

CLD-315

July 27, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-1888

RICKY DOCKERY, Appellant

VS.

SUPERINTENDENT ALBION SCI, ET AL.

(E.D. Pa. Civ. No. 14-cv-06636)

Present: SHWARTZ, RENDELL, and FISHER, Circuit Judges

Submitted is

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

in the above-captioned case.

Respectfully,
Clerk

MMW/JPD/dwb

ORDER

The application for a certificate of appealability is denied. Jurists of reason would agree that Dockery's claims lack merit for substantially the reasons detailed in the Magistrate Judge's report and recommendation and the District Court's opinion. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

By the Court,

s/ D. Michael Fisher
Circuit Judge

Dated: August 3, 2017
DWB/cc:

Ricky Dockery
Catherine B. Kiefer, Esq.



A True Copy

Marcia M. Waldron

Marcia M. Waldron, Clerk

Certified order issued in lieu of mandate.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1888

RICKY DOCKERY,
Appellant

v.

SUPERINTENDENT ALBION SCI; ATTORNEY GENERAL
PENNSYLVANIA; DISTRICT ATTORNEY PHILADELPHIA

(E.D. Pa. No. 2-14-cv-06636)

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

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellant, Ricky Dockery 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 Rendell and Fisher's votes are limited to panel rehearing only.

judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: September 7, 2017
sb/cc: Ricky Dockery
Catherine B. Kiefer, Esq.

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

RICKY DOCKERY,

Petitioner,

v.

NANCY GIROUX, et al.,

Respondents.

CIVIL ACTION
NO. 14-6636

FILED MAR 27 2017

OPINION

Slomsky, J.

March 27, 2017

I. INTRODUCTION

Before the Court is Ricky Dockery's ("Petitioner") pro se Petition for a Writ of Habeas Corpus. On November 18, 2014, Petitioner filed the instant Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.)

On February 13, 2017, Magistrate Judge Henry S. Perkin issued a Report and Recommendation ("R&R") recommending that the Petition be denied. (Doc. No. 28 at 35.) On March 3, 2017, Petitioner filed Objections to the Magistrate Judge's Report and Recommendation. (Doc. No. 30.) The Court has reviewed this case de novo, including Petitioner's Objections, and for reasons that follow, the Court will adopt Magistrate Judge Henry S. Perkin's Report and Recommendation to deny the Petition.

II. BACKGROUND

A. Facts

The facts in this case are taken from the Report and Recommendation of United States Magistrate Judge Henry S. Perkin (Doc. No. 28.) and are as follows:

ENTERED
MAR 27 2017
CLERK OF COURT

On direct appeal, the Pennsylvania Superior Court summarized the facts of this case as follows:

On the night of April 6, 2005, at approximately 10:50 p.m., Allan [sic] Johnson was shot and killed outside 1933 South 18th Street, Philadelphia[.] Ten minutes earlier, Johnson had been walking up the 1900 block of South 18th Street towards Mifflin Street, when he stopped to talk to Aziza Sidberry, a friend from the neighborhood[.] Johnson was leaning up against a van as he spoke with Sidberry.

About ten minutes into the conversation, [Appellant] rode up on a black and gray mountain bike in between the vehicle that Johnson was leaning on and the car in front of him. [Appellant] then pulled out a silver .9[sic] millimeter handgun and fired three shots at Johnson. Johnson was hit in the neck and the chest, and later died. Sidberry watched [Appellant] ride off on the bike towards Mifflin Street.

Dr. Bennett Preston, Assistant Medical Examiner of the City of Philadelphia, conducted an autopsy on the decedent's body which revealed that the decedent had been hit once in the left neck and once in the left chest. Dr. Preston, who removed ballistic evidence from the decedent's body, also determined that the cause of death was multiple gunshot wounds and the manner of death was a homicide.

Officer Joseph Cosgrove found three fired cartridge cases from a .9 millimeter handgun next to the decedent. Police Officer Kenneth James Lay of the Philadelphia Firearms Identification Unit examined the ballistic evidence recovered from the crime scene. Officer Lay determined that all three fired cartridge cases were .9 millimeter Luger, manufactured by Remington, and they were all fired from the same firearm.

Mr. Lay also examined the ballistic evidence recovered from the decedent's body, and determined that the two bullets that hit Johnson were fired from the same gun, and were consistent with .9 millimeter fired projectiles.

After a defense motion in limine, the Court allowed the introduction of 25 .9 millimeter bullets recovered from a magazine of an UZI [sic] recovered from defendant's resident pursuant to the execution of a search warrant. In the magazine, Detective Steven Mostovyk found 25 rounds of .9 millimeter semiautomatic ammunition, 20 of which were Remington manufacture. The

magazine that the ammunition was found in was not from the murder weapon.

Commonwealth v. Dockery, 1434 EDA 2007 (Pa. Super. July 28, 2008), pp. 2-3 (quoting Trial Ct. Op., July 25, 2007, pp. 2-3); Resp., Ex. A at 1-3. Respondents note that:

[n]either the gun nor the magazine were admitted as evidence. On the first day of trial, Petitioner made a motion in limine and told the trial court that the Commonwealth “[w]ishes to [] introduce into evidence the magazine.” (N.T. 5/16/07, 5.) The prosecutor explained that 20 of the rounds in the magazine were the “same caliber, same manufacturer” as the fired cartridges at the crime scene, and that all 25 rounds were capable of being fired from a wide variety of handguns (*Id.*, 8-10). The trial court properly ruled that the ammunition was admissible (*Id.*, 10).

In accordance with that ruling, a police officer who had participated in the search of Petitioner’s house testified that police had not found the murder weapon. (N.T. 5/17/07, 250.) He stated that police found 25 .9 millimeter bullets in a magazine, and specified that the magazine, was not the murder weapon. The expert further testified that .9 millimeter bullets fit many types of .9 millimeter guns, and that it is easy to remove bullets from one gun and use them in a different gun.

Resp., p. 3 n.1.

(Doc. No. 28 at 1-2.)

B. Procedural History

A jury trial was held before the Honorable Jeffery P. Minehart in the Court of Common Pleas, Philadelphia County. At the conclusion of that trial, the jury convicted Petitioner of one count of first-degree murder and one of count possessing an instrument of crime (“PIC”). (Doc. No. 28 at 1.) Following the conviction, Petitioner was sentenced to a mandatory sentence of life without parole for the murder conviction and a concurrent sentence of two and one-half years incarceration on the PIC conviction. (*Id.*) Next, Petitioner filed a timely notice of appeal to the Superior Court of Pennsylvania. On July 18, 2007, Judge Minehart issued his decision for the

benefit of the appellate court. (Id. at 2). Judge Minehart's decision was filed on July 25, 2007. (Id. at 2-3, citing Commonwealth v. Dockery, Phila. CCP July 25, 2007 (No. CP 0507-0311 1/1).) On July 28, 2008, the Pennsylvania Superior Court affirmed the judgment of sentence. (Id. at 3, citing Commonwealth v. Dockery, 959 A.2d 961 (Pa. Super. 2008) (No. 1434 EDA 2007) (unpub. mem.); Resp., Ex.A.).) On December 3, 2008, the Pennsylvania Supreme Court denied Petitioners' request for an allowance of appeal. (Id., citing Commonwealth v. Dockery, 454 EAL 2008, 962 A.2d 1195 (Pa. 2008).)

On October 26, 2009, Petitioner filed a pro se PCRA petition. (Id.) On January 15, 2010, counsel was appointed for Petitioner. On December 30, 2010, pursuant to Commonwealth v. Finley, PCRA counsel filed a no-merit letter.¹ 550 A.2d (Pa. Super. Ct. 1988). He was replaced by new counsel who again filed a no-merit letter. The PCRA Court issued a notice pursuant to Pa. R. Crim. P. 907 stating that the Petition would be dismissed without a hearing. (Id.) Petitioner filed pro se objections to this Notice. (Id.) Counsel filed a supplemental Finley letter addressing these objections. (Id.) On May 8, 2013, the PCRA Court dismissed the Petition by Order. (Id.) Petitioner appealed and the PCRA Court issued its decision for the benefit of the appellate court on July 23, 2013. (Id.) On April 15, 2014, the Pennsylvania Superior Court affirmed the PCRA Court's dismissal of the Petition. (Id., citing Commonwealth v. Dockery, 102 A.3d 541 (Pa. Super. 2013) (table, No. 1454 EDA 2013); Resp., Ex. B.) On October 6, 2014, the Pennsylvania Supreme Court denied the Petition for allowance of appeal. (Id., citing Commonwealth v. Dockery, No. 296 EAL 2014.)

¹ In Commonwealth v. Finley, a prisoner filed a pro se petition for post-conviction relief. 550 A.2d 213 (Pa. Super. Ct. 1988). He was appointed counsel who filed a "no merit letter" with the court. The Superior Court of Pennsylvania found that the appointed counsel's "no-merit letter" coupled with the court's independent review of evidence in light of the pro se post-conviction requests for relief comported with prisoner's entitlement to effective counsel.

Thereafter, Petitioner filed this action. On February 13, 2017, United States Magistrate Judge Henry S. Perkin filed his Report and Recommendation, finding the Petition to be without merit and recommending its dismissal. Petitioner's filed Objections, which are now ripe for consideration.

III. STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1)(B) and the local rules of this Court, a district judge is permitted to designate a magistrate judge to make proposed findings and recommendations on petitions for post-conviction relief. Any party may file objections in response to the magistrate judge's Report and Recommendation. 28 U.S.C. § 636(b)(1)(C). Whether or not an objection is made, a district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The [district] judge may also receive further evidence or recommit the matter to the magistrate judge with further instructions." *Id.* "[I]t must be assumed that the normal practice of the district judge is to give some reasoned consideration to the magistrate's report before adopting it as the decision of the court." Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987); see also 28 U.S.C. § 636(b).

