UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1415

KARL ROSEBORO,
Appellant

VS.

SUPERINTENDENT SOMERSET SCI; ET AL.

(D.C. Civil No. No. 2:22-cv-03377)

ORDER

Present: CHAGARES, Chief Judge, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES and CHUNG, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the the Court en banc, is denied.

BY THE COURT,

s/ David J. Porter
Circuit Judge

Dated: June 27, 2025
Lmr/cc: Karl Roseboro
All Counsel of Record

APPENDIX A

ALD-158

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 25-1415

KARL ROSEBORO,
Appellant

VS.

SUPERINTENDENT SOMERSET SCI; ET AL.

(E.D. Pa. Civ. No. 2:22-cv-03377)

Present: BIBAS, PORTER, and MONTGOMERY-REEVES, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

The application for a certificate of appealability is denied because Appellant has not made a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c). Essentially for the reasons given by the District Court, jurists of reason would not debate the denial of Appellant's petition pursuant to 28 U.S.C. § 2254. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

By the Court,

s/David J. Porter
Circuit Judge

Dated: May 30, 2025
Lmr/cc: Karl Roseboro
All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk

APPENDIX B

KARL ROSEBORO, Petitioner, v. KEN HOLLIBAUGH, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2025 U.S. Dist. LEXIS 26750
CIVIL ACTION NO. 22-3377
February 14, 2025, Decided
February 14, 2025, Filed

Editorial Information: Subsequent History

Appeal filed, 03/10/2025

Editorial Information: Prior History

Roseboro v. Hollibaugh, 2024 U.S. Dist. LEXIS 239793, 2024 WL 5412434 (E.D. Pa., Feb. 7, 2024)

Counsel {2025 U.S. Dist. LEXIS 1}KARL ROSEBORO, Petitioner, Pro se, SOMERSET, PA.

For THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, SUPERINTENDENT KEN HOLLIBAUGH, Respondents: JACLYN M. MASON, LEAD ATTORNEY, Philadelphia District Attorney's Office, Federal Litigation Unit, Philadelphia, PA.

Judges: Gerald J. Pappert, J.

Opinion

Opinion by: Gerald J. Pappert

Opinion

MEMORANDUM

Karl Roseboro, currently serving a life sentence for first-degree murder, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Magistrate Judge Lynne A. Sitarski issued a Report and Recommendation recommending denial of Roseboro's petition, to which Roseboro objected. After thoroughly reviewing the record, the Court overrules the objections, adopts the R&R and denies the petition.

I

A

At around 2 a.m. on August 4, 2012, Karl Roseboro walked past a corner store at the intersection of Wayne Avenue and Brunner Street in the Nicetown neighborhood of Philadelphia. (Jury Trial Tr. Sept. 9 at 40:9-41:19.) A store security camera recorded him and Rhonda Williams, a resident of the neighborhood, walking south on Wayne, and then out of the camera's view. (*Id.*; *id.* at 156:12-157:10; Jury Trial Tr. Sept. 10 at 26:17-27:11.) Less than thirty seconds later,{2025 U.S. Dist. LEXIS 2} four popping sounds are heard on the surveillance video. (Prelim. H'rg Tr. at 83:22-84:9; Jury Trial Tr. Sept. 10 at 46:19-50:13.)1 At 2:09:44, a 911 caller reported gunshots and a woman screaming in an alley near Wayne and Brunner. (Jury Trial Tr. Sept. 10 at 23:12-24:16.) Police arrived in the area at

APPENDIX C

2:13:37 and at 2:29 reported finding Williams's body in an alleyway on the west side of Wayne, fifty-five feet beyond view of the security camera. (*Id.* at 23:21-25:21; Jury Trial Tr. Sept. 9 at 108:23-109:6, 156:5-157:14.) Williams had been shot four times: once in the right forearm, and three times in the head. (Jury Trial Tr. Sept. 11 at 10:14-24.)

1

Four lay witnesses testified for the Commonwealth: Tyheem Williams, Rhonda Williams's son, (Jury Trial Tr. Sept. 11 at 39:14-40:8);2 Roseboro's girlfriend, Shaquilla Harmon, who was also a cousin of Williams's, (Jury Trial Tr. Sept. 10 at 99:13-101:24); Dominique Jackson, Williams's daughter's best friend, (*id.* at 145:4-146:17); and Lydia Negron, a friend of Williams who lived in the neighborhood, (*id.* at 174:23-174:16, 197:21-24). Harmon and Tyheem testified that Roseboro sold crack on the 1800 block of Brunner and that Williams, who**{2025 U.S. Dist. LEXIS 3}** was a crack addict, sometimes obtained drugs from him. (*Id.* at 103:12-106:17, 110:16-111:9; Jury Trial Tr. Sept. 11 at 41:8-21, 44:24-45:13.)

Tyheem also told the jury about a conversation with Roseboro in the afternoon of August 4 outside of Negron's house. According to Tyheem, he, his sister, Jackson and Roseboro were outside the house when someone asked Roseboro where he was at the time of Williams's murder. (Jury Trial Tr. Sept. 11 at 55:14-60:5.) Roseboro first said he "wasn't around," then said he had seen Tyheem on Germantown Avenue at the time of the murder. (*Id.* at 60:6-18.) But Tyheem, who admitted that he'd been drinking and smoking PCP the night of August 3, told the jury he'd only seen Roseboro sometime between 10 p.m. and midnight, not around 2 a.m. on August 4. (*Id.* at 46:12-49:1, 49:19-22, 61:17-62:12.) Tyheem also explained that this conversation was prompted by his hearing a rumor that Roseboro was involved in his mother's murder and that in addition to denying it, Roseboro told Tyheem that he'd lost his own mom. (*Id.* at 60:24-61:15.)3 Tyheem, Jackson and Negron described Roseboro's demeanor as scared or nervous and said they never again saw him in the area. (*Id.**{2025 U.S. Dist. LEXIS 4}*** at 63:5-64:8.)4

Harmon wasn't present for the August 4 afternoon conversation, but she told the jury that when she picked Roseboro up from a neighborhood bar to go home sometime between midnight and 1 a.m. that morning, they argued because he didn't want to leave yet. (Jury Trial Tr. Sept. 10 at 113:18-116:7.) He was "aggressive" during the conversation, so she left him in the neighborhood and made the five- to ten-minute drive to their home without him. (*Id.* at 108:2-110:11, 116:11-17.)5

Roseboro's trial counsel Stephen Patrizio cross-examined each witness. All four admitted they knew of no problems between Roseboro and Williams, who had a positive relationship and even treated each other like family. (*Id.* at 132:20-133:8, 135:18-136:5, 173:14-174:3, 207:15-23; Jury Trial Tr. Sept 11 at 103:18-104:11.) To undermine the credibility and effect of testimony about Roseboro's conduct and statements on August 4, counsel highlighted Tyheem's use of PCP, a drug that affects memory and perception.6 He also cross-examined Tyheem, Jackson and Negron on their prior statements to police.7

2

The prosecution called multiple police officers, including Philadelphia Police Detective James Dunlap,**{2025 U.S. Dist. LEXIS 5}** who presented the Commonwealth's timeline of events. Dunlap, who is trained to extract and store video data from DVRs and was responsible for retrieving the security footage, explained that DVR clocks are often inaccurate. (Jury Trial Tr. Sept. 10 at 17:3-20:16, 25:22-26:9, 29:7-16, 29:14-30:3.) As such, whenever he retrieves video footage, he uses his smartphone to check the time on the surveillance against the Naval Observatory Atomic Clock. (*Id.* at 29:25-30:12.) When he retrieved the video showing Roseboro and Williams together on August 4,

he determined that the timestamp on that surveillance footage was 9 minutes and 55 seconds slow. (*Id.* at 30:13-17.) In other words, when Roseboro and Williams walked off-screen at approximately 1:57:43 a.m., according to the timestamp, *see* (Prelim. H'rg Tr. at 83:22-84:9), the video actually displayed what occurred at 2:07:38 a.m. And the four popping sounds, heard around timestamp 1:58:08, happened around 2:08:03 a.m. - almost two minutes before the 911 call at 2:09:44 a.m. (Jury Trial Tr. Sept. 10 at 23:12-14, 46:19-50:13.) The time of the 911 call was recorded in the RADQ (Radio Assisted Data Query), a computer-generated list of all calls**{2025 U.S. Dist. LEXIS 6}** involving the police radio, dispatch or patrol car terminals, which Dunlap described as "extremely accurate" in its timekeeping. (*Id.* at 22:8-25.) The RADQ also recorded officers immediately responding to the dispatch at 2:11:28, arriving on scene at 2:13:37 and finding Williams's body at 2:29. (*Id.* at 23:21-25:21; Jury Trial Tr. Sept. 9 at 108:23-109:6.)

Patrizio attempted to undermine Dunlap's proffered timeline in two ways. He first focused on Detective Ron Dove's January 30, 2013 preliminary hearing testimony. Dove, the lead detective in this case, testified that the timestamp was "a little slow in comparison to realtime . . . . within minutes." (Prelim. H'rg. Tr. at 82:5-18.) Counsel asked Dunlap whether he knew about Dove's testimony or whether Dove ever told him that he separately calculated the time differential. (Jury Trial Tr. Sept. 10 at 66:13-67:4.) Dunlap said no. (*Id.*) Second, counsel compared Dunlap's calculation to the RADQ times, pointing out that while the officers reported arriving at 2:13:37, the timestamp on the video when they first appeared was 2:15:55. (*Id.* at 71:14-72:12.) Dunlap agreed that this would create a nearly three-minute differential based on the RADQ.**{2025 U.S. Dist. LEXIS 7}** (*Id.* at 72:13-25.) But he also explained that he didn't know what "on scene" meant, and the officers could have reported when they arrived in the area but outside the camera's view. (*Id.* at 72:25-73:5.)8

Patrizio also cross-examined Dunlap about the recorded audio accompanying the video. Dunlap had earlier testified that the microphone was located inside the store, on the side parallel to Brunner. (*Id.* at 36:3-21.)9 Under cross-examination, Dunlap agreed the microphone was likely intended to record indoor conversations, such as during a robbery, and admitted that he didn't know anything about the quality or sensitivity of the microphone. (*Id.* at 67:20-70:3.) Counsel then played the video footage for a minute beyond the time the four popping sounds were heard, revealing two additional noises that Dunlap described as a "click" and a "light pop." (*Id.* at 76:8-77:3, 96:10-98:18.) He then played various surveillance video clips, revealing that the microphone didn't pick up a bouncing basketball outside, passing cars or conversation on the store's front steps. (*Id.* at 77:4-91:15.) On redirect, the video of Roseboro and Williams leaving the camera's view and the subsequent six sounds were played**{2025 U.S. Dist. LEXIS 8}** again for the jury. (*Id.* at 95:8-98:18.)

3

The jury deliberated for more than a day, twice requesting to watch the video from the time Roseboro appeared on camera through the six sounds recorded after he and Williams walked out of view. (Jury Trial Tr. Sept. 15 at 2:1-6:5; Jury Trial Tr. Sept. 16 at 2:1-4:23.)10

On September 16, the jury found Roseboro guilty of first-degree murder and related firearms charges. (Jury Trial Sept. 16 at 5:22-8:14.) He was sentenced the same day. (*Id.* at 12:5-19.) The Pennsylvania Superior Court affirmed the judgment on appeal, *Commonwealth v. Roseboro*, No. 2833 EDA 2014, 2016 WL 903949, at *1 (Pa. Super. Ct. March 9, 2016), and the Supreme Court of Pennsylvania denied allocatur, *Commonwealth v. Roseboro*, 636 Pa. 661, 145 A.3d 164 (Pa. 2016).

B

On March 9, 2017, Roseboro filed a *pro se* petition for relief under Pennsylvania's Post Conviction Relief Act. (PCRA Op. at 2, ECF No. 31-2.) The court subsequently appointed counsel, who on

October 10, 2018 filed an amended petition raising a variety of ineffective assistance of counsel and due process claims. (*Id.* at 2-3.) After holding an evidentiary hearing on November 25, 2019, to address two of the ineffective assistance claims, the PCRA court denied Roseboro's petition. (*Id.* at 2.) The Superior Court affirmed, adopting in full the PCRA court's decision, *Commonwealth v. Roseboro*, No. 123 EDA 2020, 2021 WL 2012602, at *2 (Pa. Super. Ct. May 20, 2021), and the**{2025 U.S. Dist. LEXIS 9}** Pennsylvania Supreme Court denied allocatur, *Commonwealth v. Roseboro*, 283 A.3d 176 (Pa. 2022).

