

CLD-012

October 12, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-1857

CHRISTOPHER LEE DUCKETT, Appellant

VS.

SUPERINTENDENT BENNER TOWNSHIP SCI; ET AL.

(E.D. Pa. Civ. No. 2-14-cv-03710)

Present: CHAGARES, GREENAWAY, JR. and GREENBERG, Circuit Judges

Submitted is appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1), in the above-captioned case.

Respectfully,

Clerk

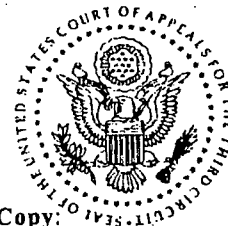
MMW/EGL/slc

ORDER

Appellant's request for a certificate of appealability ("COA") is denied because jurists of reason would not debate the District Court's denial of his claims. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). We make that determination primarily for the reasons explained by the Magistrate Judge and the District Court. We acknowledge that the District Court did not address appellant's claims of insufficiency of the evidence or factual innocence but, having carefully reviewed the record, we conclude that those claims lack debatable merit. Finally, we note that appellant filed a request for a COA in the District Court that is docketed at ECF No. 47. He did not file that document with this Court and it is not docketed in this Court, but we have considered it in reaching our disposition.

By the Court,

s/Michael A. Chagares
Circuit Judge



A True Copy:

Dated: January 18, 2018
SLC/cc: Christopher Lee Duckett
Simran Dhillon, Esq.

Patricia S. Dodszeuweit

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

" E "

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1857

CHRISTOPHER LEE DUCKETT

v.

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

Christopher Duckett,
Appellant

Present: SMITH, Chief Judge, McKEE, AMBRO,
CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE,
SHWARTZ, KRAUSE, RESTREPO, and BIBAS Circuit Judges,
and GREENGERG, Senior Circuit Judge*

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.

*Pursuant to Third Circuit I.O.P. 9.5.3., Judge Greenberg's vote is limited to panel rehearing.

BY THE COURT,

s/ Michael A. Chagares
Circuit Judge

Dated: February 21, 2018
SLC/cc: Christopher Lee Duckett
Simran Dhillon, Esq.

"B"

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

CHRISTOPHER LEE DUCKETT,)
)
 Petitioner)
) Civil Action
 v.) No. 14-cv-03710
)
 MR. DAVID PITKINS,)
 SUPERINTENDENT;)
 THE DISTRICT ATTORNEY OF THE)
 COUNTY OF PHILADELPHIA,)
 SETH WILLIAMS; and)
 THE ATTORNEY GENERAL OF THE)
 STATE [SIC] OF)
 PENNSYLVANIA, KATHLEEN)
 KANE,)
)
 Respondents)

FILED APR - 3 2017

O R D E R

NOW, this 30th day of March, 2017, upon consideration
of the following documents:

- (1) Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254, which form was filed by petitioner pro se on June 12, 2014 ("Petition") (Document 1);
- (2) Amended Petition to Habeas Corpus Pursuant to 28 U.S.C. Sec 2244 File[d] on June 12, 2014, which amended petition was filed by petitioner pro se on November 7, 2014 ("Amended Petition") (Document 13);
- (3) Response to Petition for Writ of Habeas Corpus, which response was filed December 17, 2014 ("Response") (Document 16);
- (4) Supplemental Response to Petition for Writ of Habeas Corpus, which supplemental response was filed August 24, 2015 ("Supplemental Response") (Document 34);
- (5) Amended for Habeas Corpus Relief to Article 1, Section 14, of Pennsylvania Constitution and Under 28 U.S.C. § 2254, which amended petition was filed

ENTERED
APR - 3 2017
CLERK OF COURT

by petitioner pro se on October 19, 2015 ("Second Amended Petition") (Document 36);

- (6) Amended for Habeas Corpus Relief to Article 1, Section 14, of Pennsylvania Constitution and Under 28 U.S.C. § 2254, which amended petition was filed by petitioner pro se on August 10, 2016 ("Third Amended Petition") (Document 38);
- (7) Report and Recommendation of United States Magistrate Judge Henry S. Perkin dated and filed September 30, 2016 ("R&R") (document 39); and
- (8) Objection to Report and Recommendation, which Objections were filed by petitioner pro se on October 28, 2016 ("Objections") (Document 43);

it appearing that the Objections are a restatement of the arguments raised in the Petition and subsequent amendments; it further appearing, after a de novo review of this matter,¹ that the Report and Recommendation of Magistrate Judge Perkin correctly determined the pertinent legal and factual issues presented in the Petition,

¹ The extent of review of a Magistrate Judge's Report and Recommendation is committed to the discretion of the district court. Jozefick v. Shalala, 854 F.Supp. 342, 347 (M.D.Pa. 1994). However, the district court must review de novo those portions of the R&R to which objection is made. 28 U.S.C. § 636(b)(1)(c). The court may "accept, reject, or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F.Supp.2d 667, 669 (E.D.Pa. 2001) (Padova, J.); Rule 72.1(IV)(b) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania.

Furthermore, district judges have wide latitude regarding how they treat recommendations of the magistrate judge. See United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Indeed, by providing for a de novo determination, rather than a de novo hearing, Congress intended to permit a district judge, in the exercise of the court's sound discretion, the option of placing whatever reliance the court chooses to place on the magistrate judge's proposed findings and conclusions. I may accept, reject, or modify, in whole or in part, any of the findings or recommendations made by the magistrate judge. Id.

IT IS ORDERED that the Objections are overruled.²

IT IS FURTHER ORDERED that the Report and Recommendation of Magistrate Judge Perkin is approved and adopted.

IT IS FURTHER ORDERED that the Petition, Amended Petition, Second Amended Petition, and Third Amended Petition are denied.³

² Petitioner spends the bulk of his Objections complaining about trial counsel's failure to present an alibi defense. This claim was thoroughly addressed in the R&R.

Petitioner also complains that trial counsel failed to object to the prosecutor's reference to "ghetto code" in his closing argument, which petitioner claims amounted to prosecutorial misconduct. Specifically, the prosecutor opined that "ghetto code" prevents individuals living in certain neighborhoods from cooperating with police. See R&R at pages 31-32. This claim was also thoroughly addressed by the R&R. Nonetheless, petitioner insists that this statement in the prosecution's closing argument amounted to "vouching" for the credibility of a government witness.

The prosecutor's remark did not amount to improper vouching because it did not draw upon the prosecutor's own integrity or position to boost the witness's credibility. Rather, as explained in the R&R, it was an invited response to the question posed by trial counsel during his closing argument of why the witness did not voluntarily go to the police to provide information.

³ Petitioner renews in his Objections a claim that trial counsel, James Bruno, Esquire, was ineffective by virtue of his "mental state". See Objections at page 43. This claim was first alleged in petitioner's Third Amended Petition, filed without leave after this matter had already been referred to Magistrate Judge Perkin for a Report and Recommendation.

Petitioner alleges that the Disciplinary Board of the Supreme Court of Pennsylvania temporarily suspended Attorney Bruno from the practice of law by an Order dated February 26, 2013. According to petitioner, a physician testified before the Disciplinary Board and diagnosed Attorney Bruno with Attention Deficit Hyperactivity Disorder ("ADHD").

I cannot conclude that Attorney Bruno rendered petitioner with ineffective assistance based alone on the fact that Attorney Bruno was diagnosed with ADHD years later. To establish ineffective assistance of counsel, petitioner must demonstrate that: (a) counsel's performance was so deficient that "counsel was not functioning as the 'counsel' guaranteed the

(Footnote 3 continued):

IT IS FURTHER ORDERED that, because no reasonable jurist could find this ruling debatable, a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case closed for statistical purposes.

BY THE COURT:


James Knoll Gardner
United States District Judge

(Continuation of footnote 3):

defendant by the Sixth Amendment"; and (b) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

The R&R thoroughly assessed each of petitioner's non-defaulted claims for why trial counsel's performance was allegedly deficient. Moreover, petitioner made a disciplinary complaint against Attorney Bruno for his alleged failure to respond to petitioner's inquiries. The Pennsylvania Supreme Court's Office of Disciplinary Counsel dismissed petitioner's complaint after Attorney Bruno informed them that he had met with petitioner numerous times to prepare for trial. See Third Amended Petition, Exhibit C.

Petitioner submitted a document entitled Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania, in which the Disciplinary Board recommended suspending Attorney Bruno's law license for one year based in part on difficulties stemming from Attorney Bruno suffering from ADHD. See Third Amended Petition, Exhibit D. This court may not consider this evidence because it was never presented to the state courts. See Cullen v. Pinholster, 563 U.S. 170, 185, 131 S.Ct. 1388, 1400-1401, 179 L.Ed.2d 557 (2011).

Moreover, petitioner did not present the document to this court until he filed a Third Amended Petition without leave of court, after the matter had already been referred for a Report and Recommendation, and without the opportunity for the Commonwealth to respond to it.

Even if this document had been presented to the state courts and submitted to this court in a timely and appropriate fashion, it would not establish ineffective assistance of counsel. The recommendation indicates that it was based upon a disciplinary complaint against Attorney Bruno made on October 19, 2011, which is more than five and a half years after Attorney Bruno represented petitioner during the period leading up to his March 21, 2006 trial. It is therefore not pertinent to petitioner's case.

the 4600 block of North Sydenham, Philadelphia. Police recovered shotgun wadding and lead pellets from the street, along with black plastic and shotgun wadding attached to the victim's shirt. During their investigation, police concluded that the ballistic evidence came from a 12 gauge shotgun, and the lead balls recovered from the victim were consistent with a Double OO Buckshot. On March 22, 2005, Appellant was ultimately arrested for the aforementioned homicide.