In the Eastern District of Pennsylvania, Local Rule 72.1.IV(b) governs a petitioner's objections to a magistrate judge's Report and Recommendation. Under that rule, a petitioner must "specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections[.]" Savior v. Superintendent of Huntingdon SCI, No. 11-5639, 2012 WL 4206566, at *1 (E.D. Pa. Sept. 20, 2012). Upon review, "[a district judge] shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C).

De novo review is non-deferential and generally permits the district court to conduct an "independent review" of the entire matter. Salve Regina College v. Russell, 499 U.S. 225, 238

(1991). “Although [the] review is de novo, [a district judge] [is] permitted, by statute, to rely upon the magistrate judge’s proposed findings and recommendations to the extent [the judge], in the exercise of sound discretion, deem[s] proper.” Owens v. Beard, 829 F. Supp. 736, 738 (M.D. Pa. 1993) (citing United States v. Raddatz, 447 U.S. 667, 676 (1980)).

IV. ANALYSIS

a. Petitioner’s Objection That There Was Insufficient Evidence to Convict Him is Without Merit

Petitioner objects to Magistrate Judge Perkin’s findings about the sufficiency of evidence used at trial to convict him. He claims that eyewitness Aziza Sidberry: 1) was prepared by the prosecution to say certain facts, including that she was told there would be a bike in the courtroom and she would need to identify if it “either looks similar or [if it was] the exact same bike,” 2) lacked actual knowledge that Petitioner was the shooter, and 3) was compensated for her testimony in the amount of \$6,377.48. (Doc. No. 30 at 6.)

In considering the insufficiency of evidence argument, a petition for writ of habeas corpus must persuade the Court that the evidence, viewed in the light most favorable to the prosecution, could not move a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 324 (1979). The ultimate question is whether the prosecution provided evidence to support the substantive elements of the offense as defined by state law. Id. at 324, n.16. Under the AEDPA, review for sufficiency of evidence requires a determination as to whether the state court disposition was an objectively unreasonable application of Jackson, supra. Williams v. Taylor, 529 U.S. 362, 379-90 (2000). The Petitioner has the burden of showing that the state court’s analysis was “objectively unreasonable.” Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

In this case, Magistrate Judge Perkin thoroughly reviewed Petitioner's claim for insufficiency of evidence. He noted that the claims of Petitioner were raised in state court and were found to be without merit. Petitioner argued that Aziza Sidberry's testimony was insufficient because she was prepared by the prosecution to say certain facts, lacked actual knowledge that Petitioner was the shooter, and was compensated for her testimony in the amount of \$6,377.48. Magistrate Judge Perkin reviewed these contentions and correctly found that,

In his Response to the Commonwealth's Response to the Petition, Petitioner challenges the testimony of Aziza Sidberry "the Commonwealth's prepared and compensated sole witness, and not because of the presence of contradictions, but primarily because of its unreliability. There are a number of factors that would cause one to look upon the testimony of Aziza Sidberry with a jaundiced eye." Pet'r's Resp., p.8. As correctly noted by the Respondents, the determination of witness credibility, the resolution of conflicts in evidence, and the drawing of reasonable inferences from proven facts all fall within the province of the fact finder and are therefore beyond the scope of federal habeas corpus review.

(Doc. No. 28 at 13, citing Herrera v. Collins, 506 U.S. 390, 401 (1993).) Based on the determination "that the evidence adduced at trial was sufficient to support Petitioner's convictions [and] was in no way contrary to, or an unreasonable application of the Jackson standard," this Court agrees with the conclusions made by Magistrate Judge Perkin. (Id. at 13.) As a result, Petitioner's claim for insufficiency of evidence will be denied.

b. Petitioner's Objection Regarding Prosecutorial Misconduct is Without Merit

Next, Petitioner objects to Magistrate Judge Perkin's finding that Petitioner's conviction should not be overturned because of prosecutorial misconduct. Magistrate Judge Perkin carefully considered Petitioner's allegations and found that they were already considered by the state courts. Magistrate Judge Perkin found that the state court did not unreasonably reject the claims. The claims of prosecutorial misconduct asserted by Petitioner include: 1) the prosecutor referenced inadmissible evidence on two separate occasions during the opening argument which tainted the jury with evidence that would never be made part of the record or did not exist, 2) the

prosecutor improperly attempted to create false evidence over objections, specifically in referencing the recovery of the bicycle recovered from Jahleel Thomas' house, and 3) in closing arguments the prosecutor improperly commented on evidence ruled inadmissible by the trial court and then commented on defense counsel's motive for objecting. (Doc. No. 30 at 10.)

The Court must decide if the prosecutorial misconduct, "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 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Petitioner must show that the conduct was so egregious that it amounted to a denial of due process. Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992), cert. denied, 508 U.S. 947 (1993). The error must have had a "substantial and injurious effect" on the verdict. Brecht v. Abramson, 507 U.S. 619, 637 (1993).

The state court's decision on the claims of prosecutorial misconduct was thoroughly reviewed by Magistrate Judge Perkin and has been reviewed independently by this Court. Magistrate Judge Perkin found no ground for reversible error considering the applicable law. Likewise, this Court finds that the claims of prosecutorial misconduct do not show any reversible error occurred in this case. (Doc. No. 30 at 22.) As a result, Petitioner's objection to Magistrate Judge Perkin's finding on this issue is without merit.

c. Petitioner's Objection Relating to Counsel's Deficient Performance is Without Merit

In his third argument, Petitioner objects to Magistrate Judge Perkin's finding that even though a fact witness, Jahleel Thomas, was never contacted by Petitioner's trial counsel or PCRA counsel, the failure to do so did not result in a deficient performance by either counsel. (Doc. No. 30 at 11.) This argument was previously considered by the state court.

In order to constitute ineffective assistance of counsel, a petitioner must satisfy the two well-known prongs of Strickland: 1) that counsel's performance was deficient and 2) that counsel's deficient performance caused the petitioner prejudice. Strickland v. Washington, 466 U.S. 668 (1984). When a state court rejects an ineffective assistance of counsel claim, a federal court can grant habeas relief only 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); Vega v. Klem, No. Civ. A. 03-5485, 2005 WL 3216738, at *6 (E.D.Pa. Nov. 29, 2005).

Here, Petitioner argues that his trial counsel was ineffective for not contacting and not using Jahleel Thomas as a witness at trial and also that PCRA counsel was ineffective for not pursuing this matter on collateral review.² Specifically, Petitioner states that Thomas would have testified "that the bicycle [allegedly used by Petitioner in commission of the crime] never left Thomas' house or possession on the day of the shooting." (Doc. No. 28 at 30.) Petitioner filed an affidavit from Jahleel Thomas which was executed several months after this instant Petition was filed. (Id.) In it, Thomas stated that he was willing to testify, but that he was never contacted or interviewed by Petitioner's counsel. (Id.) In his Report and Recommendation, Magistrate Judge Perkin found:

Respondents note that Thomas was Petitioner's good friend and subject to possible accomplice liability if he provided the bicycle used in the crime. Thus, he had an obvious motive to lie. Moreover, Petitioner overestimated the importance of the bike, which was only a small part of the evidence against him.

In contrast, Ms. Sidberry immediately told police that she knew the shooter and unwaveringly identified Petitioner as the shooter. She knew Petitioner before the

² The Court should only consider the claim of ineffective assistance of trial counsel because under 28 U.S.C. § 2254(i), "[t]he ineffectiveness or incompetence of counsel during Federal of State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

shooting and stood face-to-face with the shooter. (N.T., 5/16/07, pp. 125, 126.) Just after the shooting, she gave police an accurate and detailed description of Petitioner. She also unequivocally identified Petitioner as the shooter at the preliminary hearing and at trial. (Id. at 145, 173.) Ms. Sidberry's account of the shooting was corroborated by the physical evidence at the scene, and by the recovery of .9 millimeter bullets from Petitioner's house like the ones used in the shooting. Given the strong evidence against Petitioner, it is unreasonable that [] Thomas's impeachable testimony would have resulted in a different verdict or that trial counsel's decision not to call [] Thomas would have been a reasonable trial strategy.

(Doc. No. 28 at 30-31.)

This Court agrees with the assessment of Magistrate Judge Perkin and the state courts. Counsel cannot be deemed ineffective for failing to pursue a meritless claim. Here, pursuing an interview of Jahleel Thomas would not have changed the outcome of the trial or in any way shown deficiency on the part of trial counsel. The same is true for PCRA counsel. Accordingly, Petitioner has failed to offer sufficient evidence to prove a contrary application of federal law as required by 28 U.S.C. § 2254(d)(1) and has failed to meet his burden regarding ineffective assistance of counsel.

V. CONCLUSION

The Report and Recommendation of Magistrate Judge Perkin dated February 13, 2017, will be approved and adopted and Petitioner's Habeas Petition (Doc. No. 1) will be denied. (Doc. No. 28.) A Certificate of Appealability will not be issued based on the analysis contained in the Magistrate Judge Perkin's Report and Recommendation, as approved and adopted by this Court, that a reasonable jurist could not conclude that the Court is incorrect in denying and dismissing the Writ of Habeas Corpus. An appropriate Order follows.

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

RICKY DOCKERY,

Petitioner,

v.

NANCY GIROUX, et. al.

Respondents.

CIVIL ACTION
NO. 14-6636

ORDER

AND NOW, this 27th day of March 2017, upon consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1), the Report and Recommendation by United States Magistrate Judge Henry S. Perkin (Doc. No. 28), Petitioner's Objections (Doc. No. 30), a thorough and independent review of the record, and for the reasons stated in the Opinion issued this day, it is **ORDERED** as follows:

1. The Report and Recommendation of Magistrate Judge Perkin (Doc. No. 28) is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus (Doc. No. 1) is **DENIED**;
3. A Certificate of Appealability **SHALL NOT** be issued based on the analysis contained in Magistrate Judge Perkin's Report and Recommendation, as approved and adopted by this Court, that a reasonable jurist could not conclude that the Court is incorrect in denying and dismissing the Writ of Habeas Corpus; and
4. The Clerk of Court shall close this case for statistical purposes.

BY THE COURT:


JOEL H. SLOMSKY, J.