C

On August 24, 2022, Roseboro filed this petition *pro se*, asserting four claims of ineffective assistance of counsel. He alleged Patrizio (1) failed to object to Tyheem's testimony about Roseboro's rumored killing of Williams as hearsay and to request a curative instruction; (2) failed to keep a promise he made in his opening statement to introduce evidence that Dove had previously testified to a different timeline; (3) failed to call Dove to testify or have his preliminary hearing testimony admitted as the prior statement of an unavailable witness; and (4) failed to investigate Dunlap's testimony or obtain an expert report from him prior to trial. (Habeas Pet., ECF No. 2.)

On February 7, 2024, Judge Sitarski recommended denial and dismissal of all four claims. (R&R, ECF No. 37.) On the first, she found neither deficient performance nor prejudice, and on the remaining claims found that despite trial counsel's deficient performance, no prejudice resulted from any of his errors. (*Id.*)

On June 17, 2024, Roseboro objected to the R&R. (Objs., ECF No. 42.) He first argues that the magistrate judge overlooked his argument that counsel should have**{2025 U.S. Dist. LEXIS 10}** requested a curative instruction with respect to the rumor that Roseboro committed the murder. (*Id.* at 2-3.) His remaining objections concern the magistrate judge's alleged errors in conducting the prejudice analysis given, as he sees it, that the weight of the evidence against him was not overwhelming. (*Id.* at 3-11.)

II

A

28 U.S.C. § 2254 bars the Court from granting habeas relief on any claim that a state court has already adjudicated on the merits unless the state court's decision (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the" United States Supreme Court; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "Clearly established" federal law consists only of "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *Andrew v. White*, No. 23-6573, 604 U.S. __, slip op. at 5 (Jan. 21, 2025) (per curiam) (quoting *White v. Woodall*, 572 U.S. 415, 419, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014)).

The "contrary to" clause permits a court to grant the writ if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme]**{2025 U.S. Dist. LEXIS 11}** Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The "unreasonable application" clause permits a court to grant the writ if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Finally, a decision is not based on an unreasonable determination of facts "'merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed.

2d 738 (2010).

If a federal habeas court determines that a petitioner meets one of § 2254(d)'s exceptions, the court "must then resolve the claim without the deference [28 U.S.C. § 2254(d)] otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007). Similarly, "when a state court's rationale is less than clarion, it is permissible to sidestep AEDPA deference if the claim would fail under *de novo* review." *Hannibal v. Sec'y Pa. Dep't of Corrs.*, 2024 WL 1422015, at *7 (3d Cir. Apr. 2, 2024) (citing *Berghuis v. Thompkins*, 560 U.S. 370, 390, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010)).

B

To succeed on an ineffective assistance of counsel claim, a petitioner must show that (1) his "counsel's performance was deficient," and (2) he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Counsel's performance is deficient when it falls "below an objective standard of reasonableness." *Id.* at 687-88. Courts apply a "strong presumption" of reasonableness and should endeavor "to**{2025 U.S. Dist. LEXIS 12}** 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.* at 689. The presumption of reasonableness can be rebutted "by showing either that the conduct was not, in fact, part of a strategy, or by showing that the strategy employed was unsound." *Thomas v. Varner*, 428 F.3d 491, 499-500 (3d Cir. 2005). Even where the presumption is rebutted, "a court must still determine whether, in light of all the circumstances, the identified acts or omissions of counsel were outside the wide range of professionally competent assistance." *Lewis v. Horn*, 581 F.3d 92, 113-14 (3d Cir. 2009) (cleaned up). And when "the record does not explicitly disclose trial counsel's actual strategy or lack thereof . . . the presumption [of reasonableness] may only be rebutted through a showing that no sound strategy . . . could have supported the conduct." *Thomas*, 428 F.3d at 500.

To establish prejudice, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not**{2025 U.S. Dist. LEXIS 13}** just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). To determine the likelihood of a different outcome, the Court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

C

The standard pursuant to which the Pennsylvania Superior Court assessed the prejudice prong of Roseboro's claims is unclear. The court first stated that PCRA petitioners must establish, "by a preponderance of the evidence" that counsel's errors "so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place," *Roseboro*, 2021 WL 2012602 at *2, then stated that prejudice requires demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* (citation omitted). However, the court did not expressly address the merits of Roseboro's claim, concluding only that it found "no legal errors" in the PCRA court's opinion and adopted the opinion as its own. *Id.* It is thus unclear whether the court applied a preponderance of evidence or reasonable probability standard, so the Court will review Roseboro's claims *de novo*. *See Hannibal*, 2024 WL 1422015, at *7.

The Court reviews *de novo* the specific portions of the R&R to which Roseboro objects. 28 U.S.C. § 636(b)(1); *see also Cont'l Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 250 (3d Cir. 1998).

III

Roseboro's{**2025 U.S. Dist. LEXIS 14**} first claim is that trial counsel failed to object or request a curative instruction after Tyheem testified that he'd heard a rumor that Roseboro murdered Williams. (Pet. at 8.)11

The possibility that Tyheem would so testify first arose during a motion *in limine* hearing on September 10. The prosecutor explained that he intended to elicit testimony about the August 4 conversation and that, although he was willing to avoid the rumor testimony, he wanted the trial court to preclude Roseboro's statements denying the murder and explaining that he'd lost his own mother. (Jury Trial Tr. Sept. 10 at 2:9-4:11.) Defense counsel objected to the August 4 testimony in its entirety, but the trial court ruled that any testimony concerning Roseboro's own statements - either his whereabouts or his self-serving denial and explanation - was admissible. (*Id.* at 4:12-6:6.) But the court deferred decision on what Tyheem could say about the rumor that Roseboro killed Williams, stating that its admissibility could depend on the context. (*Id.* at 6:7-8:12.)

In front of the jury, the court asked Tyheem to clarify when Roseboro made a particular statement. (Jury Trial Tr. Sept. 11 at 60:24-25) Instead of answering{**2025 U.S. Dist. LEXIS 15**} the question, Tyheem explained why the August 4 conversation happened: "We was asking him, we are hearing that you had something to do with my mom being killed. I asked him." (*Id.* at 61:1-4.) The court followed up by asking Tyheem for Roseboro's response, which he said was to deny the murder and explain that his own mom had died. (*Id.* at 61:5-15) Defense counsel did not object to or move to strike the testimony about the rumor. Nor did he request an instruction, either to prohibit the jury from considering the testimony at all or limit the jury's consideration of the rumor to its effect on Tyheem.

At the PCRA hearing, Patrizio admitted that his failure to object to the testimony was not based on any strategy. (PCRA H'rg Tr. at 17:24-18:3) He and counsel for the Commonwealth also indicated they viewed the trial court's prior ruling as a conditional one: if the testimony about the rumor was admitted, then Roseboro's self-serving statements would be as well. (*Id.* at 15:4-10, 27:6-13.)

A

Counsel's admission of a lack of strategy rebuts the presumption of reasonableness. *See Thomas*, 428 F.3d at 499-500. Nonetheless, the Court must determine whether his conduct, "in light of all the circumstances," falls within the "wide{**2025 U.S. Dist. LEXIS 16**} range" of competent assistance. *Lewis*, 581 F.3d at 113-14 (citation omitted). Under this deferential review of his performance, counsel's failure to object or request a jury instruction was not deficient.

As counsel testified, this portion of Tyheem's testimony was a mixed bag for Roseboro. If the trial court's ruling had been conditional, it would not have been unreasonable for an attorney to believe, at the time, that the favorable testimony outweighed the harm. This is especially true in the circumstances of this case, where counsel could reasonably have concluded that Roseboro's denial and explanation bolstered the strategic choice to emphasize the lack of any evidence of motive and the testimony that Roseboro and Williams had a mother/son relationship. *See* (Jury Trial Tr. Sept. 9 at 39:1-40:3; Jury Trial Tr. Sept. 12 at 47:8-49:3). Even if the trial court's ruling was not conditional, objecting to it may not have been successful, given the court's position that it might find the testimony was offered for its effect on Tyheem, the listener. (Jury Tr. Transcript Sept. 10 at 7:15-18.) And Tyheem was testifying on the fourth day of a very contentious trial. *See* (Jury Tr. Transcript Sept. 12 at 68:11-15, 133:16-25.){**2025 U.S. Dist. LEXIS 17**} Given this background, counsel could reasonably have decided not to object.

And courts frequently acknowledge that not requesting a limiting instruction is a reasonable strategy to

avoid drawing attention to the issue. *See, e.g., Albrecht v. Horn*, 485 F.3d 103, 127 (3d Cir. 2007) (noting this strategy for evidence of prior bad acts); *Khan v. Gordon*, No. 11-7465, 2013 WL 4957479, at *7-8 (E.D. Pa. Sept. 12, 2013) (noting this strategy for evidence admitted under the state-of-mind hearsay exception). Despite the strong presumption that juries follow instructions, *see United States v. Franz*, 772 F3d 134, 151-53 (3d Cir. 2014), asking the jury to be instructed to consider the rumor only for its effect on Tyheem - or requesting a specific instruction to disregard the testimony entirely - risked emphasizing for the jurors an issue that had its downside for Roseboro. Thus, although counsel could not articulate a strategic reason for not objecting or requesting a jury instruction, his performance still fell within the wide range of competent assistance.

B

Even if counsel's failure to object or request an instruction constituted deficient performance, Roseboro cannot demonstrate a reasonable probability that, but-for this error, the trial would have turned out differently.

The jury heard undisputed evidence that roughly thirty minutes after she was last seen with Roseboro, Williams's**{2025 U.S. Dist. LEXIS 18}** body was found with four gunshot wounds in an alley fifty-five feet away. The jury saw the video in which Roseboro and Williams walked in the direction of that alley, and heard, thirty seconds after Roseboro and Williams walked off-camera, four sounds consistent with gunshots. Jurors heard Dunlap's testimony about the time differential, which would place their walking off camera together within two minutes of the 911 call reporting gunshots and a woman screaming in an alley near Wayne and Brunner. And it heard a variety of circumstantial evidence about Roseboro from the lay witnesses, including his mood when Harmon last saw him; his lack of alibi and shifting responses when confronted; and that he rarely, if ever, returned after Williams was killed to the block where he previously dealt drugs.

IV

Roseboro next argues that his trial counsel failed to fulfill a promise he made to the jury in his opening statement that it would hear evidence that Dove's preliminary hearing testimony offered a different timeline of the events surrounding the murder. (Pet. at 10.) Roseboro claims that, had counsel kept this promise by introducing Dove's preliminary hearing testimony, the jury would have heard**{2025 U.S. Dist. LEXIS 19}** evidence that challenged the Commonwealth's theory that only two minutes passed between the four popping sounds recorded in the video and the 911 call, which might have led a reasonable juror to doubt that those sounds were gunshots. *Cf.* (Pet. at 70-71.)

In his opening statement, counsel made a number of representations about what the evidence would and wouldn't show. (Jury Trial Tr. Sept. 9 at 37:1-43:5.) One of those concerned the Commonwealth's timeline of the murder:

> [W]hat has happened here, ladies and gentlemen, is that the evidence will show [] that there is going to be a little shifting, and a retailoring, and a little bit of overreaching by the Commonwealth in terms of the time that is displayed on the video and the time that the police arrived in response to the gunshots. So that they are going to try to suggest to you that the period of time is within seconds of their being together and it is really many, many minutes. I make that promise to you, as well. Why? Because the assigned detective . . . testified at a prior hearing . . . and said that he retrieved the videotape . . . and he checked the video-recorder for his time and it was off only a minute or two. The problem is**{2025 U.S. Dist. LEXIS 20}** that doesn't fit within their scheme. So, they are going to have another witness come in and tell you that the videotape time on the camera is 9 minutes and 55 seconds off to bring it in close proximity to the 911 call[.](*Id.* at 40:4-41:19.) In essence, counsel told jurors they would see that the Commonwealth's timeline of the murder was

untrustworthy because Dunlap's timeline differed from Dove's.12 But counsel never called Dove as a witness, nor sought to have him declared unavailable so that his preliminary hearing testimony could be admitted into evidence. He instead cross-examined Dunlap about Dove's preliminary hearing testimony and conversations Dove and Dunlap may have had:

Q: So you have no information that Detective Dove made his own calculations of the time differential between realtime and the time on the recorder?

A: No.

. . . .

Q: If he has testified previously, he said I don't have the exact calculations but it was a little slow in comparison to realtime, I would say a little, it was within minutes off, he didn't share any of that information with you; correct?