Appellant's jury trial commenced on March 23, 2006. During the Commonwealth's case-in-chief, Eugene Booker testified that on June 23, 2004, he was standing in front of his house, located at 16th and Wingohocking Street, with John Conway (a.k.a. Buddha), his next door neighbor Rob, and other individuals. While they were outside, he was approached by the victim, Mr. Bines, and a fifteen or twenty minute discussion ensued regarding a football league and pitbulls for sale. After the discussion, Mr. Bines stayed because he knew John Conway previous to that day.

On June 24, 2004, between the hours of 1:00 a.m. and 3:00 a.m., Mr. Booker, Ronny Conway (a.k.a. 6-9) and Appellant were standing outside of Mr. Booker's house discussing where to buy the drug "purple". Mr. Booker and Appellant left on bicycles in search of the drug and on their way back home, one of the bicycle tires blew and startled individuals sitting on a porch on the corner of 17th Street. After noticing Mr. Bines on the porch, Mr. Booker asked Mr. Bines if he paid back John Conway. In response, Mr. Bines acknowledged he repaid the debt. To confirm the payment, Mr. Booker and Mr. Bines went to John Conway's house. When they arrived at the house, John Conway told Mr. Booker he received the money from Mr. Bines.

After speaking with John Conway, Appellant inquired into purchasing "powder", and Mr. Bines told them about a place where they could obtain it. While Mr. Booker remained on his front porch, Appellant, Mr. Bines and Ronny Conway drove away in Ronny's vehicle. Approximately three or four minutes later, the men returned and Mr. Booker overheard an argument between Appellant and Mr. Bines. During the argument, Mr. Bines told Appellant, "I ain't trying to burn you". N.T. Trial, 03/23/06, at 91. After Appellant exited Ronny's vehicle, he ran to Louis Bryant's (a.k.a. "Nard") house, located six doors down from Mr. Booker's residence. At this time, Mr. Bines told Mr. Booker he wasn't trying to burn Appellant. Appellant yelled "Hold that n. - - -r. I'm going to shoot him." *Id.* at 92.

While Appellant retrieved his sawed-off shotgun from Mr. Bryant's residence, Mr. Booker told Mr. Bines to run away. Thereafter, Appellant exited Mr. Bryant's residence with the shotgun and asked Mr. Booker where was Mr.

Bines. Booker replied, "I told him to run". *Id.* at 95.

Approximately ten minutes later, Appellant asked Ronny Conway to drive him to the ATM. Ronny and Appellant left, but came back a short time later. Mr. Booker saw both individuals jump out of the car, and Appellant informed Mr. Booker he saw Mr. Bines in the neighborhood. Appellant retrieved his shotgun, and both Ronny Conway and Appellant drove off in Ronny's vehicle. A short time later, Ronny Conway returned alone and asked Mr. Booker, "do you think he is going to do it; do you think he is going to do it?" *Id.* at 96. During this conversation, Mr. Booker heard two gunshots.

After the gunshots, Appellant came running around the corner carrying the shotgun. Appellant asked Mr. Booker to hide the gun and Mr. Booker refused. After Appellant hid the gun in a trash can in front of Mr. Bryant's house, the men argued. Mr. Booker asked Appellant why he shot Mr. Bines over \$20.00, and Appellant replied, "it was the principle". *Id.* at 97. During the argument, John Conway exited his residence and participated in the argument.

Mr. Booker further testified that at some time during the early hours of June 24, 2004, he left the neighborhood with John Conway in search of the crime scene. Later that day, Appellant approached Mr. Booker and stated, "[You] didn't see nothing" and "You can die, too; you can die too." *Id.* at 100-101.

During the Commonwealth's case-in-chief, John Conway testified that on the afternoon of June 23, 2004, while in the presence of Appellant, Mr. Booker and Louis Bryant, he spoke briefly with Mr. Bines concerning the pitbulls. Later that night or early morning, Mr. Bines overheard an argument between Mr. Booker and Appellant. During his direct testimony, Mr. Conway admitted to the accuracy of the following statement he made to police: "Yeah; it was like - - it was after I slept for a while. I came back out. [Mr. Booker] and [Appellant] were arguing about who knew what. [Mr. Booker] was saying something like: Why did you shoot the boy? [Appellant] kept telling him: You don't know nothing." N.T. Trial, 03/24/06, at 81.

During his cross-examination testimony, Mr. Conway testified he never went to work on June 23, 2004, and spent the day partying with Mr. Bryant, Mr. Booker, and Appellant. According to Mr. Conway, he did not know Mr. Bines, nor did he loan him money. *Id.* at 90. He further testified that he never went for a walk with Mr. Booker for the purpose of looking for a crime scene. *Id.* at 91.

Bennett G. Preston, Assistant Medical Examiner of City of Philadelphia testified that Mr. Bines sustained one shotgun wound to the left upper leg, and the left lower abdomen. Six pellets, consistent with a Double 00 Buckshot, were

recovered from Mr. Bines' body. Dr. Preston concluded Mr. Bines' manner of death was homicide.

Commonwealth v. Duckett, 944 A.2d 790 (Pa. Super. 2007)(unpub. mem.); Resp., Ex. A, pp. 1-6 (internal footnotes omitted).

After a jury trial presided over by the Honorable Jane C. Greenspan ("Judge Greenspan") of the Philadelphia Court of Common Pleas, the jury found Petitioner guilty of first degree murder, carrying a firearm without a license, and possession of an instrument of crime. On May 30, 2006, Petitioner was sentenced to a term of life imprisonment for first-degree murder, a concurrent term of two to five years' imprisonment for carrying a firearm without a license, and a concurrent term of two to five years for possessing instruments of crime. Petitioner filed a timely post-sentence motion which was denied on July 5, 2006.

Petitioner filed a direct appeal and, following a limited remand providing the trial court with the opportunity to address Petitioner's weight of the evidence claim, the Pennsylvania Superior Court affirmed the judgment of sentence on December 31, 2008. Commonwealth v. Duckett, 965 A.2d 292 (Pa. Super. 2008)(table); Resp., Ex. B. On June 10, 2009, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. Commonwealth v. Duckett, 973 A.2d 1005 (Pa. 2009). Petitioner's judgment of sentence became final on September 8, 2009, upon expiration of the time to file a petition for writ of certiorari with the U.S. Supreme Court. Gonzalez v. Thaler, 132 S. Ct. 641, 653-56 (2012) (judgment becomes final at the conclusion of direct review or the expiration of time for seeking such review); Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000) (same); U.S. S.Ct. R. 13.1.

Petitioner filed a timely counseled petition pursuant to Pennsylvania's Post-

Conviction Relief Act, 42 Pa.C.S. § 9541, et seq. (“PCRA”) on May 11, 2010. Petitioner claimed ineffective assistance of trial counsel based on counsel’s failure to properly communicate with him regarding his case and for failing to investigate and/or present alibi witnesses at trial. The PCRA court allowed several continuances for Petitioner to cure pleading deficiencies because he failed to plead that the witnesses were willing and able to come to court on his behalf or that he was prejudiced by the absence of the witnesses. The PCRA court then provided Petitioner with notice that it intended to dismiss the PCRA petition without a hearing in twenty days. On July 29, 2011, the PCRA court entered an order dismissing the petition. On appeal, the Superior Court affirmed the denial of the petition on January 23, 2013.

Commonwealth v. Duckett, 64 A.3d 284 (Pa. Super. 2013)(unpub. mem.); Resp., Ex. C.

Petitioner did not seek further review in the Pennsylvania Supreme Court.

On April 16, 2013, Petitioner filed a pro se PCRA petition which was dismissed as untimely by the PCRA court on February 24, 2014. Resp., Ex. D; Commonwealth v. Duckett, CP-51-CR-0505591-2005. Petitioner filed an appeal in the Pennsylvania Superior Court on March 24, 2014, and the Superior Court dismissed the appeal on December 11, 2014, for failure to file a brief. Resp., Ex. E.

Petitioner signed the instant Petition on June 10, 2014, and it was docketed by the Clerk of Court on June 12, 2014. See Doc. No. 1. On November 7, 2014, Petitioner filed an Amended Petition.² See Doc. No. 13. Respondents filed a Response on December 17, 2014,

² Petitioner also filed two subsequent Amended Petitions, one docketed on October 19, 2015, and the other on August 10, 2016. No new claims are raised in these Petitions. Although these filings have been considered in our analysis, they are not specifically referenced in this Report and Recommendation. See Doc. Nos. 36, 38.

contending that both the Petition and the Amended Petition be dismissed as time-barred and that equitable tolling does not apply to render them timely. See Doc. No. 16. On December 24, 2014, we ordered Respondents to “file a Response to the Petition addressing the merits of Petitioner’s claims and the issue of exhaustion and procedural default.” See Doc. No. 17. After several extensions of time to file were granted, Respondents filed a Supplemental Response addressing these issues on August 24, 2015.³ See Doc. No. 34.