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

RICKY DOCKERY,

Petitioner,

v.

NANCY GIROUX, et al.,

Respondents.

CIVIL ACTION

NO. 14-6636

FILED FEB 13 2017

REPORT AND RECOMMENDATION

Henry S. Perkin, M.J.

February 13, 2017

Presently before the Court is the pro se Petition for Writ of Habeas Corpus filed by the Petitioner, Ricky Dockery ("Petitioner"), pursuant to 28 U.S.C. section 2254. Petitioner is incarcerated in the State Correctional Institution Albion. For the reasons that follow, it is recommended that the Petition should be denied with prejudice and dismissed without an evidentiary hearing.

I. PROCEDURAL HISTORY.¹

Following a jury trial before the Honorable Jeffrey P. Minehart in the Court of Common Pleas of Philadelphia County, Petitioner was convicted of first-degree murder and possessing an instrument of crime ("PIC"). On May 18, 2007, Petitioner was sentenced to a mandatory term of life imprisonment without parole for the murder conviction and a concurrent sentence of two and one-half to five years' incarceration on the PIC conviction.² See CCP Phila.

ENTERED
FEB 14 2017
CLERK OF COURT

¹ This information is taken from the documents of record in this case and the state court record. Although the Notes of Testimony of the trial and sentencing were not included in the state court record, they were provided by the Office of the Philadelphia District Attorney.

² On direct appeal, the Pennsylvania Superior Court summarized the facts of this case as follows:

On the night of April 6, 2005, at approximately 10:50 p.m., Allan[sic] Johnson was shot and

Dkt. No. CP-51-CR-0703111-2005. Petitioner filed a timely notice of appeal and Judge Minehart issued his decision dated July 18, 2007 for the benefit of the appellate court, which was

killed outside 1933 South 18th Street, Philadelphia[.] Ten minutes earlier, Johnson had been walking up the 1900 block of South 18th Street towards Mifflin Street, when he stopped to talk to Aziza Sidberry, a friend from the neighborhood Johnson was leaning up against a van as he spoke with Sidberry.

About ten minutes into the conversation, [Appellant] rode up on a black and gray mountain bike in between the vehicle that Johnson was leaning on and the car in front of him. [Appellant] then pulled out a silver .9[sic] millimeter handgun and fired three shots at Johnson. Johnson was hit in the neck and the chest, and later died. Sidberry watched [Appellant] ride off on the bike towards Mifflin Street.

Dr. Bennett Preston, Assistant Medical Examiner of the City of Philadelphia, conducted an autopsy on the decedent's body which revealed that the decedent had been hit once in the left neck and once in the left chest. Dr. Preston, who removed ballistic evidence from the decedent's body, also determined that the cause of death was multiple gunshot wounds and the manner of death a homicide.

Officer Joseph Cosgrove found three fired cartridge cases from a .9 millimeter handgun next to the decedent. Police Officer Kenneth James Lay of the Philadelphia Firearms Identification Unit examined the ballistic evidence recovered from the crime scene. Officer Lay determined that all three fired cartridge cases were .9 millimeter Luger, manufactured by Remington, and they were all fired from the same firearm.

Mr. Lay also examined ballistic evidence recovered from the decedent's body, and determined that the two bullets that hit Johnson were fired from the same gun, and were consistent with .9 millimeter fired projectiles.

After a defense motion in limine, the Court allowed the introduction of 25 .9 millimeter bullets recovered from a magazine of an UZI recovered from the defendant's residence pursuant to the execution of a search warrant. In the magazine, Detective Steven Mostovyk found 25 rounds of .9 millimeter semiautomatic ammunition, 20 of which were Remington manufacture. The magazine that the ammunition was found in was not from the murder weapon.

Commonwealth v. Dockery, 1434 EDA 2007 (Pa. Super. July 28, 2008), pp. 2-3 (quoting Trial Ct. Op., July 25, 2007, pp. 2-3); Resp., Ex. A at 2-3. Respondents note that:

[n]either the gun nor the magazine were admitted as evidence. On the first day of trial, Petitioner made a motion in limine and told the trial court that the Commonwealth "[w]ishes to [] introduce into evidence the magazine." (N.T. 5/16/07, 5.) The prosecutor explained that 20 of the rounds in the magazine were the "same caliber, same manufacturer" as the fired cartridges at the crime scene, and that all 25 rounds were capable of being fired from a wide variety of handguns (id., 8-10). The trial court properly ruled that the ammunition was admissible (id., 10).

In accordance with that ruling, a police officer who had participated in the search of Petitioner's house testified that police had not found the murder weapon. (N.T. 5/17/07, 250.) He stated that police found 25 .9 millimeter bullets in a magazine, and specified that the magazine was not for the murder weapon. The expert further testified that .9 millimeter bullets fit many types of .9 millimeter guns, and that it is easy to remove bullets from one gun and use them in a different gun. (id., 295-96.)

Resp., p. 3 n.1.

filed on July 25, 2007. Commonwealth v. Dockery, Phila. CCP July 25, 2007 (No. CP 0507-0311 1/1). The Pennsylvania Superior Court affirmed the judgment of sentence on July 28, 2008. Commonwealth v. Dockery, 959 A.2d 961 (Pa. Super. 2008)(No. 1434 EDA 2007)(unpub. mem.); Resp., Ex. A. The petition for allowance of appeal was denied by the Pennsylvania Supreme Court by order dated December 3, 2008, which was filed in the Superior Court on January 12, 2009. Commonwealth v. Dockery, 454 EAL 2008, 962 A.2d 1195 (Pa. 2008)(Table).

Petitioner filed a *pro se* PCRA petition on October 26, 2009, and counsel was appointed to represent him on January 15, 2010. Counsel filed an amended petition on February 6, 2009. Counsel later filed a no-merit letter on December 30, 2010 pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), which resulted in the removal of counsel and appointment of new counsel who also filed a no-merit letter. The PCRA court issued a notice pursuant to Pa. R. Crim. P. 907, indicating that the PCRA petition would be dismissed without a hearing. Petitioner filed a pro se objection to the Rule 907 Notice and counsel filed a supplemental Finley letter addressing Petitioner's objections. On May 8, 2013, the PCRA court dismissed the PCRA petition by order. Petitioner appealed and the PCRA court issued its decision for the benefit of the appellate court on July 23, 2013. On April 25, 2014, the Pennsylvania Superior Court affirmed the dismissal of the PCRA petition. Commonwealth v. Dockery, 102 A.3d 541 (Pa. Super. 2013)(table, No. 1454 EDA 2013); Resp., Ex. B. The petition for allowance of appeal was denied by the Pennsylvania Supreme Court on October 6, 2014. Commonwealth v. Dockery, No. 296 EAL 2014.

On November 18, 2014, the instant Petition for Writ of Habeas Corpus was

docketed by the Clerk's Office. See Dkt. No. 1. On or about November 6, 2014, Petitioner signed the Petition in which he challenges the sufficiency of the evidence at trial, claims that the prosecutor committed a number of instances of misconduct and also claims that trial counsel was ineffective for failing to investigate two potential witnesses. The Honorable Joel H. Slomsky referred the Petition to the undersigned for preparation of a Report and Recommendation. Respondents contend that Petitioner is not entitled to federal habeas relief because these claims were reasonably rejected by the state courts as meritless.

II. STANDARD OF REVIEW.

A. Petitions for Writ of Habeas Corpus.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that a writ of habeas corpus for a person serving a state court sentence shall not be granted unless (I) the state court's resolution of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" and (ii) the claim is exhausted.³ See 28 U.S.C. §

³ Exhaustion requires that the claims have been presented at all available levels of the state judicial system before being presented in a habeas corpus petition. See Anderson v. Harless, 459 U.S. 4, 7 (1982). If a petition's claims have not been exhausted, and a petitioner is time-barred from presenting those claims in state court, the claims are procedurally defaulted and will not be reviewed on the merits. 28 U.S.C. § 2254(b)(1)(A); see O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

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

A fundamental miscarriage of justice occurs if a petitioner presents new evidence and shows that "it is [now] more likely than not that no reasonable juror would have convicted him." Schlup v. Delo, 513 U.S. 298,

2254(d)(1); Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002); Berryman v. Morton, 100 F.3d 1089, 1103 (3d Cir. 1996). “As long as the reasoning of the state court does not contradict relevant Supreme Court precedent, AEDPA’s general rule of deference applies.” Priester v. Vaughn, 382 F.3d 394, 398 (3d Cir. 2004) (citing Early v. Packer, 537 U.S. 3 (2002) and Woodford, 537 U.S. 19).

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

B. Exhaustion and Procedural Default.

A petitioner may only succeed in a habeas corpus petition if he has first exhausted all remedies available in the state courts. 28 U.S.C. § 2254(b)(1)(A). To satisfy this requirement the petitioner must “fairly present” his claims to the state courts allowing the state courts a meaningful opportunity to correct alleged constitutional violations. Duncan v. Henry, 513 U.S. 364, 365 (1995); O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)(requiring “one complete round” of the state’s appellate procedures). Petitioner bears the burden of proving the exhaustion of all available remedies for each claim. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993).

Claims that are not exhausted will become procedurally defaulted, and the petitioner is not entitled to a review on the merits. O’Sullivan, 526 U.S. at 848. Review of a procedurally defaulted claim is permitted in extremely narrow circumstances, where the

327 (1995); Keller v. Larkins, 251 F.3d 408, 415-416 (3d Cir. 2001). The burden is on the petitioner to show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Schlup, 513 U.S. at 327.

petitioner can show either (1) cause for the default and actual prejudice or (2) the failure to consider the claim will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 749 (1991).

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

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

Thus, a PCRA claim for ineffective trial counsel during an initial state collateral review may qualify as “cause” to excuse the default if: (1) as a threshold matter, the state requires a prisoner to bring an ineffective counsel claims in a collateral proceeding; (2) the state courts

did not appoint counsel at the initial review collateral proceeding for an ineffective-assistance-at-trial claim; (3) where appointed counsel at the initial-review collateral proceeding was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) and (4) the underlying ineffective-assistance-at-trial claim is substantial. Martinez, 132 S.Ct. at 1315-18.

