No. 24-

IN THE

Supreme Court of the United States

ALAN KUSHNER,

Petitioner,

v.

THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JASON JAVIE
Counsel of Record
JASON JAVIE, P.C.
Two Penn Center, Suite 900
1500 John F. Kennedy Boulevard
Philadelphia, PA 19102
(267) 497-8889
jason.javie@crllaw.com

Counsel for Petitioner

380664

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Third Circuit Court of Appeals erroneously denied the petitioner's application for a Certificate of Appealability?

PARTIES & RELATED PROCEEDINGS

The petitioner is Robert Kushner, an inmate in a Pennsylvania Correctional Facility serving a sentence ordered by a Pennsylvania Court. The respondents are the Attorney General of Pennsylvania, the District Attorney of Montgomery County, Pennsylvania and the Superintendent of the State Correctional Institute at Phoenix.

Court of Common Pleas for Montgomery County, Pennsylvania

Commonwealth v. Kushner, CP-46-CR-0009814-2008, Philadelphia Court of Common Pleas

- 10/23/2009—Judgment of Sentence
- 8/1/2014—Order Denying Post-conviction Relief Petition
- 2/10/2016—Order Dismissing Post-conviction Relief Petition
- 5/16/2017—Order Dismissing Post-conviction Relief Petition
- 8/26/2019—Order Dismissing Post-conviction Relief Petition
- 12/12/2019—Order Dismissing Post-conviction Relief Petition

Superior Court of Pennsylvania

Commonwealth v. Kushner, 762 EDA 2010, 12/8/2010 (affirming judgment of sentence)

Commonwealth v. Kushner, 792 EDA 2016, 1/10/2017 (affirming dismissal of initial post-conviction proceedings)

Commonwealth v. Kushner, 3875 EDA 2017, 1/17/2019 (affirming dismissal of second or subsequent post-conviction proceedings)

Commonwealth v. Kushner, 120 EDA 2021, 11/3/2021 (affirming dismissal of second or subsequent post-conviction proceedings)

Supreme Court of Pennsylvania

Commonwealth v. Kushner, 177 MAL 2011, 10/13/2021 (denying request for discretionary review of intermediate appellate court affirming judgment of sentence)

Commonwealth v. Kushner, 74 MAL 2022, 6/22/2022 (denying request for discretionary review of intermediate appellate court affirming dismissal of petition seeking post-conviction relief)

United States District Court for the Eastern District of Pennsylvania

Kushner v. Link, et al., No. 2:2016-cv-00045, 8/2/2024 (denying and dismissing petition for *habeas corpus*; declining to issue Certificate of Appealability)

United States Court of Appeals for the Third Circuit

Kushner v. Link, et al., No. 24-2525, 1/22/2025 (denying petition requesting Certificate of Appealability)

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LOWER COURT OPINIONS

The Third Circuit did not issue a published or unpublished decision. The United States District Court for the Eastern District of Pennsylvania's unreported opinion is available at *Kushner v. Terra*, No. 16-cv-0045, 2024 U.S. Dist. LEXIS 137331 (E.D.Pa. August 2, 2024) (Leeson, J.). *See* Appendix B at 3a-29a. The Report and Recommendation of the Magistrate Judge is available at *Kushner v. Link*, No. 16-cv-0045, 2024 U.S. Dist. LEXIS 36280 (E.D.Pa. February 29, 2024) (Wells, M.J.). *See* Appendix C at 30a-66a.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered judgment in this matter on January 22, 2025. Rehearing or reargument was not requested. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1) (authorizing review of cases in courts of appeal "[b]y *writ* of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[] . . . .").

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253. Appeal

> (a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

CONCISE STATEMENT OF THE CASE

The Petitioner Alan Kushner is serving a 7 ½ to 20 year sentence following his conviction for Solicitation to Commit Murder (18 Pa.C.S. § 902).[1] In brief, Petitioner, a successful Chiropractor and Sarran Kushner were married in 1976, had two sons and lived together for more than twenty years. Marital problems ensued and culminated in the commencement of divorce proceedings in January of 2006. Petitioner ultimately left the marital home later in 2006 when the divorce court awarded Sarran Kushner exclusive possession of the marital residence.

In May of 2008, Sarran Kushner returned to her home in a suburb of Philadelphia. After she parked but before exiting the vehicle, an unknown person discharged a firearm in her direction from behind the row of hedges next to her driveway striking her in the wrist. Police investigated the shooting which, among other things, revealed that Petitioner had had dinner at a restaurant with his father on the night of the shooting and then returned home. There was no evidence that Petitioner left the home or that he was involved in his wife's shooting. The shooter has never been identified.

Petitioner was subsequently arrested by officials in Montgomery County, Pennsylvania in October of 2008 for Solicitation, Attempted Murder and Conspiracy. It was specifically alleged that during a medical appointment at his office in Philadelphia, Petitioner attempted to hire

1. Petitioner was acquitted of Attempted Murder (18 Pa.C.S. § 901), and Conspiracy to Commit Murder (18 Pa.C.S. § 903) in the same prosecution.

one of his patients (Weldon Gary) to kill his wife. He pled not guilty and was tried by a jury. The case was highly circumstantial with the evidence being centered on the acrimonious relationship between Petitioner and Sarran Kushner. Specifically, the trial court permitted testimony about the couples' domestic disputes, including those which led to the entry of an order of protection against the Petitioner. There was also testimony about off-color comments that Petitioner was alleged to have made to others as well as evidence pertaining to domestic incidents involving his ex-wife. To be sure, the evidence in question did not place Petitioner in the most positive light, but the evidence proved nothing more than Petitioner's growing dislike for his wife, something not uncommon in contested, messy divorce proceedings.[2]

The Commonwealth's star witness was Weldon Gary.[3] Gary was a regular patient of Petitioner's. Gary was uncooperative at trial and the Commonwealth secured

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2. As alluded to elsewhere, the bulk of the evidence at trial was offered by the Commonwealth in an attempt to convince the jury that Petitioner was responsible for the shooting of his ex-wife. The jury clearly rejected this contention. The only charge for which Petitioner was convicted was based almost entirely on the testimony of Weldon Gary.

3. Again, Petitioner was only convicted of Solicitation, not of Conspiracy or Attempted Murder. This is critical because the bulk of the evidence offered at trial pertained to these charges and was unquestionably prejudicial to Petitioner. Ultimately though, because there was not a shred of actual evidence that Petitioner was involved in his wife's shooting, he was acquitted. The Commonwealth was nevertheless given the benefit of putting all of this prejudicial evidence which painted Petitioner in an extremely negative light before the jury.

a material witness warrant to ensure his attendance at trial, going so far as imprisoning him for 10 days before he was called as a witness. Gary testified that while he was receiving treatment for a back injury in May 2008, Petitioner discussed his divorce. Gary testified Petitioner told him he wanted to "get rid of his wife." Gary testified that the subject was brought up again at appointments in July of 2008. After one such discussion, he asked Petitioner how much he wanted to spend and Petitioner responded, "Whatever it takes." Gary claimed Petitioner agreed to pay $20,000 and gave him a $1,000 cash down payment. Gary also claimed Petitioner provided directions to Sarran Kushner's home and a description of her vehicle. Gary claimed he never had any intention of carrying out the killing. Gary claimed that Petitioner later inquired why he had not completed the task. At that point Gary decided to discontinue treatment.

It should also be noted that the Commonwealth violated the law of Pennsylvania throughout the case. For example, the Commonwealth violated the venue rules by prosecuting Petitioner in Montgomery County when in fact the factual allegations underlying his conviction took place in Philadelphia County. In fact, the decision to transfer the case was the subject of a letter that was never presented by the prosecution to Petitioner or his counsel. This denied Petitioner the opportunity to raise an objection to the venue change. Likewise, decisions were made on numerous occasions during the trial wherein Petitioner should have been colloquied under oath but was not. In other words, there were serious Due Process concerns in this case in light of the way that the Commonwealth violated state law in prosecuting Petitioner.

Mr. Kushner was convicted of Solicitation but acquitted of the remaining charges. Following the denial of his direct appeal, Petitioner proceeded through post-conviction proceedings under Pennsylvania's Post-Conviction Relief Act. His efforts were unsuccessful and he filed a timely petition for *habeas corpus* in the Eastern District of Pennsylvania. The petition was stayed while additional petitions were presented and litigated in the Pennsylvania Court of Common Pleas. After final submissions, a Magistrate Judge filed a Report and Recommendation that the petition be dismissed. Petitioner objected on the following grounds: Petitioner's trial counsel *vis a vis* his handling of the issues of jurisdiction and venue, his handling of a potential challenge to a search warrant, that in light of the new evidence Section 905(b) of the Pennsylvania Crimes Code provided an avenue for relief and a claim under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Specifically, Petitioner offered a new statement from the prosecution's star witness, Weldon Gary that was obtained by a private investigator. In the statement, Gary explained that in addition to being held against his will for several days before testifying, he was threatened with a perjury charge if his testimony did not coincide with an earlier statement given to law enforcement. The Commonwealth never advised Petitioner of these threats before trial.

Regarding the ineffectiveness claims *vis a vis* venue and jurisdiction, the District Court found no ineffectiveness with regard to either. Considering jurisdiction first, the District Court concluded that jurisdiction was proper because the Courts of Common Pleas have general, state wide jurisdiction. This according to the Court undermined any claim of counsel's ineffectiveness. With respect to

venue, the Court noted that while the alleged solicitation occurred in Philadelphia, the crime was to be carried out in Montgomery County. Again, the Court concluded that this precluded a finding of ineffectiveness on counsel's behalf. With regard to the claim regarding Section 905(b), the Court found it inapplicable to the venue, jurisdiction or the weight and sufficiency of the evidence. Finally, the Court considered the *Brady* claim. The Court found that the evidence was immaterial because the Commonwealth granted Gary use immunity. The District Court also declined to grant a Certificate of Appealability.

Petitioner filed a Notice of Appeal to Third Circuit. He then petitioned the Third Circuit for a Certificate of Appealability. In doing so, he focused primarily on the District Court's treatment of the *Brady* claim. The Third Circuit denied the petition, concluding that Petitioner failed to satisfy his burden under *Slack v. McDaniel*, 529 U.S. 473 (2000).

As explained below, Petitioner's Due Process rights were severely frustrated by the suppression of exculpatory information and the Pennsylvania Courts' failure to respect his rights to venue under the Sixth Amendment to the United States Constitution. *Certiorari* must be granted and this matter remanded in order that a Certificate of Appealability can issue.

ARGUMENT

This Court should grant *certiorari* and reverse the decision of the Third Circuit declining to issue a Certificate of Appealability (COA). As this Court has explained, "[a] state prisoner whose petition for a writ of

habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis,* 580 U.S. 100, 115 (2017). "Federal law requires that he first obtain a COA from a circuit justice or judge." *Buck*, 500 U.S. at 100 (*citing* 28 U.S.C. § 2253(c)(1)). "A COA may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Buck*, 580 U.S. at 115 (*quoting* 28 U.S.C. § 2253(c)(2)). "s a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003).

Specific rules apply to the instant case Under *Slack v. McDaniel*, 529 U.S. 473, 478 (2000), petitioner is required to show that (1) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling"; and (2) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right."

A. Petitioner's *Brady* Claim was Meritorious

As argued in the Circuit Court, Petitioner was acquitted of 2 of the 3 charges brought against him. The record was devoid of evidence implicating him in the shooting and attempted murder of his wife, and the evidence at trial upon which the jury's guilty verdict rested was tainted and quite frankly unreliable. The evidence is now crystal clear that Weldon Gary—the star witness—was not only held against his will, he was *threatened* by law enforcement officials to provide the testimony he did. Had Petitioner threatened a witness or held a witness against his or her will, he would have been charged with—at the very least - Witness Intimidation. *See* 18 Pa.C.S. § 4952.

Yet the Commonwealth of Pennsylvania was both allowed to do so with impunity and did not disclose the fact that it threatened Mr. Gary with prosecution. For this reason, the jury was unable to appropriately evaluate Gary's testimony.

The District Court's treatment of the claim is a far too narrow view of the dynamics at play. First and foremost, it completely overlooks the fact that Weldon Gary was *the* star witness that the Commonwealth of Pennsylvania relied upon in convicting Petitioner of Solicitation. Indeed, the remaining evidence was at best circumstantial and, quite frankly, innocuous but-for the testimony from Gary. His credibility was *everything* in this trial. So the fact that the Commonwealth of Pennsylvania was engaging in acts of severe coercion, i.e., holding Petitioner against his will for several days and threatening him with a 2 ½ to 5 year sentence, was of the utmost importance to evaluating the credibility of his testimony. *See United States v. Bagley*, 473 U.S. 667 (1985) (remanding for materiality determination where prosecutor failed to disclose bias in form of payment for witness' testimony); *United States v. Abel*, 469 U.S. 45, 52 (1984) ("Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.").

The ability to probe the bias or motivation of an adverse witness is crucial to the guarantees of *Brady* and its progeny. That the District Court did not recognize this is unexplainable. This was exactly the type of evidence which would have compelled a factfinder to reject Gary's testimony in total. *See, e.g.,* Pa.S.S.J.I. (Crim) 4.17 (instructing jurors that, in evaluating witness' credibility, several factors are relevant including "[whether] the witness ha[d] any interest in the outcome of the case, bias, prejudice, or other motive that might affect [his or her] testimony?"). This is the type of evidence from which a juror could conclude that a witness' testimony was unreliable. Because the jury didn't learn about the threats, the jury didn't get the whole picture.

What's more, and although not cast in terms of a violation of *Napue v. Illinois,* 360 U.S. 264 (1959), it should be noted that pains were taken by trial counsel to cross-examine Gary about deals or other matters affecting his testimony. He testified that there were not and the prosecutor did not correct this statement. *Cf. Glossip v. Oklahoma,* ___ U.S. ___ (2025). This type of suppression and/or failure to correct a false statement goes to the very fairness of Petitioner's trial as well as the reliability of the outcome.

Nor does the District Court's analysis regarding immateriality make any sense, *i.e.*, the District Court found this immaterial because Weldon was granted use immunity by the prosecution. *See* Appx. at 27a-28a. The Court's analysis misses the point. While immunity from prosecution in the context of an agreement with the prosecution certainly may have been a reason for Mr. Weldon to testify, *i.e.*, to avoid being prosecuted for his participation in the alleged crime, the threats and

coercion are completely different. In fact, that he was threatened with imprisonment for *perjury* if he testified inconsistently with his prior statement to police could explain why he was giving false testimony at trial.

Said differently, this evidence—far from being immaterial—completely changes the landscape. The jury was tasked with evaluating Gary's credibility. It is one thing for a witness to testify on behalf of the prosecution because he is afraid of his own criminal liability *with respect to the criminal scheme at issue.* Under these circumstances, a grant of immunity could absolutely render the fear of prosecution immaterial. It is a whole separate matter to learn that a witness has been threatened with criminal prosecution *if he or she does not testify in the fashion that the prosecutor expects of him or her.* In that situation, there is absolutely a motive to fabricate testimony (*i.e.,* to ensure that the narrative is consistent with law enforcement's preferences) and a grant of immunity with respect to the underlying criminal episode is irrelevant to a perjury charge. Coupled with Gary's pretrial imprisonment, this very real threat would have provided the jury with a clear indication of what the prosecution was trying to do.

Thus, under the rule of *Brady* and its progeny, it was incumbent on the Commonwealth of Pennsylvania to inform Petitioner of this fact. What's more, the prosecution's obligations under *Brady* extend to so-called "impeachment" information. *See Kyles v. Whitley,* 514 U.S. 419 (1995). With respect to the issue of materiality, it again bears mentioning that Petitioner was acquitted of Attempted Murder and Conspiracy. The sole conviction was for Solicitation—a charge which Gary's testimony (and by extension, his credibility) played a crucial and invaluable

role. If the jury didn't believe Gary, the jury could not have convicted Petitioner. The prosecution's suppression of the information at issue was thus a textbook *Brady* violation and the District Court completely overlooked its significance. *See, e.g., Bagley*, 473 U.S. at 678 ("[E]vidence is material in the sense that its suppression undermines confidence in the outcome of the trial.").

For these reasons, Petitioner has satisfied his obligations under *Slack, supra.* That is, jurists of reason would find it debatable whether the district court was correct in its procedural ruling and whether the petition states a valid claim of the denial of a constitutional right. For this reason, *certiorari* should be granted and the order denying a Certificate of Appealability reversed.

B. Petitioner's Sixth Amendment and Due Process Claims were Meritorious

The Third Circuit also erred in denying a Certificate of Appealability insofar as jurists of reason would find it debatable whether the district court was correct in its procedural ruling and whether the petition stated a valid claim of the denial of Petitioner's Sixth Amendment rights. In *Strickland v Washington,* 446 US 668 (1984), this Court held that, to establish ineffectiveness, an accused must show (1) that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Federal Constitution's Sixth Amendment, and (2) prejudice, by showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Here, Petitioner established that counsel was ineffective and that his rights were violated as a result.

Under applicable venue rules, the prosecution should never have occurred in Montgomery County. All of the alleged and relevant facts and circumstances took place in Philadelphia. For example, the Pennsylvania Supreme Court has explained:

> Our criminal procedural rules provide a system in which defendants can seek transfer of proceedings to another judicial district due to prejudice or pre-trial publicity. Such decisions are generally left to the trial court's discretion. *See Commonwealth v. Chambers*, 546 Pa. 370, 685 A.2d 96, 103 (Pa. 1996) (citation omitted). Venue challenges concerning the locality of a crime, on the other hand, stem from the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution, both of which require that a criminal defendant stand trial in the county in which the crime was committed, protecting the accused from unfair prosecutorial forum shopping. Thus, proof of venue, or the locus of the crime, is inherently required in all criminal cases.

Commonwealth v. Gross, 101 A.3d 28, 33 (Pa. 2014). Thus, and regardless of whether this Court has formerly ruled that the Vicinage requirement of the Sixth Amendment is applicable to the States, Pennsylvania has recognized that it is governed by the Federal Constitution in this regard.

Here, all of the evidence established that the alleged criminal activity occurred in Philadelphia, Pennsylvania. That is, if one believed that Gary was telling the truth,

Philadelphia was the situs of the crime. Philadelphia was thus the appropriate venue both as a matter of Pennsylvania state law and the Sixth Amendment of the United States Constitution which (as already explained) is applied by Pennsylvania Courts.

What's more, Petitioner was arrested by Montgomery County officials in Philadelphia County. In other words, it is not as if he were arrested by authorities with jurisdiction to act in the jurisdiction where he was located. Again, this is evidence of the authorities' willingness to disregard the rule of law in their pursuit of Petitioner. The decision to drive the case from Philadelphia and into Montgomery County is an important part of the narrative.

Thus, there was absolutely a basis to object to and challenge venue as well as a right to have venue changed. Examined under the *Strickland* framework, it is also hard to imagine any reasonable strategy in *failing* to do so. The jury pool in Philadelphia is far more favorable to defendants. Moreover, the state courts' reasoning (seemingly adopted by the lower federal courts) that the crime was *intended to be carried out* in Montgomery County (which somehow conferred venue) was speculative at best. This was a convenient excuse for moving the trial into a favorable forum. In fact, the evidence showed that the prosecutor in Montgomery County (McGoldrick) sent a letter to an ADA in Philadelphia advising that the case should be transferred (this letter was not provided to Petitioner prior to trial and he was never given an opportunity to object).

The fact is that the prosecution simply failed to follow the law in prosecuting the Petitioner. Petitioner's counsel

failed to object or otherwise protect his rights in this regard. There was no strategic basis for his decision not to do so and Petitioner was prejudiced as a result.

For these reasons, Petitioner has satisfied his obligations under *Slack, supra.* That is, jurists of reason would find it debatable whether the district court was correct in its procedural ruling and whether the petition states a valid claim of the denial of a constitutional right. For this reason, *certiorari* should be granted and the order denying a Certificate of Appealability reversed.

CONCLUSION

For all of these reasons, this Court should grant *certiorari* and reverse the decision of the Third Circuit Court of Appeals insofar as it declined to issue a Certificate of Appealability. This matter must be remanded for the grant of a Certificate in order that Petitioner can fully litigate the errors made by the District Court before the Court of Appeals.

Respectfully submitted,

Jason Javie
Counsel of Record
Jason Javie, P.C.
Two Penn Center, Suite 900
1500 John F. Kennedy Boulevard
Philadelphia, PA 19102
(267) 497-8889
jason.javie@crllaw.com

Counsel for Petitioner

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JANUARY 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 24-2525
(E.D. Pa. Civ. No. 2:16-cv-00045)

ALAN KUSHNER,

Appellant,

vs.

THE ATTORNEY GENERAL OF
THE STATE OF PENNSYLVANIA; *et al.*

Filed January 22, 2025

Present: SHWARTZ, MATEY, and CHUNG, *Circuit Judges*

Submitted is Appellant's counseled request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

Appendix A

ORDER

Alan Kushner, through counsel, has requested a certificate of appealability (COA) to appeal the District Court's decision rejecting as procedurally defaulted his claim under *Brady v. Maryland*, 373 U.S. 83 (1964). To obtain a COA under the circumstances, Kushner must show that: (1) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling"; and (2) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Kushner fails to make either showing, for substantially the reasons given by the District Court in its opinion. *See* DC ECF No. 46 at 15-18; *see also Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 284–85 (3d Cir. 2016) (en banc); *Johnson v. Folino*, 705 F.3d 117, 128 (3d Cir. 2013). Accordingly, Kushner's COA request is denied.

By the Court,

Dated: January 22, 2025

s/Patty Shwartz
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED AUGUST 2, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 2:16-cv-0045

ALAN KUSHNER,

Petitioner,

v.

