause of Death by heart attack every fifteen minutes.

DLD-043

November 9, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2283

JASON KOKINDA, Appellant

VS.

SUPERINTENDENT GREENE SCI, ET AL.

(E.D. Pa. Civ. No. 5:13-cv-02202)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1), including memorandum in support thereof

in the above-captioned case.

Respectfully,

Clerk

MMW/TRA/pdb

ORDER

The application for a certificate of appealability is denied because Kokinda has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253. Essentially for the reasons given by the District Court, reasonable jurists would not debate whether the District Court was correct in denying Kokinda's petition. See Miller-El v. Cockrell, 573 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)); Slack, 529 U.S. at 484; see also, e.g., Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Hassine v. Zimmerman, 160 F.3d 941, 953-54 (3d Cir. 1998).

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: November 16, 2017
sb/cc: Jason Kokinda
All Counsel of Record

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

JASON KOKINDA,
Petitioner,

CIVIL ACTION

v.

ROBERT GILMORE,
JOSH SHAPIRO,¹ the Attorney General of
the State of Pennsylvania, and
JAMES B. MARTIN, the District Attorney
of the County of Lehigh,
Respondents.

NO. 13-2202

ORDER

AND NOW, this 24th day of May, 2017, upon consideration of the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by *pro se* petitioner, Jason Kokinda, (Doc. No. 5, filed May 21, 2013), the record in this case, the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated April 25, 2017 (Doc. No. 150, filed April 27, 2017), *pro se* petitioner's Objections to April 25, 2017, R&R (Doc. No. 155, filed May 8, 2017), and Response to Petitioner's "Objections to April 26, 2017, R&R" (Doc. No. 157, filed May 16, 2017), **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated April 25, 2017, as modified by this Order, is **APPROVED** and **ADOPTED**;
2. The Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by *pro se* petitioner, Jason Kokinda, is **DENIED** and **DISMISSED**;
3. The Objections to April 25, 2017, R&R filed by *pro se* petitioner, Jason Kokinda, are **OVERRULED** for the reasons set forth below; and
4. The Clerk of Court shall mark the case **CLOSED**.

¹ Josh Shapiro became the Attorney General of the State of Pennsylvania on January 17, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Josh Shapiro is substituted for Kathleen Kane as a respondent in this suit.

IT IS FURTHER ORDERED that a certificate of appealability will not issue because reasonable jurists would not debate (a) this Court's decision that the petition does not state a valid claim of the denial of a constitutional right, or (b) the propriety of this Court's procedural rulings with respect to petitioner's claim. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The decision of the Court is based on the following:

1. Presently before the Court is *pro se* petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. Petitioner asserts four grounds for habeas relief: (1) the invalidity of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); (2) ineffective assistance of counsel; (3) two alleged Due Process violations relating to the charging documents and alleged *Brady* violations; and (4) Post Conviction Relief Act ("PCRA") Court error. The Report and Recommendation ("R&R") prepared by Magistrate Judge Sitarski recommends that the habeas petition be denied. *Pro se* petitioner filed objections to the R&R on May 8, 2017, and respondents filed their responses to those objections on May 16, 2017.

2. The Court conducts a *de novo* review of the contested portions of the R&R. *See Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In conducting the *de novo* review, the Court may place "whatever reliance [it], in the exercise of sound judicial discretion, [chooses] to place on a magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980). To the extent *pro se* petitioner's objections are merely "general in nature," the Court "need not conduct a *de novo* determination." *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1984). The Court addresses each of *pro se* petitioner's objections in turn.

OBJECTION 1: INVALIDITY OF *ERIE*

3. Petitioner's first objection to the R&R asserts that Magistrate Judge Sitarski "wholly evades discussion of [his] *Erie* claims." Objections at 2. Contrary to petitioner's assertion,

Magistrate Judge Sitarski discussed petitioner's *Erie* claim and concluded that "the PCRA Court determined that Petitioner's jurisdictional claim lacked merit pursuant to its interpretation of the Pennsylvania constitution. This is a question of Pennsylvania state law that this court will not disturb." R&R at 13. This Court agrees with that statement. The Court further notes that *Erie* is inapplicable to these proceedings because *Erie* concerned the application of substantive state law in civil diversity cases. Thus, the Court overrules petitioner's objection on this issue.

OBJECTIONS 2 AND 5: INEFFECTIVE ASSISTANCE OF COUNSEL

4. Petitioner's second objection to the R&R states that it "fail[s] to address how Mr. Kokinda believed that agents were actual minors, when they framed their characters as if mere adults role-playing, rhetorically." Objections at 2. In Objection 5, petitioner claims that "the failure of trial counsel to obtain medical records [allegedly documenting his asexuality] was another inexcusable fatal error." Objections at 5. To succeed on an ineffective assistance of counsel claim, a petitioner must show that "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The defendant 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. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689.

5. In this case, as the PCRA Court and Magistrate Judge Sitarski concluded, petitioner's trial counsel determined that an insanity defense was the most reasonable strategy after investigation into petitioner's psychiatric history, consultation with experts, and review of the record. R&R at 19. As noted in the R&R, "[t]he role-playing defense now preferred by petitioner did not have a greater likelihood of success, as Petitioner not only engaged in chats, but sent pictures and arranged to meet his intended victim." R&R at 19. The PCRA Court concluded that counsel made a strategic decision to pursue an insanity defense and that counsel was effective. *See*

Werts v. Vaughn, 228 F.3d 178, (3d Cir. 2000) (holding that Pennsylvania follows an ineffective assistance of counsel standard not contrary to the *Strickland* standard). Under the circumstances of petitioner's case, petitioner has not demonstrated that the adjudication of this claim by the state courts was contrary to, or an unreasonable application of, clearly established federal law.

Similarly, trial counsel's decision to pursue an insanity defense and not introduce evidence of petitioner's alleged asexuality was a strategic decision. First, petitioner has presented no evidence of his alleged asexuality. Even assuming that petitioner is asexual, the Court rejects petitioner's argument that "it is absurd to find criminal sexual predisposition in an asexual." Objections at 5. Second, petitioner has made no showing that counsel's alleged failure to obtain his medical records of asexuality resulted in "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), because petitioner knew of his alleged asexuality at the time he pled guilty to the offense. Accordingly, the Court overrules petitioner's objections on this issue.

OBJECTION 3: ALLEGED *BRADY* VIOLATION

6. Petitioner's third objection to the R&R argues that "the R&R makes the fatal errors of assuming that Mr. Kokinda did not go to trial. And therefore that, *Brady* and its progeny; did not require pre-trial disclosure of evidence, evidence that resolved dispute over age-oriented role-play." Objections at 3. Contrary to petitioner's assertions, Magistrate Judge Sitarski analyzed his *Brady* argument in the R&R. R&R at 36. Magistrate Judge Sitarski concluded that a *Brady* violation did not occur on the grounds that (a) the allegedly suppressed evidence² would merely form the groundwork for possible arguments or defenses and (b) that petitioner failed to prove the materiality of the alleged evidence because it would not have changed his plea. *Id.* Upon review of the record

² The Court notes that petitioner has produced no factual support for his contention that such suppressed evidence exists. Nonetheless, this Court and Magistrate Judge Sitarski address petitioner's claim as if it does.

and the R&R, the Court concludes that there is no “reasonable probability that, had the [alleged] evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Brown*, 250 F.3d 811, 818 (3d Cir. 2001) (“Here, in light of Brown’s confession, the signed ATF Forms that corroborate her confession, and Brown’s agreement in open court that the factual basis for the crimes, as recited by the government, was accurate and correct, we conclude that she has not undermined our confidence in the outcome of this case.”). Thus, the Court overrules petitioner’s objection on this issue.

OBJECTION 6: DENIAL OF COUNSEL

7. Petitioner’s sixth objection states that “all of the severe errors by counsel, accumulatively demonstrate a denial of counsel; that he [defense counsel] acted more as a saboteur than a defender.” Objections at 6. In Objection 6, petitioner raises no specific objection to Magistrate Judge Sitarski’s conclusions on his ineffective assistance of counsel claims. Given the general nature of petitioner’s objection, the Court “need not conduct a *de novo* determination.” *Goney*, 749 F.2d at 6-7. The Court agrees with Magistrate Judge Sitarski that counsel was effective and that each of petitioner’s discreet ineffectiveness claims are meritless. Accordingly, it overrules petitioner’s objection on this issue.

OBJECTION 7: CERTIFICATE OF APPEALABILITY, ALL OTHER ISSUES

8. Petitioner’s seventh objection states that petitioner objects to “any other adversarial conclusion expressed or implied in the R&R” and the denial of the issuance of a certificate of appealability, without stating a reason for this objection. Objections at 6. Based on the general nature of petitioner’s objection to “any other adversarial conclusion expressed or implied in the R&R,” this Court “need not conduct a *de novo* determination” of that objection. *Goney*, 749 F.2d at 6-7.

As to the certificate of appealability, such certificates are granted only upon “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because this Court concludes that petitioner has not demonstrated “that reasonable jurists would find [its] assessment of the constitutional claims debatable or wrong,” the Court agrees with Magistrate Judge Sitarski that there is no basis for the issuance of a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

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

JASON KOKINDA Petitioner, v. BRIAN COLEMAN, et al. Respondents.	: : : : : : :	CIVIL ACTION NO. 13-CV-2202
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REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

April 25, 2017

Presently before the Court is a *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by Jason Kokinda (“Petitioner”). This matter has been referred to be for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED.