A: Correct.(Jury Trial Tr. Sept. 10 at 66:13-67:4.) Before closing statements, the prosecutor moved to preclude defense**{2025 U.S. Dist. LEXIS 21}** counsel from talking about Dove's preliminary hearing testimony, arguing that Dove's statements were never put into evidence; counsel instead purportedly quoted Dove in asking his questions. (Jury Trial Tr. Sept. 12 at 11:15-12:6, 13:2-6, 16:19-17:2.) Patrizio argued the statements came into evidence through his questions to Dunlap and that realistically, Dove would not respond to a subpoena. (*Id.* at 12:7-16, 15:16-20, 19:24-20:2.) The trial court acknowledged that typically, when a witness testifies at a prior proceeding, he must then testify at trial or be declared unavailable before his prior testimony can be admitted as evidence. (*Id.* at 18:3-20:8.) Nonetheless, it allowed counsel to discuss Dove's preliminary hearing testimony in his closing argument. (*Id.* at 20:6-21:24, 22:18-23:12); *see also* (*id.* at 67:12-68:9).

A

Instead of calling Dove as a witness, subpoenaing him to testify or having him declared unavailable such that he could get Dove's preliminary hearing testimony into evidence, Patrizio assumed instead he could rely on his own use of Dove's statements when cross-examining Dunlap. But, as the court instructed the jury before testimony began, attorneys' questions are not**{2025 U.S. Dist. LEXIS 22}** evidence. (Jury Trial Tr. Sept. 9 at 13:8-15:3.) Counsel was allowed to cite to Dove's "statements" in his closing, but he failed to deliver what he promised when the trial began - that the jurors would hear evidence that Dunlap offered a different timeline than the one the assigned detective, Dove, previously testified to.

Breaking a promise made during an opening statement does not necessarily constitute deficient performance. *Elias v. Superintendent Fayette SCI*, 774 Fed. App'x 745, 751 (3d Cir. 2019).13 Counsel's broken promise, however, was not a strategic decision based on an unforeseen development, *see id.*; it was a mistake based on an error of law. And in light of the circumstances of this case, his conduct was not reasonable. One of the defense's primary strategies was to attack Dunlap's timeline in order to increase the time between when Roseboro and Williams were last seen on the video and the 911 call. This strategy could be carried out in two ways: using the RADQ record to suggest the timestamp is several minutes fast or calling Dove to testify that he thought the timestamp was only a few minutes slow. Both offer different alternative timelines, but they could, individually or together, be used to argue that the jury should doubt Dunlap's timeline.**{2025 U.S. Dist. LEXIS 23}** Once Patrizio chose to use both, there was no sound reason for failing to introduce evidence he told the jurors they would hear and formed part of that defense. *Cf. Moore v. Sec'y Penn. Dep't of Corrs.*, 457 Fed. App'x 170, 182 (3d Cir. 2012) ("Counsel's failure to introduce evidence that contradicts a key witness's trial testimony is patently unreasonable.").

B

Roseboro cannot, however, demonstrate prejudice. First of all, his lawyer never promised the jury it would hear evidence from a specific witness, such as Dove himself. *See McAleese*, 1 F.3d at 166-67 (noting the rationale for finding ineffective assistance is that jurors might "think the witnesses to which counsel referred . . . were unwilling or unable to deliver the testimony he promised"). The issue was the substance of Dove's preliminary hearing testimony and the effect it might have had on the jury. Accepting Dunlap's timeline creates a narrow window favorable for the Commonwealth: Roseboro and Williams walk off-camera at 2:07:38 and two minutes later, at 2:09:44, the police receive a 911 call reporting gunshots and a woman screaming in an alley near Wayne and Brunner. Dove's assessment increases the time between these two events to approximately seven minutes, which, Roseboro argues, could affect whether**{2025 U.S. Dist. LEXIS 24}** a reasonable juror would conclude the sounds on the video were gunshots.14

Roseboro's argument is not implausible, but it does not demonstrate a reasonable probability of a different outcome. *See Harrington*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.") No possible variation on the timing of the 911 call changes the fact that, thirty seconds after Roseboro and Williams walked off-camera, four sounds consistent with gunshots were recorded, and less than thirty minutes after that, Williams's body was found with four gunshot wounds in an alley fifty-five feet beyond the camera's view, in the direction she and Roseboro had been walking. Although placing the 911 call within two minutes of the recorded sounds does bolster the Commonwealth's case, the other evidence against Roseboro was substantial, consisting not just of the video but the witnesses' testimony, which indicated, *inter alia*, that Roseboro was aggressive when his girlfriend last saw him between midnight and 1 a.m.; that he changed his story while talking to neighbors; and that he largely, if not completely, stopped coming to the neighborhood, even though he previously sold drugs there. Even assuming the**{2025 U.S. Dist. LEXIS 25}** jury accepted Dove's testimony in some manner - as evidence that the 911 call was placed five minutes later, relative to the alleged gunshots, than Dunlap believed or instead, perhaps in combination with the RADQ argument, as evidence that the timeline of events was too muddy to resolve - there is no reasonable probability that, in light of the totality of the evidence, the outcome at trial would have been different had the jurors learned what Dove testified to at the preliminary hearing.15

V

Roseboro's third claim is that his counsel's failure to subpoena or call Dove as a witness or have him declared unavailable so that his preliminary hearing testimony could be admitted as evidence constituted ineffective assistance. (Pet. at 12.)

Roseboro's argument here is effectively the same as it was with respect to the prior claim: counsel failed to introduce Dove's preliminary hearing testimony because he misunderstood the law and there is a reasonable probability that introducing this evidence would have affected the outcome. As discussed above, no reasonable strategy supports failing to proffer evidence supporting a defense counsel believed critical. *See* Section IV.A.2. Nonetheless, in light**{2025 U.S. Dist. LEXIS 26}** of all of the evidence against Roseboro, counsel's failure was not prejudicial. *See* Section IV.B.

VI

Roseboro's final claim alleges that his lawyer's failure to obtain an expert report or otherwise investigate Dunlap's testimony prior to trial constituted ineffective assistance. (Pet. at 13-14.)

A

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The decision not to investigate is "assessed for reasonableness in all the circumstances." *Id.* Here, Patrizio learned that Dunlap would be testifying shortly before a motion hearing on August 21, 2014, three weeks before trial. (Mot. H'rg Tr. at 35:1-38:9.) At the time, he told the trial court that he had received nothing from or about Dunlap. (*Id.* at 38:13-17.) Yet his subsequent conduct suggests he took no steps to investigate, waiting until Dunlap was testifying at trial to ask whether he'd prepared a report and if he could have a copy of it. (Jury Trial Tr. Sept. 10 at 62:13-16.) Dunlap explained that all he had was a single page of notes, typed in August of 2012, and the court briefly recessed so counsel could review those notes before resuming cross-examination.**{2025 U.S. Dist. LEXIS 27}** (*Id.* at 62:17-65:19.)

Counsel had made the timeline a key part of the defense and believed that Dove's testimony was "critical" to that strategy. He also intended to cast doubt on Dove's conduct during the investigation. *See* (Mot. H'rg Tr. at 39:11-18.) Given these strategic choices, it was unreasonable for Patrizio to not take steps to inform himself, as best he could, of Dunlap's possible testimony and role in the investigation.

B

But no prejudice resulted from this shortcoming. Patrizio was not caught unawares as to the substance of Dunlap's testimony or how he might undermine it. His opening expressly referenced the Commonwealth's nine minute, fifty-five second time difference, and Dunlap's testimony was independent of counsel's opportunity to rely on other evidence he already knew about, including the RADQ or Dove's testimony. Moreover, counsel thoroughly cross-examined Dunlap on each aspect of his testimony. *Compare* (Jury Trial Tr. Sept. 10 at 26:12-39:20; 22:8-25:21, 29:7-30:23; 35:6-36:21) *with* (*id.* at 61:20-67:13; 66:13-67:4, 71:14-73:25; 68:5-70:3, 76:8-94:8.) And while Dunlap was qualified at trial as an expert witness in the field of forensic video technology, (Jury Trial**{2025 U.S. Dist. LEXIS 28}** Tr. Sept. 10 at 21:18-20), no expertise was necessary to rebut his testimony concerning the time differential. Counsel's failure to better prepare did not impact his ability to address Dunlap's testimony at trial, and no pre-trial investigation into that testimony would have affected the jury's evaluation of the key component of the video evidence: Roseboro walked with Williams out of view of a security camera thirty seconds before four sounds consistent with gunshots were heard, and Williams's body was shortly thereafter found with four gunshot wounds in an alley fifty-five feet away from where she was last seen with him. In the face of this evidence and all the other testimony, there is no reasonable probability that Patrizio's failure to investigate Dunlap's opinion and role in the case affected the outcome of the trial.16

VII

A certificate of appealability should only be issued if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). 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). Roseboro has made no such showing, so no certificate**{2025 U.S. Dist. LEXIS 29}** should issue.

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert, J.

Gerald J. Pappert, J.

ORDER

AND NOW, this 14th day of February, 2025, upon careful and independent consideration of the pleadings (ECF No. 2) and state-court records, and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski (ECF No. 37) and Petitioner's objections thereto (ECF No. 42), it is hereby **ORDERED** that:

1. The objections are **OVERRULED;**

2. The Report and Recommendation is **APPROVED** and **ADOPTED**;

3. The Petition for a Writ of Habeas Corpus is **DENIED** and **DISMISSED**;

4. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not made a substantial showing of the denial of a constitutional right nor demonstrated that reasonable jurists would debate the correctness of the procedural aspects of this decision. *See* 28 U.S.C. 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); and

5. The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Gerald J. Pappert

GERALD J. PAPPERT, J.

Footnotes

1

The corner store had two exterior cameras, one across the street on the east side of Wayne and one on 1900 block of Brunner on the same side of the street as the store. (Jury Trial Tr. Sept. 10 at 26:13-25.) Both captured Roseboro and Williams and were played at trial, but due to the manner in which the audio surveillance was set up, only the video from the camera on Wayne included audio. (*Id.* at 35:6-36:3.)

2

To avoid confusion between family members, the Court refers to the victim as Williams and her son as Tyheem, to whom witnesses at trial often referred by his nickname, Randy. *See* (Jury Trial Tr. Sept. 10 at 194:16-18.)

3

Jackson, Negron and Tyheem's accounts all differed slightly. Jackson recalled Roseboro saying first that he was at one neighborhood bar, then at a different bar, and finally that he was with Tyheem. (Jury Trial Tr. Sept. 10 at 150:7-154:6.) And Negron recalled Jackson being across the street at the time Roseboro told Tyheem he wasn't in the neighborhood at the time of the murder. (*Id.* at 179:17-181:11.)

4

Harmon, Jackson and Negron also testified that Roseboro was in the neighborhood nearly every day before Williams was killed, and Harmon said she still dropped him off there a few times after August 4. (Jury Trial Tr. Sept. 10 at 104:18-105:2, 147:22-149:21, 176:17-178:23; 120:4-121:5.)

5

Harmon further testified that Roseboro usually woke her up at 2:30 a.m. so she could leave for her 3:30 a.m. shift, but on August 4 she woke up late, between 3:00 and 3:30 a.m.; as she left the house,

she saw Roseboro asleep. (*Id.* at 116:22-117:22.)
6

None of the witnesses said they thought Tyheem was high during the August 4 conversation. He denied being "out of it," (Jury Trial Tr. Sept. 11 at 104:16-105:13), and although Jackson once described him as "zoned out," she also stated, when directly asked, that he didn't seem high, (Jury Trial Tr. Sept. 10 at 170:23-171:10, 172:20-23).

But counsel got Tyheem and Jackson to acknowledge that it would not be unusual to bar-hop between the two neighborhood bars that Jackson said Roseboro named. (Jury Trial Tr. Sept. 11 at 96:6-99:22, 106:19-108:5; Jury Trial Tr. Sept 10 at 170:11-172:11).
7

Jackson saw the security footage at a police station on August 4 but didn't identify Roseboro. (Jury Trial Tr. Sept. 10 at 162:23-167:3.) Nor did Tyheem or Negron, who were at the station on August 6, tell the police about the August 4 conversation with Roseboro. (Jury Trial Tr. Sept. 10 at 194:19-199:16; Jury Trial Tr. Sept. 11 at 91:21-92:14.)