JOSEPH TERRA *et al.*,

Respondents.

Filed August 2, 2024

OPINION

Report and Recommendation, ECF No. 40—Adopted

Joseph F. Leeson, Jr.,
United States District Judge

I. INTRODUCTION

Alan Kushner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his

jury conviction of criminal solicitation to commit murder in the Montgomery County Court of Common Pleas. Magistrate Judge Carol Sandra Moore Wells issued a Report and Recommendation ("R&R") recommending that the habeas corpus claims be denied and dismissed, to which Kushner has filed objections. For the reasons that follow, the objections are overruled and the petition is denied and dismissed.

II. BACKGROUND

The R&R summarizes the factual and procedural background of this case. *See* R&R, ECF No. 40. Kushner does not object to this summary and, after review, it is adopted and incorporated herein.

Of note, on July 20, 2009, Kushner was convicted of solicitation to commit murder of his wife and was sentenced to seven and one-half to twenty years of incarceration. Kushner's direct appeal was denied and his sentence was affirmed. *See Commonwealth v. Kushner*, 23 A.3d 573 (Pa. Super. Ct. Dec. 8, 2010), *allocatur denied*, 612 Pa. 697, 30 A.3d 487 (Pa. 2011). Following the denial of his appeal, Kushner unsuccessfully pursued numerous PCRA petitions, beginning in October of 2012.

On January 5, 2016, Kushner filed a writ for habeas corpus. *See* ECF No. 1. On March 2, 2016, Magistrate Judge Wells stayed the petition pending resolution of Kushner's ongoing PCRA proceedings. *See* ECF No. 10. On June 7, 2021, Kushner filed a "Supplemental 2254 Motion" in which he informed Magistrate Judge Wells

that the PCRA petitions were resolved. *See* ECF No. 17. On August 15, 2023, the Montgomery County District Attorney's Office filed a response. *See* ECF No. 34. On October 30, 2023, Kushner filed a reply. *See* ECF No. 39.

On March 1, 2024, Magistrate Judge Wells issued an R&R finding Kushner's eighth claim non-cognizable, his first claim procedurally defaulted, and his remaining claims meritless. *See* ECF No. 40. Kushner filed objections to the R&R on April 17, 2024. *See* ECF No. 44-45.[1]

III. LEGAL STANDARDS

A. Report and Recommendation—Review of Applicable Law

When objections to a report and recommendation have been filed under 28 U.S.C. § 636(b)(1)(C), the district court must make a de novo review of those portions of the report to which specific objections are made. 28 U.S.C. § 636(b)(1)(C); *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). "District Courts, however, are not required to make any separate findings or conclusions when reviewing a Magistrate Judge's recommendation de novo under 28 U.S.C. § 636(b)." *Hill v. Barnacle*, 655 F. App'x. 142, 147 (3d Cir. 2016). The "court may accept, reject, or modify, in whole or in part, the findings and recommendations" contained in the report. 28 U.S.C. § 636(b)(1)(C).

1. Kushner filed his objections twice. One version has the Strohm report attached while the other does not. They are otherwise identical.

Appendix B

B. Habeas Corpus Petitions under 28 U.S.C. § 2254—Review of Applicable Law

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before seeking federal habeas review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). Where a petitioner has failed to properly present his claims in the state court and no longer has an available state remedy, he has procedurally defaulted those claims. *Id.* at 847-848, 119 S.Ct. 1728. An unexhausted or procedurally defaulted claim cannot provide the basis for federal habeas relief unless the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 732-33, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (explaining that a "habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion [because] there are no state remedies any longer 'available' to him"). The Supreme Court has held that the ineffectiveness of counsel on collateral review may constitute "cause" to excuse a petitioner's default. *See Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). The fundamental miscarriage of justice exception "applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would

have convicted [the petitioner].'" *McQuiggin v. Perkins*, 569 U.S. 383, 395, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)).

The AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598, 131 S.Ct. 1305, 179 L.Ed.2d 374 (2011) (internal quotations omitted); *See also* 28 U.S.C. § 2254(d);[2] *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009) (holding that there is a "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard" because the question before a federal court is not whether the state court's determination was correct, but whether the determination was unreasonable); *Hunterson v. Disabato*, 308 F.3d 236, 245 (3d Cir. 2002) ("[I]f permissible inferences could be drawn either way, the state court decision must stand, as its determination of the facts would not be unreasonable."). Additionally, "a federal habeas court must afford a state court's factual findings a presumption of correctness and that [] presumption applies to the factual determinations of state

2. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ; or . . . resulted in a decision that was based on an unreasonable determination of the facts. . . ." 28 U.S.C. § 2254(d).

trial and appellate courts." *Fahy v. Horn*, 516 F.3d 169, 181 (3d Cir. 2008). The habeas petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

C. Claims of Ineffective Assistance of Counsel—Review of Applicable Law

To establish counsel's ineffectiveness, a petitioner must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel is effective and the courts, guarding against the temptation to engage in hindsight, must be "highly deferential" to counsel's reasonable strategic decisions. *Id.* at 689, 104 S.Ct. 2052 (explaining that courts should not second-guess counsel's assistance and engage in "hindsight to reconstruct the circumstances of counsel's challenged conduct"). The mere existence of alternative, even more preferable or more effective, strategies does not satisfy the first element of the *Strickland* test. *See Marshall v. Hendricks*, 307 F.3d 36, 86 (3d Cir. 2002). To establish prejudice under the second element, the petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Roe v. Flores-Ortega*, 528 U.S. 470, 482, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). The court must consider the totality of the evidence and the burden is on the petitioner to prove ineffectiveness. *Strickland*, 466 U.S. at 687, 695, 104 S.Ct. 2052.

D. *Brady v. Maryland*—Review of Applicable Law

Under *Brady v. Maryland*, the prosecution must produce to the defendant evidence that is material to either guilt or punishment, irrespective of good or bad faith. 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (extending *Brady* to impeachment and exculpatory evidence); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). "A *Brady* violation occurs if: (1) the evidence at issue is favorable to the accused, because either exculpatory or impeaching; (2) the prosecution withheld it; and (3) the defendant was prejudiced because the evidence was 'material.'" *Breakiron v. Horn*, 642 F.3d 126, 133 (3d Cir. 2011). "Evidence is material if there is a reasonable probability that, if the evidence had been disclosed, the result of the proceeding would have been different." *Wilson v. Beard*, 589 F.3d 651, 665 (3d Cir. 2009). "A 'reasonable probability' of a different result is shown when the government's suppression of evidence 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). The Third Circuit has further explained that "evidence may be material if it could have been used effectively to impeach or corral witnesses during cross-examination." *Johnson v. Folino*, 705 F.3d 117, 129-30 (3d Cir. 2013). To that end, the Third Circuit has instructed district courts to consider not only the content of the evidence at issue but also "where it might have led the defense in its efforts to undermine [a particular witness]" when determining whether evidence is "material." *Id.* at 131.

IV. ANALYSIS[3]

Presently before the Court are Kushner's objections to the R&R's conclusions regarding his ineffective assistance of counsel and *Brady* claims. The Court has conducted a de novo review of these claims and now writes to address each objection as well as another ground raised in the habeas petition but unaddressed in the R&R.

A. Ineffective Assistance of Counsel

Kushner objects to Magistrate Judge Wells' conclusion that trial counsel was not ineffective for failing to levy a jurisdiction and/or venue challenge. Rolled into the same objection, Kushner seemingly argues that his counsel was ineffective for failing to raise 18 Pa.C.S. § 905(b) as a defense to jurisdiction or venue. The Court overrules these objections. Finally, Kushner's habeas petition argues that counsel was ineffective for failing to seek a hearing pursuant to *Franks v. Delaware.* Since this last claim was unaddressed by the R&R, the Court addresses the matter here.

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3. The numerous PCRA efforts, lengthy record, and inconsistent arguments of Kushner's post-conviction efforts muddle disposition of this habeas petition. Nonetheless, "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). Thus, "[m]erits review may be preferable when, for example, the substantive issues are straightforward, and the procedural concerns involve complicated issues of state law." *Romero v. Beard*, No. CV 08-0528-KSM, 2024 WL 1975475, at *6 (E.D. Pa. May 2, 2024). Given the convoluted procedural posture of this case, the Court opts to take this route on several objections.

Appendix B

1. Challenges to Subject Matter Jurisdiction & Venue

Kushner argues that his trial counsel was ineffective for failing to object to "jurisdiction/venue in Montgomery County."[4] Pet. at 12. Kushner's theory, which appears to be as follows, does not entitle him to relief. He argues that his trial counsel should have requested a bill of particulars to determine where the solicitation occurred. Had counsel done so, he would have found that the solicitation occurred only in Philadelphia, not Montgomery County. This fact would have led competent counsel to move to dismiss the solicitation count or sever it from the attempted murder and conspiracy counts. The upshot is that Kushner would have been relieved of the prejudice of trying all three counts together in front of a Montgomery County jury.

Kushner raised substantially the same claim in his initial PCRA. *See* ECF No. 7-10. The same was rejected by the Superior Court which reasoned that:

> Although the solicitation occurred in Philadelphia County at Defendant's office the crime was to be carried out at the marital home of Defendant and his wife in Bala Cynwyd, Montgomery County. As such, Montgomery County was the proper jurisdiction to hear the instant case. *See Commonwealth v. Carey*,

4. While Kushner uses venue and jurisdiction interchangeably, they are not the same. *See Commonwealth v. Bethea*, 574 Pa. 100, 828 A.2d 1066, 1074-75 (Pa. 2003).

> 293 Pa.Super. 359, 439 A.2d 151, 155 (Pa. Super. 1981) ("It's logical that even though the original solicitation may have taken place in Philadelphia County, the ultimate act was to be performed in Delaware County and that county should have jurisdiction to try the defendant.")

Commonwealth v. Kushner, No. 2357 EDA 2014, 2015 WL 6470520 at *15 (Pa. Super. Ct. Oct. 6, 2015). Thus, the Superior Court found, because the claim "has no merit, [trial counsel] was not ineffective in this respect." *Id*. The Superior Court's application of *Strickland* is neither "contrary to, or involved an unreasonable application of, clearly established Federal law" nor "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). Any jurisdictional challenge would have failed because "all courts of common pleas have statewide subject matter jurisdiction in cases arising under the Crimes Code." *Commonwealth v. Bethea*, 574 Pa. 100, 828 A.2d 1066, 1074 (Pa. 2003).

As regards Kushner's ineffective assistance of counsel claim regarding venue, it too would have failed because "a charge of solicitation may be tried in the county where the ultimate criminal act was to be performed."[5] *See Commonwealth v. Kingston*, No. 2016 MDA 2012, 2014 WL 10558605, at *2 (Pa. Super. 2014). Moreover, "[v]enue

5. *See* 28 U.S.C. § 2254 (b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.")

relates to the right of a party to have the controversy brought and heard in a particular judicial district" and is "predominately a procedural matter, generally *prescribed by rules of [the Pennsylvania Supreme] Court.*" *Bethea*, 828 A.2d at 1074 (emphasis added). This Court must defer to the state court's interpretation of its own law. *See Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.")[6]

Since counsel cannot be ineffective for failing to raise a meritless argument, Kushner's claims with respect to jurisdiction and venue fail. *See Glass v. Sec'y Pennsylvania Dep't of Corr.*, 726 F. App'x 930, 933 (3d Cir. 2018).

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6. Finally, the Court notes that, as Kushner points out, there is indeed a constitutional dimension to venue. For example, the Sixth Amendment contains a vicinage clause which Kushner only vaguely references in his objections. Obj. at 23. However, the vicinage clause has not been incorporated to apply to state court proceedings. *See Concepcion v. Varano*, No. 1:11-CV-02225, 2017 WL 5924463 at *6, 2017 U.S. Dist. LEXIS 171612 at *16-17 (M.D. Pa. Oct. 16, 2017) ("the Third Circuit has held that the Sixth Amendment vicinage provision is not applicable to state criminal trials.") Kushner's brief also makes passing reference to Article III, Section II, Clause III. However, that clause has no bearing as it requires that the trial "be held in the *State* where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3 (emphasis added). Here, Kushner does not argue he was tried in the wrong state but rather the wrong county.

2. Section 905(b): Mitigation of Solicitation

In his objections, Kushner reiterates 18 Pa.C.S. § 905(b) as a basis for relief. However, his theory in this respect is unclear. At times, he relates Section 905(b) to Montgomery County's subject matter jurisdiction over his case. For instance, on appeal of the denial of his second PCRA petition, he argued that "based on a lack of subject matter jurisdiction the lower Court should have granted relief pursuant to Rule 905(b)." *Commonwealth of Pennsylvania v. Alan Kushner*, (Brief of Appellant), 2016 WL 6668660 at * 34 (Aug. 16, 2016). At other times, the argument is couched in terms of venue. *See* Obj. at 23. ("However, this was a question of venue, which is clearly not a state law question.") Most importantly, but adding further confusion, Kushner's habeas petition relates Section 905(b) to a sufficiency/weight of the evidence claim, arguing that "pursuant to 18 Pa.C.S. § 905, it is clear that the alleged solicitation of Weldon Gary was unlikely to result or culminate in the commission of a crime and, that the evidence was insufficient as a matter of law." Pet. at 10.

On appeal from the denial of Kushner's second PCRA petition, the Superior Court held that the matter was both untimely and previously litigated insofar as it related to jurisdiction because Kushner's first PCRA rejected an ineffective assistance of counsel claim for failure to challenge the jurisdiction of the trial court. *Commonwealth v. Kushner*, No. 792 EDA 2016, 2017 WL 89119 at *4 (Pa. Super. 2017).

While it is not clear which theory Kushner puts forward, it is clear Section 905(b) is inapplicable and so

he cannot show prejudice for trial/initial post-conviction counsel's failure to raise these arguments.[7] *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999) ("[t]here can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument."). Section 905(b) provides:

> (b) Mitigation.—If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this section, the court may dismiss the prosecution.

18 Pa.C.S. § 905(b). The Court finds that Section 905(b) has plainly no bearing on subject matter jurisdiction because the trial court would need to have jurisdiction over the crime to use the mitigation discretion afforded by Section 905(b). It logically follows that if the trial court cannot hear a case, it cannot hear the facts which might entitle the defendant to mitigation.

Nor does Section 905(b) relate to venue. Venue, at its essence, is concerned with the fairness of bringing a controversy in a particular judicial district. *Bethea*, 828 A.2d at 1074. Its "primary concern" is "the location of the

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7. *See* 28 U.S.C. § 2254 (b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.")

trial['s] impact on the ability of the parties to have their case decided before a fair and impartial tribunal[.]" *Id.* at 1075. Again, nothing in Section 905(b) speaks to venue because the facts that might entitle one to mitigation are wholly divorced from the concerns that animate questions of venue.

Finally, in the context of a sufficiency or weight of the evidence claim, Kushner's Section 905(b) claim also fails. In his first PCRA petition, Kushner indeed brought a sufficiency of the evidence claim which the Superior Court rejected, reasoning:

> [D]uring trial, Weldon Gary testified that the Defendant offered him $20,000 to kill Defendant's wife. Furthermore, he received a $1,000 down payment from the Defendant as an advance and the Defendant gave Mr. Gary the directions to his wife's house in Bala Cynwyd and a description of her vehicle. This testimony was corroborated by the testimony of Craig Lowman, who testified that sometime in 2008, Mr, Gary told him the Defendant gave him $1,000.
>
> In reaching their verdict, the jury clearly chose to believe the testimonies of Mr, Gary and Mr. Lowman. That is their province and since these testimonies sufficiently established the elements of Criminal Solicitation to Commit Murder, we submit the verdict was not contrary to the evidence as to shock one's sense of justice.

> *See Commonwealth v. Kane*, 10 A.3d 332-333 (Pa. Super. 2010). Thus, the underlying claim is meritless and we therefore cannot find appellate counsel ineffective for not raising it on appeal.

Commonwealth v. Kushner, No. 2357 EDA 2014, 2015 WL 6470520, at *16 (Pa. Super. Ct. Oct. 6, 2015). While the Superior Court does not address the applicability of Section 905(b) directly, its reasoning forecloses 905(b)'s prospects for relief.

Section 905(b) has narrow application. In *Commonwealth v. John*, the defendant, Donald John, communicated over the internet with who he thought was a 13-year-old girl named Missy. *Commonwealth v. John*, 854 A.2d 591 (Pa. Super. 2004). In reality, Missy was an agent of the Pennsylvania Attorney General's Office conducting an operation in conjunction with Delaware County's Internet Crimes Against Children Task Force. *Id.* at 592. Over the course of several weeks, John made it clear that his intentions were to "hook up" with the young girl, going so far as to set a meetup in Media, Pennsylvania. *Id.* Upon arriving at the meetup, John was arrested by an undercover officer. *Id.* He was convicted after a bench trial. *Id.* at 593.

On appeal, John argued that the trial court erred in refusing to dismiss the charges pursuant to Section 905(b). In particular, he argued that "because there was no 'Missy,' his conduct was inherently unlikely to result in the commission of a crime and so dismissal was proper." *Id.* at 597. The Superior Court upheld the conviction, reasoning

that Section 905(b) explicitly requires a finding that the actor does not pose a public danger. *Id.* Notwithstanding the nonexistence of Missy, John's acts clearly posed a public danger by way of his "capacity to do wrong" and "his intent to influence someone to engage in a criminal act" as evidenced by the overt acts he took toward his criminal end. *Id.*

Similarly, Kushner's actions posed a clear public danger irrespective of Gary's intentions. As the Superior Court's examination of the evidence shows, Kushner gave Gary upfront money for the criminal purpose, directions to his wife's home, and a description of her vehicle. This presents a clear public danger. By way of contrast, the Court looks to the legislative backdrop of Section 905(b). Section 905(b) is derived from Section 5.05 of the Model Penal Code, the commentaries of which provide as an example an "effort[] to kill by incantation." ALI, Model Penal Code Part I Commentaries § 5.05, vol. 2, at 491 (1985). This case stands far apart from the sort of extreme cases in which Section 905(b) might warrant the dismissal of charges. That Gary did not have the immediate means to effectuate the purpose of the solicitation does not impair Kushner's capacity to do wrong.

Thus, because any invocation of Section 905(b) would have been unsuccessful, Kushner can show no prejudice from his counsel's failure to raise that claim.

3. *Franks* Hearing

Kushner argues that trial counsel was ineffective for failing to seek a *Franks* hearing[8]. In particular, he argues that:

> While Counsel asserted that critical averments in the search warrant application involving an interview with Petitioner's medical receptionist, Yvette Harris (Hawkins), were not truthful, he only utilized a "four-corners" analysis to suggest that these statements were not truthful and not sufficient to create probable cause. However, Counsel should have requested a hearing to present evidence that Hawkins was not reliable. Moreover, Counsel should have sought to reopen the suppression hearing after learning of the material witness warrants required to produce Ms. Hawkins at trial.

Pet. at 13. At the outset, the Court notes that trial counsel indeed challenged the search. Further, his initial

8. "In *Franks*, the Supreme Court determined that a criminal defendant has the right to challenge the truthfulness of factual statements made in an affidavit of probable cause supporting a warrant subsequent to the ex parte issuance of the warrant." *United States v. Yusuf*, 461 F.3d 374, 383 (3d Cir. 2006). "In order to obtain a hearing to do so, the defendant must first make 'a substantial preliminary showing' that the affidavit contained a false statement or omission that (1) was made knowingly and intentionally, or with reckless disregard for the truth, and (2) was material to the finding of probable cause." *United States v. Aviles*, 938 F.3d 503, 508 (3d Cir. 2019) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)).

post-conviction counsel raised the argument that trial counsel was ineffective for failing to challenge the denial of Kushner's Motion to Suppress. The Superior Court addressed the same as follows:

> Again, this claim has no merit because Attorney Rose did in fact challenge this court's suppression ruling. Specifically, in his Concise Statement filed March 31, 2010, Attorney Rose raised the issue as follows:
>
> > The Defendant's pretrial motion to suppress evidence seized from his home on October 2, 2008, particularly the $75,000,00 cash taken from his safe, should have been granted because, under the four corners of the Affidavit of Probable Cause, there was inadequate probable cause to justify the search and seizure of the Defendant's residence. There was an insufficient basis for the issuing authority to reasonably conclude that the Defendant's residence contained evidence of criminal activity on October 2, 2008. As a result, the Commonwealth was able to introduce at trial evidence of the $75,000.00 cash to argue to the jury that this was evidence of the Defendant's guilt which also provided corroboration of the inculpatory solicitation testimony

> of Weldon Gary [.] (Citation to notes of testimony omitted).
>
> (Def. Concise Statement, 03/31/2010 # 2). On appeal, the Superior Court found the suppression challenge meritless. *Commonwealth v. Kushner*, No. 762 EDA 2010, p. 5, 23 A.3d 573 (Pa, Super. Dec. 8, 2010). This claim is therefore waived as being previously litigated per 42 Pa.C.S.A. § 9543(a)(3); and § 9544(a). Nevertheless, we clearly cannot find Attorney Rose ineffective for failing to challenge the suppression ruling on appeal when he in fact did just that. *See Commonwealth v. Spotz*, 587 Pa. 1, 896 A.2d 1191, 1224 (Pa. 2006)

Commonwealth v. Kushner, No. 2357 EDA 2014, 2015 WL 6470520, at *17 (Pa. Super. 2015).