II. DISCUSSION.

A. The AEDPA’s One-Year Period of Limitation to File Habeas Petitions.

Petitioner’s case must be decided pursuant to the terms of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which was enacted April 24, 1996. Pub.L. 104-132, 110 Stat. 1214. Section 104(2) of the AEDPA amended 42 U.S.C. section 2254, the statute under which this Petition was filed, requires that federal courts give greater deference to a state court’s legal determinations. The AEDPA also amended 28 U.S.C. section 2244, to require that a strict one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court.⁴ However, if direct review of a

³ F. Michael Medway, Esq. (“Attorney Medway”) represented Petitioner at his preliminary hearing. According to Petitioner, because of “monetary problems” he could not retain Attorney Medway after this hearing and the Court appointed James S. Bruno, Esq. (“Attorney Bruno”) to represent him. Am. Pet. at 19. Petitioner, however, became dissatisfied with Attorney Bruno’s representation and was able to privately retain Attorney Medway “several days before trial.” Id. Attorney Medway represented Petitioner at trial, and the Court later appointed Joseph R. Viola, Esq. (“Attorney Viola”) to represent Petitioner on direct appeal and on collateral review. Pet. at 3.

⁴ 28 U.S.C. section 2244 requires that:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for

criminal conviction ended prior to the AEDPA's effective date, a prisoner has one year subsequent to the April 24, 1996-effective date to properly file a habeas action. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). In this case, the applicable starting point to examine the limitation period is the latest date on which the judgment of sentence became final, either by the conclusion of direct review or the expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1).

Petitioner's judgment of sentence became final on September 8, 2009, upon expiration of the time to file a petition for writ of certiorari with the U.S. Supreme Court. Gonzalez v. Thaler, 132 S. Ct. 641, 653-56 (2012) (judgment becomes final at the conclusion of direct review or the expiration of time for seeking such review); Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000) (same); U.S. S.Ct. R. 13.1. In the absence of any statutory or equitable tolling, Petitioner would have been required to file his federal habeas petition on or before September 8, 2010. He signed the instant Petition on June 10, 2014, nearly four years late. However, because the AEDPA's one-year statute of limitations is subject to both statutory and

seeking such review;

(B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

equitable tolling, we must examine whether the instant Petition may be considered timely filed under either concept. 28 U.S.C. § 2244(d) (enumerating statutory tolling provisions); Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir.), cert. denied, 540 U.S. 921 (2003) (holding AEDPA's time limit is subject to the doctrine of equitable tolling, a judicially crafted exception).

1. Statutory Tolling.

After a review of the record, we find that statutory tolling would not give Petitioner a new and extended deadline for the AEDPA's limitation period pursuant to 28 U.S.C. § 2244(d)(1), which would excuse his untimely habeas filing date of June 10, 2014. Petitioner does not establish that he is entitled to the advantage of any of the provisions which trigger the one-year limitation period. He did not suffer any impediment to filing this Petition. 28 U.S.C. § 2244(d)(1)(B). Second, the claims alleged in the Petition are not based on a new constitutional right recognized by the United States Supreme Court made retroactive to cases on collateral review. 28 U.S.C. § 2244(d)(1)(C). Finally, Petitioner has not shown that his claims are based on a factual predicate that could not have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(D).

With respect to Petitioner's PCRA filing, we note that the limitations period will be statutorily tolled for the time during which a "properly filed" application for state post-conviction or other collateral review is pending. See 28 U.S.C. § 2244(d)(2). Petitioner's first PCRA petition was filed on May 11, 2010, during the running of the one-year habeas clock. Because two hundred and forty-five (245) days of the one-year time period had elapsed since Petitioner's judgment of sentence became final on September 8, 2009, the clock was tolled with approximately one hundred and twenty (120) days remaining before expiration. See

Fed.R.Civ.P. 6(a)(1). The Pennsylvania Superior Court affirmed the PCRA court's dismissal of the PCRA petition on January 23, 2013. Thus, the one-year AEDPA limitation clock restarted on February 22, 2013, when the time for filing an appeal with the Pennsylvania Supreme Court expired. See Lawrence v. Florida, 549 U.S. 327, 332 (2007) (tolling ends when PCRA appeal final in state court; no tolling if certiorari petition pending after PCRA). Thus, the deadline for filing a timely federal petition for writ of habeas corpus expired 120 days later, on June 22, 2013.

In addition, we note that Petitioner's second PCRA petition filed on April 16, 2013, did not further statutorily toll the AEDPA limitation clock because it was not timely filed. See Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) (untimely PCRA is not a basis for statutory tolling). Giving Petitioner the benefit of the prison mailbox rule, the present Petition was filed on June 10, 2014, the date he signed and dated the Petition, almost one year after the June 22, 2013 AEDPA deadline for filing a timely federal petition for writ of habeas corpus expired. The Petition is, therefore, untimely even with the benefit of statutory tolling.

2. Equitable Tolling.

However, this Court must also examine whether the AEDPA statute of limitations should be equitably tolled to consider the Petition timely filed. Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002), cert. denied, 540 U.S. 826 (2003)(citing Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 617-18 (3d Cir. 1998)(citation omitted). For the reasons discussed below, we are of the opinion that the limitation period for Petitioner to file a timely habeas petition should be equitably tolled and, therefore, the instant habeas petition should not be dismissed as being untimely .

We first note that we are aware that Courts must be sparing in their use of

equitable tolling. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999). In fact, the United States Court of Appeals for the Third Circuit has held that equitable tolling is proper “only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice.” United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)(citation omitted). “The two general requirements for equitable tolling are: (1) that ‘the Petitioner has in some extraordinary way been prevented from asserting his or her rights;’ and (2) that the petitioner has shown that ‘he or she exercised reasonable diligence in investigating and bringing [the] claims.’” Merritt, 326 F.3d at 168 (citing Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), cert. denied, 534 U.S. 944 (2001)). Mere excusable neglect is not sufficient. Miller, 145 F.3d at 618 (quoting New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1126 (3d Cir. 1997) and citing Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990)).

Here, Petitioner alleges that he is entitled to the benefit of equitable tolling because he relied on his PCRA counsel’s advice to file a second PCRA petition instead of a habeas petition in this Court after his first PCRA petition was dismissed. In support of his position, Petitioner cites Holland v. Florida, 560 U.S. 631 (2010), and attaches a letter, dated January 25, 2013, from his former counsel, Joseph R. Viola, Esquire, addressed to him and Gloria Duckett. This letter states in pertinent part:

I regret to report that the Superior Court has affirmed Judge Lerner’s dismissal of Chris’s [Petitioner] P.C.R.A. petition. The Court’s memorandum is enclosed. The only method of challenging the Superior Court’s decision in the Pennsylvania Courts would be to file a Petition for Allowance of Appeal to the Supreme Court. The Supreme Court agrees to review only a few cases a year, and I do not recommend filing such a Petition.

There are still four months available to file a timely second P.C.R.A. petition. If you wish to make another attempt to use Terrence Peters’ testimony,

there may be a way to use a second petition to do so. If you decide to do this I suggest you retain a new attorney. I had no success in dealing with Mr. Peters and I could not ethically offer him as a witness in court since he told me he didn't remember anything.

The next level of review would be in the federal courts by means [of] a petition for writ of habeas corpus. The federal district court might appoint counsel to represent Chris if he files such a petition. I do not handle federal habeas cases. Approximately eight (8) months of the one-year statute of limitations for filing a federal petition have already been used up. The "clock" will start again on February 22, 2012, 30 days after the Superior Court's decision. The filing of a second P.C.R.A. would stop the "clock" until the state court proceedings on that petition are concluded.

Another thing I would like to point out is that retaining a new attorney would permit the additional arguments that I provided ineffective assistance of counsel on direct appeal and in the P.C.R.A. proceedings. A lawyer is not permitted to allege his own ineffectiveness. Given the importance of this matter, that is certainly another option that needs to be considered.

Am. Pet., Ex. D. Because of this advice, Petitioner contends that he is entitled to equitable tolling while he pursued and appealed the denial of his second PCRA petition in state court.

In determining whether extraordinary circumstances exist to warrant the application of equitable tolling, this Court will first examine Petitioner's due diligence in pursuing the matter under the specific circumstances he faced. Traub v. Folio, No. 04-386, 2004 WL 2252115, at *2 (E.D. Pa. Oct. 5, 2004) (citing Schleuter v. Varner, 384 F.3d 69 (3d Cir. 2004) (affirming dismissal of habeas petition as time barred and not entitled to equitable tolling because lengthy periods of time had elapsed following his conviction before he sought relief). It is Petitioner's burden to show that he acted with reasonable diligence and that extraordinary circumstances caused his petition to be untimely.) Id. "The standard is not 'extreme diligence' or 'exceptional diligence,' it is reasonable diligence. . . . [T]he district court should ask: did the petitioner act as diligently as reasonably as could have been expected *under the circumstances?*"

Ragan v. Horn, 411 F. App'x 491, 493-494 (3d Cir. 2011)(citations omitted, emphasis in original).

Upon review of the record, we are of the opinion that Petitioner did pursue his appeal rights “as reasonably as could have been expected under the circumstances.” Id. As outlined above, the procedural history of this case indicates that Petitioner was diligent in filing his direct appeals and, at least, attempting to be “reasonably” diligent on collateral appeal in filing two PCRA petitions, even though his second PCRA petition was considered untimely. In addition, the record reflects that Petitioner gathered evidence such as affidavits and bank records to support his filings. We, thus, find that Petitioner “exercised reasonable diligence in investigating and bringing [his] claims.” See Merritt, 326 F.3d at 168.