I. BACKGROUND¹

The Court of Common Pleas of Lehigh County provided the following recitation of facts:

[Petitioner] engaged in sexual communications with someone whom he believed was a twelve (12) year old female, but in reality was an undercover agent with the Office of the Attorney General. [Petitioner] also sent an image of his erect penis to this person. Eventually, [Petitioner] arranged a meeting with the child for the purpose of engaging in various sexual acts. When he arrived for his expected rendezvous, he was arrested by agents of the Office of the Attorney General.

¹ Respondents have submitted the relevant portions of the state court record (“SCR”) in hard-copy format. Documents contained in the SCR are indexed and numbered and will be cited as “SCR No. ____.”

Commonwealth v. Kokinda, No. CP-39-CR-00004541-2007, slip op. at 1 (Lehigh Cnty. Com. Pl. Feb.20, 2013) (SCR No. 119).

Petitioner proceeded to trial in the Court of Common Pleas of Lehigh County, but on November 12, 2009, he entered a plea of guilty but mentally ill to four counts of unlawful contact with a minor, 18 Pa. Cons. Stat. § 6318, and one count of criminal use of a communication facility, 18 Pa. Cons. Stat. § 7512. *Commonwealth v. Kokinda*, No. CP-39-CR-0004541-2007 (Phila. Cnty. Com. Pl.), Criminal Docket at 4, 13-14. On February 17, 2010, Petitioner was sentenced to a term of thirty-six to eighty-four months of incarceration. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 1. Petitioner did not file a direct appeal from his judgment of sentence.

On February 22, 2011, Petitioner filed a *pro se* petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"). Crim. Docket at 22. Following several amendments, "a variety of . . . documents and motions," and two evidentiary hearings, the PCRA Court denied relief on September 6, 2012. *Kokinda*, No. CP-39-00004541-2007, slip op. at 2-3; Crim. Docket at 43. Petitioner timely appealed to the Superior Court, raising the following claims relevant to the instant habeas petition:

- (1) *Erie R. Co. v. Tompkins*, announced the replacement of organic constitutional law with Uniform Commercial Code judicial dictations, and is thus unconstitutional, null, and void.
- (2) Appellant was denied counsel or the effective assistance of counsel: resulting in an unintelligent, unknowing, or involuntary plea; in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States.
- (3) The Commonwealth officials misrepresented material facts in their initiating documents, testimony, prosecution, and then committed *Brady* and *Trombetta* violations to cover up

their official oppression in a criminal conspiracy that involved counsel.

- (4) The PCRA Court violated Appellant's Due Process and Equal Protection rights, by denying Appellant his entire case file and trial transcripts, when Appellant had a pending PCRA petition with *pro se* and in forma pauperis status.

(Superior Ct. Br. 1, 9, 32, ECF No. 42-32; Superior Ct. Br. 1, ECF No. 42-33). The Superior Court affirmed the PCRA Court's decision on December 13, 2013. *Commonwealth v. Kokinda*, No. 2687 EDA 2012, slip op. at 1 (Pa. Super. Dec. 13, 2013). Petitioner filed a motion in the Superior Court to reinstate his direct appellate rights *nunc pro tunc*, but, by order dated February 27, 2014, the Superior Court denied relief. *Commonwealth v. Kokinda*, No. 2687 EDA 2012 (Pa. Super.), Appellate Docket at 6 [hereinafter "Pa. Super. Appellate Docket"]; (Order 134, ECF No. 65-2). On March 25, 2014, Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme Court seeking review of the Superior Court's orders affirming the PCRA Court's decision and denying the reinstatement of his appeal. *Commonwealth v. Kokinda*, No. 57 MM 2014 (Pa.), Appellate Docket at 3 [hereinafter "Pa. Appellate Docket I"].

Petitioner filed the instant *pro se* habeas petition on April 19, 2013, while the Superior Court appeal was pending. (Pet. Under 28 U.S.C. § 2254, ECF No. 1; Order, ECF No. 2; Pet. Under 28 U.S.C. § 2254, ECF No. 5 [hereinafter "Hab. Pet"]). In a Report and Recommendation dated May 30, 2014, this Court recommended staying his habeas petition and holding it in abeyance until Petitioner exhausted his state court remedies. (Report and Recommendation, ECF No. 48). The Honorable Jan E. DuBois adopted the Report and Recommendation by Order filed on July 15, 2014. (Order, ECF No. 69).

The Pennsylvania Supreme Court denied Petitioner's petition by order on July 28, 2014. Pa. Appellate Docket I at 3. Petitioner filed a Petition for Reconsideration, which was denied

September 4, 2014. *Id.* at 3-4. On September 25, 2015, Petitioner filed a number of applications in the Pennsylvania Supreme Court, including: an application for exercise of King's Bench powers or extraordinary jurisdiction; an application for leave to file original process in the Supreme Court; an application for an immediate hearing; an application to waive service requirements; and an application to recuse Justice Correale Stevens. *Commonwealth v. Kokinda*, No. 140 MM 2015 (Pa.), Appellate Docket at 1-2 [hereinafter "Pa. Appellate Docket II"]. On November 13, 2015, the application for leave to file original process was granted, and all other applications were denied. *Id.* at 2. The reconsideration period expired, and Petitioner's case was closed on December 30, 2015. *Id.*

Petitioner filed a Post-Release Case Status Report and Case Status Update in federal court in November and December of 2015, respectively, attaching the November 13, 2015 Supreme Court order, among other documents. (ECF Nos. 141, 142). In light of the Case Status Update, Judge DuBois vacated his earlier order which stayed and held in abeyance Petitioner's habeas petition until Petitioner exhausted his state remedies, and he referred the case to me for a Report and Recommendation on the merits. (Order, ECF No. 144).

Petitioner's habeas petition raises the following grounds for relief (recited verbatim):

- (1) Does *Erie R. Co. v. Tompkins*, . . . reduce all organic constitutions to unauthoritative relics by removing law from its Christian common law roots, where judges were limited by supreme authority or organic constitutions, to the oppressive rule of the Revelation Chapter 13 "Image of the Beast" under an artificial commercial law, where the dictations of judges are the supreme authority?
- (2) Was Petitioner denied counsel or the effective assistance of counsel; resulting in an unintelligent, unknowing, or involuntary plea; in violation of the Sixth and Fourteenth Amendments of the Constitution for the United States?

- (3) Did the Commonwealth misrepresent material facts by framing decontextualized equivocal age-play fragments as literal unequivocal whole facts, furthered by *Brady* and *Trombetta* violations to destroy all of the critical exculpatory evidence that would uncover the framing, usurping the gatekeeper function of judges, preventing meaningful defense, and framing otherwise innocuous conduct within a strictly construed penal statute that would not otherwise apply; depriving the trial court of jurisdiction to prosecute; and violating the Fourth, Fifth, Sixth, and Fourteenth Amendments of the Constitution for the United States?
- (4) Does Pa.C.S.A. § 314, Guilty But Mentally Ill, violate the Fifth and Fourteenth Amendments of the Constitution for the United States, by subverting the truth-determining process and violating equal protection of defendants with scientifically objective insanity, which is an irrational byproduct of their severe mental disorders, for which they have poor insight into, and are predisposed to commit the crime on their own?
- (5) Did the PCRA Court violate Petitioner's due process and equal protection rights, by denying Petitioner his case file and various accurate transcripts of proceedings, rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution for the United States?

(Hab. Pet. 2-3, ECF No. 5).² The Commonwealth filed an Answer, and Petitioner filed a Reply.

(Answer and Mem. in Opposition to Pet. for Writ of Habeas Corpus, ECF No. 43 [hereinafter

² Petitioner has since clarified that “ground four” is a sub-claim of his ineffectiveness claim, and “ground five” is “only relative to overcoming preclusion doctrines of federal habeas corpus review.” (Pet. to Amend, ECF No. 71). Ground Five will be discussed below. *See infra* Part VI.B.4. As for Ground Four, Petitioner argues Pennsylvania’s Guilty but Mentally Ill statute “reduc[es] legal insanity to an impossible oxymoron,” and “oppressively destroy[s] the mentally ill,” and he argues the Durham Rule approach to assessing legal insanity is inadequate. (Hab. Pet. 31-32, ECF No. 5). He avers these allegations support his ineffectiveness claim “by showing how off-base his experts were and his destructive insanity defense.” (*Id.* at 33). First, Pennsylvania’s Guilty but Mentally Ill statute has withstood constitutional attack in Pennsylvania courts, *Commonwealth v. Trill*, 543 A.2d 1106 (Pa. 1988), and a comparable “Guilty but Mentally Ill” statute has been found constitutional by the Seventh Circuit. *See United States ex. rel. Weismiller v. Lane*, 815 F.2d 1106, 1110 (7th Cir. 1987). The Court finds this authority persuasive, and rejects Petitioner’s assertion that Pennsylvania’s statute “oppressively destroy[s]

“Answer”]; Traverse in Opposition to the Resp’t’s Answer to Pet. for Writ of Habeas Corpus, ECF No. 52 [hereinafter “Reply”]). The Court has considered other relevant submissions as well.