Notwithstanding, Kushner's argument fails for two reasons. First, "[i]t is well-established that a substantial showing of the informant's untruthfulness is not sufficient to warrant a *Franks* hearing." *United States v. Brown*, 3 F.3d 673, 677 (3d Cir. 1993). Rather, *Franks* is concerned with "intentional or reckless falsity *on the part of the affiant*." *Id.* (emphasis in original); *see also United States v. Krall*, No. 07-607-01, 2009 WL 2394288 at * 8, 2009 U.S. Dist. LEXIS 68244 at * 25-26 (E.D. Pa. Aug. 4, 2009) (finding defendant was not entitled to a *Franks* hearing because *Franks* hearings concern the affiant's, not the informant's, truthfulness). Kushner's petition is silent in this respect.

Second, Kushner fails to state what "substantial preliminary showing" his counsel should have made which would have entitled him to a *Franks* hearing, much less a successful one. *Franks*, 438 U.S. at 155-56, 98 S.Ct. 2674. He appears to argue his counsel was ineffective for failing to attack the warrant from a different angle. However, he does not elucidate how that should have been done. Kushner argues Counsel should have presented evidence Hawkins was not reliable. He does not explain nor expound upon what this evidence is anywhere in his briefs. He does not even go so far as to explain what averments of Yvette Harris figured into any affidavit of probable cause. Instead, he puts forward the sort of "mere conclusory allegations" which are insufficient to obtain a *Franks* hearing. *Yusuf*, 461 F.3d 383 n.8. *Strickland* requires that there be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Roe*, 528 U.S. at 482, 120 S.Ct. 1029 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). With respect to this claim, Kushner's theory fails early because he has failed to put forward a theory which may have entitled him to a *Franks* hearing and the protections it provides. It reasonably follows then that a *Franks* hearing would not have changed the result of the proceeding. Thus, Kushner has shown no prejudice and his claim fails.

B. *Brady* Violation

In his next objection, Kushner argues that the Commonwealth suppressed certain evidence about Weldon

Gary in violation of *Brady*.[9] This claim is unexhausted as it was not presented to the state court. However, a *Brady* violation may demonstrate cause and prejudice so as to excuse that default. *Johnson*, 705 F.3d at 128.

Kushner's *Brady* claim is premised on the 2019 Strohm report which purportedly revealed that Gary only testified because he was threatened with a two-to-five-year sentence had he not. Thus, the theory is that this previously unknown fact could have been used to impeach Gary's testimony because "it showed Gary's motive for testifying [was] not to receive a lengthy prison sentence." Obj. at 12. The Court finds that Kushner's claim fails because the evidence was immaterial and thus procedurally defaulted. *Banks v. Dretke*, 540 U.S. 668, 698, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 282 (1999)) ("Unless suppressed evidence is 'material for *Brady* purposes, [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default.'")

Kushner's argument is that this evidence would have been used to undermine Gary's credibility by suggesting to the jurors that he had a motive to lie in that he would avoid prison time. This motive was referenced many times during trial. The following direct examination of Gary by the Commonwealth made it clear Gary was testifying under immunity:

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9. It is not clear where this claim was raised. It appears that the claim is rooted in the "Strohm report" which was provided to Kushner on October 15, 2019, far after this January 2016 habeas petition. Thus, it appears this Brady claim is brought in Kushner's "Supplemental 2254 Motion" filed in June of 2021. *See* ECF No. 17.

Appendix B

Q: When we've—did you give—you gave a statement to the detectives in October of 2008; is that right?

A: Yes.

Q: Okay. And did you meet me that day?

A: Yes, I did.

Q: All right. And did I tell you that you weren't going to get arrested for anything?

A: Yes, you did.

Q: But you didn't trust me, did you?

A: No, I didn't trust you.

Q: All right.

. . .

Q: Mr. Gary, did you ask me for immunity—

A: No—

Q: —Even though I told you you weren't going to get arrested?

A: No, I didn't

> Q: Oh, you didn't ask—did I offer to give you immunity?
>
> A: Yes, you did.
>
> Q: Okay, fair enough. And did I explain to you what immunity meant?
>
> A: Yes, you did.

ECF No. 7-114 at 130:9-131:13. On cross, Kushner's counsel reemphasized Gary's immunity:

> Q: So its clear to the jury, I want to make a couple points clear here. You weren't charged with anything in this case is that correct?
>
> A: No I wasn't charged
>
> Q: Okay, because you got immunity right? I'll get to that.

Id. at 136:19-24.

> Q: And when you gave that statement, that's when—before you gave the statement, you got immunity right?
>
> A: No I didn't.
>
> Q: You didn't?

A: Yes, I did, yes I did. You're right.

Q: Of course you did.

A: Yeah.

Q: So I understand the sequence here, Mr. McGoldrick came down, he saw you, he gave you immunity, use immunity. You've got to tell these people here

A: He gave me immunity.

Q: Gave you immunity. You know what immunity means because you've been in the criminal justice system. You know what it means?

A: I ain't never had it before.

Q: Never had it but you know what it is right?

A: I still do. Yes, I do.

Id. at 137:16-138:9. Kushner's counsel then proceeded to read the immunity agreement, which had been admitted into evidence. *see* ECF No. 7-121 at 45, to Gary. ECF No. 7-114 at 138:21-139:20. Moreover, trial counsel made a point to address Gary's immunity in closing as well:

> Before [Gary] talked to the police, he got immunity. He's got—he could tell them anything. He could tell them I shot Kennedy.

> He could tell them whatever he wants to tell them. They're not going to charge him. He still didn't get charged in this case he's not charged.

ECF No. 7-126 at 49:8-13. The jury instructions properly instructed the jury to consider what "interest a witness would have in the outcome of the litigation," ECF No. 7-120 at 16:24-25, whether "the witness had anything to gain or lose from the outcome of the case," *Id.* at 17:14-15, and whether the witness displayed "any motive to testify falsely[.]" *Id.* at 16:19.

The reason the Court does not find this evidence material is because the very nature of immunity is that it applies only *when the witness has something to be immune from.* Thus, the jurors were aware of Gary's purported motivation to testify even if they were not aware of the exact terms of the threat. Gary's immunity was made a substantial issue at trial and the jurors were properly instructed to consider his motivation to testify and the purported suppression of this evidence does not undermine the Court's "confidence in the outcome of the trial."[10] *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

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10. Kushner quibbles slightly with the Commonwealth's presentation of the events. In particular, he takes issue with the Commonwealth telling the jury that Gary was only offered immunity after it had tried to convince Gary that he would not be prosecuted. *See* ECF No. 7-127, 121:24-122:20. Thus, Kushner argues, the jury was left with the mistaken impression that Gary was never under threat of prosecution—a notion purportedly belied by the Strohm report. However, that is incorrect because the Commonwealth indeed explained that Gary was served a Grand Jury subpoena and explained to the jury that "if [Gary]

Accordingly, Kushner's argument fails because the evidence upon which Kushner's *Brady* claim relies is immaterial.

C. Certificate of Appealability

A certificate of appealability ("COA") should only be issued "if the petitioner 'has made a substantial showing of the denial of a constitutional right.'" *Tomlin v. Britton*, 448 F. App'x 224, 227 (3d Cir. 2011) (quoting 28 U.S.C. § 2253(c)). "Where a district court has rejected the constitutional claims on the merits . . . the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Where the denial of a habeas petition is based on procedural grounds and the Court does not reach the underlying constitutional claim, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* In the Court's view, Kushner has failed to demonstrate his entitlement to a COA under the applicable standard, and no COA will be issued.

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didn't show up, we would have locked him up for not appearing for the Grand Jury." *Id.* at 121:13-14.

V. CONCLUSION

After de novo review and for the reasons set forth above, the Court overrules the objections to the R&R and adopts the R&R's findings and recommendations in its entirety. Kushner's petition for habeas relief is denied and dismissed. The Court further declines to issue a COA or hold an evidentiary hearing.

A separate Order follows.

BY THE COURT:

/s/_____
Joseph F. Leeson, Jr.
United States District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED MARCH 1, 2024

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

CIVIL ACTION NO. 16-45

ALAN KUSHNER,

v.

SUPERINTENDENT CYNTHIA LINK, *et al.*

February 29, 2024, Decided
March 1, 2024, Filed

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE

Presently before the court is a counseled Petition for a Writ of Habeas Corpus filed by Alan Kushner ("Petitioner") pursuant to 28 U.S.C. § 2254. Petitioner is currently serving a sentence of 7.5 to twenty years of imprisonment at SCI-Phoenix for solicitation to commit murder. He seeks habeas relief based upon alleged ineffectiveness of trial counsel and due process violations by the trial court. The Honorable Joseph F. Leeson, Jr. referred this matter to the undersigned for preparation

of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that habeas relief be denied.

I. FACTUAL AND PROCEDURAL HISTORY[1]

The facts and circumstances leading to Petitioner's conviction and sentence were summarized by the Pennsylvania Superior Court as follows:

> [Petitioner] and [Sarran] married in 1976. They purchased the Righters Feny Road property in 1983, and resided there together for more than 20 years with their two sons. At all times relevant, [Petitioner] operated a chiropractic office at 6103 Lansdowne Avenue in Philadelphia County.
>
> After years of increasing marital disharmony, [Sarran] commenced divorce proceedings . . . in January 2006. The couple nevertheless continued to reside together, with [Petitioner] engaging in hostile and threatening behavior toward the victim.
>
> In particular, [Petitioner] and the victim had agreed during the Summer of 2006 to

1. This factual and procedural history was gleaned from the Petition for Writ of Habeas Corpus ("Pet."), the Commonwealth's Response to Petition for Writ of Habeas Corpus ("Resp."), and Petitioner's Reply in Support of Petition for Writ of Habeas Corpus ("Reply"), inclusive of all exhibits thereto and the state court record.

spend alternating weekends at their vacation home in Ocean City, New Jersey. With the Fourth of July holiday approaching, [Petitioner] indicated that he wanted the vacation property that weekend, even though it was [Sarran]'s turn to use it. An argument ensued, during which [Petitioner] advised [Sarran] that "If you go down this weekend, you'll end up in the hospital." [Petitioner] would also turn off the refrigerator at the vacation property, with the result being that any food left therein would be spoiled and malodorous by the time [Sarran] arrived for her weekend.

Another argument during the Summer of 2006 resulted in [Petitioner] pushing [Sarran] from a computer in one of their son's bedrooms. [Petitioner] also told the victim that he had tampered with her car, and that she would be killed if she drove it, and that he wished she would be hit by a truck so he could laugh when she died.

On August 28, 2006, [Sarran] obtained an Order in the divorce case granting her exclusive possession of the marital residence. [Petitioner] moved out of the house the following month, eventually settling in an apartment approximately two blocks away. He nevertheless returned to [Sarran]'s residence on numerous occasions. He also made hundreds of telephone calls to [Sarran]'s home, including more than

161 calls in October 2006 alone. [Sarran], recognizing [Petitioner]'s telephone number on her "Caller I.D.," rarely answered the calls. [Petitioner] would then leave voicemail messages for [Sarran] such as "You should commit suicide. You should remove yourself from the equation. Leave. Everyone hates you." During this time, and continuing into early 2007, [Petitioner] also handwrote and mailed a series of discourteous letters to the victim.

Based upon the telephone calls, the letters and an "incident" that occurred over the weekend of March 9, 2007, [Sarran] sought a Temporary Protection from Abuse Order on March 14, 2007. [Sarran] received a final one-year Protection from Abuse Order after a hearing on May 8, 2007.

The "incident" involved a BMW the Kushners had purchased for one of their sons, Brian, who happened to be staying with [Sarran] while he was home from college over the weekend of March 9, 2007. Brian Kushner had taken the vehicle out Friday night. [Petitioner], who was angry with his son at the time and did not want him driving the car, telephoned [Sarran] late that evening to demand that she "Get that car home." When Brian Kushner returned home [Sarran] told him not to use the car for the remainder of the weekend. Around noon on Sunday, as [Sarran]

was leaving her home to go shopping, she noticed [Petitioner] drive by. Upon returning home about 40 minutes later, [Sarran] pulled into her driveway only to find [Petitioner] and his new girlfriend standing by while another male was entering the BMW. [Sarran] exited her vehicle and asked the man what he was doing. He responded that he had been told to take the BMW. [Sarran] advised the man that he was on private property, and that she was a co-owner of the vehicle. While [Sarran] was standing near the BMW with her hand on the driver's side door handle, [Petitioner] told the man to "Drive." [Sarran] let go of the vehicle and called the police.

Brian Kushner heard the commotion and ran out of the house, believing that his vehicle was being stolen. Once outside he observed a man he did not know sitting in the driver's seat of the BMW, and [Petitioner] standing behind the vehicle. Brian jumped on the floorboard on the driver's side of the vehicle. [Petitioner] told the man in the vehicle to "Drive off." The driver responded "I'm not going to drive off with your son standing on the car." [Petitioner] said "Drive off anyway." [Sarran] convinced her son to return to the house to await the police. The car was then driven to [Petitioner]'s apartment.

On May 17, 2007, [Sarran] and [Petitioner] attended a divorce proceeding at the

Montgomery County Courthouse. Thereafter, while [Sarran] was sitting in her car in front of the Courthouse, [Petitioner] walked by, looked at her and said "Die."

Michael Simmons, a long-time acquaintance of [Petitioner], had a conversation with him at some point between 2006 and 2007. [Petitioner] complained about how much money the divorce case was costing him. When Simmons indicated that it might be cheaper to settle the case, [Petitioner] said he wished [Sarran] were dead. [Petitioner] then asked Simmons if he "knew anybody." When Simmons asked if [Petitioner] meant "like a hit," [Petitioner] responded in the affirmative. Simmons ended the conversation, and [Petitioner] rarely patronized his business after that.

Around Halloween of 2007, [Petitioner] hung in his chiropractic office a witch mask with [Sarran]'s name taped to the forehead. He also displayed a collage of family photographs with [Sarran]'s face obscured with Wite-Out.

Yvette Hawkins, a former medical receptionist at [Petitioner]'s office, observed the mask in [Petitioner]'s office. On one occasion [Petitioner] told Hawkins to say "Hi" to [Sarran] because she was on the wall. Hawkins heard [Petitioner] yell "Die, Sari, Die," on numerous occasions. [Petitioner] also asked Hawkins if she knew anything about voodoo dolls.

Appendix C

In early 2008, Hawkins observed [Petitioner] speaking with two men in his office after hours. She saw [Petitioner] showing the men photographs from a CVS envelope. She could not see the images at the time, but subsequently viewed them when the opportunity presented itself. The photographs depicted [Sarran]'s house, surrounding hedges and cars parked at the residence.

On April 15, 2008, [Petitioner] had a telephone conversation with his then 25-year-old son, Robert Kushner, during which [Petitioner] stated that he should have killed [Sarran]. Robert was upset by the statement and told his mother. Three days later [Sarran] filed for an extension of her one-year PFA Order, which was set to expire on or around May 8, 2008. A hearing on that request was scheduled for May 6, 2008.

On April 21, 2008, [Petitioner] again spoke with his son Robert, this time clarifying that what he really meant to say about [Sarran] was that he "should have beaten the s**t out of her." [Petitioner] also threatened Robert with retaliation if he testified against [Petitioner] at the upcoming PFA hearing. [Petitioner] said he would call the Narberth Basketball League, where Robert was a volunteer coach, to report that Robert had recently been arrested for drug possession. [Sarran] received a three-year

extension of the PFA Order after the hearing on May 6, 2008. Robert Kushner testified at the hearing. The following day the Narberth Basketball League received an anonymous telephone report about Robert Kushner's recent drug arrest.

[Sarran] was shot on May 16, 2008. The bullet, which was fired from behind the row of hedges next to the driveway, went completely through [Sarran]'s wrist. [Sarran] immediately drove herself to a nearby firehouse for assistance. While [Sarran] was being removed from her car, a .40-caliber bullet fell from her sleeve. [Sarran] was taken by ambulance to the Hospital of the University of Pennsylvania, where she underwent surgery.

An investigation into the shooting ensued, with [Sarran] indicating that she could think of no one who wanted to harm her other than [Petitioner]. The investigation revealed that [Petitioner] had had dinner at a restaurant with his father until approximately 8:30 p.m. on the night of the shooting, and that [Petitioner] then retired to his apartment. No arrests were made in the immediate aftermath of the shooting, and the shooter has never been identified.

In May 2008, Weldon Gary, a regular patient of [Petitioner]'s, was receiving a treatment for a back injury when [Petitioner] began discussing

his pending divorce. [Petitioner], who was aware that Gary had been incarcerated in the past for domestic violence, told Gary he wanted to "get rid of" [Sarran]. Gary ended the discussion at that point. [Petitioner] raised the subject again during a treatment in early July 2008, Gary again declined to discuss the matter. Undaunted, [Petitioner] raised the subject with Gary during an office visit in late July 2008. When Gary asked [Petitioner] how much he wanted to spend, [Petitioner] responded "Whatever it takes." Gary suggested $20,000, to which [Petitioner] agreed. [Petitioner] gave Gary a $1,000 cash down payment, as well as directions to [Sarran]'s home and a description of her vehicle. Gary accepted the down payment, but claimed that he secretly had no intention of carrying out the killing. He also told his friend, Craig Lowman, about receiving $1,000 from [Petitioner].

Over the next few weeks, [Petitioner] asked Gary during subsequent office visits why the task had not yet been completed. [Petitioner] stated that he needed it done by August 21, 2008, which he described as the date of the divorce. Gary made various excuses. During an office visit sometime after August 21, 2008, [Petitioner] told Gary that he had missed the deadline. [Petitioner] said he still wanted the job done. After this visit, Gary discontinued his treatment with [Petitioner].

Appendix C

On September 16, 2008, Hawkins was filing papers in [Petitioner]'s office after hours when she and another co-worker overheard [Petitioner offering money to a male patient. Hawkins was troubled by what she had heard given that [Sarran] had been shot a few months prior. She contacted [Sarran]'s divorce attorney the following day to report the incident. Hawkins subsequently was contacted by Montgomery County detectives, and gave a written statement on September 30, 2008. She identified Gary and Lowman as persons who might have additional information.

On October 2, 2008, law enforcement authorities from Montgomery and Philadelphia Counties executed search warrants for [Petitioner]'s apartment and chiropractic office. Still hanging on a wall in [Petitioner]'s office was the collage of family photographs with [Sarran]'s face obscured. Detectives also found in [Petitioner]'s office the Halloween witch mask and photographs of the area where [Sarran] had been shot. A search of [Petitioner]'s home resulted in the seizure of $75,000 in cash from [Petitioner]'s home safe, and handwritten notes containing words such as "son drugs" and "Sari Plan b."[2]

2. Petitioner's wife, Sarran Kushner, is also referred to as Sari.

Commonwealth v. Kushner, No. 9814-08, slip op. at 1-12 (Com. Pl. Ct. Montgomery Cnty. Nov. 14, 2014) (citations omitted).

On July 20, 2009, Petitioner was convicted of solicitation to commit murder and acquitted of attempted murder and conspiracy to commit murder. Petitioner was sentenced to seven and one-half to twenty years of incarceration, and his judgment of sentence was affirmed. *See Commonwealth v. Kushner*, No. 762 EDA 2010, 23 A.3d 573 (Pa. Super. Ct. Dec. 8, 2010), *allocatur denied*, 612 Pa. 697, 30 A.3d 487 (Pa. 2011).

Following his sentencing, Petitioner unsuccessfully litigated several PCRA petitions. On October 11, 2012, Petitioner filed his first, counseled PCRA petition. He filed a Corrected PCRA petition on October 19, 2012, followed by a *pro se* supplemental PCRA petition, on January 16, 2013. All of Petitioner's claims were dismissed on July 29, 2014. Petitioner filed a timely Notice of Appeal on August 15, 2014. The PCRA court explained its reasoning for dismissing the petition. *Commonwealth v. Kushner*, No. 9814-08, slip op. at 43 (Com. Pl. Ct. Montgomery Cnty. Nov. 14, 2014) (citations omitted). Petitioner then appealed this decision to the Superior Court, which affirmed. *Commonwealth v. Kushner*, No. 2357 EDA 2014, 124 A.3d 91 (Pa. Super. Ct. Oct. 6, 2015). On October 30, 2015, Petitioner filed a counseled PCRA petition based upon, *inter alia*, newly discovered evidence. On December 6, 2015, the PCRA court dismissed the petition. Petitioner filed a timely appeal, and the Superior Court affirmed the dismissal. C*ommonwealth v. Kushner*, No. 792 EDA 2016,

160 A.3d 249 (Pa. Super Ct. Jan. 10, 2017). On October 24, 2017, Petitioner filed another PCRA petition, alleging that the conviction of former Philadelphia District Attorney Seth Williams entitled him to relief from his Montgomery County conviction.[3] The Superior Court affirmed the PCRA court's dismissal of this petition. *Commonwealth v. Kushner*, No. 3875 EDA 2017, 209 A.3d 512 (Pa. Super. Ct. Jan. 17, 2019). Petitioner filed his seventh (and untimely) PCRA petition, on July 21, 2020, alleging after discovered facts from an October 2019 interview with Weldon Gary.[4] The Superior Court affirmed the PCRA court's dismissal of his petition, because Petitioner failed to meet an exception to the statutory time bar. *Commonwealth v. Kushner*, No. 120 EDA 2021, 268 A.3d 398 (Pa. Super. Ct. Nov. 3, 2021), *allocatur denied*, 280 A.3d 860 (Pa. 2022).

On January 5, 2016, Petitioner filed the instant counseled habeas petition in the United States District Court for the Eastern District of Pennsylvania based upon the following eight (8) grounds:

> (1) The trial court improperly allocated to Petitioner the decision of whether to seek a mistrial for alleged prosecutorial misconduct;
>
> (2) Trial counsel's ineffectiveness for failing to challenge alleged prosecutorial misconduct;

3. Petitioner argued that the transfer agreement between the two offices was somehow invalidated by Williams' 2017 conviction.