Tyheem admitted on direct examination that he hadn't identified Roseboro on August 6, only doing so a month later after one of his uncles told him that he should tell the police the truth. (Jury Trial Tr. Sept. 11 at 65:4-68:3, 71:7-78:5.) He later explained that he hadn't done so because a different uncle told him the Williams family would retaliate and he shouldn't tell the police anything. (*Id.* at 62:15-93:19.) And Negron, on cross-examination, explained that she hadn't been shown the video or asked any questions on August 4 but identified Roseboro a month later when she was asked to watch the video. (Jury Trial Tr. Sept. 10 at 196:17-198:23, 202:5-203:7.)
8

Officer Daniel Levitt, who along with his partner was dispatched to respond to the 911 call, testified to that effect the previous day, explaining that the RADQ arrival time could have been based on their use of the patrol car terminal or police radio and was not necessarily connected to their appearance on the video. (Jury Trial Tr. Sept. 9 at 102:5-104:2, 107:7-25.)
9

The jury heard the day before that the south side of a clothing donation bin on the Wayne Avenue side of the store was 119 feet from the alley where Williams's body was found, (Jury Trial Tr. Sept. 9 at 202:4-18), giving it a rough idea of how far the microphone was from the alley.
10

There was some discussion at trial concerning the volume at which to play the video, given that in-store conversations heard in the first clip played during Dunlap's testimony were overly loud. (Jury Trial Tr. Sept. 10 at 77:4-84:20.) Counsel and the court eventually settled on a volume they considered "normal," (*id.* at 84:21-85:6), and when the jury reviewed the footage during deliberations, it was replayed at both the lowest and highest volumes used during trial, (Jury Trial Tr. Sept. 15 at 4:6-11; Jury Trial Tr. Sept. 16 at 2:1-7).
11

Roseboro's petition included a claim that his PCRA counsel was ineffective for failing to raise this issue as not just ineffective assistance but also a violation of Roseboro's rights under the Confrontation Clause, though he subsequently withdrew that argument. (Supp. Reply at 2-3, ECF No. 34.)
12

Precisely what he promised is unclear. For instance, based on the evidence at trial, the "period of

time" he referenced must be the one between Roseboro and Williams being together and the gunshots, not their being together and the officers' arrival: only the former period is the crucial one, and the latter is at least six minutes, under even Dunlap's timeline. But what is clear is that counsel assured the jury it would see that a detective previously testified to a different timeline, one that provides a longer gap between events than the Commonwealth was now arguing.

13

The statement in *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) that a broken promise is "sufficient of itself to support a claim of ineffectiveness" does not resolve Roseboro's claim. That blanket pronouncement is *dictum*, not supported by the cases it cites and contradicted elsewhere in the opinion. *See Elias v. Coleman*, No. 14-1337, 2017 WL 5192476, at *21 n.12 (W.D. Pa. Nov. 9, 2017) (discussing *McAleese*). The Third Circuit has since cited this part of *McAleese* for the proposition that broken promises *can* constitute ineffective assistance, not that they necessarily do. *See Elias*, 774 Fed. App'x at 751.

14

Because Dove never provided a pecific calculation, Roseboro's argument is predicated on the belief that Dove's testimony would have shown the gunshots occurred four to seven minutes before the 911 call, (Reply at 24, 38, ECF No. 18.)

15

Not that Dunlap's timeline was unimpeachable; no one at trial offered an explanation for the seeming discrepancy between Levitt's partner leaving the camera's view at 2:19:58, which would be 2:29:53 under Dunlap's calculations, and the RADQ report that Williams's body was found at 2:29. (Jury Trial Tr. Sept. 9 at 70:1-71:5, 108:23-109:6.) But given the evidence as a whole, the jury did not need to find that Dunlap's timeline was correct, or choose between competing timelines, to find Roseboro guilty beyond a reasonable doubt.

16

To the extent Roseboro's fourth objection, which states that counsel's errors "permeated" trial, (Objs. at 8, 11); *see also* (Supp. Reply at 6) (referencing "accumulated errors"), can be read to state a claim for cumulative error, he failed to exhaust this claim in state court and cannot raise it now. *See* § 2254(b)(1); *Collins v. Sec'y of Pa. Dep't of Corrs.*, 742 F.3d 528, 541-42 (3d Cir. 2014) (holding cumulative error is a separate claim that must be exhausted in state court). Even if Roseboro had exhausted this claim, he could not obtain habeas relief. There is no indication that his lawyer's error in not investigating Dunlap prejudiced him, and there is no reasonable probability that the combined effect of his errors, if any, with respect to Tyheem's testimony and Dove affected the outcome of trial given the evidence against Roseboro.

KARL ROSEBORO, Petitioner, v. KEN HOLLIBAUGH, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2024 U.S. Dist. LEXIS 239793
CIVIL ACTION NO. 22-cv-3377
February 7, 2024, Decided
February 7, 2024, Filed

Editorial Information: Subsequent History

Adopted by Roseboro v. Hollibaugh, 2025 U.S. Dist. LEXIS 26750 (E.D. Pa., Feb. 14, 2025)

Editorial Information: Prior History

Commonwealth v. Roseboro, 144 A.3d 193, 2016 Pa. Super. Unpub. LEXIS 803 (Mar. 9, 2016)

Counsel {2024 U.S. Dist. LEXIS 1}KARL ROSEBORO, Petitioner, Pro se, SOMERSET, PA.

For THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, SUPERINTENDENT KEN HOLLIBAUGH, Respondents: JACLYN M. MASON, LEAD ATTORNEY, Philadelphia District Attorney's Office, Federal Litigation Unit, Philadelphia, PA.

Judges: LYNNE A. SITARSKI, United States Magistrate Judge.

Opinion

Opinion by: LYNNE A. SITARSKI

Opinion

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI

UNITED STATES MAGISTRATE JUDGE

Presently before the Court is a *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, by Karl Roseboro ("Petitioner"), an individual currently incarcerated at the State Correctional Institution in Somerset, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

In its May 20, 2021 opinion affirming the denial of Petitioner's petition under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9541 *et seq.*, the Superior Court, citing the PCRA Court opinion, set forth the following facts, as well as the procedural history through that point:

> The PCRA court summarized the pertinent facts and procedural history as follows:
>
> On August 4, 2012,{2024 U.S. Dist. LEXIS 2} [Roseboro] shot Rhonda Williams (the "decedent"

APPENDIX G

[or Rhonda]) four times, in an alley behind the 4200 block of Wayne Avenue and Brunner Street. [Roseboro] was a crack dealer who stored his drugs in the alley near where the decedent's body was found. Additionally, video evidence depicted [Roseboro] and the decedent walking in the direction of the alley just before the murder. Approximately thirty seconds after [Roseboro] and the decedent are last seen on camera which is approximately fifty-five feet from the alley, four gunshots are heard.

On September 16, 2014, [Roseboro] was found guilty by a jury, presided over by this [c]ourt, of first-degree murder, [two firearm violations, and possession of an instrument of crime]. [Roseboro] was sentenced that same day to life without the possibility of parole for first-degree murder, [and was sentenced to concurrent sentences for the remaining convictions].

On September 2, 2014, [Roseboro] filed a notice of appeal to the Superior Court. The Superior Court affirmed the judgment of sentence on March 9, 2016. On April 4, 2016, [Roseboro] filed a petition for allowance of appeal with the Pennsylvania Supreme Court. *Allocatur* was denied on July 27,**{2024 U.S. Dist. LEXIS 3}** 2016.PCRA Court Opinion, 3/13/20, at 1-2 (excess capitalization and footnotes omitted)

On March 9, 2017, Roseboro filed a *pro se* PCRA petition. The PCRA court originally appointed counsel, who later was replaced. On October 10, 2018, PCRA counsel filed an amended PCRA petition. Thereafter, the Commonwealth filed a motion to dismiss and PCRA counsel filed a response. Following an evidentiary hearing, the PCRA court denied Roseboro's petition on November 25, 2019. This timely appeal followed. . . .*Commonwealth v. Roseboro*, No. 123 EDA 2020, 2021 WL 2012602, at *1 (Pa. Super. Ct. May 20, 2021) (alterations in Superior Court opinion). After the Superior Court's affirmance, Petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court, but it was denied on August 3, 2022. *Commonwealth v. Roseboro*, No. 42 EAL 2020, 283 A.3d 176 (Pa. 2022) (table decision).

On August 19, 2022,1 Petitioner filed his petition for a writ of habeas corpus. (Hab. Pet., ECF No. 2). Petitioner asserts four claims of ineffective assistance of trial counsel based on the following acts and omissions: (1) failing to object to prejudicial hearsay rumor evidence and/or ask for curative instruction;2 (2) breaking promises to the jury; (3) failing to either call a witness or have him declared unavailable; and (4) failing to investigate and obtain an expert report**{2024 U.S. Dist. LEXIS 4}** from a key witness. (*Id.* at 8, 10, 12, 13). On September 22, 2022, the Honorable Gerald J. Pappert referred the petition to me for a Report and Recommendation. (Order, ECF No. 6). On March 13, 2023, after obtaining three extensions, the Commonwealth filed its response, and on May 1, 2023, Petitioner filed his reply. (Resp., ECF No. 15; Reply, ECF No. 18). On August 9, 2023, this Court ordered the Commonwealth to file a supplemental response because its prior one inadequately responded to the petition. (Order, ECF No. 28). The Court also authorized Petitioner to file a supplemental reply. (*Id.*). On September 27 and October 25, 2023, respectively, the Commonwealth and Petitioner made their supplemental filings. (Supp. Resp., ECF No. 31; Supp. Reply, ECF No. 34). Accordingly, the matter has been fully briefed and is ripe for disposition.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

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

> An application for a writ of habeas corpus**{2024 U.S. Dist. LEXIS 5}** on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues**{2024 U.S. Dist. LEXIS 6}** by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman*, 501 U.S. at 730).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557-59 (3d Cir. 2004). State procedural**{2024 U.S. Dist. LEXIS 7}** grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739-40. A state rule is "adequate" for procedural default purposes if it is "firmly established and regularly followed." *Johnson v. Lee*, __ U.S. __, 578 U.S. 605, 136 S. Ct. 1802, 1804, 195 L. Ed. 2d 92 (2016) (*per curiam*) (citation omitted); *see also Kellam v. Kerestes*, No. 13-6392, 2015 WL 2399302, at *4 (E.D. Pa. May 18, 2015) (citations omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005), and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Id.* at 708.

Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes**{2024 U.S. Dist. LEXIS 8}** is respected in all federal habeas cases.*Edwards v. Carpenter*, 529 U.S. 446, 452-53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts*, 228 F.3d at 196. Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court**{2024 U.S. Dist. LEXIS 9}** of United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). "In**{2024 U.S. Dist. LEXIS 10}** further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citation omitted).

III. DISCUSSION

Petitioner raises four ineffective assistance of counsel claims. A claim for ineffective assistance of

counsel is governed by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the United States Supreme Court established the following two-pronged test to obtain habeas relief on the basis of ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.466 U.S. at 687. Because "it is all too easy for a court, examining counsel's defense after**{2024 U.S. Dist. LEXIS 11}** it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Thus . . . a defendant must overcome the 'presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Bell v. Cone*, 535 U.S. 685, 698, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

It is well settled that *Strickland* is "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to relief if the Pennsylvania court's rejection of his claims was: (1) "contrary to, or involved an unreasonable application of," that clearly established law; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

Regarding the**{2024 U.S. Dist. LEXIS 12}** "contrary to" clause, the state courts addressed Petitioner's ineffective assistance claims using Pennsylvania's three-pronged ineffectiveness test. *Roseboro*, 2021 WL 2012602, at *3. This test requires the petitioner to establish: (1) the underlying claim has arguable merit; (2) counsel lacked a reasonable basis for his or her conduct; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. *Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523, 533 (Pa. 2009). The Third Circuit has found the Pennsylvania ineffectiveness test is not contrary to the *Strickland* standard. *See Werts* 228 F.3d at 204. Because the Superior Court did not apply law contrary to clearly established precedent, Petitioner is entitled to relief only if he can demonstrate that its adjudication involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts in light of the evidence.3

A. Failure to Object to Hearsay or Seek a Curative Instruction

Prior to trial, the prosecutor moved to preclude anticipated testimony from Rhonda's family members that Petitioner addressed a neighborhood rumor that he had murdered her by responding to the effect that "I would never kill your mother. I lost my mother too. I didn't do it." (N.T. 9/10/14**{2024 U.S. Dist. LEXIS 13}** at 2-3). The prosecutor had offered not to elicit the testimony about the rumor, or to "sanitize" it, but defense counsel wanted Petitioner's denial of involvement to be admitted. (*Id.* at 3-4). At the motion hearing, defense counsel initially took the position that none of the testimony should be admitted, but the court responded: "Here is the bottom line, if the testimony comes in that there is a conversation with the Defendant, however it comes in, you will decide, and the Defendant's statement comes in, certainly any statement by the Defendant is a statement by a party opponent." (*Id.* at 4-5). The prosecutor protested that Petitioner's denial of involvement in the murder was inadmissible, but

the court concluded that it was "fair rebuttal" to the rumor testimony. (*Id.* at 5). It explained that the trial would not be fair if "only [the] negative the Defendant says comes in and anything in his interest doesn't come in." (*Id.* at 6). Ultimately, the court let the approach be determined by defense counsel: "[I]t [the testimony] could be prejudicial. It depends on what the Defense wants to do. The Defense might say I want it in because I want the response in the end, I never would kill**{2024 U.S. Dist. LEXIS 14}** your mother. I lost my mother. The Defense may say objection. It is hearsay and I may sustain it. These are things that play out when it hits the stand." (*Id.* at 7-8). Defense counsel agreed: "I got it. . . . We will see how it goes because these people are all over the map." (*Id.* at 8).