C. Ineffective Assistance of Counsel.

Claims for ineffectiveness of counsel are governed by Strickland.⁴ Under Strickland, counsel is presumed effective, and to prevail on an ineffectiveness claim, a petitioner must “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Strickland, 466 U.S. at 689. Given this presumption, a petitioner must first prove that counsel’s conduct was so unreasonable that no competent lawyer would have followed it, and that counsel has “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” Id. at 687. In addition, a petitioner must prove prejudice. In order to do so, the petitioner must demonstrate that “counsel’s errors were so serious as to deprive [petitioner] a fair trial, a trial whose result is reliable.” Id. Thus, a petitioner must show a reasonable probability that, but for counsel’s “unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome.” Id. at 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

⁴ In Harrington v. Richter, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the United States Supreme Court reaffirmed the continued applicability of the Strickland standard in federal habeas corpus cases. See also Premo v. Moore, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

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

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

Where the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the previous decision, pursuant to 28 U.S.C. § 2254(d)(1). If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was “contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Where the state court’s application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable. Yarborough v. Gentry, 540 U.S. 1, 4, 124 S. Ct. 1 (2003) (*per curiam*) (citations omitted). The Supreme Court recently elaborated on this standard:

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

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

III. DISCUSSION.

A. **Whether the State Courts Reasonably Rejected Petitioner’s Sufficiency Claim.**

Petitioner’s first claim is that the evidence presented at trial was insufficient to support his convictions because the jury allegedly misjudged Petitioner, the credibility of the evidence and evidence was admitted that should have been excluded. Pet., Ground 1. The trial court rejected this claim as meritless in its opinion prepared for the benefit of the Pennsylvania Superior Court:

Appellant’s first issue challenges the evidentiary sufficiency of his first-degree murder and PIC convictions.

The standard we apply when reviewing the sufficiency of the

evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, We note that the facts and circumstances established by the Commonwealth need not preclude ever possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.

Commonwealth v. Gray, 867 A.2d 560, 567 (Pa. Super. 2005)(citation omitted).

In support of his assertion on appeal, Appellant contends that "the identification of [him] by Ms. Sidberry was so inherently unreliable that it did not establish that appellant was the actor." Brief for Appellant at 14. According to Appellant, Sidberry, the sole identification witness, "gave testimony that contradicted her own identification testimony which surely undermined the reliability of the verdict." Brief for Appellant at 15. Specifically, Appellant claims that during the investigative phase of the case, the prosecutor suggested to Sidberry that he would show her a bicycle "that looks similar or is the exact same bike" as Appellant rode at the time of the murder. Brief for Appellant at 15 (citing N.T., 5/16/07, at 152-53.). As such, Appellant submits that Sidberry's identification of the bicycle was "not independent and reliable" but rather "was tainted by the prosecutor's suggestivity." Brief for Appellant at 15. Moreover, Appellant argues that Sidberry only observed him for "a matter of seconds" in the dark. Brief for Appellant at 16. Although Sidberry knew Appellant from the neighborhood as "Ricky," she admitted on cross-examination that she did not know the name of Appellant when questioned by detectives, and it was the detectives who first introduced the name "Ricky" to Sidberry. Brief for Appellant at 16. For these reasons, Appellant ultimately asserts that the jury's verdict was based on conjecture and surmise and thus, the evidence was insufficient to sustain his convictions. Brief for Appellant at 16. We disagree.

While Appellant raises issues questioning the veracity of Sidberry's testimony, he does not point to any major contradictions or inconsistencies that would warrant the conclusion that Sidberry's testimony was so inherently

unreliable that the jury's verdict must be set aside as a matter of law. Here, Sidberry testified that she observed Appellant at close range and knew him before the shooting. N.T., 5/16/07, at 125-26. Sidberry identified Appellant from an array of photographs and correctly told the police where he "hung out." *Id.* at 136, 142. At the preliminary hearing and at trial, Sidberry unequivocally identified Appellant as the shooter. *Id.* at 145, 173. Although Appellant provides this Court with instances where Sidberry's credibility was contested, the ultimate issue of whether Sidberry's testimony was credible was reserved to the province of the jury. *See Gray*, 867 A.2d at 567. Based upon the unwavering certainty of Sidberry's testimony at trial, we conclude that it was not so unreliable that the jury was unable to find it was worthy of belief. We are thus satisfied that the jury could properly credit Sidberry's testimony and conclude that the verdict was not based upon mere conjecture. Appellant's first issue consequently fails.

Resp., Ex. A, pp. 4-6. In Jackson v. Virginia, 443 U.S. 307 (1979), the United States Supreme Court set the standard for a due process claim based on sufficiency of the evidence. Pursuant to Jackson, a habeas petitioner alleging that evidence is insufficient to support a conviction must persuade the Court that the evidence, viewed in a light most favorable to the prosecution, could not move a rational trier of fact to find guilt beyond a reasonable doubt. *Id.* at 319, 324. Review of the evidence must be based upon state law; that is, the ultimate question is whether the prosecution provided evidence to support the substantive elements of the offense as defined by state law. *Id.* at 324 n.16. Under the AEDPA, review for sufficiency of the evidence means a determination whether the state court disposition was an objectively unreasonable application of the Jackson standard. *See Williams v. Taylor*, 529 U.S. 362, 379-390 (2000). It is petitioner's burden to show that the state court's analysis was "objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 25 (2002). The state court's analysis will not be deemed objectively unreasonable simply because a habeas court concludes in its independent judgment that the state court "applied clearly established federal law erroneously or incorrectly." Williams, 120 S.Ct. at 1522. *See also Lockyer*, 123 S.Ct. at 1175 (2002) ("[i]t is not enough that a federal habeas court,

in its independent review of the legal question, is left with a firm conviction that a state court was erroneous.”). This reasonableness analysis applies even when the state court failed to cite any Supreme Court cases, or even show an awareness of the Supreme Court cases. Early v. Packer, 537 U.S. 3, 11 (2002) (*per curiam*).

In this case, the Superior Court examined the sufficiency claim using language from state case law which uses language from Jackson. Resp., Ex. A at 4. Respondents note that the court summarized the evidence from Petitioner’s trial as it related Petitioner’s assertions regarding the alleged lack of reliable evidence about the bicycle identified, the brief period of time the eyewitness saw Petitioner and whether the eyewitness knew Petitioner’s name. The Superior Court found that “[w]hile [Petitioner] raises issues questioning the veracity of [the eyewitness] testimony, he does not point to any major contradiction or inconsistency that . . . was so inherently unreliable that the jury’s verdict must be set aside as a matter of law.” *Id.* at 5.

Petitioner also suggests in his Petition that the evidence was insufficient because the trial court admitted 25 9-millimeter bullets recovered during a search of Petitioner’s home. The Superior Court explained that the trial court found the evidence relevant and admissible because it “showed that [Petitioner] had access to ammunition identical to that recovered at the scene of the crime.” *Id.* at 8. Thus, the Superior Court concluded that the “trial court’s reasoning [was] sound and supported by the case law of this Commonwealth.” *Id.* On the totality of the evidence, the Superior Court concluded that the evidence was sufficient to support Petitioner’s convictions.

In his Response to the Commonwealth’s Response to the Petition, Petitioner challenges the testimony of Aziza Sidberry “the Commonwealth’s prepared and compensated

sole witness, and not because the presence of contradictions, but primarily because of its unreliability. There are a number of factors that would cause one to look upon the testimony of Aziza Sidberry with a jaundiced eye.” Pet’r’s Resp., p. 8. As correctly noted by Respondents, the determination of witness credibility, the resolution of conflicts in evidence and the drawing of reasonable inferences from proven facts all fall within the province of the fact finder and are therefore beyond the scope of federal habeas review. Resp., pp. 11-12 (citing Herrera v. Collins, 506 U.S. 390, 401-401 (1993)(citing Jackson)).

Under AEDPA, review for sufficiency of the evidence means that a determination must be made as to whether the state court disposition was an objectively unreasonable application of the Jackson standard. See Williams, 529 U.S. at 379-390. The trial court’s and Pennsylvania Superior Court’s determination that the evidence adduced at trial was sufficient to support Petitioner’s convictions was in no way contrary to, or an unreasonable application of the Jackson standard because, reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found proof of guilt beyond a reasonable doubt. Because the state courts’ rejections of Petitioner’s arguments regarding the sufficiency of the evidence for his convictions were neither contrary to nor an unreasonable application of clearly established federal law, Petitioner cannot be granted relief via habeas review. 28 U.S.C. § 2254(d). This claim must be denied.

B. Whether the State Courts Reasonably Rejected Petitioner’s Prosecutorial Misconduct Claims.

Petitioner next alleges prosecutorial misconduct, including: (1) the prosecutor improperly referenced inadmissible evidence on two separate occasions during the opening

argument which tainted the jury with evidence that would never be made part of the record or did not exist; (2) the prosecutor improperly attempted to create false evidence over objections, specifically in referencing the recovery of the bicycle recovered from Jahleel Thomas' house; and (3) in closing arguments, the prosecutor improperly commented on evidence ruled inadmissible by the trial court and then commented on defense counsel's motive for objecting. Pet. at Supplemental p. 2.

The relevant question for this Court on habeas review is whether the alleged prosecutorial misconduct "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 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). For misconduct to amount to a denial of due process, a petitioner must make a showing of "egregious" misconduct. Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992), cert. denied, 508 U.S. 947 (1993). See generally Caldwell v. Mississippi, 472 U.S. 320, 338 (1985)(warning against "holding every improper and unfair argument of a state prosecutor to be a federal due process violation"). The 1996 AEDPA amendments to the federal habeas statute further narrowed the standard of review on this issue. 28 U.S.C. § 2254(d); Moore v. Morton, 255 F.3d 95, 107 (3d Cir. 2001).