4. The interview was conducted by the defense's private investigator, Richard Strohm.

(3) Trial counsel's ineffectiveness for failing to challenge actual and alleged discovery violations;

(4) Trial counsel's ineffectiveness for failing to properly investigate and present alleged evidence of Petitioner's mental and cognitive impairments;

(5) Trial counsel's ineffectiveness for failing to challenge the jurisdiction of the trial court;

(6) Commonwealth's alleged *Brady*[5] violation for failing to disclose exculpatory evidence;

(7) Trial counsel's ineffectiveness for failing to challenge prior bad act evidence related to the Commonwealth's witnesses;

(8) After-discovered evidence of Petitioner's alleged mental impairment.[6]

Pet. at 5-16. Petitioner's motion to stay the proceedings was granted on March 2, 2016. On June 7, 2021, Petitioner notified the court that briefing should resume and restated his habeas claims. On August 15, 2023, Respondent submitted his response to Petitioner's habeas

5. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

6. Petitioner asserts no federal constitutional right related to this claim, so it is therefore non-cognizable.

petition. Respondent contends that the instant habeas petition should be denied because Petitioner's claims are either meritless or procedurally defaulted. Resp. at 1. Petitioner's eighth claim is noncognizable. His first claim is procedurally defaulted, while his remaining claims were exhausted through presentation to the Pennsylvania PCRA and Superior Courts. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). Upon review, this court finds that his remaining claims are meritless.

II. DISCUSSION

A. Non-cognizable After Discovered Claim Eight

A federal court may only consider a habeas petition filed by a state prisoner "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner argues that newly discovered evidence regarding his separation anxiety compels a new trial and/or sentencing hearing.[7] Pet. at 16.

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7. Petitioner also attempts to refashion this claim as an ineffective assistance of counsel claim by stating that trial counsel was "ineffective for failing to ferret out this evidence." Pet. at 16. Even so, the claim is unexhausted as it was never presented to the state courts for review. Since Petitioner is beyond the PCRA's one-year limitation period and cannot exhaust the claim, it is also procedurally defaulted. *Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001); 42 Pa. C.S.A. § 9545(b)(1). Petitioner has declined to provide an excuse for the default. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Therefore, he is not entitled to its review.

More specifically Petitioner claims that, in 2015, conversations with his son led to the discovery that he had separation anxiety. Pet. at 16. This discovery led to a diagnosis of "Reactive Attachment Disorder." *Id.* Had this "new" diagnosis been known at trial, Petitioner asserts that it could have effectively countered the Commonwealth's depiction of his actions which were used to demonstrate his motive and intent to harm the victim.[8] *Id.*

Petitioner's claim is non-cognizable because "the existence merely of newly discovered evidence relevant

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8. The state court addressed Petitioner's claim and rejected it as follows:

> [Petitioner]'s contention that his "separation anxiety" was unknowable to him prior to his reunion with his son is unavailing. [Petitioner] litigated his mental state at trial, sentencing, on direct appeal, and during multiple evidentiary hearings in the course of his first PCRA petition. [Petitioner] was examined by multiple experts over many separate evaluations in connection with these proceedings. None of these medical professionals over the course of many hours of examinations diagnosed [Petitioner] with Reactive Attachment Disorder. In short, [Petitioner] has not satisfied the newly-discovered facts exception. Instead, he attempts to again litigate the issue of his mental health through a differing opinion. Accordingly, the PCRA court properly dismissed [Petitioner]'s petition without an evidentiary hearing.

Commonwealth v. Kushner, No. 792 EDA 2016, slip op. at 7-8, 160 A.3d 249 (Pa. Super. Ct. Jan. 10, 2017) (citations omitted).

to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Herrera v. Collins*, 506 U.S. 390, 400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (quoting *Townsend v. Sain*, 372 U.S. 293, 317, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)). No federal right was violated in 2009 when Petitioner was convicted. Therefore, Petitioner's request for habeas relief on this basis is unmeritorious.

B. Exhaustion and Procedural Default

1. General Principles

A habeas petitioner must exhaust state court remedies before obtaining habeas relief. 28 U.S.C. § 2254(b)(1)(A). The traditional way to exhaust state court remedies in Pennsylvania was to fairly present a claim to the trial court, the Pennsylvania Superior Court, and the Pennsylvania Supreme Court. *See Evans v. Ct. of Com. Pl., Del. Cnty.*, 959 F.2d 1227, 1230 (3d Cir. 1992). However, in light of a May 9, 2000 order of the Pennsylvania Supreme Court, it is no longer necessary for Pennsylvania inmates to seek *allocatur* from the Pennsylvania Supreme Court to exhaust state remedies. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004).

If a habeas petitioner has presented his claim to the state courts, but the state courts have declined to review the claim on its merits, because the petitioner failed to comply with a state rule of procedure when presenting the claim, the claim is procedurally defaulted. *See Harris v. Reed*, 489 U.S. 255, 262-63, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). When a state court has declined to review

a claim based on a procedural default and the claim is not later addressed on the merits by a higher court, the habeas court must presume that the higher state court's decision rests on the procedural default identified by, the lower state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Finally, when a habeas petitioner has failed to exhaust a claim and it is clear that the state courts would not consider the claim because of a state procedural rule, the claim is procedurally defaulted.[9] *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

Procedurally defaulted claims cannot be reviewed unless "the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. In order to demonstrate cause, the petitioner must show that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the state's procedural rule." *Id.* at 753 (citation omitted). Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; (3) attorney error that constitutes ineffective assistance of counsel. *Id.* at 753-54.

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9. A common reason the state courts would decline to review a claim that has not been presented previously is the expiration of the statute of limitations for state collateral review. *See Keller*, 251 F.3d at 415.

The fundamental miscarriage of justice exception is limited to cases of "actual innocence." *Schlup v. Delo*, 513 U.S. 298, 321-22, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). In order to demonstrate that he is "actually innocent," the petitioner must present new, reliable evidence of his innocence that was not presented at trial.[10] *Id.* at 316-17, 324. The court must consider the evidence of innocence presented along with all the evidence in the record, even that which was excluded or unavailable at trial. *Id.* at 327-28. Once all this evidence is considered, the petitioner's defaulted claims can only be reviewed if the court is satisfied "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

2. Claim One — Trial Court's Improper Allocation to Petitioner the Decision of Whether to Seek a Mistrial for Alleged Prosecutorial Misconduct

Petitioner's first claim alleges that the trial court improperly assigned the decision of whether to request a mistrial by putting the decision "in the hands of Petitioner rather than in the hands of his attorney." Pet. at 5. This court finds that this claim is procedurally defaulted because it was not raised in any PCRA petition or on appeal.

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10. This evidence need not be directly related to the habeas claims the petitioner is presenting, because the habeas claims themselves need not demonstrate that he is innocent. *See Schlup*, 513 U.S. at 315.

The court begins by noting that Petitioner does not provide adequate evidence or legal authority to support his claim. He asserts, without authority, that the trial court should have ensured that it was counsel, and not Petitioner, making decisions about whether to pursue a mistrial. Nonetheless, he failed to plead this claim properly in his prior state court proceedings, wherein he only raised claim two.[11] Hence, the claim is unexhausted, *Lambert*, 387 F.3d at 233-34, and, since the time to exhaust it has expired, procedurally defaulted. *Keller*, 251 F.3d at 415. Petitioner has neither alleged that cause and prejudice excuse the default nor presented any new, reliable evidence of actual innocence. Therefore, procedurally defaulted claim one is not reviewable. *Coleman*, 501 U.S. at 750.

C. AEDPA Standard of Review

Any claims resolved on their merits by the state courts must be reviewed under the deferential standard established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA provides that habeas relief is precluded, unless the state court's adjudication of a claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

11. Petitioner's second claim asserts that trial counsel was ineffective for failing to challenge alleged prosecutorial misconduct. Pet. at 6.

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). The habeas statute further provides that any findings of fact made by the state court must be presumed to be correct; Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court's adjudication of a claim is contrary to U.S. Supreme Court precedent, if the state court has applied a rule that contradicts the governing law set forth in Supreme Court precedent or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and the state court arrives at a different result from the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). When determining whether a state court's decision was contrary to U.S. Supreme Court precedent, the habeas court should not be quick to attribute error. *See Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (*per curiam*). Instead, state court decisions should be "given the benefit of the doubt." *Id.* In this regard, it is not necessary that the state court cite the governing Supreme Court precedent or even be aware of the governing Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (*per curiam*). All that is required is that "neither the reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. *Id.*

If, however, the state court correctly identifies the governing U.S. Supreme Court precedent, unreasonable application analysis, rather than contrary analysis, is appropriate. *Williams*, 529 U.S. at 406. A state court decision constitutes an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of the petitioner's case. *Id.* at 407-08.

In making the unreasonable application determination, the habeas court must ask whether the state court's application of Supreme Court precedent was objectively unreasonable. *Williams*, 529 U.S. at 409. The habeas court may not grant relief simply because it believes the state court's adjudication of the petitioner's claim was incorrect. *Id.* at 411. Indeed, so long as the state court's decision was reasonable, habeas relief is barred, even if the state court's application of U.S. Supreme Court precedent was incorrect. *See Harrington v. Richter*, 562 U.S. 86, 101-02, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Further, when applying § 2254(d)(1), the habeas court is limited to considering the factual record that was before the state court when it ruled, *Cullen v. Pinholster*, 563 U.S. 170, 185, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), and the relevant U.S. Supreme Court precedent that had been decided by the date of the state court's decision. *Greene v. Fisher*, 565 U.S. 34, 38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011).

Furthermore, it is permissible to consider the decisions of lower federal courts that have applied clearly established Supreme Court precedent, when deciding whether a state court's application of U.S. Supreme Court

precedent was reasonable. *See Fischetti v. Johnson*, 384 F.3d 140, 149 (3d Cir. 2004). However, the § 2254(d)(1) bar to habeas relief cannot be surmounted solely based upon lower federal court precedent, *i.e.*, lower federal court precedent cannot justify a conclusion that a state court's application of U.S. Supreme Court precedent was unreasonable; only U.S. Supreme Court precedent may be the authority for that conclusion. *See Renico v. Lett*, 559 U.S. 766, 778-79, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010).

The Supreme Court, addressing AEDPA's factual review provisions in *Miller-El v. Cockerell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds, unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* at 340. A clear example of an unreasonable factual determination occurs when the state court erroneously finds a fact that lacks any support in the record. *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). In that extreme circumstance, the presumption of correctness under § 2254(e)(1) is also clearly and convincingly rebutted. *Id.* If the state court's decision based on a factual determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is not barred by § 2254(d)(2). *Lambert*, 387 F.3d at 235.-

D. Ineffective Assistance of Counsel Standard

Federal habeas ineffective assistance of counsel claims are measured against the two-part test announced

in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In short, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotation marks omitted).

Second, the petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*, but it is less than a preponderance of the evidence. *Id.* at 693, 694.

If the petitioner fails to satisfy either prong of the *Strickland* test, there is no need to evaluate the other part, as his claim will fail. *Id.* at 697. Furthermore, counsel will not be found ineffective for failing to present

an unmeritorious claim or objection. *Johnson v. Tennis*, 549 F.3d 296, 301 (3d Cir. 2008).

Review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough v. Gentry*, 540 U.S. 1, 6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003); *see Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Accordingly, if the state court addressed counsel's effectiveness, a petitioner must show that the state court's decision was objectively unreasonable. *Woodford*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). "[I]t is not enough to convince a federal habeas court that, in its independent judgment," the state court erred in applying *Strickland. Bell*, 535 U.S. at 699; *see also Harrington*, 562 U.S. at 101 ("A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself."). Petitioner, therefore, "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell*, 535 U.S. at 698-99. Before this court can address the ineffectiveness issue on its merits, it must first determine whether the state court reviewed the merits of Petitioner's claims and, if so, whether its determination was contrary to or an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d); *see also Williams*, 529 U.S. at 406.

The Third Circuit has "ruled that Pennsylvania's test for assessing ineffective assistance of counsel claims is not contrary to *Strickland*." *Jacobs v. Horn*, 395 F. 3d 92 n.9

(3d Cir. 2005) (citing *Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000)), *cert. denied*, 546 U.S. 962 (2001). In fact, this Circuit has suggested that Pennsylvania's standard is "materially identical" to the *Strickland* test. *See Brand v. Gillis*, 82 F. App'x 278 (3d Cir. 2003) (non-precedential).

E. Petitioner's Reasonably Rejected and Meritless Ineffectiveness of Counsel Claims

1. Claim Two—Ineffective Assistance of Counsel Based Upon Trial Counsel's Failure to Challenge Alleged Prosecutorial Misconduct

Petitioner alleges that trial counsel was ineffective for failing to challenge prosecutorial misconduct committed during the closing argument and to seek a mistrial based upon that misconduct. Pet. at 5. Claim two fails under AEDPA review, because the state court's decision was reasonable. Therefore, Petitioner is not entitled to habeas relief on this claim.

Petitioner states that the prosecution committed misconduct by making derisive statements about him in closing arguments and that trial counsel was ineffective in how he addressed them. Pet. at 5. The *ad hominem* attacks complained of referenced Petitioner as being "nuts"; having a "screw loose"; being a "clown"; and "father of the year." N.T. 7/29/09 at 157. The state court on Petitioner's direct appeal found no prosecutorial misconduct because the statements complained of were "made in the context of the evidence presented at trial, and represented oratorical flair." *Kushner*, No. 9814-08, slip

op. at 26 (citations omitted). In short, the court noted that the nature of the statements was insufficient to prejudice the jury against Petitioner, and, therefore, did not deprive him of an objective and fair verdict.[12] *Id.* Since there was no prosecutorial misconduct, the court further found that Petitioner could not establish the deficiency prong of his *Strickland* claim, and, therefore, trial counsel could not be deemed ineffective. *Id.* at 26-27.

The Supreme Court has set a high bar when scrutinizing comments by a prosecutor for prejudice. In *Darden*, the prosecution made a series of comments that the Court deemed "improper." *Darden v. Wainwright*, 477 U.S. 168, 180-82, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). The prosecution referenced the defendant as an "animal," one who was so violent that he required a leash and should be shot or have his throat cut.[13] *Id.* at 180. Despite their inflammatory nature, the Court found that

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12. Petitioner ultimately accepted a curative instruction.

13. "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash. I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Defendant]'s face off. I wish that I could see him sitting here with no face, blown away by a shotgun. I wish someone had walked in the back door and blown his head off at that point. He fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself. I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time. [D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance . . . [t]he only thing he hasn't done that I know of is cut his throat." *Darden*, 477 U.S. at 180 n.12 (citations and internal quotation marks omitted).

these remarks did not deprive Darden of a fair trial. *Id.* at 181. The *Darden* comments were even more offensive than those made in Petitioner's trial; hence, it would not be unreasonable for the state court to find that what occurred in Petitioner's trial did not violate due process. Since the claim that trial counsel eschewed lacked merit, trial counsel could not have been ineffective. The Superior Court's conclusion that trial counsel could not be ineffective for omitting a meritless claim is not contrary to any U.S. Supreme Court precedent and is consistent with Third Circuit precedent. *Tennis*, 549 F.3d at 301. Hence, it is reasonable under the AEDPA standard. *Fischetti*, 384 F.3d at 149. As such, this court finds that Petitioner's ineffective assistance of counsel claim must be denied.

2. Claim Three—Ineffective Assistance of Counsel Based Upon Trial Counsel's Failure to Challenge Actual and Alleged Discovery Violations

Petitioner states that the prosecution committed misconduct by "hiding exculpatory evidence until the middle of trial" related to the Commonwealth's witnesses. Pet. at 5. He alleges that trial counsel was ineffective for not immediately pursuing a mistrial motion on this basis. *Id.* This court rejects Petitioner's claim under AEDPA review, and will not grant relief, because the state court's decision was reasonable.

Petitioner challenges trial counsel's decision not to seek a mistrial due to actual and alleged discovery violations—the Commonwealth's failure to disclose

certain information regarding witnesses that he deemed exculpatory. *Id.* First, was the belated disclosure of the grand jury testimony of James Baker—which the state court found should have been disclosed pursuant to Pa. R. Crim. P. 573(B)(1). *Kushner*, No. 9814-08, slip op. at 21. The state court found that trial counsel acted reasonably in not requesting a mistrial on this basis, because he used the late disclosure to Petitioner's advantage, and because trial counsel felt the trial was going well. *Id.* at 22-23. Therefore, Petitioner had not met his burden of showing that trial counsel had been ineffective. *Id.* (citing *Commonwealth v. Rivers*, 567 Pa. 239, 786 A.2d 923 (Pa. 2001)) (finding that courts will not second-guess trial counsel's trial tactics, so long as a reasonable basis exists for that trial counsel's actions.). This analysis comports with federal law stating that trial counsel ineffectiveness will not be found based on a tactical decision that had a reasonable basis, designed to serve the defendant's interests. *Strickland*, 466 U.S. at 690-91.

Second, referring to material witness warrants issued for Yvette Hawkins,[14] Weldon Gary,[15] and Craig Lowman,[16]

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14. Yvette Hawkins testified that she overhead Petitioner soliciting an individual to kill his wife, as well as observing other evidence suggesting Petitioner might have also been soliciting others to kill his wife.

15. Weldon Gary testified at trial that Petitioner solicited him to kill his wife after she was shot on May 16, 2008. He further claimed that Petitioner gave him a $1000 down payment.

16. Petitioner sought to preclude testimony by Craig Lowman that another witness, Weldon Gary, told him about a $1000 down

Petitioner states that trial counsel was ineffective for not seeking a mistrial based on the Commonwealth's late disclosures. Pet. at 5. The state court here found that these disclosures were not mandatory, accordingly, there was no discovery violation by the Commonwealth. *Kushner*, No. 9814-08, slip op. at 20 n.5 (citations omitted). Since there was no discovery violation, trial counsel could not have been ineffective in not filing a meritless motion. *Id.*

This court must accept as correct the state court's application of its own discovery rules. *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (*per curiam*) (citations omitted). The Third Circuit has held that counsel will not be found ineffective for failing to present an unmeritorious claim. *Tennis*, 549 F.3d at 301. Hence, the state court's determination that trial counsel's omission could not be considered ineffective was a reasonable application of U.S. Supreme Court precedent. *Fischetti*, 384 F.3d at 149. Accordingly, the AEDPA standard bars relief.

3. Claim Four—Ineffective Assistance of Counsel Based Upon Trial Counsel's Failure to Properly Investigate and Present Alleged Evidence of Petitioner's Mental and Cognitive Impairments

Petitioner claims that trial counsel failed to advise the trial court of his mental impairments and failed to

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payment that Petitioner gave Gary to kill Petitioner's wife. N.T. 3/1/13 at 16.

provide the court with a complete psychological evaluation demonstrating Petitioner's mental and cognitive impairments. Pet. at 8. This court finds that the claim fails under AEDPA review, because the state court's decision was reasonable.

The state court addressed Petitioner's claim that trial counsel was ineffective for failing to advise the trial court of his alleged mental and cognitive impairments. *Kushner*, No. 9814-08, slip op. at 27. In rejecting Petitioner's claim, the court relied upon testimony presented by Petitioner's trial counsel. This testimony stated that based on their interactions, Petitioner's trial counsel never considered hiring a psychologist or psychiatrist to examine Petitioner. *Id.* at 30. The state court found that Petitioner's trial counsel acted reasonably in not doing so, and his actions were further supported by the fact that neither of Petitioner's other two attorneys "ever expressed concerns about [Petitioner]'s mental capabilities or suggested that they should get him evaluated." *Id.* at 31. Absent any contradictory evidence, this court is bound to accept the state court's decision to credit trial counsel's testimony about his actions concerning Petitioner. 28 U.S.C. § 2254(e)(1).

This court finds that the state court reasonably resolved Petitioner's claims. The Third Circuit allows counsel to rely on the defendant and the information provided by the defendant to determine the pre-trial investigative steps needed. *See Lewis v. Mazurkiewicz*, 915 F.2d 106, 111 (3d Cir. 1990) (providing that counsel "may properly rely on information supplied by the defendant in determining the nature and scope of the

needed pretrial investigation"). Furthermore, a "heavy measure of deference" is applied to counsel's judgments. *Strickland*, 466 U.S. at 691. The state court finding that Petitioner's trial counsel was not ineffective was reached in a manner consistent with federal law. *See Lewis*, 915 F.2d at 111. Hence, this court is bound to accept the state court determination that trial counsel acted reasonably in their assessment of the Petitioner's mental health, and, therefore, were not ineffective. *Fischetti*, 384 F.3d at 149. Petitioner's claim on this basis fails, and he is not entitled to habeas relief.

4. Claim Five—Ineffective Assistance of Trial Counsel Based Upon Trial Counsel's Failure to Challenge the Jurisdiction of the Trial Court

Petitioner asserts that trial counsel was ineffective for not raising a jurisdictional challenge to the trial taking place in Montgomery County, because the solicitation occurred in Philadelphia, at his chiropractic office. Pet. at 11. This claim also fails under AEDPA review, because the state court's decision was based upon its conclusion that Montgomery County had jurisdiction under state law. Therefore, he is not entitled to habeas relief on this basis.

In finding that trial counsel was not ineffective for failing to raise a jurisdictional challenge, the state court addressed this claim as follows:

> Prior to trial, the Philadelphia County District Attorney and the Montgomery County District Attorney signed an agreement to transfer the

> proceedings from Philadelphia to Montgomery County. Although the solicitation occurred in Philadelphia County at [Petitioner]'s office, the crime was to be carried out at the marital home of [Petitioner] and his wife in Bala Cynwyd, Montgomery County. As such, Montgomery County was the proper jurisdiction to hear the instant case. *See Commonwealth v. Carey*, 293 Pa. Super. 359, 439 A.2d 151, 155 (Pa. Super. 1981) (It's logical that even though the original solicitation may have taken place in Philadelphia County, the ultimate act was to be performed in Delaware County and that county should have jurisdiction to try the defendant.).