At trial, the following testimony was admitted without objection or a subsequent request for a curative instruction:

> The Court: Did the Defendant say where he was [at the time of the murder]?
>
> [Tyheem]:4 He was just saying he wasn't around but then he later on said that he seen me on Germantown Avenue and he was like, oh, did you hear those gunshots5 and I'm like, no, not at all. I don't recall seeing you on Germantown Avenue.
>
> . . . .
>
> [Prosecutor]: Did he say this to you in that conversation that afternoon [the day after the murder]?
>
> A: Yes.
>
> Q: What did he say to you in that conversation that afternoon?
>
> A: He was saying oh, shit, did you hear those gunshots? I don't recall that, no.
>
> The Court: The night before he said that to you or --
>
> **A: We was asking him, we are hearing that you had something to do with my mom being killed. I asked him**.
>
> **The Court: You said to him, I am hearing that you had something to do with{2024 U.S. Dist. LEXIS 15} my mom being killed**?
>
> **A: Yeah**.6
>
> The Court: He said to you, the Defendant, what did he say to you?
>
> A: He said, no. Why would I do that? I lost my mom and that is when he said he recalled seeing me on Germantown Avenue and Juniata Street and I'm like, no, you didn't.(N.T. 9/11/14 at 60-61).

At the PCRA level, the court found that counsel had no reasonable strategy in failing to object, thus establishing deficient performance, but that Petitioner had failed to establish prejudice due to the overwhelming evidence of guilt. (Hab. Pet., ECF No. 2, at 2; Reply, ECF No. 18, at 2 (citing N.T. 11/25/19 at 17-18, 27-28, 84-85)). In denying the petition, the PCRA court explained at the close of the hearing:

> There was video evidence of the Petitioner and the decedent walking toward the alley where the decedent's body was found. Between twenty and thirty seconds after they go off camera, 55 feet from the alley, four pops are heard which are - gunshots are heard because the case is over and, obviously, the jury thought they were gunshots. The decedent's body is discovered minutes later and the decedent was shot four times.
>
> Let me say for the record, even if one could argue, assuming arguendo, which this**{2024 U.S. Dist. LEXIS 16}** Court doesn't agree with, that the time differential wasn't correct, no matter how

you look at it, between twenty and thirty seconds, whatever time frame you are using, after the defendant, who admits that he was on video with the decedent walks off camera, four pops are heard. It doesn't matter what time it is and the decedent is found in the alleyway right behind the store that captures the audio with the four gunshot wounds.(*Id.* at 22 (quoting N.T. 11/25/19 at 85-86)).

After Petitioner appealed, the PCRA court provided an explanatory opinion under Pennsylvania Rule of Appellate Procedure 1925(a) stating in relevant part:

> During [the PCRA] hearing, trial counsel testified that he had no tactic or strategy for refraining from objecting to the testimony of Tyheem Williams. N.T., 11/25/2019 at 17-18. However, it should be noted than an objection would have been fruitless at that point since the statement was a spontaneous utterance and the court already ruled that it would allow the Petitioner's self-serving reply into evidence in fair rebuttal. Furthermore, the Petitioner was not prejudiced by counsel's failure to object and ask for a cautionary instruction.
>
> The evidence against the Petitioner was overwhelming. There was video evidence**{2024 U.S. Dist. LEXIS 17}** of the Petitioner and the decedent walking toward the alley where the decedent's body was found. Approximately thirty seconds after the two go off camera which is fifty-five feet from the alley where the body was found, four gunshots are heard. The decedent's body was discovered minutes later, shot four times at close range.*Commonwealth v. Roseboro*, CP-51-CR-0001397-2013, at 13 (Phila. Com. Pl. Ct. Mar. 13, 2020) (ECF No. 31-2).

On appeal to the Superior Court, that court adopted this reasoning as its own. *Roseboro*, 2021 WL 2012602, at *2. It applied the same three-part test for determining ineffectiveness used by the PCRA court and also noted that the requisite finding of prejudice under the test necessitates that a petitioner demonstrate "a reasonable probability" of a different result absent counsel's errors. *Compare id.* (quoting *Johnson*, 966 A.2d at 532), *with Roseboro*, CP-51-CR-0001397-2013, at 13 (quoting *Commonwealth v. Bracy*, 795 A.2d 935, 942 (Pa. 2001) (ECF No. 31-2)). However, unlike the PCRA court, the Superior Court further stated: "To obtain relief under the PCRA premised on a claim that counsel was ineffective, a petitioner must establish by a *preponderance of the evidence* that counsel's ineffectiveness so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." *Roseboro*, 2021 WL 2012602, at *2 (emphasis added).

1. The Parties' Positions

Petitioner contends that the state court decisions**{2024 U.S. Dist. LEXIS 18}** constituted an unreasonable application of the prejudice prong of *Strickland*, in particular the requirements to review the totality of the evidence produced in the state proceedings and to consider whether "the rumor error" had any prejudicial effect "on the remainder of the evidentiary picture . . . ." (Hab. Pet., ECF No. 2, at 24). He argues that the PCRA court's determination of facts was unreasonable in light of the evidence presented at trial. (*Id.* at 23-24). According to Petitioner, the audio on the surveillance tape introduced at trial included not four but "five (5) pops and a clicking noise," and Rhonda's body was discovered at 2:29 a.m., 20 minutes after the 2:09 a.m. 9-1-1 call. (*Id.* at 23, 31-32 (citing 9/9/14 at 4-51; 9/10/14 at 22, 46-48, 76-77)). He maintains that his presence at or near the crime scene was insufficient to sustain his conviction. (*Id.*).

The Commonwealth counters that trial counsel acted reasonably in not objecting or seeking a curative instruction because the testimony regarding Petitioner's response to being confronted with the rumor of his involvement in the murder was helpful to Petitioner. (Resp., ECF No. 15, at 8). It further asserts that the state court decision**{2024 U.S. Dist. LEXIS 19}** does not run afoul of *Strickland* because there was overwhelming evidence of Petitioner's guilt in the form of witness testimony and video

surveillance, including video showing Petitioner and Rhonda - thirty seconds before four loud pops are heard and minutes before the emergency calls about the incident - walking in the direction of the alley where her body was later discovered. (*Id.* at 2, 8).

Petitioner replies that the Superior Court required him to establish by a preponderance of the evidence that counsel's deficient performance so undermined the adversarial process that no reliable determination of guilt could have occurred, but under *Strickland* and Third Circuit case law "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." (Reply, ECF No. 18, at 5 (quoting *Strickland*, 104 S. Ct. at 2068; citing *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 242 (3d Cir. 2017))).

He also argues that the state courts' objectively unreasonable determination of the facts fails to show that the evidence of his guilt was overwhelming. (*Id.* at 6). He notes that under *Ybarra v. Illinois*, 100 S. Ct. 338, 444 U.S. 85, 62 L. Ed. 2d 238 (1979), "mere presence on the scene of a crime" is insufficient to establish probable cause to arrest, let alone establish guilt beyond a reasonable doubt. (*Id.* at 3, 6 (also citing *Commonwealth v. Goodman*, 465 Pa. 367, 350 A.2d 810 (Pa. 1976) and *Commonwealth v. Hargrave*, 2000 PA Super 5, 745 A.2d 20, 23 (Pa. Super. Ct. 2000) for this**{2024 U.S. Dist. LEXIS 20}** "long standing rule of Pennsylvania Jurisprudence"); *see also* Supp. Reply, ECF No. 34, at 4 (citing *Commonwealth v. Prado*, 481 Pa. 485, 393 A.2d 8 (Pa. 1978)). He points out that just a few weeks before trial the prosecutor requested a continuance to search for more evidence, citing the possibility that the jury would find the existing evidence insufficient: "[D]id somebody else come in and commit this murder after they were off camera, could the jury have reasonable doubt if this is what we have and this is what we're left with. I submit to the Court that they could . . . ." (Reply, ECF No. 8, at 6, 16 (citing N.T. 9/5/14 at 78-79); *see also* Supp. Reply, ECF No. 34, at 4).

Petitioner observes that under *Strickland* the court must consider "the totality of the evidence before the jury" in determining whether counsel's deficient performance constitutes ineffectiveness. (Reply, ECF No. 18, at 5 (citing *Strickland*, 104 S. Ct. at 2069)). He maintains that the court must "look[ ] at the evidence of guilt and its infirmities" to determine if there is "a reasonable probability" that the outcome would have been different. (*Id.* (citing *Brown v. Kauffman*, 425 F. Supp. 3d 395 (E.D. Pa. 2019))).

Throughout Petitioner's briefing, he highlights the following evidence that he contends undermines confidence in the verdict against him. Rhonda's family**{2024 U.S. Dist. LEXIS 21}** and friends had positive things to say about him, such as that he and Rhonda were "like family" and that he was "like a son" to her. (*Id.* at 7 (N.T. 9/10/14 at 132-35, 173-74; N.T. 9/11/14 at 13)). At a hearing shortly before trial the court stated that "it ha[d] found absolutely no evidence presented by the Commonwealth before this Court probative of motive in this case," allegedly undermining the Commonwealth's theory that Petitioner shot Rhonda "during a drug deal gone wrong." (*Id.* at 8 n.6 (citing N.T. 9/5/14 at 85-86); *see also* Supp. Reply, ECF No. 34, at 1). Although Petitioner regularly sold or gave crack cocaine to Rhonda, there were no known problems between them, and he claims that her body was discovered in an alley inaccessible from the one where he kept his drugs. (Hab. Pet., ECF No. 2, at 28-29 (citing N.T. 9/10/14 at 105-06, 110; N.T. 9/11/14 at 45); Reply, ECF No. 18, at 7 (citing N.T. 9/10/14 at 105-06, 173-74); Supp. Reply, ECF No. 34, at 1). On the night of the murder, Tyheem and his mother had visited a neighborhood "speakeasy where a lot of things go on, and where a lot of undesirable people go." (Hab. Pet., ECF No. 2, at 29). Approximately one hour prior to the**{2024 U.S. Dist. LEXIS 22}** murder, Rhonda was caught on the surveillance system with an unidentified man other than Petitioner. (Hab. Pet., ECF No. 2, at 27 (citing N.T. 9/9/14 at 88); Reply, ECF No. 18, at 8 (citing N.T. 9/11/14 at 88, 90); Supp. Reply, ECF No. 34, at 2). When police arrived, they encountered a man sitting in his truck in the general area of the crime scene, but he stated he had just arrived and the police did not question him further. (Hab. Pet., ECF No. 2, at 27-28; Reply, ECF No. 18, at 2).

Approximately one hour after the murder, Petitioner's live-in girlfriend saw him asleep on a futon at their residence. (*Id.* at 10 (citing N.T. 9/11/14 at 121)). She further testified that she had never seen Petitioner with a gun. (*Id.*).

Petitioner further avers that the surveillance system was located inside a convenience store in the neighborhood and the system's microphone could not pick up sounds outside like passing automobiles, bouncing basketballs or people talking, even when turned all the way up. (Hab. Pet., ECF No. 2, at 32 (citing N.T. 9/10/14 at 35-38, 76-77, 81-83, 87; Reply, ECF No. 18, at 9-10 (citing N.T. 9/10/14 at 76-87))). Neither side retained an audio expert, and Detective Dunlap, whom**{2024 U.S. Dist. LEXIS 23}** the prosecution called to analyze the surveillance evidence, was by his own admission "not very good with sound." (Hab. Pet., ECF No. 2, at 32; Reply, ECF No. 18, at 10 (citing N.T. 9/10/14 at 79-93)). Petitioner also takes issue with Dunlap's calculation that the time-stamp on the surveillance video was almost 10 minutes behind real time because it would place the responding officers' call to the police station reporting the discovery of Rhonda's body at a time when both officers still remained in their vehicle. (*Id.* at 9, 12). Petitioner concludes that the true discrepancy was in fact "much shorter . . . ." (*Id.* at 12).

As for Tyheem's testimony that Petitioner gave inconsistent accounts or a phony alibi regarding his whereabouts at the time of the murder, Petitioner notes that Tyheem admitted that he had been drinking alcohol and smoking phencyclidine (PCP) and that his memory of events may have been compromised. (Hab. Pet., ECF No. 2, at 35-36 (citing N.T. 9/11/14 at 98-99); Reply, ECF No. 18, at 10 (citing N.T. 9/11/14 at 60); *see also* Supp. Reply, ECF No. 34, at 4 (citing *Wilson v. Beard*, 589 F.3d 651, 666 (3d Cir. 2009))).7 Petitioner also submits that a bracelet possibly belonging to Rhonda and discovered at what responding**{2024 U.S. Dist. LEXIS 24}** officers labeled a "secondary crime scene" indicates "a robbery not committed by Petitioner," but this bracelet has gone missing from police custody. (Reply, ECF No. 18, at 10-11). Moreover, he reiterates his assertion from his petition that Rhonda had four gunshot wounds but "the popping noises numbered five followed by a strange clicking noise." (*Id.* at 12).