We next move on to determine if “extraordinary circumstances” exist here to warrant equitable tolling. We note that the Third Circuit has held that “[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the ‘extraordinary’ circumstances required for equitable tolling.” Merritt, 326 F.3d at 169 (quoting Fahy, 240 F.3d at 244; see also LaCava v. Kyler, 398 F.3d 271, 276 (3d Cir. 2005)). However, the United States Supreme Court in Holland, 560 U.S. at 631, also discussed the circumstances under which an attorney’s conduct may amount to extraordinary circumstances sufficient to support an equitable tolling determination. In Holland, the Court, while stating that equitable tolling is not warranted for a “garden variety claim of excusable neglect,” rejected as “too rigid” the Eleventh Circuit’s rule that attorney misconduct could amount to an extraordinary circumstance only in cases “bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part.” Holland, 560 U.S. at 633, 649. Rather, the Court directed lower courts to

“exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.”⁵ Id. at 650.

In discussing Holland, the Third Circuit stated in Pabon v. Mahanoy, 654 F.3d 385 (3d Cir. 2011), that “there are no bright lines in determining whether equitable tolling is warranted in a given case. Rather, the particular circumstances of each petitioner must be taken into account.” Pabon, 654 F.3d at 399. The Pabon Court stated that “the relevant inquiry is not whether the circumstance alleged to be extraordinary is unique to the petitioner, but how severe an obstacle it creates with respect to meeting AEDPA’s one-year deadline.” Id. at 401. The Court further stated “[i]n sum, equitable tolling is appropriate when principles of equity would make the rigid application of a limitation period unfair.” Id. at 399; see also Miller, 145 F.3d at 616.

Under the facts of this case, we opine that a rigid application of the limitation period in this case would be unfair and against the principles of equity. As noted, without equitable tolling, Petitioner’s deadline for filing a timely federal habeas petition was June 22,

⁵ In Maples v. Thomas, 132 S. Ct. 912 (2012), the Supreme Court also addressed the issue of an “extraordinary circumstance” and equitable tolling. It, however, considered a different situation from Holland where an attorney abandons his client without notice, and thereby occasions the default. Maples, 132 S. Ct. at 912. The Court determined that when an attorney severs the principal-agent relationship, the attorney no longer acts, or fails to act, as the client’s representative, and his acts or omissions, therefore, “cannot fairly be attributed to [the client].” Id. (quoting Coleman, 501 U.S. at 753).

We do not consider Maples applicable to the instant matter. First, Petitioner does not allege that his attorney abandoned him during collateral review. See Pet.; Am. Pet. In addition, a reading of Attorney Viola’s letter to Petitioner indicates that he advises him that if he intends to file a second PCRA petition, he should retain another attorney because he “could not ethically offer him [Terrence Peters] as a witness in court since he told me he didn’t remember anything.” See Am. Pet., Ex. D. Attorney Viola also informed Petitioner that if he decided to file a federal habeas petition, he should retain new counsel since he does not handle these petitions. Id.

2013. Assuming that, acting on the advice of Attorney Viola, Petitioner filed the second PCRA petition instead of a habeas petition on April 16, 2013, the next pertinent date in our analysis is February 24, 2014, when the PCRA court dismissed the second PCRA petition as untimely filed. As stated in his letter to Petitioner, Attorney Viola specifically advised Petitioner that the “filing of a second P.C.R.A. would stop the ‘clock’ [the limitations period] until the state court proceedings on that petition are concluded.”⁶ See Am. Pet., Ex. D. If Petitioner acted on Attorney Viola’s advice that he had four months left in the one-year filing period and a second PCRA petition would “stop the clock” on the tolling period, it is plausible that Petitioner thought that he timely filed the instant Petition on June 10, 2014. Id. Under these circumstances, we find that the principles of equity would make the rigid application of a June 22, 2013 filing deadline unfair. See Pabon, 654 F.3d at 399. We, thus, find that the limitation period to file a timely habeas petition should be equitably tolled, and the instant Petition should not be dismissed as untimely. The habeas claims Petitioner raises in his Petition and Amended Petition are hereafter addressed.⁷

⁶ We note that Petitioner also filed an appeal in the Pennsylvania Superior Court on March 24, 2014, and the Superior Court dismissed the appeal on December 11, 2014, for failure to file a brief. (Resp., Ex. E.)

⁷ Petitioner also appears to aver that the Court should equitably toll the limitation period because he is “actually innocent.” In McQuiggin v. Perkins, 133 S. Ct. 1924 (2013), the United States Supreme Court concluded that federal habeas petitioners can in “rare” cases overcome a procedural bar or statute of limitations by making a convincing showing of “actual innocence.” McQuiggin, 133 S. Ct. at 1928. To qualify for review under McQuiggin, a petitioner must offer “new reliable evidence - - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - - that was not presented at trial.” House v. Bell, 547 U.S. 518, 538 (2006); Schlup v. Delo, 513 U.S. 298, 324 (1995). The new reliable evidence must convincingly demonstrate “factual innocence, not mere legal insufficiency.” Bousley v. United States, 523 U.S. 614, 623 (1998). Petitioner must demonstrate that, more likely than not, in light of the new evidence, “no reasonable juror would find him guilty beyond a reasonable doubt.” McQuiggin, 133 S. Ct. at 1928 (quoting Schlup, 513 U.S. at 324).

It appears that Petitioner’s McQuiggin arguments are based on trial counsel ineffectiveness for failing to call a man named Terrence Peters to testify at trial that he was with Petitioner elsewhere when the murder occurred and for not presenting his bank records which, he argues, would indicate that someone else withdrew cash from his account through two ATMs on the day of the murder to corroborate Peters’ testimony. Pet., Ex. B.

B. Ineffective Assistance of Counsel Claims.

In his Petition and Amended Petition, Petitioner raises ineffective assistance of trial counsel claims. Claims for ineffectiveness of counsel are governed by Strickland v. Washington, 466 U.S. 668 (1984).⁸ Under Strickland, counsel is presumed effective, and to prevail on an ineffectiveness claim, a petitioner must “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Given this presumption, a petitioner must first prove that counsel’s conduct was so unreasonable that no competent lawyer would have followed it, and that counsel has “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” Strickland, 466 U.S. at 687. In addition, a petitioner must prove prejudice. In order to do so, the petitioner must demonstrate that “counsel’s errors were so serious as to deprive [petitioner] a fair trial, a trial whose result is reliable.” Id. Thus, a petitioner must show a reasonable probability that, but for counsel’s “unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome.” Id. at 694. This determination must be made in light of “the totality of the evidence before the judge or jury.” Id. at 695.

The United States Court of Appeals for the Third Circuit has cautioned that

We, however, need not decide the issue of whether Petitioner’s claim of “actual innocence” should equitably toll the limitation period because we have already determined that Petitioner’s reliance on his attorney’s letter amounted to “extraordinary” circumstances to toll the period. Moreover, we will address the merits of these two claims, infra.

⁸ In Harrington v. Richter, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the United States Supreme Court reaffirmed the continued applicability of the Strickland standard in federal habeas corpus cases. See also Premo v. Moore, 131 S. Ct. 733 (2011).

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

Petitioner must show not only that counsel’s conduct was improper, but also that it amounted to a constitutional deprivation. Petitioner must show that he was deprived of a fair trial. Smith v. Phillips, 455 U.S. 209, 221 (1982); Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992), cert. denied, 508 U.S. 947 (1993) (citations omitted) (stating court must distinguish between ordinary trial error, and egregious conduct that amounts to a denial of due process).

Where the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the previous decision, pursuant to 28 U.S.C. § 2254(d)(1). If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Where the state court’s application of governing federal law is challenged, it must be

shown to be not only erroneous, but objectively unreasonable. Yarborough v. Gentry, 540 U.S. 1, 4, 124 S. Ct. 1 (2003) (*per curiam*) (citations omitted). The Supreme Court elaborated on this standard:

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

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

1. Failure to Investigate Alibi Witness Terrence Peters.

Petitioner first asserts that his trial counsel was ineffective for failing to investigate and present the testimony of alleged alibi witness, Terrence Peters ("Peters"). Am. Pet. at 2-4. In support, Petitioner has submitted, attached to his Amended Petition, an affidavit from Peters dated June 28, 2014.⁹ See Am. Pet., Ex. B. First, we note that to the extent that Petitioner attempts to use this affidavit to support his claim, this Court may not consider the

⁹ In this affidavit, Peters states that he was with Petitioner during the day in question at Great Adventure with their children and that he later met Petitioner around 11:00 p.m. at a party. See Am. Pet., Ex. B. Peters further states that when he arrived at the party, Petitioner and the victim were arguing and Petitioner was accusing the victim of breaking into a house where he was staying and stealing money. Id. After that, Petitioner asked Peters to drive him to an ATM machine and then to 12th and Dauphin Streets where they "hung out" getting high. Id. Peters also states that at about 2:00 a.m., they left and went to "Cecil B. Moore" to another ATM machine and then to 19th and Gingerol Streets to "meet with Mus, Kev, and Nard to get some syrup." Id. Peters added that they stayed there "drinking syrup while they were hustling," and that he left the group, including Petitioner, at about 7:30 a.m. in the morning. Id. He also indicates that he was willing to "come to court and testified, to all of above." Id.

affidavit in evaluating whether the state courts acted reasonably in rejecting the claim that was presented to them because the affidavit was never presented to the state courts. See Cullen v. Pinholster, 563 U.S. 170, 185 (2011). In Cullen, the United States Supreme Court held that evidence introduced in federal court has no bearing on § 2254(d)(1) review. Id. It held further that “[I]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.” Id. Petitioner, for the first time, submits the Peters affidavit, after the Pennsylvania Superior Court already decided the ineffectiveness of counsel issue on its merits. Accordingly, the affidavit cannot be considered on habeas review. Nonetheless, even if it could be considered, the record indicates that Petitioner’s ineffective assistance of counsel claim is meritless.