To qualify for relief, the alleged error must have had a "substantial and injurious effect" on the verdict. Brecht v. Abramson, 507 U.S. 619, 637 (1993). See also Fry v. Pliler, 127 S.Ct. 2321, 2328 (2007)("a court must assess the prejudicial impact of constitutional error . . . under the 'substantial and injurious effect' standard set forth in Brecht, 507 U.S. 591, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman, 386 U.S. 18."). Petitioner

exhausted these prosecutorial misconduct claims and each is hereafter examined.

1. Whether the Prosecutor Improperly Referenced Inadmissible Evidence on Two Separate Occasions During Opening Argument.

Petitioner first contends that the prosecutor improperly referenced inadmissible evidence on two separate occasions during his opening argument which tainted the jury with evidence that would never be made part of the record or did not exist. Petitioner presented this claim on direct appeal from his sentence and Judge Minehart held that it was meritless:

Defendant next argues that the prosecutor committed prosecutorial misconduct in his opening argument by referencing inadmissible evidence on two separate occasions. In the Commonwealth's opening statements the District Attorney referenced tips that police received about a bike, to which Defense Counsel objected. (N.T. 5/16/07, pp. 36). The Court sustained the objection, and instructed the jury to disregard the comments. The District Attorney then went on to reference Sidberry's friend, to which Defense Counsel also objected. (N.T. 5/16/07, pp. 36). The Court again sustained the objection and instructed the jury to disregard any reference to a friend.

In Commonwealth v. Harris, 884 A.2d 920, Pa. Super 335 (2005) the Superior Court addressed claims involving misconduct in arguments made by a prosecutor, and the effect a Court's response to an allegedly improper remark has on the fairness of the trial. The Court wrote:

Not every unwise remark on a prosecutor's part constitutes reversible error. Indeed, the test is a relatively stringent one. Generally speaking, a prosecutor's comments do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward [Appellant] so that they could not weight the evidence objectively and render a true verdict. Prosecutorial misconduct, however, will not be found where comments were based on evidence or proper inferences therefrom or were only oratorical flair. In order to evaluate whether comments were improper, we must look to the context in which they were made. Finally, when a trial court finds that a prosecutor's comments were inappropriate, they may be appropriately cured by a cautionary instruction to the jury.

Commonwealth v. Harris, 884 A.2d 920, 927, Pa. Super. 335 (2005).

Applying the foregoing to the instant matter, the Commonwealth's reference to the bike tip and Sidberry's friend did not prejudice the jury so that they were biased or hostile towards the defendant, and did not prevent the jury from weighing the evidence objectively and rendering a true verdict. The District Attorney's reference to the tip and friend were made in context of how police came across a black and gray mountain bike and not to prejudice the defendant.

Moreover, the Court sustained the objections to the prosecutor's comments made by defense counsel regarding any tips about a bike and Sidberry's friend. (N.T. 5/16/07, pp. 36-37). The Court then instructed the jury to disregard both comments made by the prosecutor. (N.T. 5/16/07, pp. 36-37). Thus, even if the prosecutor's remarks did have a prejudicial effect on the jury, they were cured by the cautionary instructions the Court gave to the jury. Commonwealth v. Harris, 884 A.2d 920, 927, Pa. Super 335 (2005). This claim, therefore, should be rejected.

Commonwealth v. Dockery, CCP 0507-0311 1/1 (Phila. CCP 7/18/07, pp. 5-6). On appeal, the Superior Court adopted the rationale of the trial court:

Appellant initially contends that the prosecutor referenced inadmissible evidence on two separate occasions in his opening statement. Brief for Appellant at 23-24. First, Appellant claims that the prosecutor improperly argued that a "tip" from a person at the crime scene resulted in the discovery of the bicycle that Appellant rode during the commission of crime at 2000 Cleveland Street, Jahmil Thomas' house. Brief for Appellant at 24. Second, Appellant argues that the prosecutor erroneously inferred that Sidberry knew that Thomas was a friend of Appellant. Brief for Appellant at 24. Appellant objected to these statements on the ground that this evidence was turned over to the defense during discovery and was inadmissible hearsay. Although the trial court sustained defense counsel's objections, Appellant argues that he is entitled to a new trial because the "initial taint was before the jury." Brief for Appellant at 24.

....

We agree with the trial court that the nature of the prosecutor's comments did not have a prejudicial effect on the jury and even if they did, the trial court's instruction was adequate to cure the prejudicial effect. *See Commonwealth v. Simpson*, 754 A.2d 1264, 1272 (Pa. 2000)(stating that juries are presumed to follow the instructions of a trial court's prompt instruction to the jury to disregard the statement cured any possible prejudice). Appellant's argument to the contrary thus fails.

Commonwealth v. Dockery, 1434 EDA 2007 (Pa. Super. July 28, 2008), pp. 9-11.

Petitioner repeats the claim he presented in the state courts that the prosecutor erred when he mentioned during opening statements that there was evidence regarding a tip received by police that resulted in the discovery at Jahleel Thomas's house of the bicycle he rode during the crime and that the eyewitness knew that Thomas was a friend of Petitioner. Defense counsel objected to both of these comments and the trial court sustained the objections and instructed the jury to disregard the references.

The Superior Court agreed with the trial court that even if the prosecutor's remarks have a prejudicial effect on the jury, they were cured by the cautionary instructions the Court gave to the jury. Resp., Ex. A at 10. Because Petitioner has not proven that the state courts unreasonably rejected this claim, this claim must be denied.

2. Whether the Prosecutor Improperly Attempted to Create False Evidence in Closing Arguments By Commenting on Evidence Ruled Inadmissible by the Trial Court.

Petitioner sets forth a claim that the prosecutor committed misconduct when he commented during closing argument about the bike recovered from Jahleel Thomas' house and the prosecutor committed misconduct by commenting on defense counsel's motive for objecting to evidence which was ruled inadmissible by the trial court. On appeal, the Pennsylvania Superior Court affirmed the trial court as follows:

Appellant also contends that the prosecutor committed misconduct during closing by commenting on evidence that was ruled inadmissible by the trial court. Brief for Appellant at 24-25. Particularly, Appellant takes issue with the prosecutor's comments about the bike recovered from Thomas' house at 2000 Cleveland Street. Brief for Appellant at 25. Upon review, we conclude that the prosecutor's comments, although not entirely a fair comment in response to defense counsel's summation, did not rise to the level of prejudice for the granting of a new trial.

Here, in his summation, defense counsel argued to the jury:

Two days ago is the first time that anybody shows that bike to the woman [Sidberry] who was out there that night. Now somebody tell me why that is. This homicide occurred in April of 2005. Last I check, it is May of 2007.

And the identification of the bike comes two years later, when the assistant district attorney calls her [Sidberry] up on the phone and says, "By the way, we're showing you a bike."

"Yeah, that's the bike."

Cut me a break. Show her ten bikes that are gray and black and ask her to pick among them if you want her to pick a bike; or show it in 2005. Ridiculous.

By the way, whose bike is that? Does anybody know beyond a reasonable doubt? Not his [Appellant]. Whose bike is it? Who is Mr. So-and-so who lives on Cleveland Street? Not him [Appellant].

N.T., 6/25/07, at 35-36.

In response, the prosecutor stated to the jury:

The defense attorney is trying to tell you . . . "Look at the bike over here that everyone agrees was not the bike [Appellant] was riding that night." Why would I bring it in here and waste everybody's time. It exists. I didn't hide it. I brought it out. I asked the detective about the bike: "Why did you take it?"

"Well we want to be sure." . . . [The detectives] took it.

[The detectives] walk around [the] corner to 2000 Cleveland Street. They find the bike, gray and black, the one [defense counsel] makes a big deal about "Whose bike is that? How does he know to find that bike?" [Defense counsel] knows because I told him. And when Detective Verrechio was testifying to it, [defense counsel] objected to it.

Mr. McMonagle [defense counsel]: Objection, Judge. I move for a mistrial.

The Court: It is the jury's recollection, not counsel's. They'll

recall what the detectives testified to.

Mr. Gilson [the prosecutor]: When I attempted to question him as to how he found that bike and who told him about it, there was an objection. Now [defense counsel] stands up in front of you, makes a big point about how did you find the bike, who did it belong to.

Don't object.

Mr. McMonagle: Judge, that's a mischaracterization.

The Court: Yeah. We don't get into the rulings of the Court.
That's sustained.

N.T., 6/25/07, at 367-68.

Appellant cites *United States v. Molina-Guevara*, 96 F.3d 698, 703 (3d Cir. 1996), for the proposition that he is entitled to a new trial due to the prosecutor's above comments. Brief for Appellant at 25. We conclude that *Molina-Guevara* is factually inapposite. Unlike the prosecutor in *Molina-Guevara*, the prosecutor in this case did not argue that a government agent, an absent witness at trial, would have testified favorably for the United States. 96 F.3d at 703. Moreover, unlike the prosecutor in *Molina-Guevara*, the prosecutor here did not provide the jury with the substance of the absent witness' would-be testimony. *See id.* Instead, the prosecutor in this case rebutted defense counsel's statements during summation by merely reminding the jury that Appellant objected when the detective (a witness who testified at trial) was asked about the bicycle, thus accounting for the lack of evidence that Appellant initially referred to. Significantly, the prosecutor did not provide the jury with the substance of the detective's unknown testimony that the trial court held inadmissible. While we hesitate to find that the prosecutor's comments were completely shielded as a responsive "fair comment," since the prosecutor alluded to evidence ruled inadmissible by the trial court, we nonetheless conclude that the prosecutor's remarks, in this context, were non-prejudicial. As the trial court correctly noted, the jury was entitled to recall what the detectives testified to, the prosecutor simply brought the detective's testimony and defense counsel's objection to the jury's attention, in an attempt to dispel defense counsel's argument during summation. Because *Molina-Guevara*, the sole authority cited by Appellant in support of his contention, is distinguishable on its facts, we conclude that Appellant's argument on appeal does not entitle him to relief. Despite the prosecutor's comments, we conclude that the jury was able to weigh the evidence objectively and render a true verdict.