Petitioner maintains that a court could find overwhelming evidence of guilt only if it cherrypicked the evidence against him, not if it looked at this entire body of evidence. (*Id.* at 11 (citing *Brown*, 425 F. Supp. 3d 395)). He points out that there was no eyewitness, firearm, DNA or motive evidence tying him to the murder, and even the prosecutor admitted that jurors could have reasonable doubts as to his guilt. (Hab. Pet., ECF No. 2, at 28 (citing N.T. 9/11/14 at 187); Reply, ECF No. 18, at 11). He insists that he has rebutted the presumption of correctness attached to the state court's factual findings under 28 U.S.C. § 2254(e)(1) with clear and convincing record evidence. (Reply, ECF No. 18, at 12 (citing *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009))).

Petitioner continues that a curative instruction was required because the trial court and the prosecutor had previously stated that the rumor testimony would not be**{2024 U.S. Dist. LEXIS 25}** admitted for the truth of the matter after defense counsel objected and because no reasonable counsel would make a strategic choice to allow "this prejudicial, untested testimony, to be heard especially when two other Commonwealth witnesses testified that Petitioner denied being with Ms. Williams at the time of her murder." (*Id.* at 12-13 (citing *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985); *Atkins v. Hooper*, 979 F.3d 1035 (5th Cir. 2020)) (additional citations omitted);8 Supp. Reply, ECF No. 34, at 3-4). He criticizes the PCRA court's determination that a curative instruction would be "fruitless" as: (1) contrary to *Strickland*'s directive to review the proffered instruction in the context of the totality of the evidence; and (2) problematic given the court's finding that the underlying claim had merit and that counsel's failure to act constituted deficient performance. (Reply, ECF No. 18, at 14). He insists that the evidence he previously cited shows that the evidence of guilt in this case was not overwhelming. (Supp. Reply, ECF No. 34, at 4 (citing *Moore v. Rivello*, No. 20-838, 2022 WL 1749250

(E.D. Pa. May 31, 2022))). He acknowledges that the deficient performance must rise to the level that counsel was effectively "not functioning as the counsel guaranteed by the Sixth Amendment," thus calling into question the fairness of the proceeding, but he argues that counsel's**{2024 U.S. Dist. LEXIS 26}** failure to make a "critical" objection or ask for a curative instruction due to inattention rather than a strategic choice establishes sufficient prejudice. (*Id.* at 14-15 (citations omitted)).

Petitioner maintains that the record in this case "arguably supports" the conclusion that it is reasonably probable that one or more jurors would accept the rumor testimony for its truth (i.e., that Petitioner killed Rhonda) because the trial was short, with no other "direct evidence" of Plaintiff's criminality (other than his drug dealing). (*Id.* at 15). He insists that the testimony was distinct from any "untainted evidence" of guilt, which was also not so overwhelming that the testimony's prejudicial effect rendered it "insignificant by comparison . . . ." (*Id.* at 15-16 (citing *Commonwealth v. Markman*, 591 Pa. 249, 916 A.2d 586 (Pa. 2007) (dissenting opinion))). He submits that the introduction of this testimony provided the Commonwealth "an unfair bolstering of its limit[ed] evidence that helped to 'cement' its case." (*Id.* at 15 (citing *United States v. Sallins*, 993 F.2d 344 (3d Cir. 1993); *Commonwealth v. Young*, 561 Pa. 34 (2000))).

In its supplemental response, the Commonwealth adds that even if the Superior Court on PCRA appeal incorrectly applied a preponderance of the evidence standard not found in**{2024 U.S. Dist. LEXIS 27}** *Strickland*,9 Petitioner's claim should be dismissed on *de novo* review as meritless. (Supp. Resp., ECF No. 31, at 6-15). It reasserts that trial counsel was not ineffective in failing to object or seek a limiting instruction because the testimony at issue, in which Petitioner also denied his involvement in the murder, was at least partially helpful to him. (*Id.* at 10). It quotes the trial court's pretrial discussion of the mixed nature of the testimony and decision to defer ruling on its admissibility for that reason, as well as counsel's agreement to this course of action. (*Id.* at 11). The Commonwealth submits that counsel acted reasonably in not opposing the admissibility of this evidence, which included Petitioner's immediate denial of participation in the murder and an explanation that he would not have killed Rhonda because his mother had been killed. (*Id.* at 14). The Commonwealth highlights the helpful nature of this portion of the testimony by pointing out that the prosecution had moved *in limine*, unsuccessfully, to exclude it. (*Id.*). It notes that any objection or request for a curative instruction as to only the unhelpful portion of the testimony would have deprived Petitioner of the**{2024 U.S. Dist. LEXIS 28}** benefit of the helpful portion as well because the court would have excluded it in light of its statement that the testimony should be admitted or excluded in its entirety. (*Id.*). Thus, it concludes, counsel acted reasonably. (*See id.*).

Additionally, the Commonwealth insists that Petitioner cannot establish the prejudice required under *Strickland* because the remainder of the evidence against him was "compelling." (*Id.*). It notes that video surveillance captured Rhonda and him walking off camera 30 seconds before four gunshots are heard on the audio. (*Id.* at 14 (citing N.T. 9/9/14 at 45-50, 157)). The pair headed in the direction of a nearby narrow alley, only wide enough to fit someone standing sideways, where Rhonda's body was discovered minutes later with four close-range gunshot wounds. (*Id.* at 14).

2. Analysis

This Court agrees that it is not possible to tell if the Superior Court applied a standard that comports with *Strickland*. The court clearly applied Pennsylvania's three-pronged test for ineffectiveness, which has been held not contrary to *Strickland, Werts*, 228 F.3d at 196, and it noted, also consistent with *Strickland*, that prejudice must be shown by "a reasonable probability." *Roseboro*, 2021 WL 2012602, at *2. However, it further referenced a**{2024 U.S. Dist. LEXIS 29}** preponderance-of-the-evidence standard, which was explicitly disavowed in *Strickland*. 466 U.S. at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel

cannot be shown by a preponderance of the evidence to have determined the outcome."). Because the Superior Court may have applied an incorrect standard, this Court conducts a *de novo* review. *See Dennis v. Sec'y, Pa. Dep't of Corrs.*, 834 F.3d 263, 284 (3d Cir. 2016) ("the federal court owes no deference to the state court" when its "ruling is based on a reasoned, but erroneous, analysis"); *see also Johnston v. Mitchell*, 871 F.3d 52, 59 (1st Cir. 2017) ("Only when a petitioner's claims are exhausted in state court but the state court fails to consider them on the merits or *resolve them on adequate and independent state law grounds* do we review them *de novo*.") (quotation omitted) (emphasis added); (Reply, ECF No. 18, at 14 (subsection entitled: "*De Novo* Review - Ineffective Counsel - Performance Prong")).

Applying *Strickland*'s two-pronged ineffectiveness test *de novo*, this Court rejects Petitioner's claim because: (1) defense counsel did not perform deficiently in failing to object to or seek a curative instruction regarding the subject testimony, which indisputably benefited Petitioner in part; and (2) even if counsel**{2024 U.S. Dist. LEXIS 30}** performed deficiently, Petitioner was not prejudiced in light of the other evidence against him.

a. Deficient Performance

As noted, to establish deficient performance, a petitioner must overcome the court's high deference to the "strong presumption" that counsel's conduct fell within a "wide range" of reasonable professional conduct such that his or her errors were so serious that they effectively deprived the petitioner of "counsel" as guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 689. Here, any error by trial counsel in not further opposing Tyheem's testimony did not rise to this level because it partially benefited Petitioner. Although Petitioner fixates on the portion of the testimony repeating a neighborhood rumor that he had been involved in Rhonda's killing, he disregards the remainder of it in which Tyheem stated that Petitioner immediately and flatly denied the rumor and questioned why he would have done such a thing, particularly since he had lost his own mother. (*See* N.T. 9/11/14 at 61 ("He said, no. Why would I do that? I lost my mom . . . .")). That this testimony benefited Petitioner is reflected in the fact that the prosecutor had previously moved *in limine*, unsuccessfully, to exclude it. (N.T. 9/10/14**{2024 U.S. Dist. LEXIS 31}** at 1-8). Addressing that motion, the trial court also observed that the quoted portion of the testimony was "in his interest" and acknowledged that counsel therefore might choose to have it admitted, notwithstanding that the court made clear that it would only come in alongside Tyheem's statement about the rumor of Petitioner's involvement. (*Id.* at 6). Given this mixed nature of the testimony, containing statements harmful to Petitioner but also others beneficial to him, this Court cannot say that counsel's course in proceeding with all the testimony, both the good and the bad, constituted deficient performance under *Strickland*.

b. Prejudice

Even if trial counsel had performed deficiently, Plaintiff's claim would fail because he was not prejudiced in light of other, damning evidence against him. To demonstrate prejudice, Petitioner must show that the result of his trial is not reliable and that it is reasonably probable that it would have concluded differently without counsel's alleged errors. *Strickland*, 466 U.S. at 687, 694. In this case, video surveillance showed Rhonda and Petitioner, alone, walking off camera 30 seconds before four gunshots are heard on the audio and just minutes before 9-1-1 calls about "a woman screaming**{2024 U.S. Dist. LEXIS 32}** in an alley followed by gunshots." (N.T. 9/9/14 at 50, 52, 158; Hab. Pet., ECF No. 2, at 22, 27, 30 (citing N.T. 11/25/19 at 85-86); *Roseboro*, CP-51-CR-0001397-2013, at 14 (ECF No. 31-2)). On the video, Rhonda and Petitioner walked in the direction of a nearby narrow alley, approximately 55 feet away and just over three feet wide, where her body was discovered minutes later with four close-range gunshot wounds, including to the back of the head. (N.T. 9/9/14 at 51, 55, 157; Hab. Pet., ECF No. 2, at 22 (citing N.T. 11/25/19 at 85-86); *Roseboro*, CP-51-CR-0001397-2013,

at 14 (ECF No. 31-2)). Despite this surveillance, Petitioner insisted to his neighbors the following day that he had not been with Rhonda on the night of her murder, claiming instead to have been at a bar, then another bar, and later with Tyheem, who refuted this assertion. (N.T. 9/10/14 at 152, 172, 181 (Negron testimony: "Well, first he said he was at Buffy's, then he said he was at the Yellow Bird, then he was saying I was with you, Randy.")10; N.T. 9/11/14 at 60-61 (Tyheem's testimony denying he had seen Petitioner on the night of his mother's murder)). This evidence of Petitioner's guilt was overwhelming, and it is therefore not reasonably probable that a jury would have**{2024 U.S. Dist. LEXIS 33}** reached a different result if counsel had not committed the purported errors described above.

Nonetheless, Petitioner makes multiple arguments and points to several pieces of evidence allegedly supporting a contrary conclusion. He first contends that his presence at or near the crime scene was insufficient to sustain his conviction. (Hab. Pet., ECF No. 2, at 24; Reply, ECF No. 18, at 3, 6 (citations omitted)). But the jury had significantly more evidence of his guilt to consider than simply his geographic proximity to the scene. As noted, despite his denials of having been in the area, Petitioner was the last person seen with Rhonda, within 30 seconds before her murder, when four gunshots are heard on the audio from the surveillance. The surveillance also showed the pair walking in the direction of where her body, shot in the head and elsewhere, was located shortly thereafter in a tiny alley only wide enough for people to walk in single-file.11 Petitioner cites only one federal12 case in purported support of his position, *Ybarra*, 444 U.S. 85, but even he acknowledges that the facts in that case "are different than [in] Petitioner's case." (Reply, ECF No. 18, at 3); *see Ybarra*, 444 U.S. at 84-85, 96 (warrant to search a bar and its bartender**{2024 U.S. Dist. LEXIS 34}** for narcotics did not permit search and seizure from patron on the premises).