Petitioner asserts that Peters drove him across town in his car to ATM machines. Am. Pet. at 2. He argues that Peters’ testimony would have placed him far from the site of the murder during the precise time frame in which the chief prosecution witness, Eugene Booker (“Booker”), testified that it occurred. Id. Petitioner claims that he requested counsel to contact Peters and interview him and offer his testimony to rebut the evidence of the Commonwealth and discredit the testimony of Booker. Id. Petitioner maintains that counsel merely told him that “we’ll leave it up to the jury.” Id. The PCRA and Pennsylvania Superior Court rejected this claim because Petitioner failed to demonstrate that Peters was available at the time of trial and was prepared to testify on his behalf. See Commonwealth v. Duckett, No. 2155 EDA 2011 at 9 (Super. Ct. Jan. 23, 2013). The Superior Court, citing Commonwealth v. Wright, 961 A.2d 119,

155 (Pa. Super. 2008), found that counsel was not ineffective,¹⁰ noting that Petitioner admitted in his appellate brief that Peters “[does] not remember anything” that happened on the night of the murder and Peters is not and was not willing to testify for Petitioner.¹¹ Id. (citing Appellant’s Br. at 23-34); see also Commonwealth v. Johnson, 51 A.3d 237, 244 n.6 (Pa. Super. 2012) (“[a]n attorney is not ineffective for failing to put on a witness who was unavailable or unwilling to testify.”). A review of Petitioner’s brief on collateral appeal to the Superior Court from denial of his PCRA petition confirms that Petitioner’s PCRA counsel acknowledged that trial counsel met and spoke with Peters, but Peters told counsel that “it was a long time ago” and he did not remember anything except that “he was there.” PCRA Appeal Br. at 24. In addition, PCRA appellate counsel added that counsel’s investigator contacted Peters but he refused to discuss the case. Id. at 23.

Where a petitioner contends that trial counsel was ineffective for failing to locate or present witnesses, he must show that the witnesses would have been available to testify at the time of trial, and set forth the facts of the testimony that would have been elicited. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.1991) (habeas petitioner must at least allege that witness testimony was forthcoming or available); United States v. Dawson, 857 F.2d 923, 928 (3d Cir.1988) (ineffectiveness claim for failure to call witnesses dismissed where petitioner

¹⁰ In Commonwealth v. Wright, 961 A.2d 119 (Pa. Super. 2008), the Superior Court held that in order to prevail on a claim of ineffective counsel for failure to call a witness, a defendant must prove that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness’s testimony was so prejudicial as to have denied him a fair trial. Id. at 155.

¹¹ As noted earlier, Attorney Viola wrote in a letter to Petitioner, in relevant part, that “I had no success in dealing with Mr. Peters and I could not ethically offer him as a witness in court since he told me he didn’t remember anything.” See Am. Pet., Ex. D.

did not allege that witnesses were ready to volunteer their testimony or, if called, would have testified). Petitioner fails to establish that Peters would have been available to testify at trial to the statements in the recently produced affidavit. In fact, Petitioner testified the opposite at his trial. At trial, the Court asked him: “[a]re there any witnesses that you have not told them [his lawyers] about, that they are refusing to present?” (N.T. 3/27/06 at 39.) Petitioner responded “[N]o.” (Id.) Petitioner also responded to the Court that he was satisfied with his attorney’s representation. (Id. at 39.)

The credibility of the affidavit is also suspect considering Petitioner’s trial testimony and the timing of the submission of the affidavit. In McQuiggin, the Court determined that unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing of “actual innocence.” McQuiggin, 133 S. Ct. at 124. The Court further stated that “[a]s we stated in Schlup,¹² ‘[a] court may consider how the timing of the submission and the likely credibility of [a petitioner’s] affiants bear on the probable reliability of . . . evidence [of actual innocence].’” Id. ; see also House, 547 U.S. at 537. In addition, the Court has held that “[i]t is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed.” Taylor v. Illinois, 484 U.S. 400, 413 (1988).

It is the Petitioner’s burden to first prove that counsel’s conduct was so unreasonable that no competent lawyer would have followed it, and that counsel has “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” Strickland, 466 U.S. at 687. As the state courts correctly determined, Petitioner

¹² 513 U.S. at 332.

fails to meet his burden of proving that counsel's conduct was not unreasonable. Accordingly, we find that this claim lacks merit.

2. Failure to Investigate and Present Thomas Hopper and Edward Ledbetter as Witnesses.

Petitioner next contends that trial counsel was ineffective for failing to investigate and present Thomas Hopper ("Hopper") and Edward Ledbetter ("Ledbetter") as witnesses at his trial. Am. Pet. at 2-4. Petitioner claims that these two men gave statements to the Philadelphia Police Department ("PPD") that they witnessed other individuals speaking to the victim earlier on the night of the murder and could have had a motive to murder him. *Id.*; Def. Br., Ex. F at 19. The Superior Court found that the absence of the testimony from Ledbetter and Hopper did not cause Petitioner "any prejudice whatsoever." Commonwealth v. Duckett, No. 2155 EDA 2011 at 11 (Pa. Super. Jan. 23, 2013.) The Court further determined:

Certainly, the proposed testimony of Messrs. Hopper and Ledbetter concerned innocuous events that occurred hours before Mr. Bines was murdered. Moreover, and contrary to Appellant's claim, there is not even a hint that anyone involved in the above events "had the motive and opportunity to harm [Mr.] Bines." PCRA Petition, 5/11/09, at 20. Further the proposed testimony was cumulative, as Mr. Booker had also testified that Mr. Bines associated with other people on the night of the murder. N.T. Trial, 3/23/06, at 88-89; *see Commonwealth v. Gibson*, 951 A.2d 1110, 1134 (Pa. 2008) ("trial counsel will not be found ineffective for failing to call a witness whose testimony would be cumulative").

Id.

On habeas review, this Court must to review Petitioner's claim to determine if the state courts "unreasonably applied" the clearly established Strickland standard. See Santiago v. Folino, No. 12-4065, 2013 WL 6578778, at *6 (E.D. Pa. Dec. 16, 2013). A habeas court "will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses."

Gov't of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1434 (3d Cir. 1996). Moreover, a trial counsel acting reasonably in failing to call witnesses in question cannot be found to have been ineffective. Henderson v. DiGuglielmo, 138 F. App'x 463, 469 (3d Cir. 2005).

A review of the state court decisions in Petitioner's case and the record before us show that the state courts did not unreasonably apply the Strickland standard. In his statement to the PPD, Ledbetter stated that the last time he saw Petitioner was between 10:30 p.m. and 11:30 p.m. on the night in question, standing on the corner of Wingohocken and Colorado Streets talking to two men. Appellant Br., Ex. C. Ledbetter also stated that he was walking with Hopper when he saw the victim talking with two individuals. Id. When asked how the victim was acting, he answered that he looked "normal" and that he and Hopper just kept walking when he saw the three men. Id. Hopper's statement to the PPD is very similar to Ledbetter's statement. Hopper stated that the victim was his cousin and the last time he saw him was approximately between 11:00 p.m. and 11:30 p.m. on the night of the murder. Appellant Br., Ex. C at 10. He stated further that he was with Ledbetter when he saw the victim leaning on a bike at Wingohocken and Colorado Streets talking to two guys. Id. He stated that the victim said to him, "[w]hat's up cuz, for [you] ain't speaking. I told him to get off the bike and speak to me. Then me and Ed just left." Id.

Any testimony from Ledbetter and/or Hopper would not, as the Superior Court determined, have been relevant because anybody they saw with the victim was before his murder. See Appellant Br., Ex. C at 10. Such testimony would not have changed the outcome of the proceedings because nothing in these statements shows that anyone else had motive to kill the victim. In fact, these statements only indicate that Ledbetter and Hopper saw the victim earlier

that night talking to other individuals, and Ledbetter described the victim as acting “normal.” Id. We also agree with the Superior Court’s conclusion that the “proposed testimony was cumulative, as Mr. Booker had also testified that Mr. Bines associated with other people on the night of the murder.” See Duckett, No. 2155 EDA 2011 at 11 (citing N.T. 3/23/06 at 88-89).