Even if the prosecutor's comment had a prejudicial effect on the jury, the trial court charged the jury that they "may not rely upon supposition or guesswork

on any matters that are not in evidence[.]” N.T., 6/25/07, at 403. The trial court further explained to the jury that “[r]eferences to the Court’s rulings, references to conversations that the parties may have had at another time, references to matters not in evidence or not presented to you, that may be part of an argument, but that is not part of the evidence” should not be considered during deliberation. *Id.* at 404. Hence, we conclude that the trial court’s charge to the jury was sufficient to cure any prejudice that Appellant suffered as a result of the prosecutor’s comments concerning the detective’s testimony.

Resp., Ex. A, pp. 12-14. Again, Petitioner presents the same arguments in this Court as in the state courts. On federal habeas review, the question when prosecutorial misconduct is alleged is whether the prosecutor’s comments so infected the trial with unfairness as to make the conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986)(quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). This Court must distinguish between ordinary trial error and the type of egregious misconduct that amounts to a denial of due process. Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992), cert. denied, 113 S.Ct. 2433 (1992).

Petitioner has not identified any decision of the trial court or the appellate court which is contrary to, or an unreasonable application of, Sixth Amendment jurisprudence.

Petitioner, therefore, does not meet his burden of proving prosecutorial misconduct on this claim either at trial or on appeal and this claim must be denied.

C. Whether Petitioner’s Fifth Amendment Rights Were Violated When the Prosecutor Commented on Petitioner’s Post-Arrest Silence.

Petitioner’s third claim in the Petition is that the prosecutor’s comment on his post-arrest silence violated his Fifth Amendment rights. Petitioner specifically claims:

During the course of argument the prosecutor urged the jury to assume that the motive evidence was being hidden by the Petitioner by hiding behind his constitutional right to remain silent. At this point, there was a sole witness whose identification was unreliable, as such the prejudicial reference to Defendant’s silence was substantial.

Pet., Supplemental page 3. This claim was reviewed and found meritless by both the trial court and the Pennsylvania Superior Court. Judge Minehart held:

Defendant finally argues that the trial court erred in not granting a motion for a mistrial based upon the misconduct of the prosecutor in closing statements. . . Defendant also argues that the prosecutor improperly commented on the defendant's exercise of his right to remain silent when he commented on defense counsel's motive for objecting to comments made by the prosecutor (N.T. 5/17/07, pp. 371).

.....

Later on in the Commonwealth's closing arguments, the District Attorney commented on why he did not prove motive and referred to the Defendant's right to remain silent. (N.T. 5/17/07, pp. 371). Defense Counsel objected, and the Court sustained the objection and instructed the jury to disregard the comments. (N.T. 5/17/07, pp. 371). In the Court's charge, the Court instructed the jury that they must not draw any inference of guilt or other inference adverse to the defendant from the fact that the defendant did not testify. (N.T. 5/18/07, pp. 412). Again this was sufficient to cure any harm the remarks may have caused.

Even if the prosecutor's remarks were improper, the defendant has a fair and impartial trial, and therefore the District Attorney's remarks do not constitute a reversible error. Commonwealth v. Harris, 884 A.2d 920, 927, Pa. Super. 335 (2005). The claim, therefore, should be rejected.

Commonwealth v. Dockery, No. 0507-0311 (CCP Phila. 7/18/07), pp. 6, 7-8. The Superior Court affirmed Judge Minehart's holding as follows:

The law governing a prosecutor's comments on a defendant's constitutional right to remain silent is summarized as follows:

It is axiomatic that a prosecutor may not comment adversely on a defendant's refusal to testify with respect to the charges against him since such commentary would compromise the defendant's privilege against self-incrimination and the defendant's constitutional presumption of innocence. This is so because allowing the prosecution to comment on the accused's failure to testify is, in effect, allowing the failure to take the witness stand to be used as evidence against him, which in the minds of the jurors would be indicative of guilt.

However, such comments are improper only if they unequivocally call attention to the defendant's failure to testify. Therefore, reference to the failure of a defendant to testify on his own behalf, to constitute reversible error, *must call the jury's attention to the fact that the defendant has not testified and must reasonably lead to an inference that he would have taken the stand if not guilty.*

Commonwealth v. Randall, 758 A.2d 669, 681-82 (Pa. Super. 2000)(emphasis supplied, citation and internal quotation marks omitted).

After review of the prosecutor's reference to Appellant's right to remain silent, we conclude that it did not reasonably suggest that the jury draw an inference that Appellant would have taken the stand if he was not guilty. Rather, the prosecutor's statement simply attempted to explain why the Commonwealth could not prove Appellant's "motive" for the shooting. Therefore, the prosecutor's reference to Appellant's right to remain silent, in light of its contextual setting, did not amount to reversible error. Notably, the trial court, in its charge to the jury, instructed the jury that they must not draw any adverse inference of guilt or any other inference adverse to Appellant from the fact that he did not testify at trial. N.T., 5/18/07, at 42. As such, to any extent the jury considered the fact that Appellant did not testify as a result of the prosecutor's closing comment, the trial court instructed the jury on the applicable law, thus curing any prejudice.

Resp., Ex. A at 16. Respondents correctly note that Petitioner fails to prove that the Superior Court's resolution of this claim was contrary to federal law or an unreasonable determination of the facts. Thus, this claim should be denied.

D. Whether Trial Counsel Was Ineffective for Allegedly Failing to Investigate and/or Interview Two Potential Witnesses.

Petitioner claims that trial counsel was ineffective for failing to investigate and/or interview two witnesses, Jahleel Thomas and Bahair Stafford. Petitioner contends:

At trial, the Commonwealth presented evidence of a bike purportedly used by the assailant. This bike was recovered at the residence of Jahleel Thomas. The Commonwealth, on the day before trial, met with their sole witness to suggest that they need her to identify this bike when shown to her tomorrow at trial. Their sole witness did so. Jahleel Thomas, who[se] bike the Commonwealth seized and presented at trial would have been available and willing to testify at Petitioner's

trial, but was not contacted by trial counsel or PCRA counsel. The Petitioner informed trial counsel of Jahleel Thomas' identity and contact information, but refused to interview or investigate. Mr. Thomas would have testified that he was in possession of the seized bike at all times relevant to the homicide. Had Mr. Thomas been called as a witness, there is a reasonable probability of different outcome. PCRA counsel never spoke to trial counsel of Jahleel Thomas.

At trial and throughout the prior proceedings the Commonwealth bolstered their sole witness as the only witness. In fact, there were other potential eyewitnesses which were ignored by both the Commonwealth and trial counsel. Bahair Stafford was a potential eyewitness to the shooting in which defense counsel was aware of, since his name and contact information was provided to trial counsel. Mr. Stafford would have informed counsel that the shooter was not the petitioner who he knows and if shown a photo array there would be a possibility of identifying the actual shooter who rode by him prior to shooting the victim. Bahair Stafford was never contacted or interviewed by counsel who had no reasonable basis not to interview and/or investigate him.

Pet., Supplemental pp. 3-4. In his Response to the Commonwealth's Answer, Petitioner states that "Bahir Stafford was an eyewitness who notified Petitioner of his observation that night, however, Stafford could not be located for the purpose of obtaining an affidavit. His contact information was provided to previous counsel during the course of the PCRA proceedings."

Pet'r Resp., p. 21.

The Pennsylvania Superior Court affirmed the trial court's holding with respect to these claims as follows:

Appellant first submits a thinly layered claim of ineffective assistance of counsel ("IAC"), asserting that PCRA counsel and all earlier counsel failed to preserve and present his claim that two potential defense witnesses, Jahlil Thomas^{fn} and Bahir Stafford, should have been investigated, interviewed, and presented at trial. Appellant's Brief at 9. According to Appellant, Stafford "was an eyewitness to the crime indicating that the Appellant was not the shooter" and Thomas "had possession of his bike the entire night . . . the same bike that the Commonwealth confiscated and presented at trial." *Id.* at 10. Upon review, we discern no merit to Appellant's first issue.

fn. We note the record and briefs contain various spellings of Mr.

Thomas' name. We shall use the "Jahlil" form.

We reiterate that counsel's representation is presumed to have been effective, unless the petitioner proves otherwise. *Commonwealth v. Williams*, 732 A.2d 1167, 1177 (Pa. 1999). In order to succeed on an ineffective assistance of counsel ("IAC") claim, an appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's performance lacked a reasonable basis; and (3) that the ineffectiveness of counsel caused the appellant prejudice. *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). We have explained that trial counsel cannot be deemed to be ineffective for failing to pursue a meritless claim. *Commonwealth v. Loner*, 836 A.2d 125, 132 (Pa. Super. 2003)(*en banc*).

With regard to the second IAC prong, trial counsel's approach must be "so unreasonable that no competent lawyer would have chosen it." *Commonwealth v. Ervin*, 766 A.2d 859, 862-863 (Pa. Super. 2000)(quoting *Commonwealth v. Miller*, 431 A.2d 233 (Pa. 1981)). Our Supreme Court has long defined "reasonableness" as follows:

Our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had *some reasonable* basis designed to effectuate his client's interests. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis.

Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987)(quoting *Washington v. Maroney*, 235 A.2d 349 (Pa. 1967))(emphasis in original).

In addition, we are mindful that prejudice requires proof that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Pierce*, 786 A.2d at 213. "A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness." *Commonwealth v. Daniels*, 963 A.2d 409, 419 (Pa. 2009)(citation omitted). Thus, when it is clear that an appellant has failed to meet the prejudice prong of an ineffective assistance of counsel claim, the claim may be disposed of on that basis alone, without a determination of whether the first two prongs have been met. *Commonwealth v. Baker*, 880 A.2d 654, 656 (Pa. Super. 2005). Furthermore, claims of ineffective assistance of counsel are not self-proving. *Commonwealth v. Wharton*, 811 A.2d 978, 986 (Pa. 2002). Therefore, a post-conviction petitioner must, at a minimum, present argumentation relative to each layer of ineffective assistance, on all three prongs of the ineffectiveness standard." *Commonwealth v. D'Amato*, 856 A.2d 806 812 (Pa. 2004).