II. JURISDICTION AND MOOTNESS

A federal court has jurisdiction to entertain a habeas petition under 28 U.S.C. § 2254(a) “only if [a petitioner] is in custody in violation of the constitution or federal law.” *DeFoy v. McCullough*, 393 F.3d 439, 441 (3d Cir. 2005). To determine whether a petitioner is “in custody,” a court looks to the time the habeas petition was filed. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *see also Obado v. New Jersey*, 328 F.3d 716, 717 (3d Cir. 2003) (“[F]or a federal court to have jurisdiction, a petitioner must be in custody under the conviction he is attacking at the time the habeas petition is filed.”). Although Petitioner was in custody when he filed his habeas petition, and thus satisfied the “in custody” requirement of § 2254(a), his sentence has since expired, and he is no longer incarcerated.³

After a prisoner’s release from custody, his habeas case becomes moot unless he “can demonstrate he will suffer some collateral consequences if his conviction is allowed to stand.” *DeFoy*, 393 F.3d at 441-42 n.3. Significantly, though, the Court may presume “collateral consequences when a litigant challenges a criminal conviction.” *United States v. Kissinger*, 309

the mentally ill.” In any event, this argument is unrelated to Petitioner’s ineffectiveness claim regarding pursuance of an insanity defense. Next, because Pennsylvania does not follow the Durham Rule, but rather, follows the M’Naghten approach to assess legal insanity, *see Commonwealth v. Rabold*, 951 A.2d 329, 348 n.1 (Pa. 2008), Petitioner’s discussion of the Durham Rule is irrelevant. As for Petitioner’s argument that counsel was ineffective in pursuing an insanity defense, this allegation is discussed in more detail below. *See infra* Parts VI.B.1 and 2.

A.14 ³ Petitioner was released from prison on November 1, 2015. (*See* Order, ECF No. 143).

F.3d 179, 181 (3d Cir. 2002) (citing *Sibron v. New York*, 392 U.S. 40, 55-56 (1968)); *see also United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (“When the defendant challenges his underlying *conviction*, this Court’s cases have long presumed the existence of collateral consequences. But when a defendant challenges only an expired *sentence*, no such presumption applies”) (emphasis in original) (internal citations omitted); *Spencer*, 523 U.S. at 14; *Strother v. Nardolillo*, 583 F. Supp. 2d 645, 648 (E.D. Pa. Oct. 14, 2008) (“Collateral consequences are presumed in cases where the petitioner is challenging a wrongful conviction. This is because the ‘disabilities or burdens’ deriving from criminal conviction, such as the loss of the right to vote, the right to serve on a jury, or the right to hold certain offices, clearly present a continuing injury to the wrongfully convicted.”).

Accordingly, the Court presumes that Petitioner would suffer collateral consequences if the challenged convictions be allowed to stand, and recommends that the District Court exercise its jurisdiction over the petition pursuant to 28 U.S.C. §§ 2241 and 2254.

III. LEGAL STANDARDS

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been “fairly presented to the state courts.” *Castille*, 489 U.S. at 351. To “fairly present” a claim, a petitioner must present its “factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.” *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies by giving the “state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because

there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683.

The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, “a state law ground that is independent of the federal question and adequate to support the judgment” to foreclose review of the federal claim. *Nolan v. Wynder*, 363 Fed. App’x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman*, 501 U.S. at 730). Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States’ interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel’s efforts to comply with some state procedural rule. *Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically

demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995) (describing a “quintessential miscarriage of justice” claim as one that a petitioner is actually innocent of the crime). To be credible, an actual innocence claim “requires [a] petitioner to 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.” *Id.* at 324.

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court’s adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, “clearly established Federal law, as determined by the Supreme Court of United States;” or (2) the adjudication resulted in a decision that was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, “[u]nder the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir.

2000). “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Williams*, 529 U.S. at 413. The “unreasonable application” inquiry requires the habeas court to “ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). “In further delineating the ‘unreasonable application of’ component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court’s incorrect or erroneous application of clearly established federal law was also unreasonable.” *Werts*, 228 F.3d at 196 (citation omitted).

IV. DISCUSSION

The Court will address Petitioner’s claims in the order they are presented in his habeas petition: (1) the *Erie* claim; (2) multiple allegations of ineffective assistance resulting in an unknowing and involuntary plea; and (3) two due process claims couched within Petitioner’s *Brady/Trombetta* claim. For the reasons explained below, the Court concludes that Petitioner is not entitled to relief on any of these claims.

A. Ground One: *Erie* Claim

In Ground One, Petitioner makes a slew of assertions challenging the validity of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and the Uniform Commercial Code (“UCC”). (See Hab. Pet. 8-10, ECF No. 5). Petitioner states *Erie* violates Article I, § 15 and Article V, § 17(d) of the Pennsylvania Constitution, the Tenth Amendment, the Supremacy Clause, and the Equal

Protection Clause. (*Id.* at 10). He also asserts, “The *Erie* claim requires petitioner’s entire habeas corpus petition to be adjudicated on pre-*Erie* 28 U.S.C. § 2241 (1937 or earlier) true constitutional common law standards of public law. Thus, is AEDPA § 2254 inapplicable” (Reply 21, ECF No. 52). He states that under this “pre-*Erie* common law” standard, the state court lacked jurisdiction to “convict petitioner or arrest him” because it operated under “private law.” (*Id.*).

To obtain habeas relief, Petitioner must show that the Constitution, laws, or treaties of the United States were violated. *See* 28 U.S.C. § 2254(a). To the extent that Petitioner alleges that *Erie* violates the United States and Pennsylvania constitutions, he does not satisfy this requirement. In that regard, Ground One does not state a cognizable claim.⁴

To the extent Petitioner challenges the state court’s jurisdiction, the PCRA Court explained:⁵

⁴ Petitioner concludes his *Erie* section by stating, “The pcra [sic] Court simply dictated what is and isn’t age-play, to render all of the age-play based gravamen – nugatory. To excuse all of the perjury, false evidence, double jeopardy violations, ineffectiveness of counsel.” Although *pro se* filings should be liberally construed, a habeas petitioner must nonetheless “specify all grounds for relief available” to him and “state the facts supporting each ground.” *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (quoting Habeas Corpus Rule 2(c)). Under the rules governing habeas petitions, “notice pleading is not sufficient, for the [habeas] petition is expected to state facts that point to a real possibility of constitutional error.” Advisory Committee’s Note on Habeas Corpus Rule 4 (internal quotation and citation omitted). In the absence of facts supporting his “perjury, false evidence, double jeopardy” claims, they need not be addressed. To the extent Petitioner is raising an additional ineffectiveness claim, it need not be addressed for the same reason. Petitioner’s other ineffectiveness claims will be addressed below. *See supra* Part IV.B.

⁵ In considering a § 2254 petition, the federal courts examine the “last reasoned decision” of the state courts. *Simmons v. Beard*, 590 F.3d 223, 231-32 (3d Cir. 2009) (citation omitted). Here, the last reasoned decision came from the PCRA Court. The Superior Court found the February 20, 2013 PCRA Court opinion addressed the issues raised on appeal, and “affirm[ed] on the basis of Judge Steinberg’s thorough and well-written opinion.” *Kokinda*, No. 2687 EDA 2012, slip op. at 3. The Pennsylvania Supreme Court denied Petitioner’s allocator petition and petition for reconsideration without comment. *See Simmons*, 590 F.3d at 232.

[Petitioner] refers to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1983) and suggests it has some impact on the within case. It has none. *Erie* was a landmark decision which held that in diversity cases, substantive state law, not federal common law, controls. . . .

In *Commonwealth v. Stout*, 978 A.2d 984, 988 (Pa. Super. 2009), claims similar to those raised herein were dispatched with the recognition that “the Pennsylvania constitution itself provides for the promulgation of rules governing the practice, procedure, and conduct of courts, so long as those rules do not abridge, enlarge, or modify the substantive rights of litigants.” [Petitioner’s] argument, as in *Stout*, is “patently without merit.” *Id.*

Kokinda, No. CP-39-CR-00004541-2007, slip op. at 6-7 (some citations omitted). Thus, the PCRA Court determined that Petitioner’s jurisdictional claim lacked merit pursuant to its interpretation of the Pennsylvania constitution. This is a question of Pennsylvania state law that this court will not disturb. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to re-examine state-court determinations on state-law questions.”); *Lambert*, 387 F.3d at 239; *Jones v. Carroll*, 388 F. Supp. 2d 413, 420-21 (D. Del. 2006) (dismissing claim that state court lacked jurisdiction as non-cognizable; collecting cases).

Accordingly, I respectfully recommend that Ground One be denied as non-cognizable.