Kushner, No. 9814-08, slip op. at 37-38.

The determination of jurisdictional propriety is solely a state law matter, and the state court, in compliance with state law, found that jurisdiction was proper in Montgomery County. Hence, this court must accept the state court's resolution of the question. *Bradshaw*, 546 U.S. at 76. Next, a change of venue motion would have been futile; therefore, trial counsel was not ineffective for failing to pursue it. *Tennis*, 549 F.3d at 301. This claim would fail under *de novo* review; hence, it cannot prevail under AEDPA review. *Weeks v. Angelone*, 528 U.S. 225, 237, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000).

5. Claim Seven— Ineffective Assistance of Trial Counsel Based Upon Trial Counsel's Failure to Challenge Prior Bad Act Evidence

Petitioner argues that trial counsel was ineffective for failing to challenge prior bad act evidence. Pet. at 13-14. This court finds that Petitioner's claim fails under AEDPA review. The state court reviewed the application of its evidentiary rules and reached a reasonable decision on Petitioner's meritless claim.

The state court, in resolving Petitioner's claims, found that the statement of Craig Lowman was admissible as a prior consistent statement. *Kushner*, No. 9814-08, slip op. at 32. Therefore, counsel was not ineffective in failing to object to its use. *Id.* The state court found that the testimony of Michael Simmons was admissible as an exception to the prior bad acts rule, Pa. R. Evid. 404(b), since it was relevant to show a sequence of events regarding the domestic conflict between Petitioner and his wife and his hostility towards her. *Id.* at 33-34 (citations omitted)

The determination of admissibility is a state law evidentiary matter. *Wilson v. Vaughn*, 533 F.3d 208, 213 (3d Cir. 2008) ("Admissibility of evidence is a state law issue.") (citing *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)). The court found here that the evidence complained of was properly admitted. Hence, this court must accept the state court's resolution of the question. *Bradshaw*, 546 U.S. at 76. Since counsel cannot be found ineffective for failing to lodge a meritless

objection, its finding that counsel was not ineffective is reasonable. *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999). Therefore, Petitioner's ineffective assistance claim on this basis fails.

F. Claim Six—Alleged *Brady* Violation by the Commonwealth for Failing to Disclose Exculpatory Evidence

Petitioner alleges that the Commonwealth committed a *Brady* violation by suppressing allegedly exculpatory evidence related to Weldon Gary. Pet. at 9-10. The Commonwealth states that the claim is procedurally defaulted. Resp. at 29. This court agrees that the claim is procedurally defaulted; however, under *Banks*,[17] this court can address the merits. This is because if a *Brady* claim has merit, its components will provide cause and prejudice to overcome default. *See* 540 U.S. at 681. Under *de novo* review, this court finds that the *Brady* claim is meritless.

The three elements of a *Brady* claim are:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

17. *Banks v. Dretke*, 540 U.S. 668, 681, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004).

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Prejudice is the materiality requirement, *id.* at 282, to wit, the defendant must show that there is a reasonable probability that, if the omitted evidence had been disclosed to him, the outcome of the proceeding would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). In order for omitted evidence to be material, it is not necessary that the evidence establish by a preponderance that its disclosure would have resulted in an acquittal. *Id.* at 434. The omitted evidence need only detract from the reviewing court's confidence in the outcome that the jury, or fact-finder, did reach. *Id.* The requisite lack of confidence may exist, although sufficient record evidence to convict remains, even after discounting the inculpatory evidence impacted by the undisclosed evidence. *Id.* at 434-35. Materiality is evaluated by examining the collective effect of all the undisclosed evidence, not by evaluating the impact of each item of undisclosed evidence separately. *Id.* at 436. However, to determine whether any particular piece of undisclosed evidence is favorable, each item is evaluated separately. *Id.* at 436 n.10.

The Superior Court did not address the merits of Petitioner's *Brady* claim since the claim was time-barred. The claim is, therefore, defaulted. *See McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999). However, since a meritorious *Brady* claim could establish both cause and prejudice to excuse this procedural default, *see Banks*, 540 U.S. at 681, this court will examine the merits of claim six.

Petitioner's *Brady* claim fails under *de novo* review. The statement at issue was not exculpatory; Gary testified at trial that he would never carry out the crime. Next, it was not suppressed by the Commonwealth willfully or inadvertently, because the statement did not exist at the time of trial, making it impossible that the prosecution suppressed it. Petitioner, in fact, obtained the statement many years after the trial. Finally, since the evidence was not favorable— because it was not exculpatory—its omission could not have affected the trial's outcome. Hence, it was not material. Petitioner's *Brady* claim fails, and he is not entitled to relief. *See Strickler*, 527 U.S. at 280.

III. CONCLUSION

Petitioner's eighth claim is non-cognizable, his first is procedurally defaulted. All other claims lack merit under the appropriate federal standard of review. Reasonable jurists would not debate this court's substantive and procedural dispositions of his claims; therefore, a certificate of appealability should not issue. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 29th day of February 2024, for the reasons contained in the preceding Report, it is hereby **RECOMMENDED** that Petitioner's claims be **DISMISSED** and **DENIED**, without an evidentiary hearing. Petitioner has neither demonstrated that any

reasonable jurist could find this court's procedural rulings debatable, nor shown denial of any federal constitutional right; hence, there is no probable cause to issue a certificate of appealability.

Petitioner may file objections to this Report and Recommendation within fourteen (14) days of being served with a copy of it. *See* Local R. Civ. P. 72.1(IV). Failure to file timely objections may constitute a waiver of any appellate rights.

It be so **ORDERED**.

BY THE COURT:

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS
United States Magistrate Judge

APPENDIX D — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA, FILED NOVEMBER 3, 2021

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 120 EDA 2021

COMMONWEALTH OF PENNSYLVANIA

v.

ALAN KUSHNER,

Appellant.

Filed November 3, 2021

Appeal from the PCRA Order Entered December 3, 2020
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0009814-2008

BEFORE: STABILE, J., KING, J., and PELLEGRINI, J.*

MEMORANDUM BY PELLEGRINI, J.:

Alan Kushner (Kushner) appeals from the order entered in the Court of Common Pleas of Montgomery County (PCRA court) dismissing his seventh petition filed pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546 as untimely. Kushner contends he

* Retired Senior Judge assigned to the Superior Court.

met the newly-discovered facts exception to the PCRA's time-bar based on an interview his private investigator conducted with Commonwealth witness Weldon Gary (Gary) in October 2019. We affirm.

I.

A.

This case arises from Kushner's attempt to hire another individual to kill his then-wife Sari Kushner (Wife)[1] in May 2008. The couple had married in 1976 and resided together with their two sons. Kushner is a chiropractor and he operated an office in Philadelphia County. After years of marital disharmony, Wife initiated divorce proceedings in January 2006. During the pendency of the proceedings, Wife was shot in the driveway of her home after she returned from a museum event. The bullet was fired from behind a row of hedges next to the driveway and it went completely through her wrist. Wife immediately drove herself to a nearby firehouse for assistance and she was taken by ambulance to a hospital for surgery. Wife indicated to police that she could think of no one who wanted to harm her other than Kushner.

The police investigation revealed that Kushner had dinner at a restaurant with his father until approximately 8:30 p.m. on the night of the shooting and he then went to his apartment. No arrests were made immediately following the shooting and the gunman has never been identified.

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1. Wife is also referred to as "Sarran" in the record.

Appendix D

Kushner was arrested in October 2008 after police executed search warrants on his apartment and chiropractic office. He was charged with attempted murder, solicitation to commit murder and conspiracy to commit murder. At his July 2009 trial, the jury heard testimony from several witnesses, including Gary, who had been a regular patient of Kushner's. Gary was an uncooperative witness and the Commonwealth secured a material witness warrant to ensure his attendance at trial.

Gary testified that while he was receiving treatment for a back injury in May 2008, Kushner began discussing his pending divorce. Kushner was aware that Gary had been incarcerated in the past for domestic violence and told Gary he wanted to "get rid of his wife." (N.T. Trial, 7/27/09, at 122). Gary ended the discussion, but averred that Kushner revived it during a July 2008 session and Gary declined to discuss the matter. When Kushner raised it again, Gary asked Kushner how much he wanted to spend and Kushner responded, "Whatever it takes." (***Id.*** at 123). Kushner agreed to Gary's suggested $20,000 and gave him a $1,000 cash down payment, as well as directions to Wife's home and a description of her vehicle. Although Gary accepted the down payment, he claimed he never had any intention of carrying out the killing and that he ripped up Wife's address. (***See id.*** at 126, 128). On direct examination by the Commonwealth, he testified:

> Q. Did you ever have any intention of actually hurting Mrs. Kushner?

> A. No, I did not. I don't even know what she look like. . . . I don't even know what she look like. I never had no intention to hurt nobody.

(***Id.*** at 128).

On cross-examination by defense counsel, Gary testified:

> Q. Okay. You never even had an intention to go to Montgomery County and do anything; right?
>
> A. That's correct.
>
> Q. You knew that you didn't do anything wrong in Montgomery County?
>
> A. That's correct.

(***Id.*** at 139-40). In the next few weeks, Kushner asked Gary during office visits why he had not completed the task. Gary then discontinued treatment.

The jury found Kushner guilty of solicitation to commit murder and returned verdicts of not guilty on the remaining charges. On October 23, 2009, the trial court sentenced Kushner to 7½ to 20 years' incarceration. On December 8, 2010, we affirmed his judgment of sentence. (***See Commonwealth v. Kushner***, 23 A.3d 573 (Pa. Super. 2010)) (unpublished memorandum). The Pennsylvania Supreme Court denied his petition for allowance of appeal on October 13, 2011. (***See Commonwealth v. Kushner***,

612 Pa. 697, 30 A.3d 487 (Pa. 2011)). Kushner then unsuccessfully litigated several PCRA petitions.

B.

Kushner filed the instant counseled PCRA petition on July 21, 2020. He acknowledges that his petition is untimely and bases his newly-discovered facts claim on a telephone interview private investigator Richard Strohm (Strohm) conducted with Gary in October 2019. Strohm's report provides:

> Mr. Gary informed us that he didn't know anything about an affidavit.[2] After reading the

2. Kushner filed his sixth PCRA petition based upon a notarized affidavit, purportedly signed by Gary. The PCRA court held a hearing on the matter and determined that the affidavit was fraudulent. This document read as follows:

> My name is Weldon Gary an [sic] I would like to tell the Court that I lied to the Philadelphia Police and the prosecutor about Mr. Kushner hiring me to kill his wife. I am coming forward now with this information because my conscience is really weighing on me. I have changed my life an [sic] I am a devoted Christian now. Mr. Kushner never paid me any money or gave me any type of gifts for doing such a crime. I would like to go on record and tell anybody who has a concern with Mr. Kushner's legal matters or anyone representing him with his case that I, Weldon Gary did not take a contract to kill his ex-wife or do any harm to no one for money or gifts I am coming forward with this statement, to right my wrongs that I have did and to make myself a better person and to do what's right

> affidavit to him, he stated that it was false and he never signed any such thing. He also stated that Alan Kushner paid him one thousand dollars to kill his wife, but he had no intentions on killing her and **told him that from the beginning**. He further stated that he wasn't the only person Alan Kushner asked to kill his wife. He had been going around asking others before he asked him to do it. Furthermore, he never received $1000 until after his wife had already been shot. In closing, Mr. Gary stated that he never wanted to get involved in this situation and that he never went to the police on his own free will. He only did it because he was threatened by the detectives, who told him that he would be going to jail for 2 to 5 years, if he didn't testify against Alan Kushner.

(PCRA Petition, 7/21/20, at Paragraph 22) (emphasis original). Kushner characterizes this interview as "Gary's recantation to investigator Strohm" and argues that it "is

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> by Mr. Kushner. I would like the Court to know that no one has made me come forward or no one has offered me any monies or gifts for my changing my statement. I just want to do what's right so that I can move forward with my life. I can't move on with my life knowing I put a man in jail for nothing. I lied on Mr. Kushner an [sic] I would like to make this right for me. I am living a new life for God an [sic] he has forgave [sic] me for my sins, so I must do the right thing and tell the truth for Mr. Kushner.

(PCRA Petition, 7/21/20, at Paragraph 18).

critical evidence that essentially should lead to the grant of a new trial under the newly discovered facts exception." (***Id.*** at Paragraph 41).

The PCRA court issued Rule 907 notice to dismiss the petition without a hearing. ***See*** Pa.R.Crim.P. 907(1). On December 3, 2020, the PCRA court dismissed the petition as untimely. In doing so, it explained that Kushner did not establish applicability of the newly-discovered facts exception to the PCRA time-bar with regard to Strohm's report on his interview with Gary. It explained that the "instant seventh petition amounts to nothing more than a patchwork regurgitation of previously litigated and meritless claims." (PCRA Court Opinion, 3/15/21, at 11). Kushner timely appealed. He and the PCRA court complied with Rule 1925. ***See*** Pa.R.A.P. 1925(a)-(b).

II.

A.

Before considering the merits of Kushner's PCRA petition, we must first determine whether it is timely under the PCRA's jurisdictional time-bar.[3] A PCRA petition, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." 42 Pa.C.S. § 9545(b)(1). A judgment becomes final at the conclusion of direct review, "including discretionary

3. Because the issue of whether a PCRA petition is timely raises a question of law, our standard of review is *de novo*. ***See Commonwealth v. Reid***, 235 A.3d 1124, 1166 (Pa. 2020).

review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. § 9545(b)(3). Because the timeliness requirements of the PCRA are jurisdictional in nature, courts cannot address the merits of an untimely petition. ***See Commonwealth v. Moore***, 247 A.3d 990, 998 (Pa. 2021).

Kushner's judgment of sentence became final on January 11, 2012, when his time to file a petition for *writ of certiorari* with the Supreme Court of the United States expired. ***See*** 42 Pa.C.S. § 9543(b)(3). Because he did not file the instant PCRA petition until more than eight years later in July 2020, it is facially untimely and he must plead and prove one of the three limited exceptions to the time-bar:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court

> of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i)-(iii).

Kushner invokes the newly-discovered facts exception at Section 9545(b)(1)(ii) pursuant to which he must establish: "1) the **facts** upon which the claim was predicated were **unknown** and 2) could not have been ascertained by the exercise of **due diligence**." ***Commonwealth v. Howard***, 2021 PA Super 75, 249 A.3d 1229, 1235 (Pa. Super. 2021) (citation omitted; emphases original). "If the petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection." ***Id.*** (citation omitted). "Thus, the 'new facts' exception at Section 9545(b)(1)(ii) does not require any merits analysis of an underlying after-discovered-evidence claim."[4] ***Id.*** (citation omitted).

"Due diligence demands that the petitioner take reasonable steps to protect his own interests [and] explain why he could not have learned the new fact(s) earlier with the exercise of due diligence." ***Id.*** at 1234 (citation omitted). "This rule is strictly enforced." ***Id.*** (citation omitted).

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4. ***See*** 42 Pa.C.S. § 9543(a)(2)(vi) (providing for post-conviction relief based on after-discovered exculpatory evidence after jurisdictional threshold is met).

Additionally, "it is well-settled that there is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." ***Commonwealth v. Allison***, 2020 PA Super 168, 235 A.3d 359, 364 (Pa. Super. 2020) (citation omitted); ***see also*** Pa.R.Crim.P. 907(1).

B.

As noted, Kushner bases his after-discovered facts claim on Strohm's report summarizing his interview with Gary in October 2019 wherein Gary allegedly stated that he had no intention of killing Wife and that he "told [Kushner] that from the beginning." Kushner asserts that he became aware of this information "only after the false affidavit [attached to his sixth PCRA petition] was submitted and Investigator Strohm then contacted [Gary] by phone." (PCRA Petition, at Paragraph 44; ***see also*** Kushner's Brief, at 18). Kushner argues this evidence is "entirely different" from Gary's trial testimony and that it represents a "sea change in the evidence of this case" reflecting that Gary's testimony was tainted, that he never had any intention of committing the crime and that he was threatened with a jail term if he did not cooperate with police. (Kushner's Brief, at 17-18, 21).

In assessing Kushner's claims, the PCRA court concluded:

> The fact that Gary was an uncooperative witness was known at trial. It was elicited at

> trial that he did not want to testify, was given immunity, and had been incarcerated for 10 days on a material witness warrant prior to trial in order to secure his testimony.
>
> . . . [A]ny "facts" related to something purportedly told to the Defendant by Gary cannot satisfy the time bar as these were not previously unknown facts that could not be ascertained with the exercise of due diligence as required by §9545(b)(1)(ii). Assuming that Gary did in fact tell the Defendant that he had no intention of carrying out the crime, that fact would have been known to the Defendant at the time of trial, at the time of his direct appeal, and at the time of his timely collateral review. Furthermore, Gary testified at trial that he was never going to carry out the crime. The defendant's seventh petition, filed nearly eight years after his sentence became final, was properly dismissed without a hearing as he failed to overcome the PCRA's jurisdictional time limits.

(PCRA Ct. Op. at 12-13) (record citation omitted).

We agree with the PCRA court's analysis. Kushner has failed to demonstrate that the purported "newly-discovered facts" were unknown at the time of trial or that he has exercised due diligence in obtaining them. Although Kushner maintains that he could not have discovered the

information from Gary until after the fraudulent affidavit was filed, this assertion is not persuasive. Kushner frames the comments Gary made in the 2019 interview as entirely different from his trial testimony, but the record reflects that his interview was consistent with his trial testimony insofar as he maintains that he never intended to carry out Wife's killing. (***See*** Kushner's Brief, at 17; N.T. Trial at 128, 139-40). The information, therefore, cannot be accurately characterized as "new." Defense counsel thoroughly cross-examined Gary at trial concerning the circumstances of his reluctant cooperation with the Commonwealth and had ample opportunity to highlight the impact of the immunity agreement. Any issue regarding Gary's interaction with the Commonwealth was already part of this case over 10 years ago. Likewise, Kushner was well aware at that time of any information Gary "told him [] from the beginning" concerning his intention, or lack thereof, to follow through on the killing. (***See*** PCRA Petition, at Paragraph 22).

In sum, Kushner has fallen short of establishing an exception to the statutory time-bar. Because this seventh PCRA petition is untimely and Kushner has not demonstrated the applicability of the newly-discovered facts exception, this Court is without jurisdiction to provide further review of the merits of his petition.[5] The

5. We note Kushner's argument that jurisdiction and venue were improper in Montgomery County because no "overt act" occurred there and any contact he had with Gary took place in Philadelphia is a transparent attempt to relitigate the claim he has made in previous PCRA petitions that the Court of Common

PCRA court, therefore, properly dismissed Kushner's petition without a hearing.

Order affirmed.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/3/2021

Pleas of Montgomery County lacked jurisdiction over this case. (***See*** Kushner's Brief, at 29-30). We reiterate our admonition that Kushner cannot resurrect previous claims by asserting a new theory under the guise of one of the PCRA timeliness exceptions. (***See Commonwealth v. Kushner***, 209 A.3d 512, 2019 Pa. Super. Unpub. LEXIS 194, 2019 WL 243913, at *2) (Pa. Super. Ct. filed Jan. 17, 2019).

APPENDIX E — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA, FILED JANUARY 17, 2019

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3875 EDA 2017

COMMONWEALTH OF PENNSYLVANIA

v.

ALAN KUSHNER,

Appellant.

Filed January 17, 2019

Appeal from the Order Entered October 31, 2017
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0009814-2008

BEFORE: LAZARUS, J., McLAUGHLIN, J., and STEVENS*, P.J.E.

MEMORANDUM BY LAZARUS, J.:

Alan Kushner appeals from the order, entered in the Court of Common Pleas of Montgomery County, dismissing as untimely his fourth petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After our review, we affirm.

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* Former Justice specially assigned to the Superior Court.

Appendix E

On October 30, 2008, Lower Merion Township Police arrested Kushner and charged him with attempted murder, criminal solicitation to commit murder, and criminal conspiracy to commit murder in connection with his attempts to hire another individual to kill his wife. On July 20, 2009, a jury convicted Kushner of solicitation to commit murder and acquitted him of attempted murder and conspiracy to commit murder. On October 23, 2009, the court sentenced him to 71/2 to 20 years of incarceration. On December 8, 2010, this Court affirmed his judgment of sentence. ***See Commonwealth v. Kushner***, 23 A.3d 573 (Pa. Super. 2010) (unpublished memorandum). The Pennsylvania Supreme Court denied review on October 13, 2011. ***See Commonwealth v. Kushner***, 612 Pa. 697, 30 A.3d 487 (Pa. 2011) (Table).

Kushner's judgment of sentence became final for PCRA purposes on January 11, 2012.[1] Thus, Kushner had until January 11, 2013, to file any and all PCRA petitions. The instant petition, filed on October 24, 2017, is facially untimely. ***See*** 42 Pa.C.S.A. § 9545(b)(1) (in order for petition to be timely under PCRA, petitioner must file petition within one year of date judgment of sentence

1. A judgment is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of the time for seeking review." 42 Pa.C.S.A. § 9545(b)(3). ***See Commonwealth v. Fahy***, 558 Pa. 313, 737 A.2d 214, 218 (Pa. 1999) (noting appellant's judgment of sentence becomes final upon expiration of ninety-day period for seeking appellate review to United States Supreme Court.). ***See also*** Sup. Ct. R. 13.1 (allowing ninety days for filing of writ of certiorari in Supreme Court of the United States).

becomes final); ***see also Commonwealth v. Brown***, 596 Pa. 354, 943 A.2d 264, 267 (Pa. 2008) (PCRA's time requirements are jurisdictional; no court has jurisdiction to address untimely petition).