Whether an appellant claims that counsel was ineffective for failing to call a particular witness:

“we require proof of that witness’s availability to testify, as well [as] an adequate assertion that the substance of the purported testimony would make a difference in the case.” *Commonwealth v. Clark*, 599 Pa. 204, 961 A.2d 80, 90 (2008). With respect to such claims, our Court has explained that:

the [appellant] must show: (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness’s existence; (4) that the witness was prepared to cooperate and would have testified on appellant’s behalf; and (5) that the absence of the testimony prejudiced appellant.

Commonwealth v. Brown, 767 A.2d 576, 581-582 (Pa. Super. 2001), quoting *Commonwealth v. Fletcher*, 561 Pa. 266, 750 A.2d 261, 275 (2000), *abrogated on other grounds by Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003). Thus, trial counsel will not be found ineffective for failing to investigate or call a witness unless there is some showing by the appellant that the witness’s testimony would have been helpful to the defense, *Commonwealth v. Auken*, 545 Pa. 521, 681 A.2d 1305, 1319 (1996). “A failure to call a witness is not per se ineffective assistance of counsel for such decision usually involves matters of trial strategy.” *Id.*

Commonwealth v. Michaud, 70 A.3d 862, 867-868 (Pa. Super. 2013).

The PCRA court disposed of Appellant’s IAC claim with the following analysis:

Here, the record shows that at trial [Appellant] participated in a colloquy asking him if counsel had done everything [Appellant] asked him to and he responded affirmatively. Where a defendant voluntarily concurs with trial counsel’s strategy he may not later claim ineffective assistance of counsel. *Commonwealth v. Rios*, 920 A.2d 790, 803 (Pa. 2007) (holding that when defendant decides a matter knowingly, voluntarily, and intelligently concerning trial strategy he will not later be heard to complain that trial counsel was ineffective on the basis of that decision); *Commonwealth v. Lawson*, 762 A.2d 753 (Pa. Super. 2000) *appeal*

denied 781 A.2d 141 (Pa. 2001)(same). The following discussion took place during [Appellant's] trial:

The Court: Any other evidence you wanted presented that has not been presented by Mr. McMonagle?

[Appellant]: No, sir.

The Court: Has he done what you've asked of him and have discussed as far as trial strategy?

[Appellant]: Yes, Your Honor.

The Court: Are you satisfied with his representation?

[Appellant]: Yes, Your Honor.

(N.T. 5/17/07 pg 312).

[Appellant] is bound by the statements he made at trial about trial counsel's representation of him and, thus, counsel was not ineffective for failing to present witnesses at [Appellant's] trial. Accordingly, [Appellant's] claim with respect to this issue should be dismissed.

Even should it be determined that [Appellant's] current claim is not precluded by what he averred to at trial regarding trial counsel's strategy, the claim still lacks merit and properly was dismissed without a hearing. The failure of trial counsel to call a witness constitutes ineffective assistance where there is a showing that the testimony of the absent witness would have been helpful in establishing the asserted defense. Commonwealth v. Leonard, 499 Pa. 357, 453 A.2d 587, 589 (1982). The defendant is also required to establish: 1) the witness existed; 2) the witness was available; 3) counsel was informed of the existence of the witness or counsel should otherwise have known of him; 4) the witness was prepared to cooperate and testify for appellant at trial; and 5) the absence of the testimony prejudiced appellant so as to deny him a fair trial. Commonwealth v. Petras, 534 A.2d 483 (Pa. Super. 1987) (citations and footnote omitted).

In the present matter, [Appellant], without explication, alleged in his *pro se* PCRA [petition] that prior counsel provided him with ineffective assistance of counsel. See *pro se* PCRA

petition, p.3, sec. 5. [Appellant] thereafter identified two alleged witnesses in his *pro se* petition, Bahair Stafford and [Jahlil Thomas], but did not set forth what these individuals would testify to or set forth why these witnesses entitled him to PCRA relief. See *pro se* PCRA petition, p.6, sec. 12. In her no-merit letter, [PCRA counsel] addressed these witnesses and stated that she concluded that trial counsel had not been ineffective for failing to call them at trial for two reasons. First, she indicated that [Appellant], at trial, agreed with counsel's trial strategy, which, by implication, did not include calling any witnesses. No-Merit Letter, 12/4/12, pp. 6-7. She then stated that even had [Appellant] not so agreed counsel was not ineffective for failing to call these witnesses because they both had criminal records and the testimony was irrelevant and would not have resulted in a different outcome. No-Merit Letter, 12/4/12, pp. 7-8.^{fn}

^{fn}. [PCRA counsel] noted that [Appellant's] assertion that the information these witnesses had concerning a bicycle was *de minimis* because, at trial, the Commonwealth elicited very little testimony about the bike, trial counsel objected to testimony and comments about it, and the evidence of [Appellant's] guilt was sufficient to sustain the convictions. No-Merit Letter, 12/4/12, pp. 7-8.

In his response to the 907 notice, Appellant took issue with [counsel's] analysis. He claims that [her] conclusion that he acquiesced in trial counsel's decision not to call any witnesses is incorrect because the colloquy did not specifically ask him if he wished to call any witnesses. 907 Response, p. 2. [Appellant] further claims that [counsel] should not have filed a no merit letter because he "proffered the testimony" of [Jahlil] Thomas, who [Appellant] claims would have testified about a bike that the Commonwealth did not describe until just prior to the commencement of the trial and that he was in possession of a bike at all times. 907 Response, p. 3. Finally, [Appellant] contends that even had the colloquy covered whether he wanted witnesses called, he still was entitled to relief because his claim was predicated on an assertion that trial counsel had conducted no investigation of the witnesses [Appellant] named in his *pro se* PCRA petition. 907 Response, p. 3. [Appellant] goes on to add that counsel acted unreasonably when he failed to interview [Appellant's] witnesses. Id.

[Appellant] has not established, through affidavits from the witnesses he names or other means, that these individuals were available at the time of trial, that trial counsel was aware of their existence, that the witnesses were prepared to cooperate and testify at trial and that the lack of this testimony denied him a fair trial. This is fatal to his claim. See *Commonwealth v. Khalil*, 806 A.2d 415, 422 (Pa. Super 2002), *appeal denied*, 572 Pa. 754, 818 A.2d 503 (2003)(citing *Commonwealth v. Davis*, 554 A.2d 104 (1989)) (“ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense.”). Because [Appellant] cannot establish that trial counsel was ineffective, PCRA counsel cannot be ineffective for failing to raise a meritless claim. Thus, [Appellant’s] first claim on appeal should be denied.

In addition, as noted by [PCRA counsel], the testimony [Appellant] claims the identified witnesses would have provided would not have changed the outcome of the trial and, thus, the failure to call the witnesses did not deprive [Appellant] of a fair trial. Evidence concerning the bike was tangential at best and would not have sufficed to result in an acquittal.

PCRA Court Opinion, 7/23/13, at 5-8.

Initially, we note that the record does not contain any notes of testimony from this matter. What is not of record does not exist for purposes of appellate review. *Commonwealth v. Martz*, 926 A.2d 514 (Pa. Super. 2007). Therefore, we cannot confirm the primary basis for the PCRA court’s decision, i.e., that Appellant agreed during a colloquy to trial counsel’s strategy not to present any evidence, including the potential defense witnesses. PCRA Court Opinion, 7/23/13, at 5. However, we may affirm the PCRA court’s order on any basis where that order is supported by the record. *Accord Commonwealth v. Rykard*, 55 A.3d 1177, 1183 (Pa. Super 2012), *appeal denied*, 64 A.3d 631 (Pa. 2013) (“[T]his Court may affirm a PCRA court’s decision on any ground if the record supports it.”).

Based on our thorough review, we conclude that the certified record and applicable law support the PCRA court’s ruling and that its ruling is free of legal error. Appellant’s underlying claim that trial counsel was ineffective for failing to investigate, interview, and present Strafford and Thomas does not warrant relief for several reasons. First, Appellant failed to establish the availability and willingness to cooperate of the potential witnesses with affidavits. *Michaud*, 70 A.3d at 867-868; *accord Commonwealth v. Khalil*, 806 A.2d 415, 422-423 (Pa. Super. 2002) (“This Court will not grant relief based on an allegation that a certain witness may have testified in the absence of an affidavit from that witness to show

that the witness would, in fact, testify.”). Second, trial counsel had a rational basis for not presenting their testimony, *i.e.*, both witnesses had criminal records, evidence of which would have compromised their credibility. Case Correspondence, 12/4/12 and 4/23/13. *See Commonwealth v. Ograd*, 839 A.2d 294, 336 (Pa. 2003)(stating that decision of defense counsel not to call witnesses was strategic one that did not provide basis for new trial). Third, Appellant did not demonstrate that Thomas’ testimony about the bicycle would be beneficial to the defense under the circumstances of this case, including the eyewitness testimony positively identifying Appellant as the shooter.^{fn} Indeed, “it would be difficult to show that the testimony of the putative witnesses was beneficial to the defense because Appellant asserted no defense at trial.” *Khalil*, 806 A.2d at 423 n.3.

fn. PCRA counsel advised the PCRA court that, on direct appeal “prosecutorial misconduct was alleged with regard to argument made by the prosecutor concerning the trip and the bicycle. The Superior Court rejected [Appellant’s] claim, slip op. at 9-14, and it may not be relitigated in a post-conviction proceeding. 42 Pa.C.S.A. § 9544(a). The bicycle becomes less significant in light of the fact that both [Appellant] and trial counsel were aware that it was Sidberry who provided the information regarding the bicycle to the police.” Case Correspondence, 12/4/12, at 7.