B. Ground Two: Ineffective Assistance of Counsel

In Ground Two, Petitioner makes numerous allegations of ineffective assistance of counsel that purportedly resulted in an unintelligent, unknowing, or involuntary guilty plea.⁶ (Hab. Pet. 13, ECF No. 5). He asserts that counsel: (1) failed to pursue various defenses and deprived Petitioner of his right to meaningfully participate in his own defense (*id.* at 13, 14); (2) abandoned Petitioner to force a plea (*id.* at 13); (3) made false promises that Petitioner could

⁶ Petitioner also asserts that the PCRA judge “undermine[d] the truth-determining process of the pcra [sic] proceedings” (Hab. Pet. 23, ECF No. 5). This statement and related allegations do not state a cognizable claim. *See Lambert*, 387 F.3d at 247; *Hassine v. Zimmerman*, 160 F.3d 941, 954 (3d Cir. 1998).

allocute to induce a plea (*id.* at 13, 14); (4) failed to consult and meet with Petitioner to prepare his case (*id.* at 13, 14, 17, 18, 21); (5) failed to make a “meaningful adversarial testing of the Commonwealth’s case” (*id.* at 14); and (6) participated in “conspiracy to commit official oppression against petitioner and obstruct justice in petitioner’s attempts to undo the crime” (*id.* at 14, 24). Petitioner also alleges that counsel failed to withdraw his guilty plea upon request (*id.* at 13), and failed to file an appeal after Petitioner’s request that he do so (*id.* at 14).

The clearly established federal law governing a claim of ineffective assistance is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 529 U.S. at 391. In *Strickland*, the United States Supreme Court established the following test to obtain habeas relief on the basis of ineffectiveness:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Because “it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable,” a court must be “highly deferential” to counsel’s performance and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. “Thus . . . a defendant must overcome the ‘presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Pennsylvania applies the same test for ineffective assistance claims.⁷ See *Werts* 228 F.3d at 204.

Strickland “applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). In a case, such as this case, where the petitioner alleges that counsel’s ineffectiveness led him to plead guilty, the petitioner must prove that counsel’s performance affected the outcome of the plea process. *Id.* at 59. To prove prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59; *Kaylor v. Coleman*, No. 13-69, 2014 WL 1998232, at *7 (E.D. Pa. May 15, 2014).

1. Ineffectiveness Resulting in Involuntary Plea

Petitioner asserts that numerous instances of ineffective assistance resulted in an unintelligent, unknowing, or involuntary plea. The Commonwealth responds that the state courts reasonably applied the correct federal standard, and that counsel’s advice to enter the plea was reasonable. (Answer 50-51, ECF No. 43). I agree.

Before discussing Petitioner’s specific allegations of ineffective assistance, the PCRA Court considered whether counsel’s alleged ineffectiveness in pursuing an insanity defense resulted in an involuntary plea. The PCRA Court explained that a defendant’s statements from the plea colloquy are binding, and a defendant cannot later seek to withdraw the plea with

⁷ In the instant case, the PCRA Court did not enunciate Pennsylvania’s three-pronged test or *Strickland*, but it cited cases applying Pennsylvania’s ineffectiveness test. See, e.g., *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 9 (citing *Commonwealth v. Brown*, 48 A.3d 1275, 1277 (Pa. Super. 2012)); *id.* at 13 (citing *Commonwealth v. Harvey*, 812 A.2d 1190, 1196 (Pa. 2002)). In any event, the failure to enunciate a legal standard does not preclude this Court from analyzing whether the state court’s decision was contrary to, or an unreasonable application of, clearly established federal law. See *Jamison v. Klem*, 544 F.3d 266, 274-75 (3d Cir. 2008); *Tirado v. Klopotoski*, No. 09-CV-814, 2009 WL 5895261, at *5 n.6 (E.D. Pa. Oct. 30, 2009), report and recommendation adopted as modified, No. 09-CV-814, 2010 WL 653092 (E.D. Pa. Feb. 18, 2010).

reasons that contradict those statements. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 9. Relief on the basis of ineffective assistance will only be granted “if the ineffectiveness actually caused an involuntary or unknowing plea.” *Id.* When a plea is entered on the advice of counsel, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” *Id.*

The PCRA Court found Petitioner “entered a knowing, intelligent, and voluntary guilty plea.” *Id.* at 7. The court cited trial counsel’s testimony at the PCRA hearing that given Petitioner’s psychiatric history, he believed the only “viable defense” was insanity. *Id.* Counsel further stated that he believed even this defense was “tenuous” because, despite Petitioner’s claims that he thought “the chat room was a fantasy room where you[’re] free to espouse any fantasy” without legal repercussion, Petitioner made overt steps to accomplish the subject of the chat room chats. *Id.* at 7-8 (quotation marks omitted). These overt steps included going “to meet what [Petitioner] thought was a twelve year old child, to have sexual intercourse with her” and sending a photograph of an erect penis to the purported twelve year old. *Id.* at 7. Counsel also testified that Petitioner’s chats discussed “sex with a twelve year old being more thrilling because its [sic] illegal.” *Id.* at 8. Additionally, counsel noted that the Commonwealth planned to call a psychiatrist to testify to refute the insanity defense. *Id.* Thus, when the Attorney General agreed to a mitigated range sentence, counsel recommended that Petitioner plead guilty but mentally ill, and Petitioner agreed. *Id.* During the guilty plea colloquy, counsel, forensic experts, and Petitioner all expressed their belief that Petitioner was competent to enter his plea. *Id.* Petitioner stated he wanted to plead guilty, did not want to continue with trial, was satisfied with counsel’s representation, and believed counsel had adequately reviewed the matter with

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him. *Id.* Petitioner acknowledged that his plea was voluntary in both his written colloquy and in response to the court's questioning. *Id.* at 8-9.

The PCRA Court concluded, "counsel's advice to enter the guilty plea was within the range of competence demanded of attorneys in criminal cases." *Id.* at 10 (citation omitted). The PCRA Court explained that Petitioner faced the real chance of the jury rejecting the insanity defense, which might have resulted in a more severe sentence. *Id.* Furthermore, counsel's decision not to pursue the role-playing defense – which it described as a canard – was sound. *Id.*

Petitioner has not demonstrated that the state courts' adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law. In fact, he advances no argument on this point.⁸

The PCRA Court's decision was not contrary to federal law. The PCRA Court found this claim lacked merit because counsel's advice was within the range of competence demanded of attorneys in criminal cases; this decision was consistent with *Strickland*. See *Boyd v. Waymart*, 579 F.3d 330, 350 (3d Cir. 2009) (quotations omitted) (the first *Strickland* prong examines whether counsel rendered advice "within the range of competence demanded of attorneys in criminal cases").

The PCRA Court also reasonably applied *Strickland*. The PCRA Court reasonably concluded that counsel's advice that Petitioner plead guilty but mentally ill was sound. As the PCRA Court explained, counsel believed the only "viable" defense was insanity, but even that defense was "tenuous." *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 7-8. Thus, when a

⁸ Instead, Petitioner argues that the PCRA Court did not adjudicate his claims on the merits and that he is entitled to *de novo* review. (Traverse 13, 17, 21-22, ECF No. 52). The state court adjudicated most of Petitioner's claims on the merits, as the decision finally resolved many of the claims pursuant substantive reasons. See *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). The Court has otherwise specified when the PCRA Court did not adjudicate claims on the merits. See *infra* Parts VI.B.3, VI.B.4, VI.B.6, VI.B.7, VI.C.1, and VI.C.2.

plea deal was offered, counsel recommended that Petitioner take it. *Id.* at 8. Counsel's strategic decisions should not be second-guessed. *Leary v. Kerestes*, No. 10-5541, 2011 WL 5446839, at *7 (Apr. 19, 2011); *see id.* (counsel's advice that petitioner take plea deal instead of pursuing a justification defense at trial did not constitute deficient performance). Additionally, the PCRA Court examined Petitioner's statements at the guilty plea hearing and in the written colloquy, wherein Petitioner confirmed that his plea was voluntarily made, that counsel adequately reviewed the matter with him, and that he was satisfied with counsel's representation. The PCRA Court also considered statements from Petitioner, his attorney, and forensic experts that Petitioner was competent to enter a plea. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations made in open court carry a strong presumption of verity."); *Copeland v. Capozza*, No. 15-0481, 2016 WL 6679268, at *3-4 (M.D. Pa. Nov. 14, 2016) (state court reasonably applied *Strickland* when it examined petitioner's written plea colloquy and statements at plea hearing); *Troutman v. Overmyer*, No. 2:14-CV-1592, 2015 WL 1808640, at *16 (E.D. Pa. Apr. 21, 2015) (petitioner's statements that he was satisfied with counsel's representation supported state court's rejection of ineffectiveness claim).

Because the state courts reasonably determined that counsel rendered competent assistance in advising Petitioner about his plea, Petitioner's assertion that counsel's ineffective assistance resulted in an involuntary plea lacks merit.

2. Failure to Pursue Other Defenses

Petitioner asserts that he "gave dozens of examples of meritorious defenses and pretrial motions which trial counsel had no reason to forego: Selective prosecution, various forms of entrapment, actual innocence age-play defenses with age-play expert, suppression of coerced statement and inflammatory photo, challenges to unconstitutional statutes" (Hab. Pet. 13,

ECF No. 5). Petitioner complains that instead of pursuing these defenses, counsel pursued an insanity defense. (*Id.*).