The standard for effective or deficient performance of counsel is an objective standard of reasonableness, viewed from the attorney’s perspective at the time, without “the distorting effects of hindsight.” See Strickland, 466 U.S. at 687; Duncan v. Morton, 256 F.3d 189, 200 (3d Cir. 2001). In this matter, that trial counsel’s performance cannot be deemed deficit for failure to offer testimony from Ledbetter and Hopper. Even assuming that trial counsel’s failure to investigate Ledbetter and Hopper’s testimony rose to the level of deficient performance, we cannot find the Superior Court’s application of Strickland unreasonable because Petitioner has failed to show any prejudice stemming from such a lapse. See Duncan, 256 F.3d at 201. Accordingly, this claim must be denied.

C. Procedurally Defaulted Claims.

Petitioner also raises eight claims which should be dismissed as procedurally defaulted. These claims are: 1) ineffectiveness of trial counsel for failure to call Renee North-Robinson as a witness; 2) failure of trial counsel to prepare for trial; 3) failure of trial counsel to present evidence that Petitioner was using an ATM machine at the time of the murder; 4) failure of trial counsel to cross-examine Booker with his preliminary hearing testimony; 5) failure of trial counsel to object to the prosecutor’s closing argument; 6) failure of trial counsel to object when the prosecutor elicited hearsay testimony from Booker; 7) failure of trial counsel to argue

that a juror should be dismissed; and 8) trial court error for denying Petitioner counsel of his choice.

Because Petitioner failed to raise any of these claims in any PCRA petition or on PCRA appeal before the state courts, they are all procedurally defaulted and unreviewable by this Court. See O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (“fair presentation” requires that a Petitioner present his claim through “one complete round of the State’s established appellate review process”). Review of a procedurally defaulted claim is permitted in extremely narrow circumstances, where the petitioner can show either: (1) cause for the default and actual prejudice; or (2) that failure to consider the claim will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 749 (1991).

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

In Martinez v. Ryan, 132 S. Ct. 1309 (2012), the Supreme Court examined whether ineffective assistance at the initial review of a collateral proceeding on a claim of ineffective assistance at trial can provide cause for a procedural defect in federal habeas proceedings. Id. at 1315. This case recognized a narrow exception to the Coleman rule (that

ineffective assistance of counsel at the state collateral review level could not establish cause to excuse procedural default), holding that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” Id. at 1309. Thus, a PCRA claim for ineffective assistance of trial counsel during an initial state collateral review may qualify as “cause” to excuse the default if: (1) as a threshold matter, the state requires a prisoner to bring an ineffective counsel claims in a collateral proceeding; (2) the state courts did not appoint counsel at the initial review collateral proceeding for an ineffective-assistance-at-trial claim; (3) where appointed counsel at the initial-review collateral proceeding was ineffective under Strickland, 466 U.S. at 668; and (4) the underlying ineffective-assistance-at-trial claim is substantial. Martinez, 132 S. Ct. at 1315-18. The Supreme Court in Martinez advised that this exception is a “narrow” one, and that outside of these “limited circumstances,” Coleman remains the law. Id. at 1320; see also Norris v. Brooks, 794 F.3d 401, 404–05 (3d Cir. 2015), cert. denied, 136 S. Ct. 1227 (2016). Each of Petitioner’s procedurally defaulted claims are hereafter examined to determine whether any meet the Martinez exception to establish cause for Petitioner’s procedural default of these claims.

1. Failure to Call Renee North-Robinson as a Witness

Petitioner asserts that trial counsel was ineffective for failing to call Renee North-Robinson (“North-Robinson”) as a witness to establish that other individuals had a motive to harm the victim. Am. Pet. at 2-3. North-Robinson testified that she last saw the victim, who was her fiancé, on Sunday, Father’s Day, when they walked to a local park. N.T. 3/24/06 at 119. She testified further that while they were at the park, two men “approached [the victim] about a bike or something. He shunned them away. I took it to mean nothing other than that. Then we went

back to his sister's house, and I left." Id. When asked if the victim had an argument with the two men about the bike, Robinson answered, "words." (Id. at 120.) She went on to give a description of the two men and stated that neither was the Petitioner. (Id.)

Thus, the jury had the benefit of hearing testimony that other people may have had some kind of disagreement with the victim. However, such testimony did not establish that anyone else had a motive to murder the victim. This claim, however, clearly is not "substantial" under Martinez nor can Petitioner establish that trial counsel was ineffective under Strickland because counsel called North-Robinson as a witness to testify at trial. See N.T. 3/24/06 at 118-120. Accordingly, because counsel offered Robinson's testimony at trial, his performance cannot be deemed "deficient" under Strickland's first prong, and Petitioner cannot meet the Martinez exception to establish cause for his procedural default of this claim.

2. Failure to Prepare for Trial

Petitioner next maintains that trial counsel failed to meet with him and prepare for trial. Pet. at 1. Petitioner raised this claim in his PCRA petition and the PCRA court rejected it as meritless. On PCRA appeal, Petitioner failed to raise this ineffectiveness of counsel claim as a separate claim for relief, therefore the Superior Court did not review it. See Duckett, No. 2155 EDA 2011.¹³ Because the default occurred on collateral appeal and not during the initial review of Petitioner's PCRA petition, Petitioner is not entitled to relief under Martinez. See Martinez, 132 S. Ct. at 1320 (Martinez exception "does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings . . . "); see also

¹³ The Court noted that Petitioner "alternatively pleaded that counsel was ineffective for failing to 'investigate' his case." Duckett, No. 2155 EDA 2011 at 8 n.4. Petitioner did not, however, raise the instant claim as a distinct ground for relief.

Fiorentino v. Glunt, CIV.A. No. 3255, 2015 WL 1055798, at *6 (E.D. Pa. Mar. 11, 2015).

This claim is also without merit. The Superior Court, its decision regarding whether trial counsel was ineffective for failing to investigate his case, found that Petitioner's claim was "refuted by Petitioner's own exhibits." Opinion, Learner, J., 12/6/11, at 4 (attached as an Exhibit to Def.'s Supp. Resp.) For support of this claim, Petitioner appends to his Petition a petition he filed with the Office of the Disciplinary Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania (the "Board") where he alleges that trial counsel failed to respond to his calls or letters regarding his case. Am. Pet., Ex. C. However, Petitioner also include a letter dated February 23, 2006, from the Board dismissing his complaint. Id. The Board notified Petitioner that they had spoken with, James Bruno, Esq.¹⁴ and that he had informed them that he visited Petitioner twice at the prison and that one of his investigators was scheduled to meet with him that week. Id. In addition, Attorney Bruno had planned to meet with Petitioner in prison to prep for trial. Id. Moreover, the Board stated that according to the docket entries of Petitioner's case, "Bruno had appeared at court dates and your case has been continued for various reasons." Id. Furthermore, as highlighted earlier, at a colloquy before the trial court, Petitioner stated that he was satisfied with the representation of his counsel. See N.T. 3/27/06 at 38. In light of the above, this claim is meritless under Strickland.

3. Failure to Present Evidence that Petitioner Was Using an ATM at the Time of the Murder

Petitioner claims that trial counsel was also ineffective for failing to introduce

¹⁴ Attorney Medway represented Petitioner prior to trial, but apparently because Petitioner could no longer afford his services, the Court appointed Attorney Bruno to represent Petitioner on May 31, 2005. However, prior to trial, Petitioner was able to privately retain Attorney Medway who represented him through trial.

alibi evidence that he was withdrawing money from an ATM machine at the time of the murder. Pet. at 1. In support of this contention, Petitioner attaches a copy of his bank records from Citizen's Bank indicating transactions at ATM machines on the day of the murder, June 24, 2005. Am. Pet., Ex. A. We again note that to the extent that Petitioner attempts to use bank records to support his claim, this Court may not consider these records in evaluating whether the state courts acted reasonably in rejecting the claim that was presented to them because the records were never before the state courts. See Cullen, 563 U.S. at 185. The Cullen Court determined that "[I]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." Id. For the first time before any court, Petitioner submits bank records for this Court's habeas review but these records cannot be considered on habeas review because they were never presented to any state courts. Nonetheless, even if we could consider the records, this procedurally defaulted claim cannot meet the Martinez exception to establish "cause" to excuse the default. See Martinez, 132 S.Ct. at 1318-19.

The records reflect withdrawals of \$61.75 on June 24, 2005, from an ATM on 4524 Germantown Avenue in Philadelphia, and \$31.50 on this same date from 1925 Cecil B. Moore Avenue. Am. Pet., Ex. A. These records do not show the times during June 24, 2005 that the withdrawals were made. Id. Petitioner does assert that the ATM machines would have shown pictures of him and given the time and date of the withdrawals. Pet. at 1. We, however, agree with Respondents that Plaintiff cannot meet the "highly demanding" standard of Strickland with this claim because a Strickland claim cannot be based on mere speculation. See Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); see also Campbell v. Burris, 515 F.3d 172,

184 (3d Cir. 2008). Petitioner fails to explain or establish how this alleged error could have had a “reasonable probability” of affecting the outcome of the his trial. Strickland, 466 U.S. at 694.

Moreover, any attempt to present an alibi defense on the basis of these bank records at trial would have failed under Pennsylvania law because an alibi defense is a “defense that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party.” Commonwealth v. Johnson, 966 A.2d 523, 538 n.5 (Pa. 2009); see also Commonwealth v. Ali, 10 A.3d 282, 316 (Pa. 2010). In the instant case, the ATM at 4524 Germantown Avenue was located several blocks from the murder scene and therefore did not render it “impossible” for him to have committed the murder. Id.