However, section 9545(b)(1) provides three exceptions to the general time requirements of the PCRA. To invoke an exception, a petition must allege and the petitioner must prove:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1). A petitioner has the burden of pleading and proving an exception to the time bar.

Commonwealth v. Hawkins, 598 Pa. 85, 953 A.2d 1248, 1253 (Pa. 2008). A petitioner seeking relief pursuant to a statutory exception must adhere to the additional requirement of filing the petition within sixty (60) days of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2).[2]

Here, Kushner attempts to invoke the newly-discovered facts exception, averring that the June 29, 2017 conviction of former Philadelphia District Attorney Seth Williams entitles him to relief from his Montgomery County conviction. Specifically, he argues that the transfer agreement between the Montgomery County District Attorney's Office and the Philadelphia County District Attorney's Office, executed in 2008, is somehow invalidated by Seth Williams' 2017 conviction. Kushner argues that he filed the instant petition "to litigate the integrity of that decision." Appellant's Brief, at 10.

Kushner's argument is a thinly veiled attempt to relitigate his prior claim that the Montgomery County Court of Common Pleas lacked jurisdiction over his case because the events leading up to the solicitation occurred in Philadelphia. Kushner cannot resurrect previous claims by asserting a new theory under the guise of one of the PCRA timeliness exceptions. ***Commonwealth v.***

2. Section 9545(b)(2) was amended on October 24, 2018, effective in 60 days (Dec. 24, 2018), extending the time for filing from sixty (60) days of the date the claim could have been presented, to one year. The amendment shall apply to claims arising on December 24, 2017, or thereafter. It is not applicable here. ***See*** Act 2018, Oct. 24, P.L. 894, No. 146, § 3.

Mumia Abu-Jamal, 833 A.2d 719, 727, 574 Pa. 724 (Pa. 2003). This claim was presented in Kushner's first PCRA petition, dismissed by the PCRA court, and affirmed by this Court on collateral appeal. ***Commonwealth v. Kushner***, 134 A.3d 91 (Pa. Super. 2015) (unpublished memorandum).[3] ***See*** 42 Pa.C.S.A. § 9543(a)(3) (in order to be eligible for PCRA relief, petitioner must plead and prove by preponderance of evidence that allegation of error has not been previously litigated or waived; an issue has been previously litigated if it was raised and decided in proceeding collaterally attacking conviction or sentence);

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3. In his appeal from the 2014 order denying his first PCRA petition, Kushner claimed that trial counsel was ineffective for failing to raise a jurisdictional challenge. Specifically, he claims counsel's failed to raise a jurisdictional challenge to Kushner being tried in the Montgomery County Court of Common Pleas, where the alleged solicitation to commit murder occurred in Philadelphia. The PCRA court determined that the contention was meritless, and this Court affirmed. Since the crime was to be committed in the marital home in Montgomery County, jurisdiction was proper in Montgomery County. ***See Kushner***, 134 A.3d at 91. ***See also Commonwealth v. Carey***, 293 Pa. Super. 359, 439 A.2d 151, 155 (Pa. Super. 1981) (even though original act of solicitation occurred in Philadelphia County, ultimate act was to be performed in Delaware County and that county should have jurisdiction to try defendant).

We also note that pursuant to Pa.R.Crim.P. 130(B), the Philadelphia District Attorney's Office relinquished jurisdiction of the solicitation incidents to the Montgomery County District Attorney's Office. The transfer agreement, executed in 2008, two years before Seth Williams took office, was signed by Chief of Trials, Thomas McGoldrick of the Montgomery County District Attorney's Office, and his counterpart in the Philadelphia District Attorney's Office, Deputy District Attorney John P. Delaney, Jr. ***See*** N.T. PCRA Hearing, 11/12/13, at 65; Ex. C-19).

see also Commonwealth v. Small, 602 Pa. 425, 980 A.2d 549, 569 (Pa. 2009) (whether issue was previously litigated turns on whether issue constitutes discrete legal ground or merely alternative theory in support of same underlying issue raised on direct appeal).

We conclude, therefore, that Kushner has failed to meet the newly-discovered fact exception to the time bar. The PCRA court, therefore, properly dismissed Kushner's petition.

Order affirmed.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/17/19

APPENDIX F — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA, FILED DECEMBER 8, 2010

IN THE SUPERIOR COURT OF PENNSYLVANIA

NON-PRECIDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

No. 762 EDA 2010

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

ALAN E. KUSHNER,

Appellant.

Appeal from the Judgment of Sentence of October 23, 2009, in the Court of Common Pleas of Montgomery County, Criminal Division, at No. CP-46-CR-0009814-2008

BEFORE: BENDER, FREEDBERG and COLVILLE*, JJ.

Filed December 8, 2010

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* Retired Senior Judge assigned to the Superior Court.

Appendix F

MEMORANDUM:

This case is a direct appeal from the judgment of sentence imposed on Appellant following his conviction for solicitation to commit murder. Appellant contends the trial court erred in not suppressing evidence seized from his residence. He also claims he is entitled to a new trial based on prosecutorial misconduct committed during the Commonwealth's closing argument. We affirm the judgment of sentence.

The record reveals the following facts. In May 2008, Appellant's wife, Sarran Kushner, parked her vehicle outside her home. As she began to pull her hood over her head, she heard a loud bang and felt pain in her wrist. She noticed a window in the vehicle was broken and realized she had been shot. She then drove to a nearby fire company for help. It was determined that her wound was caused by a .40 caliber bullet. The bullet was recovered by police.

In the course of investigating the incident, police came to suspect that Appellant was involved in the shooting. They eventually applied for a search warrant supported by an affidavit which recounted the foregoing details of the shooting and identified Appellant as a suspect either in the actual shooting or in directing someone else to shoot Sarran. The affidavit also contained a variety of other supporting allegations as set forth in the following paragraphs.

Appellant and his wife were married in 1976. The marital relationship eventually began to deteriorate and,

in 2005, Sarran started divorce proceedings. For some time thereafter, the two resided together. Sarran claimed that, during that time, Appellant made various comments of a threatening nature to her (e.g., indicating he would make sure she ended up dead, stating he would make sure bad things happened to her, telling her that he would get her and that something horrible would befall her). In 2006, Sarran was granted exclusive possession of the couple's house.

The affidavit also alleged that Sarran petitioned for a protection from abuse order and, when she did so, cited numerous times Appellant returned to the marital house after the exclusive-possession order was issued. Her petition also alleged Appellant had made many harassing or abusive phone calls to her. A PFA order was entered in 2007.

At some point in time, police interviewed a witness who recounted that, in the fall of 2007, Appellant complained about the money he would have to give his wife if they divorced, stated that he wished his wife were dead and then asked the witness if he "knew anybody." Affidavit of Probable Cause, 10/01/08, at 4. The witness asked, "[L]ike a hit?" ***Id.*** Appellant replied, "[Y]eah." ***Id.*** The conversation then ended.

Additionally, the affidavit explained that a receptionist in Appellant's chiropractic office advised police that, in March 2008, Appellant showed two male patients pictures of the marital home. The pictures were in a CVS envelope.

Another receptionist reported that one of Appellant's patients, Craig Lowman, told her that Appellant had offered him $1,000.00 to do something to Appellant's wife. Lowman did not tell the receptionist exactly what Lowman was to do. Lowman also told the receptionist that Appellant had paid another patient $6,000.00, though Lowman did not explain why Appellant made that payment. The dates on which the foregoing offer and payment were made was not specified in the affidavit.

According to the affidavit, one of the receptionists also advised police that, in September 2008, she overheard Appellant offer a patient $2,000.00 to kill Sarran. The receptionist could not recall the patient's name but indicated there was a patient file for him in the office.

During 2007, Appellant hung in his office a Halloween mask having hair similar to Sarran's. He taped his wife's name to the mask and was overheard by one of the receptionists yelling, "Die, Sari, Die." ***Id.*** at 5. Appellant removed the mask after patients complained.

The affidavit also referenced comments Appellant made to his son in April 2008. In those comments, Appellant indicated he should have killed or otherwise harmed Sarran.

Finally, the affidavit explained that police had interviewed Appellant, questioning him about his whereabouts on the evening of the shooting. Appellant indicated he was with his father at a restaurant until roughly 8:30 p.m. and returned to his residence at

roughly 9:00 p.m. The front desk attendant at Appellant's apartment complex confirmed Appellant's arrival time and did not see Appellant leave the premises thereafter, although the attendant acknowledged there was a rear exit which residents can use without the attendant's knowledge. The shooting occurred at roughly 10:47 p.m.

Having submitted the affidavit, police sought a warrant to search Appellant's apartment for such items as a .40 caliber handgun and ammunition, pictures of the marital residence, a CVS envelope, Appellant's personal and professional financial records, patient information sheets, medical records, and other documents pertaining to Appellant's treatment of his patients from November 2007 to October 2008.

With respect to the patient-related records, the affidavit acknowledged Appellant's office would be the most likely place to find them. However, the affidavit also asserted that Appellant may have removed such records to his home given that he knew police were conducting an investigation and given that he might arguably believe his home would be more secure than his office.

Based on the aforementioned affidavit, the court issued a warrant. Police then searched Appellant's apartment and, in doing so, found and seized various items of evidence. Appellant was eventually arrested and charged with several offenses relating to the shooting of his wife. He filed a suppression motion that was denied. He then proceeded to trial and was convicted of solicitation to commit murder. Thereafter, he was sentenced. Appellant

filed post-sentence motions. The court denied them. He then filed this timely appeal.

Appellant's first claim is that the court should have suppressed the evidence seized from his residence because the affidavit failed to establish probable cause that his residence would contain evidence of crime. This argument is meritless.

When presented with an affidavit supporting a warrant request, a magistrate is to consider the totality of the circumstances expressed in the affidavit in order to decide if there is probable cause to issue the warrant. ***Commonwealth v. Camperson***, 650 A.2d 65, 69 (Pa. Super. 1994). A *prima facie* case need not be shown. ***Id.*** Rather, the magistrate must make a practical, common-sense determination of whether, under the totality of the circumstances, there is a fair probability that the identified evidence of the identified crime will be found in the place to be searched. ***Id.*** Phrased somewhat differently, probable cause exists where the affiant's reasonably trustworthy information and knowledge are sufficient to warrant a reasonable belief that the requested search for contraband should be conducted. ***Commonwealth v. Jones***, 988 A.2d 649, 655 (Pa. 2010). If the affidavit sets forth probable cause, a warrant may issue. ***Id.***; ***Camperson***, 650 A.2d at 69-70.

A magistrate's determination regarding the issuance of a warrant must be given deference by a reviewing

court. ***Jones***, 988 A.2d at 655. Indeed, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. ***Id.***

When reviewing the denial of a suppression motion, our standard is to determine whether the suppression court's findings are supported by the record and whether the court's ruling is free of legal error. ***Id.*** at 654.

Appellant does not contend the affidavit failed to establish probable cause that he was a suspect. He also does not argue the items listed in the warrant and/or seized from his apartment were not fairly considered to be contraband. Rather, he contends some or all of the evidence (particularly the patient-related documents) could be expected to be found in his office, not his home, and, as such, there was no probable cause supporting the warrant for a search warrant of his apartment. In turn, he asserts the court should have suppressed the evidence seized from his home.

After examining the contents of the affidavit and warrant, the suppression court concluded the sought-after items were of a type that could have been kept at home and that probable cause supported the search of Appellant's apartment. We see no reason to disturb this ruling. The warrant allegations made clear the authorities' belief that Appellant had solicited one or more patients to commit murder. It

was reasonable to believe that information in patient files could assist police in their investigation and could perhaps incriminate Appellant. As such, it was also reasonable for the police to suspect Appellant, believing the records might incriminate him and believing his home would be more secure and private than his office, may have moved some of the patient files to his apartment. Lastly, patient files would seem to be movable items and, therefore, it was fair to expect not only that Appellant may have wanted to take the files home but also that doing so was practical. Accordingly, common sense suggested a fair probability that patient files would be found at Appellant's home.

The same conclusion holds true for the other items specified in the warrant. For example, it was sensible to believe that Appellant's financial records identified in the warrant (e.g., ATM receipts showing cash withdrawals) would just as likely, if not more likely, be found at his residence rather than his office. Although the Halloween mask was once displayed at Appellant's workplace, it was reasonable to expect he may have taken it home after he stopped displaying it in his office. Additionally, it was fair to anticipate the ammunition and gun related to the offense would be found where he lived.

In short, the totality of the circumstances alleged in the affidavit constituted a substantial basis for the issuing authority's conclusion that probable cause existed. The suppression court's decision to deny the suppression motion was thus supported by the record and was free of

legal error. Therefore, we will not disturb that order. Appellant's claim fails.

In his next issue, Appellant contends he is entitled to a new trial because of prosecutorial misconduct. More particularly, he complains that, during closing argument, the prosecutor referred to Appellant by using derogatory terms such as "nut," "clown," and as being a man with a "screw loose." Appellant's Brief at 6. Appellant further argues the prosecutor improperly referred to facts not of record when he indicated that he had, on other cases, dealt with recalcitrant witnesses such as several reluctant Commonwealth witnesses who were jailed in order to secure their appearance at the instant trial. Appellant claims that, when the prosecutor stated that he had routinely dealt with reluctant witnesses in the past, the prosecutor implied that his methods of doing so were generally successful in securing truthful testimony. According to Appellant, the prosecutor's implication improperly bolstered or vouched for the witnesses' credibility.

After closing argument, Appellant's counsel objected to the foregoing aspects of the prosecutor's closing argument and indicated he believed they provided grounds for a mistrial.[1]However, counsel also told the court that Appellant himself did not want that particular relief. The

1. Appellant's objections to the prosecutor's argument were preserved despite the fact that counsel waited until after the argument to object. ***Commonwealth v. Judy***, 978 A.2d 1015, 1018 (Pa. Super. 2009).

court then questioned Appellant about his wishes and concluded that he had instructed his counsel not to move for a mistrial. The court then granted a defense request for a curative instruction.

The next day, the court instructed the jurors that the prosecutor's reference to what he or his office did in other cases were inappropriate and that his derogatory references to Appellant were not to be considered by the jury. Appellant did not object to these curative instructions.

Appellant now seems to complain about both the content and timing of the instructions suggesting their content failed to cure the impropriety of the prosecutor's argument and, further, claiming the court should not have waited until the day after the closing argument to issue the instructions. Appellant did not raise these arguments or any other objection to the instructions in the trial court. As such, he may not do so now. ***Commonwealth v. Powell***, 956 A.2d 406, 422 (Pa. 2008); Pa.R.A.P. 302(a). Moreover, having asked for, obtained, and not objected to curative instructions, and having not moved for a mistrial, Appellant waived his claim that he should now receive a new trial. ***Commonwealth v. Marrero***, 687 A.2d 1102, 1110 (Pa. 1996).

Appellant makes some limited argument that this Court should excuse any waiver of a request for a mistrial because, according to Appellant, the court improperly relied on Appellant's personal wishes

rather than allowing counsel to make the decision to move or not to move for a mistrial. Appellant suggests the trial court prevented or interfered with counsel's opportunity to make such a motion. In this vein, Appellant contends the record shows that any objection by counsel to the court's reliance on Appellant's personal choice would have been futile.

To whatever extent that there might or might not be any legitimacy to Appellant's general theory that waiver should be overlooked where objections would have been futile, the record simply does not contain facts supporting his claim. It was Appellant's counsel who put before the court the dilemma that, while he believed there were grounds for a mistrial, Appellant himself did not want that relief. Moreover, there is nothing in the record persuading us that it would have been futile for counsel to object to the court's subsequent decision to colloquy Appellant and then to honor his request that no mistrial be granted. Appellant has not shown trial court error. Therefore, he is not entitled to relief.

Based on our foregoing discussion, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

/s/ Karen [Illegible]
Prothonotary

Date: _____

APPENDIX G — OPINION OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY PENNSYLVANIA, CRIMINAL DIVISION, FILED NOVEMBER 17, 2014

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY PENNSYLVANIA
CRIMINAL DIVISION

NO. 9814-08

COMMONWEALTH OF PENNSYLVANIA

v.

ALAN KUSHNER

Decided November 14, 2014

O'NEILL, J.

OPINION

Defendant, Alan Kushner, appeals from the Order dated July 29, 2014, denying his Petition for Post-Conviction Collateral Relief. For the reasons set forth below, the Order should be affirmed.

I. FACTUAL AND PROCEDURAL HISTORY

The relevant facts were set forth by this court in an Opinion written to the Superior Court on May 28, 2010 as follows:

Appendix G

On May 16, 2008, at approximately 10:45 p.m., Sarran Kushner returned to her home at 26 Righters Ferry Road in Bala Cynwyd, Montgomery County, after spending the evening with a female friend at the Philadelphia Museum of Art. She parked her white Cadillac Escalade in the driveway. Before exiting the vehicle she began to pull up the hood on her jacket because it was raining. As she lifted her hands to the side of her head, she heard a loud bang and felt pain in her wrist. She noticed blood running down her arm, and saw a hole in the driver's side window of her vehicle. Sarran Kushner had been shot.

Defendant and Sarran Kushner (hereinafter "the victim") married in 1976. (N.T., 07/22/09, p. 76) They purchased the Righters Feny Road property in 1983, and resided there together for more than 20 years with their two sons. At all times relevant, Defendant operated a chiropractic office at 6103 Lansdowne Avenue in Philadelphia County.

After years of increasing marital disharmony, the victim commenced divorce proceedings in this court in January 2006. (N.T., 07/22/09, pp. 84-85) The couple nevertheless continued to reside together, with Defendant engaging in hostile and threatening behavior toward the victim. (N.T., 07/22/09, pp. 87-92)

In particular, Defendant and the victim had agreed during the Summer of 2006 to spend alternating weekends at their vacation home in Ocean City, New Jersey. (N.T., 07/23/09, p. 104) With the Fourth of July holiday approaching, Defendant indicated that he wanted the vacation property that weekend, even though it was the victim's turn to use it. An argument ensued, during which Defendant advised the victim that "If you go down this weekend, you'll end up in the hospital." (N.T., 07/23/09, p. 105) Defendant would also turn off the refrigerator at the vacation property, with the result being that any food left therein would be spoiled and malodorous by the time the victim arrived for her weekend. (N.T., 07/22/09, p. 94)

Another argument during the Summer of 2006 resulted in Defendant pushing the victim from a computer in one of their son's bedrooms. (N.T., 07/22/09, p. 87; 07/23/09, p. 107) Defendant also told the victim that he had tampered with her car, and that she would be killed if she drove it, and that he wished she would be hit by a truck so he could laugh when she died. (N.T., 07/22/09, pp. 87-88)

On August 28, 2006, the victim obtained an Order in the divorce case granting her exclusive possession of the marital residence. (N.T., 07/22/09, p. 96) Defendant moved out of the house the following month, eventually settling

in an apartment approximately two blocks away. (N.T., 07/22/09, p. 98) He nevertheless returned to the victim's residence on numerous occasions. (N.T., 07/22/09, p. 97) He also made hundreds of telephone calls to the victim's home, including more than 161 calls in October 2006 alone. (N.T., 07/22/09, p. 99) The victim, recognizing Defendant's telephone number on her "Caller I.D.," rarely answered the calls. Defendant would then leave voicemail messages for the victim such as "You should commit suicide. You should remove yourself from the equation. Leave. Everyone hates you." (N.T., 07/22/09, p. 99) During this time, and continuing into early 2007, Defendant also handwrote and mailed a series of discourteous letters to the victim. (N.T., 07/22/09, pp. 107-114, 118-125; Ex. C-6)

Based upon the telephone calls, the letters and an "incident" that occurred over the weekend of March 9, 2007, the victim sought a Temporary Protection from Abuse Order on March 14, 2007. (N.T., 07/22/09, p. 127) The victim received a final one-year Protection from Abuse Order after a hearing on May 8, 2007.

The "incident" involved a BMW the Kushners had purchased for one of their sons, Brian, who happened to be staying with the victim while he was home from college over the weekend of March 9, 2007. (N.T., 07/22/09, p. 134) Brian Kushner had taken the vehicle out

Friday night. Defendant, who was angry with his son at the time and did not want him driving the car, telephoned the victim late that evening to demand that she "Get that car home." (N.T., 07/22/09, p. 134) When Brian Kushner returned home the victim told him not to use the car for the remainder of the weekend. (N.T., 07/22/09, p. 135) Around noon on Sunday, as the victim was leaving her home to go shopping, she noticed Defendant drive by. (N.T., 07/22/09, p. 135) Upon returning home about 40 minutes later, the victim pulled into her driveway only to find Defendant and his new girlfriend standing by while another male was entering the BMW. (N.T., 07/22/09, p. 135) The victim exited her vehicle and asked the man what he was doing. He responded that he had been told to take the BMW. (N.T., 07/22/09, p. 135) The victim advised the man that he was on private property, and that she was a co-owner of the vehicle. While the victim was standing near the BMW with her hand on the driver's side door handle, Defendant told the man to "Drive." (N.T., 07/22/09, p. 136) The victim let go of the vehicle and called the police.