Petitioner lodges several complaints about the surveillance video. Initially, he notes that Dunlap, who testified at trial about the time-stamp on the video, calculated that it was nine minutes and 55 seconds behind the real time, but that this discrepancy was too long, a fact that the trial court noted in a sidebar with counsel while further determining that the matter was for the jury's consideration. (Hab. Pet., ECF No. 2, at 30-31, 33-35, 37-38; Reply, ECF No. 18, at 9, 12 (citing N.T. 9/9/14 at 66; N.T. 9/10/14 at 26, 55-56); *see also* N.T. 1/30/13 (Detective Dove's preliminary hearing testimony that the time-stamp was "a little slow") (cited by Petitioner in his brief)). However, Petitioner fails to demonstrate why this discrepancy is significant.13 The video showed Rhonda and Petitioner walking off camera together at 1:57:43 a.m. according to the time stamp, which would have been approximately 2:07:38 a.m. according to Dunlap's calculations. (N.T. 9/11/14 at 76). Within two minutes, at 2:09 a.m., a 9-1-1 caller reported hearing a woman screaming in an alley**{2024 U.S. Dist. LEXIS 35}** followed by gunshots. (N.T. 9/9/14 at 50). If the time-stamp was not nearly 10 minutes off, but in fact only "a little slow," as Dove testified, the period between the screaming and gunshots and the emergency call may have been longer than two minutes,14 but it is not reasonably probable that any jurors would have reached a different conclusion regarding Petitioner's guilt based on this inconsequential factual change. Nor is it reasonably probable that a different outcome would have accrued if Rhonda's body was discovered closer to 30 than 22 minutes15 after she was last seen walking off camera with Petitioner. As noted in the preceding paragraph, the critical fact regarding timing was not the precise length of the (maximum ten-minute) discrepancy between the video time-stamp and real time, but the fact that no more than 30 seconds after Rhonda and Petitioner walked off camera together in the direction of the nearby alley where her body was subsequently found with four gunshot wounds, four gunshots are heard on that same surveillance. (*See* Hab. Pet., ECF No. 2, at 22 (citing N.T. 11/25/19 at 85-86 (PCRA court observing that this was the critical fact and that "[i]t doesn't matter what**{2024 U.S. Dist. LEXIS 36}** time it is" when this occurred))). Petitioner posits that if Dove's time calculation had been introduced, it would have supported his claim to the neighbors that he was "not around" when Rhonda was killed, (*see* Hab. Pet., ECF No. 2, at 38), but it would have done nothing of the sort

because it would not have affected the length of time between when the pair disappeared from view on the camera and when the gunshots are heard.

Additionally, Petitioner takes issue with the audio from the surveillance. He notes that Dunlap conceded at trial that he was "not very good with the sound" from surveillance systems (because his "training is in video"), but this admission merely went to his credibility, to be considered by the jury similar to his discrepancy calculations. (N.T. 9/10/14 at 79). It does not call into question whether the result of the trial would have been the same but for counsel's allegedly deficient performance. Petitioner observes, moreover, that: (1) the surveillance video was inside of a convenience store and unable to pick up external sounds like a bouncing basketball or passing automobiles; and (2) in addition to the four gunshots heard on the audio, it also captured a fifth**{2024 U.S. Dist. LEXIS 37}** "pop" and "a strange clicking noise." (Hab. Pet., ECF No. 2, at 23; Reply, ECF No. 18, at 9-10, 12 (citations omitted)). However, Petitioner fails to explain how the audio picking up gunshots but not a bouncing basketball or passing automobile is inconsistent. Ultimately, the jury, as the finder of fact, was empowered to determine that the audio captured four gunshots, or even if it did reflect an additional gunshot(s), that Petitioner was nonetheless Rhonda's murderer. (*See* N.T. 9/10/14 at 76 (Dunlap characterizing the fifth pop as only "light"); *cf.* N.T. 11/25/19 at 85-86 (PCRA court observing that: "four pops are heard which are gunshots are heard because the case is over and, obviously, the jury thought they were gunshots")). Petitioner's criticisms of the surveillance audio evidence do not render the jury's verdict unreliable, even accounting for counsel's allegedly deficient performance.

Petitioner further claims that the evidence showed he had a good relationship with Rhonda and that there was no evidence of motive,16 no DNA or murder weapon recovered, and no eyewitnesses, but these facts fail to establish that the evidence against him was not sufficient to render the chances of**{2024 U.S. Dist. LEXIS 38}** a different result improbable. *See Brown v. Wenerowicz*, 663 F.3d 619, 626, 630 (3d Cir. 2011) (district court granted habeas claim of ineffective assistance of trial counsel because "the evidence of guilt was hardly overwhelming" where, *inter alia*, "no murder weapon was ever found," but on appeal the Third Circuit held that petitioner nonetheless suffered no prejudice and reversed); *Solano v. Beard*, No. 07-2703, 2020 WL 13812286, at *11 (E.D. Pa. Aug. 21, 2020) (rejecting ineffectiveness of trial counsel claim despite lack of evidence of Petitioner's motive to commit the murder); *Chambers v. Beard*, 3:06-CV-980, 2008 WL 7866182, at *22 (E.D. Pa. Mar. 5, 2008) ("the absence of Petitioner's [DNA] at the crime scene would not prove that he did not commit the murder, only that he did not leave his DNA behind"); *Buehl v. Vaughn*, No. 95-5917, 1996 WL 752959, at *16-17 (E.D. Pa. Dec. 31, 1996) (rejecting claim of trial counsel ineffectiveness on lack of prejudice grounds because "the evidence of Petitioner's guilt was so strong that it rendered any such error harmless," even though "[t]here were no eyewitnesses to the murders . . . , and Petitioner's fingerprints were not found at the scene of the crime").

Petitioner claims that the lack of evidence of motive, physical evidence, murder weapon, or eyewitnesses17 render this case similar to *Moore*, 2022 WL 1749250, where the district court rejected a magistrate judge's report and recommendation finding on *de novo* review that the petitioner suffered no actual**{2024 U.S. Dist. LEXIS 39}** prejudice from his counsel's failure to object to an unconstitutional reasonable doubt jury instruction, thus dooming his claim of ineffective assistance. However, *Moore* is readily distinguishable. First, in that case the Commonwealth conceded the existence of prejudice, which the district court found "persuasive." *Id.* at *17. Second, the case against Petitioner hinged upon the testimony of three witnesses, none of whom claimed to have seen the shooting. *Id.* Indeed, two of these witnesses "basically recanted" their statements, and the third "had several material consistencies in his version of events." *Id.* Third, and perhaps most importantly, in this case video and audio surveillance places Petitioner with the victim, just moments before she was shot and killed off camera, walking in the direction of where her body was discovered. Moreover,

despite this video evidence, the following day Petitioner denied to his neighbors that he was with Rhonda on the night of her murder. (*See* N.T. 9/10/14 at 152, 172, 181). *Moore* lacked similar inculpatory evidence.

Petitioner also cites my report and recommendation in *Brown v. Kauffman*, 425 F. Supp. 3d 395 (E.D. Pa. 2019) (adopting report and recommendation), in which I concluded that the petitioner was prejudiced**{2024 U.S. Dist. LEXIS 40}** by the same reasonable doubt jury instruction issued in *Moore*. I began my prejudice analysis by observing that in cases where an improper reasonable doubt instruction is given (a different issue than the one here), "prejudice is presumed." *Brown*, 425 F. Supp. 3d at 412 (citation omitted). Further, similar to *Moore*, the evidence tying Brown to the crime was not video and/or audio surveillance but a statement and testimony from two witnesses. *Id.* I noted that this evidence was "infirmed" because the witness who had given the statement later testified at trial that "he never saw the shooter at all" and the other witness had expressed doubt about his identity at an on-the-street police "show-up" and only pegged him as the perpetrator "after being showed a single photograph of only Petitioner" at the police station. *Id.* at 412-13 & n.7. *Corbin v. Tice*, No. 16-4527, 2021 WL 2550653 (E.D. Pa. June 21, 2022), cited by Petitioner and again involving this jury instruction, is similarly distinguishable because in that case there were also "holes in the prosecution's case," including "witnesses with substantial axes to grind against [p]etitioner." *Id.* at *6. Petitioner points to no similar evidence of bias here. Moreover, unlike in this case, no video or audio evidence linking the petitioner to the crime was introduced**{2024 U.S. Dist. LEXIS 41}** in *Corbin*. *See generally Corbin*, 2021 WL 2550653.

Petitioner's remaining citation along these lines is unavailing as well. In *Bridges v. Beard*, 941 F. Supp. 2d 584 (E.D. Pa. 2013), a capital case, the court found prejudice resulting from counsel's deficient performance in failing to investigate mitigating factors for sentencing because a reasonable investigation would have turned up several. *Id.* at 620-21. In concluding a reasonable probability existed that the jury would not have returned a death sentence absent counsel's errors, the court "particularly" highlighted the fact that the jury had deadlocked before the trial judge adjourned proceedings for the evening and reconvened the following day. *Id.* Nothing similar occurred in this case.

Petitioner repeatedly observes that the prosecutor himself suggested a few weeks prior to trial that on the instant record jurors could harbor reasonable doubts as to whether Petitioner committed the murder. (*See, e.g.*, Hab. Pet., ECF No. 2, at 38 (citing N.T. 9/5/14 at 78-79)). However, this prosecutorial statement, made in the course of requesting a continuance of the trial to further build the case against Petitioner, was not evidence. *See United States v. Sandini*, 888 F.2d 300, 311 (3d Cir. 1989) ("the arguments of counsel are simply not evidence").18

Petitioner also complains that**{2024 U.S. Dist. LEXIS 42}** Tyheem's admitted use of alcohol and PCP shortly before their encounter the day after the murder may have affected his recollection of it. (*See* N.T. 9/11/14). Nonetheless, "[e]ven when a witness admits to using drugs or alcohol in the hours preceding an incident, the jury has the right to assess the witness's credibility and the court may not substitute its judgment for that of the finder of fact."19 *Cruz v. McGrady*, No. 09-36, 2010 WL 4814692, at *5 (E.D. Pa. Nov. 24, 2010) (denying habeas relief).

Petitioner points to two additional witnesses, Lydia Negron and Dominque Jackson, who were present when he encountered Tyheem and repeated at trial Petitioner's claims that he had not been with Rhonda on the night of the murder. (Reply, ECF No. 18, at 10; Supp. Reply, ECF No. 34, at 3-4). Negron testified that Petitioner "said he wasn't in the neighborhood," and Jackson testified that Petitioner stated that he was at a bar, then a different bar, before claiming to have been with Tyheem.20 (N.T. 9/10/14 at 152, 172, 181). But this testimony, which merely repeated Petitioner's

own self-serving denials about not being in the neighborhood, does not undermine the evidence against Petitioner, who later admitted that he was the person on the video with Rhonda just seconds{2024 U.S. Dist. LEXIS 43} before she was killed. (Hab. Pet., ECF No. 2, at 22 (citing N.T. 11/25/19 at 85-86)).

Petitioner suggests a possible alibi defense insofar as his live-in girlfriend and Rhonda's cousin, Shaquilla Harmon, testified that she saw him asleep on their futon approximately one hour after the murder, but Petitioner lived in the neighborhood of the murder and thus this testimony, even if credited, is not inconsistent with him having killed Rhonda. (*See* Hab. Pet., ECF No. 2, at 37 ("They lived a short walk away from the scene of the crime."); N.T. 9/10/14 at 117); *see also Jackson v. Diguglielemo*, No. Civ.A. 03-5398, 2004 WL 2064895, at *11 (E.D. Pa. Sept. 14, 2004) (witness's "estimate that she saw petitioner at about 10 p.m. did not make it impossible for him to have been at the scene of the murder, which was only four blocks away, and commit the crime by 10:30 p.m. Thus, an alibi defense was not established . . . .").

Finally, Petitioner points to a few additional alleged facts, but their impact, if any, is purely speculative. He appears to suggest that two other men may have been involved in Rhonda's murder instead: an individual with whom she was seen on the surveillance video approximately one hour before her killing and another sitting in his truck in the vicinity of the crime scene{2024 U.S. Dist. LEXIS 44} and encountered, but not questioned, by police upon their arrival. (Reply, ECF No. 18, at 2, 18 (citing N.T. 9/11/14 at 88, 90); Supp. Reply, ECF No. 34, at 2). He also notes that on the night of her murder Rhonda visited an unlicensed neighborhood bar frequented by "undesirable people." (Hab. Pet., ECF No. 2, at 29). But Petitioner provides no evidence of any other person's involvement in the murder, and his speculation does not render the case against him any less overwhelming, particularly in light of the far stronger evidence connecting him to the murder in the form of surveillance showing him with Rhonda in the last moments of her life, walking in the direction where her body would be found shortly thereafter, and his later denials of having been "around." Likewise, Petitioner's undeveloped contention that responding officers established a "secondary crime scene" for a robbery not committed by him after they found a bracelet "possibl[y] belonging to Rhonda" is of no moment. (Reply, ECF No. 18, at 10-11). Instead of explaining how this fact purportedly undermines the evidence against him, Petitioner simply claims that the bracelet disappeared and was never tested for gunpowder{2024 U.S. Dist. LEXIS 45} or DNA evidence. (*Id.* at 10). Even if this unsubstantiated contention (for which Petitioner fails to cite any record evidence) is true, it does not change this Court's conclusion that Petitioner has failed to establish a reasonable probability that his trial would have concluded differently in the absence of the alleged errors made by defense counsel.