The PCRA Court explained that counsel's strategic or tactical choice is constitutionally effective if it "had some reasonable basis designed to effectuate [the] client's interests." *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 12 (citation omitted). A chosen strategy should not be found to lack a reasonable basis unless an alternative strategy "offered a potential for success substantially greater" than the chosen strategy. *Id.* "A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued." *Id.* The PCRA Court found that counsel undertook a "viable insanity defense," noting that he hired well-recognized experts, and intended to use Petitioner's psychiatric history to support the defense. *Id.* The role-playing defense now preferred by Petitioner did not have a greater likelihood of success, as Petitioner not only engaged in chats, "but sent pictures and arranged to meet his intended victim." *Id.* Additionally, the PCRA Court found it doubtful that testimony from an age-play expert would have been admissible at trial. *Id.*

The PCRA Court's conclusion that counsel made a strategic decision to pursue the insanity defense was neither contrary to, nor an unreasonable application of, clearly established federal law. Courts must be careful not to engage in hindsight and must be "highly deferential" to counsel's reasonable strategic decisions. *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002), *cert. denied*, 538 U.S. 911 (2003); *see also Rolan v. Vaughn*, 445 F.3d 671, 681-82 (3d Cir 2006). "[T]he mere existence of alternative—even preferable or more effective—strategies does not satisfy the requirements of demonstrating ineffectiveness under *Strickland*." *Marshall*, 307 F.3d at 86. Here, the PCRA Court found that counsel engaged in a reasonable strategy by pursuing the insanity defense, supported by Petitioner's psychiatric history, experts hired to

corroborate the defense, and the record. Under these circumstances, the state court's determination that counsel rendered effective assistance was not an unreasonable application of *Strickland*. Furthermore, the PCRA Court's determination that an age-play expert would likely have been inadmissible at trial is a matter of state law that this federal court will not second-guess. *See Estelle*, 502 U.S. at 67-68.

I thus conclude that the state court's determination that counsel's performance was reasonable was neither contrary to, nor an unreasonable application of, *Strickland*. Accordingly, I respectfully recommend denying relief on this claim.

3. Abandonment of Petitioner

Petitioner alleges that trial counsel abandoned him "to force [a] guilty plea, by telling petitioner that he no longer had any expert support to even assert unbelievable pulp fiction insanity defense." (Hab. Pet. 13, ECF No. 11).

The PCRA Court acknowledged that Petitioner raised this claim in his 1925(b) statement, *see Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 3, but it did not address this claim on the merits. Petitioner did not raise this claim in his Superior Court brief. Notwithstanding any failure to exhaust, the Court recommends denying relief on the merits. *See* 28 U.S.C. § 2254(b)(2); *Roman v. DiGuglielmo*, 675 F.3d 204, 209 (3d Cir. 2012) (A federal court "may bypass the exhaustion issue altogether should [it] decide that the petitioner's habeas claim fails on the merits.").

The record belies Petitioner's assertion that counsel abandoned him. During the guilty plea hearing, Petitioner testified that he was satisfied with counsel's representation, and that counsel discussed the case with him in detail. (N.T. 11/12/09 at 8:6-11). At the PCRA hearing, counsel testified that he hired a forensic psychologist and a forensic psychiatrist who believed

that Petitioner met the standard for legal insanity, and that neither doctor changed his opinion on that matter. (N.T. 12/19/11 at 22:16-23, 27:8-13). Reports from these doctors verify that both believed Petitioner was legally insane at the time of the offense (ECF No. 65-2 at 19-20, 26), and the PCRA Court found the experts were prepared to testify in support of the insanity defense. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 7. However, counsel testified that as trial progressed, he observed “how the evidence [came] in” and how the jury reacted to it, and he believed Petitioner was going to be convicted. (N.T. 12/19/11 at 27:14-20; 66:3-14). Counsel explained that “there was ample evidence of [Petitioner] being at times psychotic and broken from reality,” but “there were also periods where [Petitioner] . . . indicated that perhaps [he] knew right from wrong.” (*Id.* at 28:1-15). In other words, the Commonwealth had evidence that could lead to a guilty but mentally ill verdict and that would make an insanity defense more difficult. (*Id.* at 64:22-25, 65:1-24). Accordingly, when the plea deal was offered, “knowing the Court and their understanding of the law and their compassion for people that have mental illness,” counsel believed the plea was in Petitioner’s best interest. (*Id.* at 28:21-25, 29:1-3). Thus, the record shows the experts did not change their opinions about Petitioner’s sanity and that counsel did not abandon Petitioner.

Because Petitioner’s claim is belied by the record, the Court respectfully recommends denying this claim as meritless.

4. False Promises Concerning Allocution

Petitioner also avers that counsel “prevented [him] from making allocution of truth; that was promised to unlawfully induce plea.” (Hab. Pet. 13, 14, ECF No. 5). The PCRA Court did not acknowledge this claim or address it on the merits. When a state court does not address the merits of a claim, but the claim is properly before a federal habeas court, AEDPA’s deferential

standard does not apply, and the claim is reviewed *de novo*.⁹ *Breakiron v. Horn*, 642 F.3d 126, 131 (3d Cir. 2011) (citations omitted). State court factual findings are still entitled to a presumption of correctness, unless rebutted by clear and convincing evidence. *Id.* (citations omitted).

Petitioner's allegations that counsel made false promise that he could allocute, then prevented him from making an allocution statement, are belied by the record. Petitioner testified at the guilty plea hearing that no promises were made to him, he entered his plea voluntarily and of his own free will, and he was not forced to plead guilty. (N.T. 11/12/09 at 20:10-22). These statements contradict his allegation that the plea was induced. *See Suarez v. Pennsylvania*, No. 4:11-CV-349, 2014 WL 2922283, at *11 (M.D. Pa. June 26, 2014) (rejecting petitioner's claim that counsel induced her plea in light of petitioner's sworn statements on guilty plea forms and during her plea hearing).

Counsel's testimony at the PCRA hearing similarly contradicts Petitioner's claims. At the PCRA hearing, counsel denied promising Petitioner that he could inform the sentencing court about his New Jersey case (N.T. 12/19/11 at 35:8-13), a subject of Petitioner's allocution statement.¹⁰ Counsel also denied dissuading Petitioner from allocuting, and coercing Petitioner into the plea:

Petitioner: [A]t the sentencing, do you remember taking me into the side room to talk to me and dissuade me from not expressing my allocution to the Court?

⁹ Petitioner raised this claim in his 1925(b) statement and in his Superior Court brief. (See Statement of Matters Complained of on Appeal 5, SCR No. 114; Br. for Appellant 22, 23, ECF No. 42-31).

¹⁰ Petitioner testified at the PCRA hearing that his allocution would have addressed his New Jersey case, counsel's failure to meet with him, and facts proving his role play defense. (N.T. 09/06/12 at 134-35, 139:7-9).

Counsel: No. I believe in any sentence the Court gives the Defendant an opportunity to say what he or she wants to say and apprise the Court of. And you were given that opportunity.

I, in no means – by no means coerced you into this plea, you had the opportunity to accept it or reject it, and you accepted it.

(*Id.* at 45:15-25).

Finally, there is no evidence that Petitioner was affirmatively prevented from allocuting.¹¹ In assessing a claim that the PCRA Court “should have considered [Petitioner’s] allocution statement presented at September 6, 2012 PCRA hearing, and nullified the guilty plea,” the PCRA Court found that although Petitioner did not allocute at sentencing, he was not precluded from doing so. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 4, 14 n.28.

In light of Petitioner’s testimony at the plea hearing, counsel’s testimony at the PCRA hearing, and the PCRA Court’s findings, the record contradicts Petitioner’s assertion that counsel induced him to enter his plea. Because Petitioner’s claim is contracted by the record, the Court respectfully recommends denying this claim as meritless.

5. Failure to Meet with Petitioner

Petitioner asserts that counsel failed to consult and meet with him a sufficient number of times to prepare his case. (Hab. Pet. 13, 14, 17, 18, 21, ECF No. 5). Counsel testified at the PCRA hearing that he “prepared very thoroughly,” and the PCRA Court found that counsel met with Petitioner “on a number of occasions” to review his case. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 13 (quotation marks omitted). It found counsel’s testimony “believable and credible” and Petitioner’s recollection “clouded and uncorroborated.” *Id.*

¹¹ The sentencing transcript reveals that the sentencing court simply did not ask for an allocution statement, and counsel did not request that Petitioner provide one.

Petitioner did not exhaust this claim. His Superior Court brief vaguely referenced the PCRA Court's factual determination, but did not assert that counsel failed to meet with Petitioner. (*See* Br. for Appellant 46, ECF No. 42-32). Notwithstanding Petitioner's failure to exhaust, this Court has examined the merits of this claim, and recommends denying relief. 28 U.S.C. § 2254(b)(2); *Roman*, 675 F.3d at 209.

The PCRA Court's factual determination that counsel met with Petitioner "on a number of occasions" to review his case is presumed to be correct.¹² 28 U.S.C. § 2254(e)(1). In light of the factual determination that trial counsel met with Petitioner to review his case, Petitioner has no viable ineffectiveness claim; trial counsel cannot be ineffective for failing to meet with his client when he, in fact, met with his client. Petitioner's allegations are further belied by his statements at the guilty plea hearing that he and counsel talked about his case in detail and that counsel spent sufficient time discussing the case with him. (N.T. 11/12/09 at 8:6-14). These statements "carry a strong presumption of verity." *Blackledge*, 431 U.S. at 73-74. Thus, there is no factual basis to find counsel ineffective for failing to meet with his client.