In addition, any evidence that Petitioner withdrew money from these ATM machines is consistent with Booker’s testimony. Booker testified that Petitioner came out of a house with a sawed-off shotgun looking for the victim. N.T. 3/23/06, at 94. Booker stated that he told the victim to run and when asked by Petitioner: “why you ain’t hold [sic] him” stated that “I ain’t holding nobody so you can shoot him.” Id. at 95. He testified that “[m]aybe ten minutes passed. He asked Ronny to drive him to the MAC machine to get some money. They got in the car and went toward Broad Street, down Wingohocking.” Id. Booker testified further:

The car came back up toward 16th Street. They [Petitioner and Ronny] came down, and they jumped out of the car, and [Petitioner] said: I see that n - - - er; I see him. I told Ronny- I gave him a hand motion, first telling him to cut the car off, and then to come over to me. He did that. When he almost got to me, the Defendant, Taste, came running out of the house with the gun again, and said come on Ronny. They jumped back in the car and sped off after Arthur, and a quick, two, three minutes passed. Ronny backed up again at Wingohocking, because he had to have seen him within 15th or 16th Street. It is two streets in the middle. When the car came, Ronny was by himself. He got out of the car, and he

asked me: Do you think he is going to do it; do you think he going to do it? I said, "I don't know." Before we could finish talking, you heard the gunshots.

Id. at 96. Based on Booker's testimony, any evidence that Petitioner used an ATM machine on the night of the murder would have corroborated Booker's testimony and bolstered the credibility of other incriminating testimony against Petitioner. Because trial counsel cannot be ineffective for failing to offer this baseless alibi defense at trial, this claim fails. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a merit less argument").

4. Failure to Cross-Examine Booker with his Preliminary Hearing Testimony

Petitioner claims that trial counsel was ineffective for failing to impeach Booker, a Commonwealth witness, with his preliminary hearing testimony. Pet. at 2-3. Because this claim is meritless, Petitioner cannot get relief from the procedural bar of this claim under Martinez. Petitioner asserts that trial counsel was ineffective for not cross-examining Booker concerning whether he saw Petitioner with a gun and whether he observed that Petitioner was under the influence of any drugs. Pet. at 2-3. This claim is meritless because trial counsel extensively cross-examined Booker at trial on Booker's preliminary hearing testimony on these issues. N.T. 3/23/06 at 131-163. Specifically, when Booker testified at trial that he saw Petitioner leave Louis Bryant's house with a gun, trial counsel questioned him about his preliminary hearing testimony where he stated that "[h]e had something wrapped in his shirt. Basically, he had the gun wrapped in his shirt." Id. at 131. Counsel further questioned Booker at trial regarding what he saw compared to what he testified to at his preliminary hearing. Id. at 132-33.

Likewise, when Booker testified at trial that Petitioner was not under the influence of any drugs or alcohol on the night of the murder, trial counsel impeached him on cross-examination with Booker's preliminary hearing testimony. N.T. 3/23/06 at 161-63. Counsel referred Booker to the following: "Question: How would you describe Mr. Duckett's condition that evening? Was he clean and sober, or was he under the influence?" Id. at 162. Counsel then pointed out that Booker testified at the preliminary hearing that: "He was under the influence." Id. at 162-63. Counsel further questioned Booker about this discrepancy. Id. at 163. Accordingly, it is clear from the above cross examination that this claim is meritless, and counsel cannot be deemed to be ineffective for failing to pursue a meritless argument. See Sanders, 165 F.3d at 253. Martinez does not give Petitioner relief because he cannot establish that this claim is "substantial" and that his counsel was ineffective under Strickland.

5. Failure to Object to Prosecutor's Closing Argument

Petitioner next maintains that trial counsel was ineffective for failing to object when the prosecutor referred to the "ghetto code" in his closing argument,¹⁵ which Petitioner claims constituted prosecutorial misconduct. Pet. at 7; Am. Pet. at 14-16. Like Petitioner's other

¹⁵ In his closing argument, the prosecutor stated, in relevant part:

What we have here- - Mr. Medway talked about life in the city. You have all heard of the Morse Code, of dots and dashes, dot, dot, dash? Well, there is another code, ladies and gentlemen, that is kind of prevalent. It is called the ghetto code. I didn't see nothing; I don't know nothing, and I don't want to be involved.

(N.T. 3/27/06 at 94.) The prosecutor later stated in the closing concerning the credibility of Booker that:

I would submit to you that he [Booker] came forward at some risk to himself. He told you that he was threatened. Maybe that was in keeping with the ghetto code. You don't know nothing. You didn't see nothing.

(Id. at 97.)

procedurally defaulted claims discussed above, Martinez does not give Petitioner relief because he cannot establish that this claim is “substantial” and that his counsel was ineffective under the Strickland standard.¹⁶ See Martinez, 132 S. Ct. at 1318-19.

A prosecutor’s improper comments will be held to violate the Constitution only if they “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see also Parker v. Matthews, 132 S. Ct. 2148, 2153 (2012). In United States v. Young, 470 U.S. 1, 12-13 (1985), the Supreme Court held that:

In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor’s remarks, but must also take into account defense counsel’s opening salvo. Thus the import of the evaluation has been that if the prosecutor’s remarks were “invited,” and did no more than respond substantially in order to “right the scale,” such comments would not warrant reversing a conviction.

Young, 470 U.S. at 12-13. Thus, in analyzing the effect of the prosecutor’s remarks on the outcome of the trial, courts will consider the “invited response” or “invited reply” rule, i.e., whether “defense counsel’s comments ‘clearly invited the reply.’” Id. at 11. This analysis requires the reviewing court to weigh not only the impact of the prosecutor’s remarks, but also to consider defense counsel’s statement. Id.; see also Werts v. Vaughn, 228 F.3d 178, 199 (3d Cir. 2000).

In the instant case, it is evident that the prosecutor’s comments concerning “the ghetto code” were not improper and trial counsel was not ineffective for failing to object to them

¹⁶ Petitioner also asserts that appellate counsel was ineffective for failing to raise a prosecutorial misconduct claim on direct appeal. Am. Pet. at 14. However, Petitioner cannot overcome the default of this claim by alleging that PCRA counsel was ineffective for failing to raise appellate counsel’s ineffectiveness on PCRA review. Martinez only allows review of defaulted claims of trial counsel’s ineffectiveness. Martinez, 132 S. Ct. at 1320.

because the prosecutor was responding to defense counsel's comments regarding the credibility of Booker's testimony. Booker testified that Petitioner came up to him at his door the day after the murder and began arguing with him. N.T. 3/23/06 at 100. The testimony reads as follows:

Q. What were you arguing about this time?

A. He [Petitioner] said that I didn't see nothing, and I said that I didn't have to see to know what happened.

Q. Did anything else occur, at that time, during that conversation?

A. Yes. It got real heated, and - -

Q. What do you mean when you say it got real heated?

A. The argument was- - he said that I was going to die, too, and - - the words were: You can die, too, you can die too.

Id. at 101. During his closing, trial counsel stated the following regarding Booker's credibility:

Here is a guy who claims: I only moved into this neighborhood about six months before, because I had witnessed my other good friend get murdered in a different part of town. So, I moved into a house on that street to get away from that other area, because people were threatening me. Now he has two Homicides to report on. What does he do? He doesn't do anything. He does make an anonymous telephone call, but he doesn't do anything. He doesn't go to the police. He doesn't say: Look, I am a regular guy; I am a good citizen; I am a decent fellow, as he would have you folks believe. He never goes to the police. He never does anything.

N.T. 3/27/06 at 76-77. A "prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence." United States v. Werme, 939 F.2d 108, 117 (3d Cir. 1991), cert. denied, 502 U.S. 1092 (1992); see also United States v. Hernandez, 306 F. App'x 719, 723 (3d Cir. 2009). Here, it is clear that the prosecutor was fairly responding to defense counsel's closing. See Darden, 477 U.S. at 179, 181-82. Accordingly, trial counsel cannot be ineffective for failing to raise a meritless objection.

6. Failure to Object When the Prosecutor Elicited Hearsay Testimony from Booker

Petitioner also asserts that trial counsel was ineffective for failing to object when the prosecutor elicited impermissible hearsay testimony from Booker about an argument he and Petitioner had immediately after the murder.¹⁷ Am. Pet. at 9-10. Under the Martinez exception, this procedurally defaulted claim is not entitled to review because it is not substantial and Petitioner cannot establish that trial counsel was ineffective under Strickland. See Martinez, 132 S. Ct. at 1318-19. Booker testified at trial:

Q. Did you have a conversation with him [Petitioner]?

A. We argued a little bit about me not hiding the gun. Then he hid the gun in a trash can in front of Nard's house, and then the gun was moved again.

Q. What, specifically, did he say to you, or did you ask him what had happened to your friend?

A. Yes, because after he put the gun- - after the second place where he hid it, it was out of my sight. Then he came down the street, and I started arguing with him about did he shoot him, and he said: Yeah.

Q. What did you say?

A. I said: "You shot him over \$20.00;" and he said: It was principle.

N.T. 3/23/06 at 97. Despite Petitioner's contention, this is not impermissible hearsay.