Because Appellant’s underlying claim regarding Strafford and Thomas lacks merit, PCRA counsel cannot be deemed ineffective for failing to assert prior counsel’s ineffectiveness with regard to the potential witnesses. *Accord Commonwealth v. Busanet*, 54 A.3d 35, 46 (Pa. 2012), *cert. denied*, 134 S.Ct. 178 (2013)(“If the petitioner cannot prove the underlying claim of trial counsel ineffectiveness, petitioner’s derivative claim of appellate counsel ineffectiveness fails.”); *Commonwealth v. Lions*, 971 A.2d 1125, 1146 (Pa. 2009)(“As the substantive *Baton* claim lacks arguable merit, trial counsel cannot be deemed ineffective for failing to raise it and [appellant’s derivative claim of PCRA counsel’s ineffectiveness fails.”)(citation omitted)). Thus, Appellant’s first issue does not warrant relief.

Resp., Ex. B, pp. 4-12.

Respondents contend that Petitioner is not entitled to relief on this ineffectiveness claim because he cannot establish prejudice. According to Petitioner, Bahair Stafford was an eyewitness who would have contradicted the testimony of Aziza Sidberry. Respondents note that

the publicly available criminal record for Bahair Stafford shows that he had multiple criminal convictions, including a conviction for robbery one month before Petitioner's trial. See CP-51-CR1104611-2005. This record of *crimen false* would have discredited Stafford's testimony if he was called as a witness at Petitioner's trial. See Pa.R.Evid. 609(a) (credibility of witness may be attacked by presenting evidence that witness was previously convicted of crime involving dishonesty or false statement); Commonwealth v. Jackson, 585 A.2d 1001, 1003 (Pa. 1991) ("robbery conviction would have been admissible for impeachment purposes had appellant testified at his trial"). Petitioner also does not explain when this witness came forward, and why he did not come forward right after the shooting if he was an eyewitness to the crime.

Jahleel Thomas was Petitioner's friend who lived in the house at 2402 Cleveland Street where police found the bicycle that Ms. Sidberry identified as being like the one used in the shooting. (N.T., 5/17/07, pp. 273-274.) According to Petitioner, Thomas would have testified that the bicycle never left Thomas' house or possession on the day of the shooting. Petitioner attaches to his Reply to the Response to the Petition an affidavit executed by Thomas months after the instant Petition was filed in support of this argument that Thomas was available and willing to testify but he was never contacted or interviewed by Petitioner's counsel. "When assessing this type of new evidence, we should 'consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.'" Williams v. Patrick, No. CIV.A. 07-776, 2014 WL 2452049, at *11 (E.D. Pa. June 2, 2014)(quoting Goldblum v. Klem, 510 F.3d 204, 230 (3d Cir. 2007)(quoting Schlup, 513 U.S. at 332) and McQuiggin v. Perkins, 133 S.Ct. 1924, 1928, 1936 (2013) ("Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite

showing.”)). “Mere cumulative impeachment evidence, along with all of the evidence presented at trial, is not so strong that the Court does not have confidence in the outcome of the trial such that no reasonable juror could have found Petitioner guilty.” Williams, 2014 WL 2452049, at *11 (citing Goldblum, 510 F.3d at 231). Respondents note that Thomas was Petitioner’s good friend and subject to possible accomplice liability if he provided the bicycle used in the crime. Thus, he had an obvious motive to lie. Moreover, Petitioner overestimated the importance of the bike, which was only a small part of the evidence against him.

In contrast, Ms. Sidberry immediately told police that she knew the shooter and unwaveringly identified Petitioner as the shooter. She knew Petitioner before the shooting and stood face-to-face with the shooter. (N.T., 5/16/07, pp. 125, 126.) Just after the shooting, she gave police an accurate and detailed description of Petitioner. She also unequivocally identified Petitioner as the shooter at the preliminary hearing and at trial. (Id. at 145, 173.) Ms. Sidberry’s account of the shooting was corroborated by the physical evidence at the scene, and by the recovery of .9 millimeter bullets from Petitioner’s house like the ones used in the shooting. Given the strong evidence against Petitioner, it is unreasonable that Stafford’s and Thomas’s impeachable testimony would have resulted in a different verdict or that trial counsel’s decision not to call Stafford and Thomas would have been a reasonable trial strategy.

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). See also Vega v. Klem, No. CIV.A. 03-5485, 2005 WL 3216738, at *6 (E.D. Pa. Nov. 29, 2005)(citing 28 U.S.C. § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 404-405 (2000); Fountain v. Kyler, 420 F.3d 267, 272-273 (3d Cir. 2005)). 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).

In the present case, counsel cannot be deemed ineffective for failing to pursue a meritless claim. Accordingly, we conclude that Petitioner has not identified any decision of the trial court or the appellate court which is contrary to, or an unreasonable application of, Sixth Amendment jurisprudence. Petitioner, therefore, does not meet his burden of proving ineffective assistance of counsel on this claim and it is recommended that this claim should be denied.

E. Petitioner's Claims in the Reply Brief Which Are Neither Exhausted Nor Included in the Petition.

In a Motion for Extension of Time to File an Amended Petition filed on December 24 and again on December 29, 2014, Petitioner sought an extension of time of forty-five days to file an Amended Petition and supporting Memorandum of Law. This proposed Amended Petition and supporting Memorandum of Law would have been filed on or before February 7, 2015. No Amended Petition was filed, therefore the Motion to File an Amended Petition was denied on May 12, 2015. Following the filing of the initial Motion to File an Amended Petition, Petitioner then sought an extension of time of sixty days for leave to file an Amended Petition and supporting Memorandum of Law in a letter motion dated February 23, 2015 which was docketed by the Court on May 4, 2015. The deadline for filing such Amended Petition and

supporting Memorandum of Law would have been April 23, 2015. No Amended Petition was filed by April 23, 2015, therefore the Motion to File an Amended Petition was denied on May 15, 2015.

Petitioner then filed a Motion for Extension of Time to File a Reply to Respondents' Answer, which was docketed on August 3, 2015, and granted on August 12, 2015, giving Petitioner permission to file a Reply on or before November 3, 2015. Petitioner then filed a Motion for Extension of Time which was docketed on October 30, 2015 and granted on November 9, 2015, giving Petitioner an extension of time until January 3, 2016 to file a Reply.

Petitioner's Reply was postmarked January 7, 2016 and docketed on January 11, 2016. In the Reply, Petitioner added the following claims in addition to those contained in his original Petition: (1) trial counsel was deficient in failing to consult or obtain an expert to cross-examine Commonwealth's expert or be prepared for the testimony of Kenneth Lay, Ballistician (Reply, pp. 22-23); (2) trial counsel's performance was deficient in failing to object to evidence of prior bad acts (Id. at 24); (3) trial counsel's performance was deficient when he permitted prejudicial remarks to be heard by the jury that resembled a victim's impact statement (Id. at 25); (4) the cumulative effect of the Constitutional errors in this case violated Petitioner's right to due process of the law (Id. at 25-26). Petitioner has not exhausted these claims in the state courts, therefore all of the claims are procedurally defaulted.

Upon a finding of procedural default, review of a federal habeas petition is barred unless the habeas petitioner can demonstrate (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law", or (2) that "failure to consider the claims will result

in a fundamental miscarriage of justice.”⁵ Coleman v. Taylor, 501 U.S. 722, 750 (1990); Peterkin v. Horn, 176 F. Supp. 2d 342, 353 (E.D. Pa. 2001). These claims are procedurally defaulted because Petitioner did not properly present them to each level of the state courts.⁶ Further, we note that Petitioner fails to acknowledge that these claims are procedurally defaulted and does not offer evidence of cause and prejudice for the default, and he does not allege that a miscarriage of justice would result.

F. 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

⁵ Petitioner can demonstrate cause for procedural default if he can show that some objective factor external to the defense impeded or prevented his ability to comply with the state procedural rules. Caswell, 953 F.2d at 862. The cause must be “something that cannot fairly be attributed to the petitioner.” Coleman, 501 U.S. at 753. While ineffectiveness of counsel may, in some instances, constitute “cause” to excuse procedural default, Murray v. Carrier, 477 U.S. 478, 488-489 (1986), in order to qualify, the ineffectiveness alleged must arise to an independent constitutional violation which claim itself must also be presented to state court. Edwards v. Carrier, 529 U.S. 446 (2000).

To show prejudice, petitioner must present evidence that this factor did more than merely create a possibility of prejudice; it must have “worked to [petitioner’s] actual and substantial disadvantage.” Murray, 477 U.S. at 494 (emphasis in original) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). Additionally, the fundamental miscarriage of justice exception to procedural default is only concerned with “actual” innocence and petitioner must show that it is more likely than not that no reasonable juror would have convicted him absent the claimed error. Schlup v. Delo, 513 U.S. 298, 327 (1995). The Supreme Court has repeatedly held, however, that the scope of the miscarriage of justice exception is a narrow one. Sawyer v. Whitley, 505 U.S. 333 (1992); McCleskey v. Zant, 499 U.S. 467 (1991); Dugger v. Adams, 489 U.S. 401 (1989). This exception only applies when “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Murray, 477 U.S. at 496. The Supreme Court has suggested that the test for actual innocence is whether there is “a fair probability that, in light of all the evidence, including that to have been . . . wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.” Kuhlmann v. Wilson, 477 U.S. 436, 454-55 n.17 (1986).

⁶ The factual and legal basis of a claim must be the same in state and federal court, otherwise the claim stated in federal court was not fairly presented in state court and is procedurally defaulted. Baldwin v. Reese, 541 U.S. 27 (2004); Anderson v. Harless, 459 U.S. 4, 7 (1982); Lines v. Larkins, 208 F.3d 153, 159-160 (3d Cir. 2000).

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

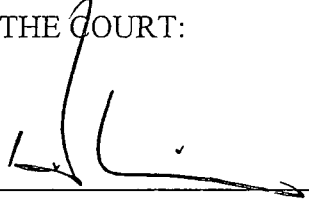
For all of the above reasons, I make the following:

RECOMMENDATION

AND NOW, this 13th day of February, 2017, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 should be DENIED with prejudice and DISMISSED without an evidentiary hearing. There is no probable cause to issue a certificate of appealability.

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

BY THE COURT:



HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE

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