Additionally, Petitioner has failed to allege how he suffered prejudice from counsel's purported failure to meet with him. He has neither asserted nor proven that, but for counsel's alleged failure to meet with him, there is a reasonable probability that he would not have pled guilty but mentally ill. *See Hill*, 474 U.S. at 59.

Accordingly, I respectfully recommend denying relief on this claim.

¹² Petitioner states that he sought documentation proving that counsel met with him only three times, and that "the county lawyer admitted that no express entries [in the attorney visitor log book] exist." (Hab. Pet. 21, ECF No. 5). Petitioner cites no exhibits supporting this alleged admission. Accordingly, Petitioner has not rebutted the state court's factual determination with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

6. Failure to Make a “Meaningful Adversarial Testing”

Petitioner alleges that counsel was ineffective because he “made no meaningful adversarial testing of the Commonwealth’s case at trial or pretrial, save an opening statement where he spent more time advertising himself than defending.” (Hab. Pet. 14, ECF No. 5). He avers that counsel accepted the prosecutions’ evidence at face value (Hab. Pet. 17, ECF No. 5; Mem. in Support of Pet. 29, 47, 65, ECF No. 1-2) and did not object to the admission of hearsay testimony (Hab. Pet. 17, ECF No. 5). Because Petitioner exhausted this claim and the state courts did not address it, this Court will review the claim *de novo* and afford the state court’s factual findings a presumption of correctness, unless rebutted by clear and convincing evidence. *Breakiron*, 642 F.3d at 131.

In *United States v. Cronin*, the United States Supreme Court explained that “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that make the adversary process itself presumptively unreliable.” 466 U.S. 648, 659 (1984). When counsel fails to test the prosecutor’s case, prejudice may be presumed, but “the attorney’s failure must be complete.” *Bell v. Cone*, 535 U.S. 685, 696-97 (2002); *see also Wright v. Van Patten*, 552 U.S. 120, 125 n.1 (2008). For instance, in *Bell v. Cone*, a petitioner’s argument that counsel failed to challenge the prosecution only at specific points of the proceeding was insufficient to trigger *Cronin*. *Bell*, 535 U.S. at 697-98.

Here, Petitioner has not established that counsel completely failed to test the prosecution’s case. *See Anker v. Wesley*, 789 F. Supp. 2d 487, 497 (D. Del. May 26, 2011) (“[T]o prevail on his *Cronin* claim, petitioner must still demonstrate that counsel completely failed to subject the prosecution’s case to meaningful adversarial testing”). First,

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Petitioner's characterization of counsel's opening statement is inaccurate. Although counsel's opening statement briefly mentioned his qualifications (N.T. 11/10/09 at 37:19-24), it also comprehensively laid out what counsel expected the evidence to reveal, including an extensive history of mental illness and Petitioner's schizophrenic symptoms (*id.* at 38-51) and how Petitioner's mental illness led to the commission of the crimes in question (*id.* at 52-58, 61). Moreover, in addition to making this opening statement, the record reveals that counsel cross-examined witnesses, hired experts to support an insanity defense, and objected to the display of what he believed to be an inflammatory photograph. (N.T. 11/10/09 at 95-97). *Cf. Anker*, 789 F. Supp. 2d at 497 (petitioner failed to prove *Cronic* claim when record showed that counsel, *inter alia*, hired an investigator, cross-examined witnesses, and made opening and closing arguments).¹³ Petitioner's claims that counsel did not sufficiently challenge the prosecution's evidence or object to hearsay testimony are errors "of the same ilk as other specific attorney errors [the Supreme Court has] held subject to *Strickland*'s performance and prejudice components." *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 697-98 (2002)) (quotation marks omitted). Thus, Petitioner did not suffer a complete lack of representation required to invoke *Cronic*.¹⁴ *See id.*

¹³ In the instant case, counsel was unable to present witnesses or make a closing argument due to the entry of Petitioner's plea.

¹⁴ Petitioner also suggests that counsel had an actual conflict of interest because he allegedly believed Petitioner was guilty, causing him to reject "the age-play truth-based defenses." (See Mem. in Support of Pet. 47 n.192, 47-48, ECF No. 1-2). Prejudice is presumed when counsel operates under an actual conflict, but in such a case, the petitioner must demonstrate "that the conflict adversely affected his counsel's performance." *Smith v. Robbins*, 528 U.S. 259, 287 (2000). Here, Petitioner has not demonstrated that counsel had a conflict; he simply points to arguments made at sentencing and counsel's reasons for pursuing an insanity defense. (Mem. in Support of Pet. 47 n.192, ECF No. 1-2). Moreover, Petitioner has not shown that counsel's performance was adversely affected by the alleged conflict; as discussed above, counsel reasonably pursued an insanity defense and reasonably rejected the age-play defense.

Insofar as Petitioner claims that the counsel “accepted the prosecution’s evidence at face value” or failed to object to hearsay testimony, this claim lacks merit under *Strickland*. The Commonwealth had compelling evidence of Petitioner’s guilt, including “multiple pages of chats that had been transcribed between [Petitioner] and an Agent for the Attorney General’s Office,” (N.T. 12/19/11 at 22:24-25, 23:1-2) and a photograph of an erect penis that Petitioner sent to an undercover agent (N.T. 11/10/09 at 95:2-7). In light of this compelling evidence, rather than focusing on weaknesses in the prosecution’s case, counsel followed a reasonable strategy in pursuing an insanity defense. *See Mitchell v. Grace*, 287 F. App’x 233, 237 (3d Cir. 2008) (putting the prosecution to its proof and exploiting weaknesses in the prosecution’s case is a matter of trial strategy). Counsel conceded in his opening statement that the content of the chats was true,¹⁵ and then explained to the jury that both “[a] guilty act and a guilty state of mind” are required for a conviction. (N.T. 11/10/09 at 37:7-14). Given that the content of the chats would have been difficult to challenge, this accomplished two things: establishing credibility with the jury and setting forth a viable insanity defense. *See Rollins v. Pierce*, No. 11-109, 2014 WL 1212188, at *6 (D. Del. Mar. 19, 2014) (counsel’s concession of an issue was a tactical decision that helped establish credibility with the jury). Additionally, as counsel explained at the PCRA hearing, Petitioner attempted “to meet what [he] thought was a twelve year old child, to have sexual intercourse with her” and sent “a photograph of [his] erect penis to what [he thought was] a twelve year old child.” (N.T. 12/19/11 at 29:20-25, 30:3-6). Counsel believed the only defense to these acts was the insanity defense, which “[he] pursued vigorously on [Petitioner’s] behalf.” (*Id.* at 30:7-11). Counsel’s decision to pursue an insanity defense was reasonable, and he was not required to pursue an alternative strategy of exploiting weaknesses in the

¹⁵ Petitioner argues that this is one instance of counsel accepting the prosecution’s evidence at face value. (Mem. in Support of Pet. 29 n.90, ECF No. 1-2).

prosecution's case. *See Marshall*, 307 F.3d at 86 (existence of alternative strategies does not prove ineffectiveness).

Accordingly, the Court respectfully recommends denying relief on this claim.

7. Participation in Framing and Conspiracy

Petitioner alleges that counsel helped frame him and participated in a conspiracy to commit oppression and obstruct justice. (Hab. Pet. 14, 24, ECF No. 5). The PCRA Court acknowledged that Petitioner raised this claim in his 1925(b) statement, *see Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 3, but did not address it on the merits. Petitioner also mentioned this claim in his Superior Court brief. (*See Br. for Appellant 22*, ECF No. 42-31). Because the claim plainly lacks merit, the Court need not address whether it has been exhausted. *Roman*, 675 F.3d at 209.

In his Memorandum of Law, Petitioner attempts to support this claim by referring back to his other claims for relief. (*See Mem. in Support of Pet. 72 n.342*, ECF No. 1-2). Because these other claims lack merit, they do not support Petitioner's allegations of conspiracy. As discussed throughout this ineffective assistance section, counsel engaged in effective advocacy by pursuing an insanity defense at trial, and thereafter advising Petitioner to agree to a favorable plea deal when one was offered. *See, e.g., supra* Parts VI.B.1 and VI.B.2. The allegation that counsel actively worked against Petitioner's best interests, and sought to frame or otherwise "obstruct" him, is completely meritless. Therefore, Petitioner is not entitled to relief.

The Court respectfully recommends denying relief on this claim.

8. Failure to Withdraw Guilty Plea

Petitioner asserts counsel was ineffective because he "would not withdraw the plea at the request of petitioner." (Hab. Pet. 13, ECF No. 5).

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The PCRA Court explained, “Counsel cannot be deemed ineffective for failing to file a motion to withdraw a guilty plea unless the appellant either requested counsel to do so or made counsel aware of grounds to support such a motion.” *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 11-12 (citing *Commonwealth v. Gonzalez*, 840 A.2d 326, 331 (Pa. Super. 2003)). The PCRA Court found that Petitioner never requested that counsel file a motion to withdraw the guilty plea, and Petitioner did not file such a motion. *Id.* at 11. Petitioner did not raise this claim in his Superior Court brief. Notwithstanding any failure to exhaust, this Court considers the merits of this claim, and respectfully recommends denying relief. 28 U.S.C. § 2254(b)(2); *Roman*, 675 F.3d at 209.