Brian Kushner heard the commotion and ran out of the house, believing that his vehicle was being stolen. (N.T., 07/23/09, pp. 137-138) Once outside he observed a man he did not know sitting in the driver's seat of the BMW, and Defendant standing behind the vehicle. Brian

jumped on the floorboard on the driver's side of the vehicle. (N.T., 07/22/09, p. 137; 07/23/09, p. 139) Defendant told the man in the vehicle to "Drive off." (N.T., 07/23/09, p. 139) The driver responded "I'm not going to drive off with your son standing on the car." (N.T., 07/23/09, p. 139) Defendant said "Drive off anyway." (N.T., 07/23/09, p. 139) The victim convinced her son to return to the house to await the police. The car was then driven to Defendant's apartment.

On May 17, 2007, the victim and Defendant attended a divorce proceeding at the Montgomery County Courthouse. Thereafter, while the victim was sitting in her car in front of the Courthouse, Defendant walked by, looked at her and said "Die." (N.T., 07/22/09, p. 141)

Michael Simmons, a long-time acquaintance of Defendant, had a conversation with him at some point between 2006 and 2007. (N.T., 07/23/09, p. 151) Defendant complained about how much money the divorce case was costing him. (N.T., 07/23/09, pp. 152-153) When Simmons indicated that it might be cheaper to settle the case, Defendant said he wished the victim were dead. (N.T., 07/23/09, p. 153) Defendant then asked Simmons if he "knew anybody." (N.T., 07/23/09, p. 153) When Simmons asked if Defendant meant "like a hit," Defendant responded in the affirmative. (N.T., 07/23/09, p. 153) Simmons ended the conversation, and

Defendant rarely patronized his business after that. (N.T., 07/23/09, pp. 153-154)

Around Halloween of 2007, Defendant hung in his chiropractic office a witch mask with the victim's name taped to the forehead. (N.T., 07/23/09, p. 22; 07/27/09, p. 9) He also displayed a collage of family photographs with the victim's face obscured with Wite-Out. (N.T., 07/23/09, p. 22; 07/27/09, p. 11)

Yvette Hawkins, a former medical receptionist at Defendant's office, observed the mask in Defendant's office. On one occasion Defendant told Hawkins to say "Hi" to the victim because she was on the wall. (N.T., 07/27/09, p. 9) Hawkins heard Defendant yell "Die, Sari, Die," on numerous occasions. (N.T., 07/27/09, p. 10) Defendant also asked Hawkins if she knew anything about voodoo dolls. (N.T., 07/27/09, p. 10)

In early 2008, Hawkins observed Defendant speaking with two men in his office after hours. (N.T., 07/27/09, pp. 11-15) She saw Defendant showing the men photographs from a CVS envelope. (N.T., 07/27/09, pp. 13-15) She could not see the images at the time, but subsequently viewed them when the opportunity presented itself. The photographs depicted the victim's house, surrounding hedges and cars parked at the residence. (N.T., 07/27/09, p. 14)

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On April 15, 2008, Defendant had a telephone conversation with his then 25-year-old son, Robert Kushner, during which Defendant stated that he should have killed the victim. (N.T., 07/23/09, p. 23) Robert was upset by the statement and told his mother. Three days later the victim filed for an extension of her one-year PFA Order, which was set to expire on or around May 8, 2008. A hearing on that request was scheduled for May 6, 2008.

On April 21, 2008, Defendant again spoke with his son Robert, this time clarifying that what he really meant to say about the victim was that he "should have beaten the s**t out of her." (N.T., 07/23/09, pp. 23-24) Defendant also threatened Robert with retaliation if he testified against Defendant at the upcoming PFA hearing. Defendant said he would call the Narberth Basketball League, where Robert was a volunteer coach, to report that Robert had recently been arrested for drug possession. (N.T., 07/23/09, p. 26)

The victim received a three-year extension of the PFA Order after the hearing on May 6, 2008. (N.T., 07/22/09, p. 146) Robert Kushner testified at the hearing. The following day the Narberth Basketball League received an anonymous telephone report about Robert Kushner's recent drug arrest. (N.T., 07/23/09, p. 26)

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The victim was shot on May 16, 2008. The bullet, which was fired from behind the row of hedges next to the driveway, went completely through the victim's wrist. (N.T., 07/22/09, p. 161) The victim immediately drove herself to a nearby firehouse for assistance. While the victim was being removed from her car, a .40-caliber bullet fell from her sleeve. (N.T., 07/22/09, p. 153) The victim was taken by ambulance to the Hospital of the University of Pennsylvania, where she underwent surgery.

An investigation into the shooting ensued, with the victim indicating that she could think of no one who wanted to harm her other than Defendant. The investigation revealed that Defendant had had dinner at a restaurant with his father until approximately 8:30 p.m. on the night of the shooting, and that Defendant then retired to his apartment. (N.T., 07/28/09, p. 52) No arrests were made in the immediate aftermath of the shooting, and the shooter has never been identified.

In May 2008, Weldon Gary, a regular patient of Defendant's, was receiving a treatment for a back injury when Defendant began discussing his pending divorce. (N.T., 07/27/09, p. 122) Defendant, who was aware that Gary had been incarcerated in the past for domestic violence, told Gary he wanted to "get rid of" the victim. (N.T., 07/27/09, p. 122) Gary ended the

discussion at that point. (N.T., 07/27/09, pp. 122-123) Defendant raised the subject again during a treatment in early July 2008, (N.T., 07/27/09, pp. 123, 165) Gary again declined to discuss the matter. (N.T., 07/27/09, pp. 165-166) Undaunted, Defendant raised the subject with Gary during an office visit in late July 2008. (N.T., 07/27/09, p. 167) When Gary asked Defendant how much he wanted to spend, Defendant responded "Whatever it takes." (N.T., 07/27/09, p. 123) Gary suggested $20,000, to which Defendant agreed. (N.T., 07/27/09, p. 123) Defendant gave Gary a $1,000 cash down payment, as well as directions to the victim's home and a description of her vehicle. (N.T., 07/27/09, pp. 123-124, 126) Gary accepted the down payment, but claimed that he secretly had no intention of carrying out the killing. (N.T., 07/27/09, p. 128) He also told his friend, Craig Lowman, about receiving $1,000 from Defendant. (N.T., 07/27/09, pp. 130, 218)

Over the next few weeks, Defendant asked Gary during subsequent office visits why the task had not yet been completed. (N.T., 07/27/09, p. 127) Defendant stated that he needed it done by August 21, 2008, which he described as the date of the divorce. (N.T., 07/27/09, p. 127) Gary made various excuses. During an office visit sometime after August 21, 2008, Defendant told Gary that he had missed the deadline. (N.T., 07/27/09, p. 129) Defendant said he still wanted

the job done. (N.T., 07/27/09, p. 129) After this visit, Gary discontinued his treatment with Defendant.

On September 16, 2008, Hawkins was filing papers in Defendant's office after hours when she and another co-worker overheard Defendant offering money to a male patient. (N.T., 07/27/09, pp. 17-20) Hawkins was troubled by what she had heard given that the victim had been shot a few months prior. (N.T., 07/27/09, p. 21) She contacted the victim's divorce attorney the following day to report the incident. (N.T., 07/27/09, pp. 32-34) Hawkins subsequently was contacted by Montgomery County detectives, and gave a written statement on September 30, 2008. She identified Gary and Lowman as persons who might have additional information.

On October 2, 2008, law enforcement authorities from Montgomery and Philadelphia Counties executed search warrants for Defendant's apartment and chiropractic office. Still hanging on a wall in Defendant's office was the collage of family photographs with the victim's face obscured. Detectives also found in Defendant's office the Halloween witch mask and photographs of the area where the victim had been shot. A search of Defendant's home resulted in the seizure of $75,000 in cash from Defendant's home safe, and handwritten notes containing words such as "son drugs" and "Sari Plan b."

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Defendant was arrested on October 30, 2008, and charged with Attempted Murder, Solicitation to Commit Murder and Conspiracy to Commit Murder. At a trial that commenced on July 20, 2009, the jury heard testimony from, among others, the victim, the Kushners' two sons, Hawkins, Gary and Lowman. The jury ultimately found Defendant guilty of Solicitation to Commit Murder; verdicts of not guilty were returned on the charges of Attempted Murder and Conspiracy to Commit Murder.

On October 23, 2009, this court sentenced Defendant to seven-and-one-half to 20 years in prison. That same day, Defendant filed a post-sentence motion that would later be supplemented with court permission. After a series of continuance requests, this court heard oral argument on Defendant's post-sentence motion on February 18, 2010. At that proceeding, Defendant requested, and this court granted, an extension of time to decide the motion under Pa. R.Crim.P. 720(B)(3)(b). In an Order dated March 4, 2010, this court denied Defendant's motion for post-sentence relief.

Defendant filed a Notice of Appeal on March 22, 2010. On March 23, 2010, this court issued an Order directing Defendant to produce a Concise Statement of Errors Complained of on Appeal. Defendant timely complied with that directive.

(Trial Court Opinion, 05/28/10 pp. 1-10) (Footnotes omitted).

Thereafter, the Superior Court affirmed the judgment of sentence on December 8, 2010[1]. Our Supreme Court denied Defendant's Petition for Allowance of Appeal on October 13, 2011[2]. On October 11, 2012, Defendant, through counsel, filed a Petition for Post Conviction Relief Under Pa.C.S.A. Sections 9541 et seq. and Habeas Corpus Relief Under the Pennsylvania Constitution. A few days later, his PCRA counsel filed a Corrected Petition for Post Conviction Relief Under Pa.C.S.A. Sections 9541 et seq. and Habeas Corpus Relief Under the Pennsylvania Constitution on October 19, 2012. Defendant, *pro se*, then filed a "Petitioner's Pro Se Supplemental Petition for Post Conviction Relief Under 42 Pa.C.S. §9541 et seq." on January 16, 2013[3]. Four hearings were held to address all claims raised on March 1, 2013; May 20, 2013; August 26, 2013; and November 11, 2013.

This court issued an order denying all claims and dismissing Defendant's PCRA Petition on July 29, 2014. Defendant filed a timely Notice of Appeal on August 15, 2014. Accordingly on August 19, 2014, we issued an order

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1. See *Commonwealth v. Kushner*, No. 762 EDA 2010 (Pa. Super. December 8, 2010)

2. See *Commonwealth v. Kushner*, No. 177 MAL 2011 (Pa. October 13, 2011)

3. Defense counsel ultimately adopted the contentions Defendant set forth in this *pro se* supplemental PCRA at the hearing held on March 1, 2013. (N.T., 03/01/13 p. 12)

directing Defendant to produce a Concise Statement of Errors Complained of on Appeal. Defendant has since complied with that directive.

II. ISSUES

Defendant raises the following allegations of error in his Concise Statement:

1. The Trial Court erred in denying Defendant's Petitions for Post Conviction Relief; when it found that Defendant had not been rendered ineffective assistance of Trial and/or Appellate counsel as a result of the following:

   (a.) Counsel's failure to move for a mistrial when the alleged *Brady* violation, regarding the Commonwealth's failure to make the Grand Jury Transcripts of witnesses prior testimony available to the Defense in pre-trial discovery, was uncovered;

   (b.) Counsel's failure to move for a mistrial when the Commonwealth's Attorney made repeated, prejudicial and improper references to Defendant during his closing argument to the jury;

   (c.) Counsel's failure to properly advise the Court of, and present to the Court evidence of, Defendant's mental and cognitive impairment prior to the Court's colloquy of the Defendant

on his decision not to move for a mistrial in the afore-mentioned instances;

(d.) Counsel's failure to object to the improper admission of hearsay testimony offered by Commonwealth Witness, Craig Lowman, regarding statements allegedly made to him by Weldon Gary;

(e.) Counsel's failure to object to the improper admission of testimony offered by Commonwealth Witness, Michael Simmons, regarding statements allegedly made to him by Defendant;

(f.) Counsel's failure to move for a dismissal of the charges, where the Bills of Information filed against Defendant in the Court of Common Pleas failed to specify a date when the alleged offenses were to have occurred;

(g.) Counsel's failure to raise a jurisdictional challenge to Defendant's being tried the Montgomery County Court of Common Pleas, where the alleged "solicitation" to commit murder occurred in Philadelphia;

(h.) Counsel's failure to raise a request for a new trial in Post Sentence Motions, upon discovering that the Commonwealth had been intercepting and reading his legal correspondence, prior to and during trial;

(i.) Counsel's failure to raise a sufficiency of the evidence claim in Post Sentence Motions, where the sole conviction of Solicitation to Commit Murder was clearly against the weight of the evidence;

(j.) Counsel's failure to raise a sufficiency of the evidence claim on Appeal, where the sole conviction on the charge of Solicitation to Commit Murder was clearly against the weight of the evidence;

(k.) Counsel's failure to challenge the Court's denial of Defendant's Motion to Suppress evidence found as a result of the improper search of a safe, found within his residence, on Appeal.

III. DISCUSSION

To be entitled to PCRA relief, Defendant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa.C.S.A. §9543(a)(2), his claims have not been previously litigated or waived, and "the failure to litigate the issue prior to or during trial . . . or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." *Commonwealth v. Robinson*, 623 Pa. 345, 82 A.3d 998, 1005 (Pa. 2013) (citing *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 223 (Pa. 2007); and §9543(a)(3)-(a)(4)). An issue is previously litigated if "the highest appellate court

in which [defendant] could have had review as a matter of right has ruled on the merits of the issue." *Id.* §9544(a)(2). An issue is waived if appellant "could have raised it but failed to do so before trial, at trial . . . on appeal or in a prior state postconviction proceeding." *Id.* §9544(b).

In order to obtain relief on a claim of ineffectiveness, a PCRA petitioner must satisfy the performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984). In Pennsylvania, we have applied the *Strickland* test by looking to three elements—the petitioner must establish that: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different. *Robinson*, supra (citing *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975 (Pa. 1987)).

"Furthermore, counsel is presumed to have rendered effective assistance. Both the U.S. Supreme Court and this Court have made clear that a court is not required to analyze the elements of an ineffectiveness claim in any particular order of priority; if a claim fails under any necessary element of the *Strickland* test, the court may proceed to that element first." *Robinson*, supra (citing *Strickland*; and *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 701 (Pa. 1998)). "Additionally, counsel obviously cannot be deemed ineffective for failing to raise a meritless claim." *Robinson*, supra (citing *Commonwealth v. Jones*, 590 Pa. 202, 912 A.2d 268, 278 (Pa. 2006)).

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Regarding appellate counsel's ineffectiveness on direct appeal, Defendant may obtain relief if he can show appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. *Commonwealth v. Walker*, 613 Pa. 601, 36 A.3d 1, 6-7 (Pa. 2011) (citations omitted). To preserve a "layered" ineffectiveness claim, a petitioner must plead, in his PCRA petition, that appellate counsel was ineffective for failing to raise all prior counsel's ineffectiveness. Additionally, a petitioner must present argument on, i.e. develop each prong of the *Pierce* test as to appellate counsel's deficient representation. "Then, and only then, has the petitioner preserved a layered claim of ineffectiveness for the court to review; then, and only then, can the court proceed to determine whether the petitioner has proved his layered claim." *Walker*, supra (citing *Commonwealth v. Rush*, 576 Pa. 3, 838 A.2d 651, 656 (Pa. 2003)). Finally, in cases where appellate counsel is alleged to be ineffective for failing to raise a claim of trial counsel's ineffectiveness, the inability of a petitioner to prove each prong of the *Pierce* test in respect to trial counsel's purported ineffectiveness alone will be fatal to his layered ineffectiveness claim. *Commonwealth v. Carson*, 590 Pa. 501, 913 A.2d 220, 233 (Pa. 2006).

A. – B. Trial counsel was not ineffective for failing to move for a mistrial on two occasions.

Defendant argues that his trial counsel, Frank DeSimone, was ineffective because he failed to move for a mistrial on two occasions. The first occasion was when

an alleged *Brady*[4] violation was discovered, regarding the Commonwealth's failure to make the Grand Jury Transcripts of a witness's prior testimony available to the defense in pre-trial discovery per Pa.R.Crim.P. 573. This violation was discussed at a *Brady* hearing held Friday, July 24, 2009. Defense counsel DeSimone requested the hearing specifically because the Grand Jury Testimony of James Baker (from May 20, 2009) was not given to him until the second day of trial on the morning of July 23, 2009. (N.T., 07/24/09, pp. 6-7) Moreover, Attorney DeSimone alleged he was not given petitions filed by the Commonwealth for material witness warrants[5] or the disclosure of the name Yvette Childs which came up during investigations[6]. (N.T., 07/24/09, p. 24)

At the end of the hearing, Attorney DeSimone noted that Defendant did not want a mistrial to occur. (N.T., 07/24/09, p. 77) However, Attorney DeSimone indicated that his opening statement would have been different had he been aware of the information that was the subject of the *Brady* hearing. *Id.* At the close of the hearing, the court engaged in a colloquy of the Defendant in order to ascertain his position on asking for a mistrial.

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4. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

5. Referring to material witness warrants issued for Yvette Hawkins; Weldon Gary; and Craig Lowman. The court found that these disclosures were not mandatory and thus there was no discovery violation by the Commonwealth. (N.T., 07/24/09, p. 94)

6. The court ultimately found that the Commonwealth was not required to disclose this name to the defense. (N.T., 07/24/09, p. 96)

(N.T., 07/24/09, pp. 82-85) Defendant indicated that he agreed with his counsel's strategy decision not to request a mistrial, and the court found that he knowingly, intelligently, and voluntarily made this decision. (N.T., 07/24/09, p. 85)

The court ultimately found that the late disclosure of James Baker's Grand Jury Testimony would be a violation under Pa.R.Crim.P. 573(b)(1). Because the Commonwealth did not refuse or fail to disclose the transcript however and instead turned it over late, the court shifted the analysis to determine the prejudice imposed on the defense and how it could be cured at that particular time. (N.T., 07/24/09, p. 91) Thus, as a remedy we granted Attorney DeSimone the right to present a second opening statement to the jury. (N.T., 07/24/09, pp. 92-93) Furthermore, we gave the defense a one-day continuance (Friday, July 24, 2009), plus the weekend to interview James Baker and gather the information they needed in order to conduct an effective cross-examination of this potential witness. *Id.*

At the PCRA hearing, Attorney DeSimone testified to the basis for his actions and trial strategy in not requesting a mistrial due to the discovery violation. First, he did not want a mistrial because he was able to question the Commonwealth's credibility in front of the jury by bringing the discovery violation to the court's attention. (N.T., 03/01/13, p. 74) Second, he was given the opportunity to give a second opening statement where he again was able to comment on the Commonwealth's credibility. *Id.* Next, the defense was given a continuance and three days to prepare with the belated discovery information and

extensively cross-examine the witnesses with it. (N.T., 03/01/13, pp. 77-78) Finally, the Defendant did not want a mistrial as evidenced by the court's colloquy as stated above, and he was actually upbeat because the discovery violation turned into a positive for the defense due to the remedies they were granted. (N.T., 03/01/13, p. 74, 78)

We found that Attorney DeSimone acted reasonably in not requesting a mistrial. His PCRA testimony demonstrated his tactical decision to use the belated discovery to the defense's advantage and not request a mistrial in a case that he already thought was going well for them. (N.T., 03/01/13, p. 74) We therefore submit that the Defendant has not met his burden of overcoming the presumption that his counsel was effective. See *Commonwealth v. Rivers*, 567 Pa. 239, 786 A.2d 923 (Pa. 2001) (finding that courts will not second-guess trial counsel's trial tactics, so long as there is a reasonable basis for what trial counsel did or did not do.)

The second occasion in which Defendant alleges Attorney DeSimone was ineffective for failing to request a mistrial occurred during the Commonwealth's closing argument. Defense counsel objected to the Commonwealth's negative characterization of the Defendant at certain times during their argument. Specifically, Attorney DeSimone pointed out that the Commonwealth stated the Defendant "is nuts"; "he's got a screw loose"; "he's a clown"; and "was father of the year". (N.T., 07/29/09, p. 157) Accordingly, he indicated to the court that these statements, among others, were grounds for a mistrial in his opinion. (N.T., 07/29/09, p. 160) The

court then stated that the possible remedies were for the defense to request a mistrial, or seek cautionary and curative instructions. (N.T., 07/29/09, p. 167)

After Attorney DeSimone was given time to speak with his client in private, the court engaged in colloquy with the Defendant regarding his decision to request a mistrial. (N.T., 07/29/09, pp. 167-171) The court found that he knowingly, intelligently, and voluntarily made the informed decision that he was not going to direct his counsel to request a mistrial. (N.T., 07/29/09, p. 171) Accordingly, this court gave a curative instruction regarding the statements made by the Commonwealth in which the defense objected to. (N.T., 07/30/09, pp. 6-8)

Attorney DeSimone testified at the PCRA hearing that he spoke with other counsel assisting with the case Stephen Patrizio and Jules Epstein[7], Defendant's father, and Defendant himself regarding the potential motion for a mistrial. (N.T., 03/01/13, p. 29) He considered that his client was facing a mandatory maximum of 15 – 30 years on one of the three charges. *Id.* Although Attorney DeSimone acknowledged that a mistrial might be the safest way to go in light of this substantial sentence, he was also aware that if a mistrial was granted, the defense would not be able to duplicate "surprise element[s]" that occurred throughout the instant trial. *Id.*

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7. While Mr. DeSimone was the primary trial attorney, Mr. Epstein and Mr. Patrizio both assisted with the case. (N.T. 03/01/13, p. 17)

Further, Attorney DeSimone indicated that a lot of good things happened in the trial, which was ultimately confirmed by two acquittals out of three charges, including the 15 – 30 year mandatory sentence. (N.T., 03/01/13, p. 37) For example, Attorney DeSimone was able to cross-examine one of the Defendant's sons and impeach him when the son said he was never in the courthouse before, yet testified previously in another hearing. (N.T., 03/01/13, p. 39) This impeachment tactic would have been gone in the next trial, and the defense would not have had the same opportunity to call the son's credibility in to question. *Id.*

That being said, Attorney DeSimone was still concerned about the mistake in error and put what he calls his ethical obligation on the record. (N.T., 03/01/13, pp. 40, 41, 49, 50) He told the court he was conflicted about whether to continue with a request for a mistrial and placed the reasons he believed a mistrial was warranted on the record. (N.T., 03/01/13, pp. 41, 49, 50, 81) Ultimately, Attorney DeSimone did not press the request for a mistrial and consulted with other counsel and the Defendant to make the decision that cautionary instructions would suffice. (N.T., 03/01/13, p. 83)

We found that Attorney DeSimone had a reasonable basis for his actions regarding the second potential motion for a mistrial. He properly weighed and conveyed the ramifications for moving for a mistrial versus not moving for one with his client. They ultimately came to the decision to accept curative instructions due to their assessment of the defense-favorable evidence that was presented to the jury. See *Commonwealth v. Chmiel*,

612 Pa. 333, 30 A.3d 1111 (Pa. 2011), ("Reasonable basis" prong of an ineffective assistance claim does not question whether there were other more logical courses of action which counsel could have pursued, but, rather, examines whether counsel's decisions had any reasonable basis.)