Pennsylvania law clearly allows this testimony, a party's own statement, as an exception to the hearsay rule which does not prohibit the testimony from being offered against Petitioner. See Pa.R.E. 803(25)(A). Thus, any objection by trial counsel to this testimony would have been

¹⁷ As with the previous claim, Petitioner also maintains that direct appeal counsel was ineffective for failing to raise a claim that hearsay was improperly admitted at trial. Pet. at 5. As previously discussed, a claim of appellate counsel's ineffectiveness does not fall within the limited exception set forth in Martinez. See Martinez, 132 S. Ct. at 1320.

overruled.

Petitioner also argues that trial counsel was ineffective for failing to object when the prosecutor elicited testimony from Booker about an argument between Booker and the victim prior to the murder. Am. Pet. at 9. Petitioner refers to the following testimony from Booker:

Q. Who was arguing?

A. Taste [Petitioner] was talking loud, and Art [victim] was defending himself, basically.

Q. What was he saying?

A. He was saying: I ain't trying to burn you.

Q. What was the conversation? Was any amount of money mentioned?

A. Yes; \$20.00.

N.T. 3/23/06 at 91.

This testimony is not hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. See Pa.R.E. 801(c)¹⁸; see also Commonwealth v. Griffin, 515 A.2d 865, 870 (Pa. 1986). When an extrajudicial statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under the hearsay rule. Id. Thus, statements are admissible to establish ill-will or motive where they are not being

¹⁸

Pa.R.E. 801 states that “[h]earsay means a statement that

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.”

Pa.R.E. 801.

offered for the truth of the matter contained therein. See 803(3)¹⁹; see also Commonwealth v. Pukсар, 740 A.2d 219, 225 (Pa. 1999)(statements by witness who overheard defendant and his brother (the victim) arguing were admissible as non-hearsay because not offered to prove truth of matter asserted, but rather to establish motive for killings); Commonwealth v. Brown, 648 A.2d 1177, 1182 (1994)(out-of-court statement, which was not offered for its truth, but only for the fact that it was made, was not inadmissible hearsay).

Here, the Commonwealth attempted to establish Petitioner's motive for shooting the victim by showing that ill-will existed between them. The Commonwealth did not offer Booker's testimony to prove that the victim owed Petitioner \$20.00, but rather to offer proof of a motive for the shooting. Therefore, these statements were admissible since they were not offered to prove the truth of the matter asserted, but rather to establish a motive for the killing. Accordingly, trial counsel cannot be deemed ineffective for failing to object to this admissible testimony.

7. Failure to Argue that a Juror Should be Dismissed

Petitioner further asserts that trial counsel was ineffective for failing to request the dismissal of juror No. 2 because she was biased.²⁰ Pet. at 9; Am. Pet. at 16-18. This

¹⁹ Pennsylvania Rule of Evidence 803(3) states:

A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Pa.R.E. 803(3).

²⁰ We omit the name of this juror and only identify her as a female since her identity is not necessary for consideration of the issue before us.

procedurally defaulted claim is not entitled to habeas review because it is not “substantial.”²¹ See Martinez, 132 S. Ct. at 1318-19. “It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the fullest extent practicable from extraneous influences that may subvert the fact-finding process.” United States v. Bertoli, 40 F.3d 1384, 1393 (3d Cir.1994) (quoting Waldorf v. Shuta, 3 F.3d 705, 709 (3d Cir.1993)). In this regard, ““any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial.”” United States v. Vega, 285 F.3d 256, 266 (3d Cir.2002)(quoting Remmer v. United States, 347 U.S. 227, 229 (1954)); see also United States v. Claxton, 766 F.3d 280, 299 (3d Cir. 2014).

Petitioner argues that juror No. 2 was biased based on the following statements by Judge Greenspan to trial counsel and the prosecutor:

Juror Number 2 has indicated a couple of things to the Court Officer. She was the one, I think I had mentioned yesterday, possibly off the record, I don't remember, who felt a little nervous yesterday when she passed by some of the family members. One of them actually spoke to her. That was after she was picked, and she was on her way home. So, she was leaving the courtroom - actually leaving the courtroom, after having been selected.

That is, by the way, Juror Number 2, as I said - - [sic]. She also indicated that her best friend's sister's husband is the Crime Scene Unit Officer who testified, Officer Lewis. He is her best friend's brother-in-law, or something like that. He doesn't know her, but she knows who he is.

Now, I don't think that matters, particularly since all he did was take pictures, and we passed them around.²²

²¹ Petitioner also claims that the trial court erred in not dismissing the juror and that appellate counsel was ineffective for failing to raise this claim on direct appeal. However, as discussed several times earlier, these claims are not subject to habeas review because they do not concern trial counsel's ineffectiveness. See Martinez, 132 S. Ct. at 1320.

²² Trial counsel responded to the Court: “I will not scream about that, your Honor.” N.T. 3/23/06 at 152.

N.T. 3/23/06 at 151-52. The court officer also informed the trial judge that juror No. 2 indicated to him that her stepmother lived near the crime scene. Id. at 151-52. The court officer added that “she [juror no. 2] doesn’t really know anyone here in the audience, or anything like that, that has been testifying, but she doesn’t know if they know her from being in the neighborhood, and she wanted the Court to know that.” Id. at 152-53. Judge Greenspan then stated:

This is now the third time that she has approached the Court Officer with an issue. I am of the impression that she is not happy to be here. I am more than happy to substitute Number - 13 for her, if you so choose, but that is - - you can discuss this among your selves. We can wait until a fourth thing happens. We can colloquy her. She knows not to discuss anything with the other jurors.²³

Id. at 153.

On habeas review, a challenge of a prospective juror for bias is a “factual issue” which requires the federal reviewing court to accord any findings of the state courts on “factual issues” a “presumption of correctness.” Patton v. Yount, 467 U.S. 1025 (1984). This rule applies to a trial court’s determination where the trial court determines that a juror is impartial and need not be dismissed. Id. Jurors are presumed to follow the court’s instructions. Richardson v. Marsh, 481 U.S. 200, 206 (1987); see also Francis v. Franklin, 471 U.S. 307, 325, n.9 (1985); Connecticut v. Johnson, 460 U.S. 73, 85 n.14 (1983) (“[w]e must assume that juries for the most part understand and faithfully follow instructions”). It is evident from the record that the concerns surrounding the impartiality of juror No. 2 were properly considered by the trial court and discussed with defense counsel and the prosecutor, and that such concerns were determined insignificant to her ability to serve as an impartial juror. The trial judge’s finding is,

²³ A review of the trial transcript indicates that there was no fourth encounter or potential problem with juror No. 2 during the rest of the time that she was empaneled.

therefore, “presumed correct” absent anything in the record showing one of the reasons enumerated in the statute for avoiding the presumption. Patton, 467 U.S. at 1036. The question under the statute is whether the trial court’s findings are fairly supported by the record, and here, there is ample support for the trial judge’s finding that the concerns of the juror would not have prevented or substantially impaired the performance of her duties as a juror. See Wainwright v. Witt, 469 U.S. 412, 412–13 (1985).

Thus, the trial court properly determined that juror No. 2 could be a fair and impartial juror, and that finding is presumed correct. See Patton, 467 at 1036. Accordingly, trial counsel cannot be found to have been ineffective counsel for failing to argue a baseless objection to the trial court’s decision not to dismiss juror No. 2.

8. Trial Court Denied Petitioner Counsel of his Choice

Lastly, Petitioner claims that the trial court denied him counsel of his choice, Attorney Medway, whom he originally retained.²⁴ Am. Pet. at 19. This contention is procedurally defaulted because it was not presented in the state courts. 42 Pa.C.S. § 9544(b) provides that “an issue is waived if the Petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding”; see also Commonwealth v. Keaton, 45 A.3d 1050, 1060 (Pa. 2010). Because this claim was not raised at any level in the state court, it is unreviewable here.²⁵ Even if the claim was reviewable,

²⁴ As noted earlier, Petitioner states that Attorney Medway was his counsel of choice and was his counsel “commencing at the preliminary stages” of his case. Am.Pet. at 19. Petitioner further states that because of “monetary problems” he could not retain Medway after this hearing and was only able to retain Medway “several days before trial.” Id.

²⁵ As discussed above, Petitioner’s allegation of trial court error here is not covered by Martinez, which held that PCRA counsel’s ineffectiveness could constitute cause to excuse a procedural default of only one type of claim, a claim of trial counsel’s ineffectiveness. Martinez, 132 S. Ct. at 1315.

it is claim is baseless because, as discussed above, Petitioner was rendered effective counsel by all three attorneys who represented him.

III. CERTIFICATE OF APPEALABILITY

The Court must also determine whether to recommend granting a certificate of appealability (“COA”) with respect to the Petitioner’s claims. A COA can issue if “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [if] jurists of reason would find it debatable whether the district court was correct in its [] ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). This Court is of the opinion that reasonable jurists would not debate the Court’s determinations, and a COA should not be granted.

For all of the above reasons, I make the following:

RECOMMENDATION

AND NOW, this 30th day of September, 2016, IT IS RESPECTFULLY RECOMMENDED that the instant Petition for Writ of Habeas Corpus and Amended Petition filed pursuant to 28 U.S.C. § 2254 (Doc. Nos. 1, 13) should be DENIED with prejudice and DISMISSED without an evidentiary hearing. There is no probable cause to issue a certificate of appealability.

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

BY THE COURT:

/s/ Henry S. Perkin
HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE

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