The state court’s determination that Petitioner did not ask counsel to file a motion to withdraw the plea is a finding of fact, presumed to be correct. 28 U.S.C. § 2254(e)(1). Petitioner has not rebutted this finding with clear and convincing evidence. Accordingly, because this Court must accept as true that Petitioner did not ask counsel to withdraw his plea – the sole basis for his claim – Petitioner’s claim must fail as factually deficient. *Cf. Kaylor v. Coleman*, No. 13-69, 2014 WL 1998232, at *11 (E.D. Pa. May 15, 2014) (petitioner’s claim that counsel failed to withdraw guilty plea failed when state court found as fact that petitioner did not ask counsel to withdraw guilty plea).

Thus, I respectfully recommend denying relief on this claim.

9. Failure to File Appeal

Finally, Petitioner asserts that counsel was ineffective for failing to file an appeal after Petitioner requested that he do so. (Hab. Pet. 14, ECF No. 5).

The PCRA Court explained that to establish *per se* ineffectiveness, Petitioner must prove that he asked counsel to file a direct appeal, and that counsel disregarded that request. *Kokinda*,

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No. CP-39-CR-00004541-2007, slip op. at 10 (citations omitted). The PCRA Court credited counsel's testimony that Petitioner never expressed a desire to appeal, and concluded that "Attorney Charles was never asked to file an appeal." *Id.* The PCRA Court further concluded that counsel had no obligation to consult with Petitioner about an appeal. *Id.* It explained, "Counsel only has a constitutionally imposed duty to consult with the appellant about an appeal if he has 'reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interest[ed] in appealing.'" *Id.* at 11 (citing *Commonwealth v. Carter*, 21 A.3d 680, 683 (Pa. Super. 2011) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000))). The PCRA Court explained that Petitioner's plea significantly reduced his potential ten to twenty year sentence and provided him "substantial benefits." *Id.* Accordingly, "[a] rational defendant would not have filed an appeal, and counsel had no reason to expect otherwise." *Id.*

When a petitioner alleges ineffectiveness based on counsel's failure to appeal, "a more specific version of the *Strickland* standard applies." *Harrington v. Gillis*, 456 F.3d 118, 125 (3d Cir. 2006) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000)). In *Flores-Ortega*, the Supreme Court declined to institute a *per se* rule finding counsel performed deficiently under *Strickland* whenever counsel fails to consult with the client regarding an appeal. Instead, the Supreme Court adopted a case-by-case analysis, so that evaluating alleged "deficient performance" under *Strickland* requires a two-step analysis. *Id.* (citing *Flores-Ortega*, 528 U.S. at 478).

First, the Court must determine whether counsel consulted with his client about filing an appeal. *Flores-Ortega*, 528 U.S. at 478. If counsel has consulted with the client, then the Court should determine whether counsel followed the client's express instructions. *Id.* If counsel has

not consulted with the client, “the court must in turn ask a second, and subsidiary, question: whether counsel’s failure to consult with the defendant itself constitutes deficient performance.”

Id. In determining whether a failure to consult constitutes deficient performance, the Supreme Court recognized that “counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is a reason to think either (1) a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”

Flores-Ortega, 528 U.S. at 480. To establish prejudice from counsel’s failure to consult with a petitioner, “a defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” *Harrington*, 456 F.3d at 125 (quotation and citation omitted).

In this case, Petitioner has not established that the PCRA Court’s decision was contrary to, or an unreasonable application of, clearly established federal law. The Court concludes Petitioner is not entitled to relief on either ground.

The PCRA Court’s decision was not contrary to clearly established federal law because it analyzed whether counsel had a duty to consult Petitioner under the *Flores-Ortega* standard.¹⁶

¹⁶ The Court is mindful that the PCRA Court initially used a test derived from *Commonwealth v. Harmon*, 738 A.2d 1023 (Pa. Super. 1999), and that the *Harmon* test is contrary to federal law. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 10 (quoting *Commonwealth v. Markowitz*, 32 A.3d 706, 715 (Pa. Super. 2011)); see *Harrington v. Gillis*, 456 F.3d 118, 126 (3d Cir. 2006). Nonetheless, the PCRA Court’s decision is not contrary to *Flores-Ortega*; after discussing the test derived from *Harmon*, the court continued its ineffectiveness analysis and applied the *Flores-Ortega* standard by examining whether counsel had a constitutional duty to consult with Petitioner regarding an appeal. Thus, because Petitioner’s failure to request an appeal was not dispositive of his ineffectiveness claim, this case is distinguishable from cases where Pennsylvania courts applied a standard contrary to *Flores-Ortega*. See *Harrington*, 456 F.3d at 126 (state court’s decision was contrary to federal law when defendant’s failure to ask counsel to file an appeal was dispositive); *Lewis v. Johnson*, 259 F.3d 646, 658-59 (3d Cir. 2004) (same). Accordingly, the PCRA Court’s reasoning and result

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See Kokinda, No. CP-39-CR-00004541-2007, slip op. at 11; *Schwartz v. Colleran*, 287 F. App'x 218, 223 (3d Cir. 2008) (*Flores-Ortega* is clearly established federal law for AEDPA purposes); *Green v. Mazurkiewicz*, No. 10-282, 2012 WL 895491, at *12 (W.D. Pa. Feb. 8, 2012), *report and recommendation adopted*, No. 10-282, 2012 WL 895436 (W.D. Pa. Mar. 15, 2012) (state court's decision was not contrary to federal law when it found petitioner did not instruct his attorney to file an appeal, respondents did not point to evidence that consultation occurred, and state court analyzed whether counsel had a duty to consult under *Flores-Ortega*).

The PCRA Court's decision was also not an unreasonable application of clearly established federal law. The PCRA Court's conclusion that counsel had no duty to consult with Petitioner was reasonable.¹⁷ There is no credible evidence that Petitioner demonstrated that he was interested in appealing, and the state court found as a fact that Petitioner never asked counsel to file an appeal, or otherwise expressed a desire to appeal. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 10. This finding is entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e)(1); *cf. Green v. Mazurkiewicz*, 2012 WL 895491, at *12. Additionally, the PCRA Court found that a rational defendant would not have filed an appeal, explaining that Petitioner faced a

did not contradict *Flores-Ortega*, and its decision was not contrary to federal law. *See Jamison*, 544 F.3d at 274-75.

¹⁷ The PCRA Court did not explicitly state whether a consultation occurred, but its opinion points to a finding of no consultation. *See Robinson v. Beard*, 762 F.3d 316, 324 (3d Cir. 2014) (Section 2254(d)(1) "demands that state-court decisions be given the benefit of the doubt . . .") (quotation marks and citation omitted). The PCRA Court cited *Commonwealth v. Carter*, which explained that a court must determine whether counsel consulted with the client, and if not, whether the failure to consult constitutes deficient performance based on the *Flores-Ortega* factors. *See Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 11 (citing *Commonwealth v. Carter*, 21 A.3d 680, 683 (Pa. Super. 2011)). Given that the PCRA Court found Petitioner made no express instructions to appeal, if a consultation did occur, counsel would not be ineffective, and there would be no need to analyze whether he had a constitutional duty to consult. Because the PCRA Court was aware of the necessary analysis under *Flores-Ortega* and proceeded to determine whether counsel had a constitutional duty to consult with Petitioner, it implicitly found that no consultation occurred.

sentence of ten to twenty years, entered a negotiated plea with which the sentencing court complied, and pursuant to that plea, received a sentence of thirty-six to eighty-four months. *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 11. One “highly relevant factor” in the determination of whether counsel had a duty to consult is whether the conviction follows a guilty plea. In that case, “the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waive some or all appeal rights.” *Flores-Ortega*, 528 U.S. at 480; *see also Bilal v. Walsh*, No. 11-1973, 2015 WL 10372429, at *9 (E.D. Pa. May 20, 2015) (fact that petitioner received expected sentence pursuant to plea “weighs in favor of finding there was no duty to consult”). Because the state court reasonably concluded that counsel had no duty to consult with Petitioner, counsel’s failure to do so was not deficient.

Accordingly, I respectfully recommend denying relief on this claim.

C. Ground Three: Due Process Violations

In Ground Three, Petitioner asserts two due process claims: (1) that the Commonwealth misrepresented material facts in its charging documents (Hab. Pet. 27, ECF No. 5); and (2) that the Commonwealth violated *Brady* (*id.* at 28). He is not entitled to relief on either claim.

1. Misrepresentation of Facts in Charging Documents

Petitioner argues the Affidavit of Probable Cause, Criminal Complaint, and Criminal Information: (1) were deficient and failed to apprise him of the charges (Mem. in Support of Pet. 74-80, ECF No. 1-2); and (2) represented fragments of the “age-oriented role-play cybersex chat . . . as though they were literal sexual solicitations to a literal actual minor on an ordinary chat room” (Hab. Pet. 27, ECF No. 5). These allegations implicate Petitioner’s federal due process right to be notified of the nature of the charges against him prior to trial. Because the claim is

exhausted (*see* Statement of Matters Complained of on Appeal 12-13, SCR No. 114; Br. for Appellant 32-37, ECF No. 42-31), but was not addressed by the state courts, review is *de novo*. *Breakiron*, 642 F.3d at 131.