Finally, this court noted in the Opinion we submitted as a result of Defendant's direct appeal,

> These characterizations of Defendant and his behavior were made in the context of the evidence presented at trial, and represented oratorical flair. Moreover, the statements were not of such a nature as to so prejudice the jury against Defendant that no objective and fair verdict could be rendered. Accordingly, no prosecutorial misconduct occurred in connection with the alleged name-calling.

(Trial Court Opinion, 05/28/10 pp. 15-16) Since we ultimately found that no prosecutorial misconduct existed, Defendant cannot prove that the alternative, i.e. a motion for a mistral, would have been granted had counsel chosen to go that route. See *Chmiel*, 30 A.3d 1127, (On an ineffective assistance claim, the Supreme Court will conclude that counsel's chosen strategy lacked a reasonable basis only if defendant proves that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.) Accordingly, Defendant cannot establish the reasonable basis element of the *Strickland* test in either issue A. or B. Therefore, Attorney DeSimone cannot be deemed ineffective and these claims must fail.

C. Trial counsel was not ineffective for failing to advise the Court of Defendant's alleged mental and cognitive impairment.

Coupled with the motion for mistrial ineffectiveness claims as discussed above, the Defendant alleges that Attorney DeSimone was also ineffective for not advising the court of his alleged mental and cognitive impairments before the court engaged in colloquies with the Defendant. This claim must also fail for the following reasons.

At the PCRA hearing, the defense presented the testimony of Dr. Jonathan H. Mack, a licensed psychologist (N.T., 05/20/13, p. 5) and expert in neuropsychology (N.T., 05/20/13, p. 21). Dr. Mack testified that Defendant has a long-standing pattern of executive frontal lobe dysfunction that affects his ability to make appropriate, sound and rational decisions while under stress. (N.T., 05/20/13, pp. 35-46) Additionally, he opined that there is evidence of a rigid, obsessive-type personality that tends to be self-centered and narcissistic and that Defendant is an individual whose ability to modulate his responses and think about the environmental consequences of those actions is absolutely impaired. (N.T., 05/20/13, p. 38)

The Commonwealth extensively cross-examined Dr. Mack where he conceded that a majority of the tests conducted show Defendant was not impaired or only mildly impaired. See (N.T., 05/20/13, p. 65); (N.T. 08/26/13, pp. 9-13) Furthermore, Dr. Mack testified that the Defendant functions in the overall high-average range of intellectual ability. (N.T., 05/20/13, p. 34) His IQ, memory,

processing speed, and working memory are all normal. (N.T., 05/20/13, p. 65) Moreover, Defendant sustained a successful chiropractic office for thirty years which required him to generate and implement strategies to deal with ailments, individualize treatment plans for each patient, monitor treatments through follow-up visits with the goal of fixing or minimizing ailments, and generally engage in goal-oriented behavior. (N.T., 08/26/13, pp. 49-50) These behaviors are all components of executive functioning which involve the frontal cortex and appear to contradict or diminish Dr. Mack's overall findings of executive frontal lobe dysfunction in the Defendant. (N.T., 05/20/13, pp. 84-85)

Attorney DeSimone testified that he did not notice any indication of psychological or psychiatric issues with Defendant, and in fact noted that Defendant always appeared articulate and rational. (N.T., 03/01/13, pp. 19-21, 61) Defendant understood issues and inquired when he didn't; participated in every legal discussion; asked and responded appropriately to questions; and actively participated in his defense. (N.T., 03/01/13, pp. 22, 61, 65) Further, Defendant listened to Attorney DeSimone's advice not to take the stand and testify on his own behalf, suggesting his decision-making capabilities were intact. (N.T., 03/01/13, p. 22)

Based on his dealings with the Defendant, Attorney DeSimone never considered, hiring a psychologist or psychiatrist to examine the Defendant. (N.T., 03/01/13, pp. 72-73) Therefore he also did not advise the court that his client had mental impairments because he did

not believe any existed. (N.T., 03/01/13, p. 72) Moreover, neither of the other two attorneys assisting with the case, Mr. Patrizio and Mr. Epstein, ever expressed concerns about Defendant's mental capabilities or suggested that they should get him evaluated. (N.T., 03/01/13, p. 71)

We found Attorney DeSimone acted reasonably in not presenting evidence and advising the court of Defendant's alleged mental impairment. Based on his PCRA testimony, Attorney DeSimone credibly and extensively described his interactions with the Defendant and it is apparent the two engaged in a typical attorney-client relationship. We submit that other attorneys, as evidenced by Mr. Patrizio and Mr. Epstein, would have engaged in the same trial strategy, i.e. not presenting evidence of alleged mental impairments they did not believe existed. See *Commonwealth v. Chmiel*, 585 Pa. 547, 889 A.2d 501, 540-41 (Pa. 2005) (To sustain a claim of ineffectiveness, the defendant must prove that the strategy employed by trial counsel "was so unreasonable that no competent lawyer would have chosen that course of conduct.")

Finally, we must note that Dr. Mack's testimony has not persuaded us that Defendant met his burden of overcoming counsel's effectiveness. While Defendant may say inappropriate things and act highly unprofessional at times, as Dr. Mack indicated, this court found nothing in the record to suggest that he was incapable of consulting with counsel, participating in his defense, and engaging in colloquies with the court in order to make informed, intelligent, !mowing, and voluntary decisions.

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D. – E. Trial counsel was not ineffective for failing to object to admission of the testimonies of Craig Lowman and Michael Simmons.

Prior to trial, Attorney DeSimone filed a motion in limine to preclude testimony pertaining to Craig Lowman and Michael Simmons. (N.T., 07/20/09, p. 58); (N.T., 03/01/13, p. 85) However, this court deferred ruling on that motion because we wanted to make a ruling during the context of the trial. (N.T., 07/20/09, pp. 11-12, 59); (N.T., 03/01/13, p. 86)

Regarding Craig Lowman, Attorney DeSimone was seeking to preclude his testimony that another witness, Gary Weldon, told him about a $1,000 down-payment the Defendant gave to Weldon to kill the Defendant's wife. However, a few days into the trial, Gary Weldon testified that he told Craig Lowman about receiving the $1,000 payment. (N.T., 03/01/13, p. 86) During cross-examination, Attorney DeSimone heavily attacked Weldon Gary's credibility and tried to show that he and Craig Lowman were making the whole thing up in order to get the reward money that was being offered. *Id.*

Prior to Craig Lawman's testimony, Attorney DeSimone and the Commonwealth engaged in a conference with the court. At that time, the Commonwealth argued that Lawman's testimony was admissible as a prior consistent statement to rebut the charge of fabrication Attorney DeSimone suggested during Gary Weldon's testimony. (N.T., 03/01/13, p. 87) Over Attorney DeSimone's argument that it was inadmissible, the court indicated that

we agreed with the Commonwealth and the testimony was admissible. *Id.* Thus, Attorney DeSimone decided not to make a futile object in front of the jury. (N.T., 03/01/13, p. 88) Rather, his strategy was to impeach Lowman and attempt to paint him as a liar. *Id.* Impeachment is a common tactic used by counsel to attack the credibility of a witness. Attorney DeSimone acted swiftly in engaging in this new strategy when he learned of the court's decision to allow Lawman's testimony as a prior consistent statement. We found this to be a reasonable response to the court's ruling and as such, Defendant has not overcome the presumption of effectiveness.

A for Michael Simmons testimony, the record reflects that he testified about a conversation he had with the Defendant sometime in 2006 or 2007. Specifically, the Defendant was talking to Mr. Simmons about his divorce and complaining about lawyer's fees. (N.T., 07/23/09, pp. 152-153) Mr. Simmons testified that Defendant went as far as to say he wished his wife was dead, and proceeded to ask Mr. Simmons if he knew anyone who could perform a hit on her. (N.T., 07/23/09, p. 153) Instantly, Defendant argues that Mr. DeSimone should have objected to this testimony and was ineffective for not doing so. We disagree however. Although the court indicated during the pre-trial motions hearing that we would reserve a final ruling on the motion in limine to preclude Michael Simmons' testimony, we also noted that we would generally permit testimony from witnesses regarding the domestic conflict history between the Defendant and his wife. (N.T., 07/20/09, pp. 91-92)

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Mr. Simmons' testimony was admissible as an exception to the prior bad acts rule, Pa. R. Evid. 404(b), since it was relevant to show a sequence of events regarding the domestic conflict between the Defendant and his wife and his hostility towards her. See *Commonwealth v. Mayhue*, 536 Pa. 271, 639 A.2d 421, 434-435 (Pa. 1994) (holding evidence of the death of a hitman, who accepted money to kill defendant's wife but failed to do so, admissible under the res gestae exception to the general proscription against evidence of prior criminal acts, where such piece of evidence provided another piece of a puzzle which, once completed, revealed defendant's wife's murder to be the culmination of a series of cold, calculating, and unrelenting attempts to bring about her demise); and *Commonwealth v. Buchanan*, 456 Pa. Super. 95, 689 A.2d 930 (Pa. Super. 1997) (where evidence that, two weeks prior to ordering assault on victim, defendant ordered witness' assault and exile from biker's club by uttering the words "[d]o what you got to do" to an associate was admissible to demonstrate witness's motive to set up victim's beating in order to get back into defendant's good graces and to develop the facts of the witness' story of the defendant's soliciting and conspiring.) Therefore, since the issue underlying Defendant's claim of ineffective assistance of counsel is meritless, such claim fails and Attorney DeSimone was not ineffective for failing to object to the testimony.

F. Trial counsel was not ineffective for failing to move for a dismissal of charges because the Bills of Information did not specify a date when the alleged offenses were to have occurred.

Defendant next alleges that Attorney DeSimone was ineffective for failing to request a dismissal of charges since the Information did not specify a date when the alleged offenses were to have occurred. The Bill of Information, filed March 9, 2009, alleged the crimes occurred "from the Fall of 2007 through September 2008."

At trial, Weldon Gary testified that while he was at an appointment at Defendant's chiropractic office, the Defendant told Mr. Gary sometime in May of 2008, that he wanted to get rid of his wife. (N.T., 07/27/09, p. 122) The Defendant brought up getting rid of his wife again to Mr. Gary in June or July of 2008 during another appointment. (N.T., 07/27/09, p. 123) At this appointment, the Defendant and Mr. Gary agreed on an amount, $20,000, for Mr. Gary to kill Defendant's wife. *Id.* Although Mr. Gary could not remember the exact dates, he testified that he went back to Defendant's office the very next day and collected a $1,000 down-payment. (N.T., 07/27/09, pp. 124-125) The Defendant indicated to Mr. Gary that he needed the job done by August 21, 2008. (N.T., 07/27/09, p. 127) When Mr. Gary did not complete the task by August 21, 2008, Defendant told him he still wanted it done. (N.T., 07/27/09, p. 129)

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"Du[e] process is not reducible to a mathematical formula, and the Commonwealth does not always need to prove a specific date of an alleged crime." *Commonwealth v. Brooks*, 2010 PA Super 185, 7 A.3d 852, 858 (Pa. Super. 2010) (citing *Commonwealth v. Devlin*, 460 Pa. 508, 333 A.2d 888, 892 (Pa. 1975)). Furthermore, Pa.R.Crim.P. 560(B)(3) affords that it shall be sufficient for the Commonwealth to provide in the Information, if the precise date of an offense is not known, an allegation that the offense was committed on or about any date within the period fixed by the statute of limitations.

Defendant's conduct, which resulted in a guilty verdict to Criminal Solicitation, clearly occurred over a period of Mr. Gary's chiropractic appointments. Although Mr. Gary could not provide exact dates, he was able to estimate the time period of when the solicitations occurred. Case law has "established that the Commonwealth must be afforded broad latitude when attempting to fix the date of offenses which involve a continuous course of criminal conduct." *Brooks*, supra (citing *Commonwealth v. G.D.M., Sr.*, 2007 PA Super 169, 926 A.2d 984, 990 (Pa. Super. 2007)). Since the solicitations occurred over a period of time and not just on one particular day, the Commonwealth was not required to allege a specific date in the Information. Thus, there is no merit to the underlying claim and Attorney DeSimone can therefore not be found ineffective in failing to challenge it.

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G. Trial counsel was not ineffective for failing to raise a jurisdictional challenge.

Defendant next asserts that Attorney DeSimone was ineffective for not raising a jurisdictional challenge to the trial taking place in Montgomery County because the solicitation occurred in Philadelphia at Defendant's chiropractic office. As this claim also has no merit, Attorney DeSimone was not ineffective in this respect.

Prior to trial, the Philadelphia County District Attorney and the Montgomery County District Attorney signed an agreement to transfer the proceedings from Philadelphia to Montgomery County. (N.T., 11/12/13, p. 65; Ex. C-19) Although the solicitation occurred in Philadelphia County at Defendant's office[8], the crime was to be carried out at the martial home of Defendant and his wife in Bala Cynwyd[9], Montgomery County. (N.T., 07/27/09, p. 126) As such, Montgomery County was the proper jurisdiction to hear the instant case. See *Commonwealth v. Carey*, 293 Pa. Super. 359, 439 A.2d 151, 155 (Pa. Super. 1981) (It's logical that even though the original solicitation may have taken place in Philadelphia County, the ultimate act was to be performed in Delaware County and that county should have jurisdiction to try the defendant.)

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8. 6103 Lansdowne Avenue, Philadelphia, PA 19151 See (Crim. Compl., 12/22/2008)

9. 26 Righter's Ferry Road, Bala Cynwyd, Lower Merion Township, Montgomery County See (Crim. Comp., 12/22/2008)

H. Trial counsel was not ineffective for failing to request a new trial on the basis that the Commonwealth was intercepting and reading Defendant's legal correspondence from the prison.

We find no merit in Defendant's contention that the Commonwealth was intercepting and reading his legal correspondence from the prison. The only evidence Defendant produced to support this contention was his own allegation. (N.T., 11/12/13 pp. 29-32) On the contrary, the prosecuting Deputy District Attorney, Thomas W. McGoldrick, testified that he never had communications with anyone at the correctional facility regarding Defendant's legal mail. (N.T., 11/12/13, p. 66) Furthermore, he never saw legal mail between Defendant and his counsel. (N.T., 11/12/13, p. 67) We afford all credibility regarding this issue to Mr. McGoldrick and thus Defendant's claim is meritless. See *Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523, 540 (Pa. 2009) (When a PCRA hearing is held, and the PCRA court makes findings of fact, we expect the PCRA court to make necessary credibility determinations.)

I. – J. Counsel was not ineffective for failing to argue the verdict of guilty to Solicitation to Commit Murder was against the weight of the evidence.

Defendant raises two ineffective assistance of counsel claims with regard to post-sentence motions. First, he alleges that Attorney DeSimone failed to raise a

sufficiency of the evidence claim in post-sentence motions where the sole conviction on the charge of Solicitation to Commit Murder was clearly against the weight of the evidence[10]. The record belies this claim. Attorney DeSimone did file a post-sentence motion asserting the guilty verdict to Criminal Solicitation was against the weight of the evidence. See (Post-Sent. Motion, 10/23/2009, #2) Therefore, Attorney DeSimone cannot be deemed ineffective for failing to do something that he in fact did. *Commonwealth v. Spotz*, 587 Pa. 1, 896 A.2d 1191, 1224 (Pa. 2006) (finding we will not deem counsel ineffective for failing to object to a statement when he in fact did object to that statement . . .).

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10. It appears counsel, in his Concise Statement is mixing language from both a sufficiency of the evidence claim per Pa.R.Crim.P. 606 and a weight of the evidence claim per Pa.R.Crim.P. 607.

A challenge on appeal to the sufficiency of the evidence triggers an analysis of whether or not the Commonwealth carried its trial burden of presenting evidence sufficient to enable the fact-finder to determine every element of the crime charged beyond a reasonable doubt. *Commonwealth v. Andrulewicz*, 2006 PA Super 309, 911 A.2d 162, 165 (Pa. Super. 2006) (citations omitted).

Whereas, a true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed. *Commonwealth v. Morgan*, 2006 PA Super 351, 913 A.2d 906, 909 (Pa. Super. 2006) (citations omitted).

In the PCRA Petition, filed October 19, 2012, the defense alleges that trial counsel and appellate counsel were ineffective for failing to argue that the verdict was against the weight of the evidence. (PCRA Pet. 10/19/12, #14(f) Therefore, that is what we will address in this Opinion.

Secondly, Defendant contends that appellate counsel, Burton A. Rose was ineffective for failing to raise a claim on appeal that the conviction of Solicitation to Commit Murder was against the weight of the evidence. However, the verdict was not against the evidence and Attorney Rose can therefore not be deemed ineffective for failing to raise it on appeal.

A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed. *Commonwealth v. Morgan*, 2006 PA Super 351, 913 A.2d 906, 909 (Pa. Super. 2006) (citing *Commonwealth v. Charlton*, 2006 PA Super 149, 902 A.2d 554, 561 (Pa. Super. 2006) (quoting *Commonwealth v. Galindes*, 2001 PA Super 315, 786 A.2d 1004, 1013 (Pa. Super. 2001)). The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. *Commonwealth v. Champney*, 574 Pa. 435, 832 A.2d 403, 408 (Pa. 2003)). Accordingly, a weight of the evidence challenge contests the weight that is accorded the testimonial evidence. *Commonwealth v. Morgan*, 2006 PA Super 351, 913 A.2d 906, 909 (Pa. Super. 2006) (citing *Armbruster v. Horowitz*, 1999 PA Super 333, 744 A.2d 285, 286 (Pa. Super. 1999)).

As noted above, during trial, Weldon Gary testified that the Defendant offered him $20,000 to kill Defendant's wife. Furthermore, he received a $1,000 down-payment from the Defendant as an advance and the Defendant gave Mr. Gary the directions to his wife's house in Bala Cynwyd and a description of her vehicle. This testimony

was corroborated by the testimony of Craig Lowman, who testified that sometime in 2008, Mr. Gary told him the Defendant gave him $1,000.

In reaching their verdict, the jury clearly chose to believe the testimonies of Mr. Gary and Mr. Lowman. That is their province and since these testimonies sufficiently established the elements of Criminal Solicitation[11] to Commit Murder, we submit the verdict was not contrary to the evidence as to shock one's sense of justice. See *Commonwealth v. Kane*, 10 A.3d 332-333 (Pa. Super. 2010). Thus, the underlying claim is meritless and we therefore cannot find appellate counsel ineffective for not raising it on appeal.

K. Trial counsel was not ineffective for failing to challenge the court's denial of Defendant's Motion to Suppress evidence.

Defendant's final claim is that appellate counsel, Attorney Rose, was ineffective for failing to challenge the court's denial of Defendant's Motion to Suppress the evidence that was found as a result of the improper search of a safe that was in his residence. Again, this claim has no merit because Attorney Rose did in fact challenge this court's suppression ruling. Specifically, in his Concise

11. A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission. 18 Pa.C.S.A. §902

Statement filed March 31, 2010, Attorney Rose raised the issue as follows:

> The Defendant's pretrial motion to suppress evidence seized from his home on October 2, 2008, particularly the $75,000.00 cash taken from his safe, should have been granted because, under the four corners of the Affidavit of Probable Cause, there was inadequate probable cause to justify the search and seizure of the Defendant's residence. There was an insufficient basis for the issuing authority to reasonably conclude that the Defendant's residence contained evidence of criminal activity on October 2, 2008. As a result, the Commonwealth was able to introduce at trial evidence of the $75,000.00 cash to argue to the jury that this was evidence of the Defendant's guilt which also provided corroboration of the inculpatory solicitation testimony of Weldon Gary[.] (Citation to notes of testimony omitted).

(Def. Concise Statement, 03/31/2010 #2). On appeal, the Superior Court found the suppression challenge meritless. *Commonwealth v. Kushner*, No. 762 EDA 2010, p. 5 (Pa. Super. Dec. 8, 2010). This claim is therefore waived as being previously litigated per 42 Pa.C.S.A. §9543(a)(3); and §9544(a). Nevertheless, we clearly cannot find Attorney Rose ineffective for failing to challenge the suppression ruling on appeal when he in fact did just that. See *Commonwealth v. Spotz*, 587 Pa. 1, 896 A.2d 1191, 1224 (Pa. 2006)

IV. CONCLUSION

Based upon the foregoing, this court respectfully requests that the Superior Court affirm the Order denying Defendant's Petition for Post-Conviction Collateral Relief.

BY THE COURT:

/s/ Steven T. O'Neill
STEVEN T. O'NEILL J.