Due process requires that a charging paper “sufficiently apprise[] the defendant of what he must be prepared to meet.” *Virgin Islands v. Moolenaar*, 133 F.3d 246, 248 (3d Cir. 1998) (quotations omitted); *see also Bae v. Peters*, 950 F.2d 469, 478 (7th Cir. 1991) (no matter how a state chooses to charge a defendant, due process only requires that a criminal defendant be given notice of the offense with which he is charged, in order for him to adequately prepare a defense.).

The Court concludes these documents were not deficient, and facts were not misrepresented as Petitioner suggests. These documents clearly list the charges against Petitioner and state that Petitioner solicited undercover agents from the Pennsylvania Office of the Attorney General, rather than a “literal actual minor.” (*See* SCR No. 1, SCR No. 2). For instance, the Criminal Information notified Petitioner that he was charged with two counts of Unlawful Contact with a Minor under 18 Pa. Cons. Stat. § 6318(a)(1) for engaging in sexually explicit communications with undercover agents from the Pennsylvania Attorney General’s Office, two counts of Unlawful Contact with a Minor under 18 Pa. Cons. Stat. § 6318(a)(4) for sending images of a male’s exposed genitalia to undercover agents from the Pennsylvania Attorney General’s Office, and one count of Criminal Use of a Communication Facility under 18 Pa. Cons. Stat. § 7512(a) for using a computer to facilitate the commission of these offenses. (Information, SCR No. 2). Thus, Petitioner was on notice of the need to defend himself against charges of Unlawful Contact with a Minor and Criminal Use of a Communication Facility.

Accordingly, the Court respectfully recommends that this claim be denied.

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2. *Brady and Trombetta* Violations¹⁸

Petitioner asserts *Brady* violations, contending the Commonwealth failed to provide: the surveillance tape from the Blockbuster store where he was arrested; recordings of undercover agents' phone calls with Petitioner; the "identities or decoy status" of alleged decoys used in the Blockbuster store the day Petitioner was arrested; and information about "the agent's ip [sic] addresses, aliases, and other contextual information." (Hab. Pet. 28, ECF No. 5). The Commonwealth counters that the state court's conclusion that Petitioner's entry of a guilty plea waived his right to raise *Brady* arguments is consistent with federal law.¹⁹ (Answer 25, ECF No. 43).

The PCRA Court did not address the *Brady* claim on the merits.²⁰ Because it is properly exhausted, review is *de novo*, and the state court's factual findings are presumed correct unless rebutted by clear and convincing evidence. *Breakiron*, 642 F.3d at 131.

To show that a *Brady* violation occurred, a petitioner must show that: "(1) evidence was suppressed; (2) the evidence was favorable to the defense; and (3) the evidence was material to guilt or punishment." *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006). In the context of

¹⁸ Petitioner has not established that the Commonwealth no longer possesses the evidence in question. Thus, the Court will construe this claim as a *Brady* claim and will not discuss *Trombetta*. See, e.g., *Abdul-Salaam v. Beard*, No. 4:02-CV-2124, 2008 WL 2704605, at *15 (M.D. Pa. July 7, 2008) (citation omitted) (*Brady* concerns evidence the government still possess; *Trombetta* governs when the government no longer possesses the evidence in question).

¹⁹ Because Petitioner pled guilty, the standard is not whether the alleged suppression affected the fairness of Petitioner's trial prior to the entry of the plea, but rather, whether the alleged suppression affected Petitioner's decision to plead guilty. See *infra* at 33.

²⁰ The PCRA Court acknowledged that Petitioner raised a *Brady* claim, see *Kokinda*, No. CP-39-CR-00004541-2007, slip op. at 3-4, but never analyzed it. The Commonwealth and Petitioner treat the PCRA Court's resolution of a sufficiency of the evidence claim as its resolution of Petitioner's *Brady* claim. (Compare *id.* at 14 n.28 with Answer 25, ECF No. 43; see also Reply 29, ECF No. 29). Without indication from the PCRA Court that it construed Petitioner's *Brady* claim as a sufficiency claim, the Court is unwilling to make this leap.

a guilty plea, material impeachment evidence does not have to be disclosed prior to the entry of a plea agreement. *United States v. Ruiz*, 536 U.S. 622, 623 (2002). Whether a petitioner who pleads guilty is entitled to other *Brady* material before pleading remains an open question in the Third Circuit. *Shapiro v. United States*, No. 14-1316, 2017 WL 896987, at *5 (D.N.J. Mar. 6, 2017) (citing *United States v. Brown*, 250 F.3d 811, 816 n.1 (3d Cir. 2001)). Assuming for the sake of argument that *Brady* applies in the guilty plea context, *see Brown*, 250 F.3d at 816 n.1, evidence is material in the guilty plea context only if “but for the failure to disclose the *Brady* material, the defendant would have refused to plead guilty and would have gone to trial.” *Shapiro*, 2017 WL 896987, at *5 (quoting *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995)); *see also United States v. Hammer*, 404 F. Supp. 2d 676, 795-96 (M.D. Pa. 2005).

In the instant case, *Brady* did not mandate disclosure of the evidence in question, which Petitioner says would have supported an age-play defense. (Mem. in Support of Pet. 80, ECF No. 1-2). *Brady* does not require disclosure of information that might merely form the groundwork for possible arguments or defenses. *Carter v. Parker*, No. 13-4260, 2014 WL 3964924, at *32 (E.D. Pa. Aug. 12, 2014); *see also Maynard v. Gov’t of Virgin Islands*, 392 F. App’x 105, 115 (3d Cir. 2010) (“*Brady* is not a discovery rule, and it is neither designed nor intended to enable the defendant to present the most effective case possible.”). Furthermore, Petitioner has failed to prove the materiality of this evidence because it would not have impacted his plea. (See N.T. 11/10/09 at 306:10-25; *see generally* N.T. 11/12/09).

Accordingly, I respectfully recommend denying relief on this claim.

D. Ground Five: PCRA Court Error

Petitioner argues in Ground Five that the PCRA Court violated his due process and equal protection rights by denying him his case file and accurate transcripts of proceedings. (Hab. Pet.

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3, 36, ECF No. 5). To the extent that Ground Five raises an independent claim, it is not cognizable. Alleged errors in PCRA proceedings do not give rise to habeas relief. *See Lambert*, 387 F.3d at 247; *Hassine*, 160 F.3d at 954; *Gattis v. Snyder*, 46 F. Supp. 2d 344, 384 (D. Del. 1999) (“Claims attacking a state court’s application of post-conviction procedures do not state a basis for a federal claim under 28 U.S.C. § 2254.”).

Accordingly, to the extent Ground Five raises an independent claim, I respectfully recommend that it be dismissed as non-cognizable.

V. CONCLUSION

As fully explained herein, I respectfully recommend that Petitioner’s petition for writ of habeas corpus be denied.²¹

Therefore, I respectfully make the following:

²¹ Petitioner has also filed a Petition to Provide Discovery (ECF No. 28) and Omnibus Motion for Preliminary Relief (ECF No. 146). These motions will be resolved in a separate Order accompanying this Report and Recommendation.

RECOMMENDATION

AND NOW this 25th day of April, 2017, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without an evidentiary hearing, without the issuance of a certificate of appealability.

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

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-2283

JASON KOKINDA,
Appellant

v.

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

(E.D. Pa. No. 5-13-cv-02202)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO,
Circuit Judges

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

DATE: January 11, 2018
PDB/cc: Jason Kokinda
James P. Barker, Esq.

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

JASON KOKINDA,
Petitioner,

v.

ROBERT GILMORE,
JOSH SHAPIRO,¹ the Attorney General of
the State of Pennsylvania, and
JAMES B. MARTIN, the District Attorney
of the County of Lehigh,
Respondents.

CIVIL ACTION

NO. 13-2202

ORDER

AND NOW, this 30th day of May, 2017, upon consideration of *pro se* petitioner's Motion for Reconsideration of 5-24-17 Order Evading Merits of § 2254 Petition Entirely (Doc. No. 168, filed May 25, 2017), Supplemental Exhibits Proving Asexuality and Moral Innocence (Doc. No. 169, filed May 27, 2017), and Supplemental Exhibits Proving Schizophrenia False (Doc. No. 170, filed May 27, 2017), **IT IS ORDERED** that *pro se* petitioner's Motion for Reconsideration is **DENIED** for the reasons stated in the Order dated May 24, 2017, approving and adopting the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski.²

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

¹ Josh Shapiro became the Attorney General of the State of Pennsylvania on January 17, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Josh Shapiro is substituted for Kathleen Kane as a respondent in this suit.

² Three situations justify granting a motion for reconsideration: (a) an intervening change in the controlling law; (b) the availability of new evidence that was not available when the Court adopted Judge Sitarski's Report and Recommendation; or (c) the need to correct a clear error of law or fact or to prevent "manifest injustice." *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). *Pro se* petitioner has failed to provide the Court with any basis for reconsideration of its Order dated May 24, 2017.

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