For these reasons, the Court respectfully recommends that Petitioner's claim of ineffective assistance of trial counsel for failure to object or seek a curative instruction regarding the testimony at issue be denied.

B. Broken Promises

In Petitioner's second claim, he asserts that trial counsel was ineffective for breaking promises to the jury made in his opening statement.21 (Hab. Pet., ECF No. 2, at 10). In his opening statement, defense counsel made various "promises" to the jury that he claimed would be fulfilled by the conclusion of trial, including the following:

> The evidence will show . . . [that] in terms of the time that is displayed on the video and the time that the police arrived in response to the gunshots[,] . . . [the prosecution is] going to try to suggest to you that the period of time is within seconds of their [Petitioner{2024 U.S. Dist. LEXIS 46} and Rhonda's] being together and it really is many, many minutes. I make that promise to you, as well.

> **Why? Because the assigned detective [Detective Dove] in this case, ladies and gentlemen, testified at a prior hearing like Her Honor talked about and said that he retrieved the videotape and that it was 1:56, 1:57 in the morning. He made a composite and he checked the video-recorder for his time and it was off only a minute or two.**
>
> The problem is that it doesn't fit with their scheme. So, they are going to have another witness come in and tell you that the videotape time on the camera is 9 minutes and 55 seconds off to bring it in close proximity to the 911 call . . . .(N.T. 9/9/14 at 41) (bolded in petition).

At trial, counsel did not call Dove as a witness or attempt to have his preliminary hearing testimony regarding the shorter time discrepancy admitted into evidence on the basis of Dove's unavailability. (*See* Hab. Pet., ECF No. 2, at 40-41). Instead, the substance of Dove's testimony regarding the discrepancy was presented via counsel's questioning of Dunlap and another investigating detective, Harkins. (*See* N.T. 9/10/14 at**{2024 U.S. Dist. LEXIS 47}** 66-67 (counsel positing that Dove "testified previously" that the surveillance "was a little slow in comparison with real[ ]time, . . . it was within minutes off"); 9/11/14 at 163 (same)). At the outset of the trial, the prosecutor had objected to this course on the basis that Dove was in fact available to testify, but the trial court did not sustain the objection. (N.T. 9/10/14 at 13-14).

At the conclusion of the evidence but prior to closing statements, the prosecutor renewed his objection:

> [Prosecutor:] Counsel has repeatedly cross-examined other witnesses with respect to a few sentences from Detective Dove's preliminary hearing testimony. That is not evidence. It is hearsay. The detective did not testify in this case. He was not subject to cross-examination. So I believe that it would be improper for him to argue and state to the jury again, as he did in his opening, as he has done through cross-examination, those sentences which are pure hearsay. They are not evidence. He is only permitted to argue the evidence presented.
>
> [Defense:] I need to argue that, Judge, because I asked Dunlap about it. I asked Harkins about it and this was a statement under oath by a detective. If they didn't**{2024 U.S. Dist. LEXIS 48}** like it, they could have called Dove. I happen to like the statement. It actually helps me. So why can't I argue it? It is in evidence when I cross-examined the witnesses.
>
> . . . .
>
> [Prosecutor:] Questions are not evidence. The witnesses said I don't know what the detective testified to. I was not in the room. Questions are not evidence.
>
> . . . .
>
> Questions are not evidence, Your Honor. Nobody said yes to any of his questions. Evidence comes from the witness stand.(N.T. 9/12/2023 at 13-15)

After reconfirming with the prosecutor that Dove was available, the court stated that for purposes of trial his statements were "under oath hearsay." (*Id.* at 14, 17). It explained that for the statements to be admitted Dove's unavailability should have been formally established, but the court nonetheless permitted defense counsel to reference the testimony in his closing22 because the testimony was "critical" and the likelihood that even if counsel had subpoenaed Dove, he would not have appeared due to his pending criminal matter stemming from on-the-job misconduct. (*Id.* at 19-23).

Petitioner raised his broken promises claim at the initial level PCRA stage, although he notes that the court did not take evidence**{2024 U.S. Dist. LEXIS 49}** regarding it at the evidentiary hearing.23 (Hab. Pet., ECF No. 2, at 47). Nonetheless, the PCRA court disposed of the claim, stating: "The claim that

trial counsel was ineffective for failing to present the testimony of Detective Dove after promising to do so in his opening statement is belied by the record. Trial counsel never promised to present the testimony of Detective Dove in his opening statement." *Roseboro*, CP-51-CR-0001397-2013, at 30 (ECF No. 31-2). It then quoted the portion of counsel's opening, also quoted above, referring to the dispute over the length of the time discrepancy and the testimony "at a prior hearing" from "the assigned detective" that the discrepancy was no more than two minutes. *Id.* (citation omitted). The PCRA court continued:

> What trial counsel promised the jury was that the defense would show that there was a discrepancy between the Commonwealth's theory of the timeline and the defense theory of the timeline for the murder, and that the defense timeline was accurate. Trial counsel never mentioned Detective Dove by name, or promised the jurors that they would hear from him. Moreover, Detective Dove did not recover the video. It was actually recovered by Detective Dunlap, who testified that he extracted the**{2024 U.S. Dist. LEXIS 50}** video at the request of Detective Dove and Detective Harkins. N.T., 9/10/2014 at 25-39.
>
> Furthermore, the statement made by Detective Dove at the preliminary hearing was used by trial counsel to cross-examine both Detective Dunlap and Detective Harkins. N.T., 9/10/201 at 66-67; N.T., 9/11/2014 at 162-64. Trial counsel also referred to Detective Dove's statement in his closing argument. N.T., 9/12/2014 at 11-23, 67-68. Therefore this issue has no merit.*Id.* at 31. On appeal, to the extent that Petitioner raised this claim, *see supra* n.21, the Superior Court adopted this reasoning. *Roseboro*, 2021 WL 2012602, at *2.

1. The Parties' Positions

Petitioner complains that no evidence admitted during trial or changes in trial strategy rendered counsel's decision to forego Dove's testimony a reasonable course of professional conduct. (Hab. Pet., ECF No. 2, at 45). He claims that, instead, counsel did not present the testimony because he misunderstood three legal principles: (1) that testimony from a prior proceeding is hearsay, even though the individual is not testifying in the instant proceeding and has not been ruled inadmissible; (2) that attorneys' questions and arguments do not constitute evidence for the jury's consideration (as**{2024 U.S. Dist. LEXIS 51}** the trial court instructed the jury);24 and (3) that it is not the court's duty to locate critical witnesses. (*Id.* at 45-47). He further notes that counsel did not interview the police witnesses to learn what Dove might have discussed with them. (*Id.* at 47). Reiterating that attorney questioning is not evidence, he additionally posits that counsel's statement "at the end of Detective Harkin[s]'s testimony that 'Dove may have lied'25 also served to cast grave doubt on counsel's 'no evidence' promises." (*Id.*; *see* N.T. 9/11/14 at 164).

Petitioner enumerates four sets of "facts that clearly an[d] convincingly show that the PCRA court's reasoning is not supported by the record and cannot be reconciled through fair-minded disagreement." (Hab. Pet., ECF No. 2, at 50). First, he again repeats that attorneys' questions and arguments are not evidence, such that the PCRA court's observation that counsel referred to Dove's testimony in his cross-examination of law enforcement witnesses and in his closing is of no moment. (*Id.*). Second, Petitioner maintains that: (1) the PCRA court incorrectly stated that "Detective Dove did not recover the video, Detective Dunlap did," when in fact Dove testified**{2024 U.S. Dist. LEXIS 52}** at the preliminary hearing that he was the one who "went to the store and downloaded some of the video," (*Id.* at 51 (citing N.T. 1/30/13 at 82)); *see also Roseboro*, CP-51-CR-0001397-2013, at 30 (ECF No. 31-2); and (2) Dove's preliminary hearing testimony that the video was "a little slow" contradicts Dunlap's testimony and "was more trustworthy."26 (*Id.* at 51). Third, Petitioner disputes the state court finding that counsel only promised to establish that the defense's view of the time discrepancy on the video was more accurate, not that Dove's testimony would be presented, because

in his view "[t]rial counsel clearly linked the court's referenced promised evidence to the assigned Detective Dove." (*Id.*). Fourth, and relatedly, he insists that counsel's reference in his opening to the prior testimony of the "assigned detective," a status borne out by the subsequent trial evidence, establishes that "counsel did promise to present the testimony of Detective Dove . . . ." (*Id.* at 51-52).

Additionally, Petitioner points to the trial court's prefatory statements to the jury at the start of trial that an opening is an "outline of the case" that the attorneys "believe you will see come from the witness stand" and that the jury "should**{2024 U.S. Dist. LEXIS 53}** look for it [i.e., what the attorneys say] to come out in evidence." (*Id.* at 52 (quoting N.T. 9/10/14 at 4)). He references unspecified "[m]any other cases, some federal," where courts have allegedly "upheld finding[s] of ineffective counsel for making promises without naming the person or other part[ie]s in the opening promises." (*Id.* at 52-53). He reiterates that the PCRA court did not permit testimony on this issue at the evidentiary hearing and that on appeal the Superior Court simply adopted the lower court's reasoning while noting that counsel did not mention Dove by name in his opening. (*Id.* at 53). Further, he revisits his *Strickland* prejudice argument, arguing that counsel's mistakes rendered the trial unfair and that the totality of the evidence does "not amount to overwhelming evidence of guilt and shows that Petitioner was [merely] on or near the scene of the homicide." (*Id.*).

Quoting the portion of counsel's opening statement at issue, the Commonwealth counters that counsel promised only that the evidence would show that the period between Rhonda and Petitioner's walking off camera together and her being shot was "many, many minutes" rather than "within seconds" as the prosecution claimed,**{2024 U.S. Dist. LEXIS 54}** not that the jury would necessarily hear Dove's testimony. (Resp., ECF No. 15, at 10). It also claims that Dove's preliminary hearing testimony was admitted at trial, consistent with counsel's promise. (*Id.*). It asserts that the state court reasonably concluded that this claim lacked merit when it: (1) determined that counsel had never mentioned Dove by name or promised jurors that they would hear his testimony, and (2) noted that counsel used Dove's prior testimony to cross-examine two detectives, including Dunlap, who recovered the video from the store. (*Id.* at 11).

In Petitioner's reply, he parses the PCRA court's reasoning (later adopted by the Superior Court) into five findings and argues that each was unreasonably determined, overlapping much of his opening brief in the process. First, he again faults the court's determination that counsel never promised to present Dove's testimony, pointing to the aforementioned statements by defense counsel in his opening and the prosecution's purported seizing upon the "unfulfilled promises." (Reply, ECF No. 18, at 17 (citations omitted)). Second, Petitioner continues to attack the conclusion that counsel did not mention Dove by name in his**{2024 U.S. Dist. LEXIS 55}** opening because he referenced only "the assigned detective," which was confirmed by subsequent testimony as Dove, and because the trial court instructed the jury that an opening is "an outline of the case." (*Id.* at 17-18 (citations omitted)). Third, Petitioner takes issue with the court's "somewhat confusing" conclusion that what counsel promised was that the evidence would show a discrepancy between the prosecution's and defense's versions of the timeline of events. (*Id.*). He agrees that "this was the exact promise made by trial counsel," along with a promise to present supporting testimony from Dove, but complains that the only individual in a position to provide such testimony, as confirmed throughout trial, was Dove himself. (*Id.* at 18 (citations omitted)). Fourth, he reiterates that Dove was the detective who recovered the surveillance, noting Dove's preliminary hearing testimony that he downloaded and analyzed it. (*Id.* at 18-19 (citations omitted)). Fifth, he reiterates his disagreement with the state court's determination that defense counsel "used" Dove's preliminary hearing testimony when he cross-examined prosecution witnesses with it and referred to it in his closing because,**{2024 U.S. Dist. LEXIS 56}** as the court repeatedly instructed, attorney questions and statements do not constitute evidence. (*Id.* at 19 (citing *Showers v. Beard*, 635 F.3d 625 (3d Cir. 2011) for the proposition that a state court's

reliance on such matter is unreasonable and cannot warrant deference from a reviewing federal court)). Petitioner again cites counsel's misstatement that Dove's testimony came into evidence when he cross-examined witnesses with it and counsel's misunderstanding regarding the hearsay nature of the testimony, as well as the court's attempt to correct this misunderstanding. (*Id.* at 19-20).

Conducting a *de novo* review, Petitioner maintains as to *Strickland*'s deficient performance prong that courts consistently hold that an unexplained broken promise is a mistake rather than a tactical decision and that failure to present a strong defense due to unfamiliarity with settled law - such as whether attorney cross-examination is evidence and the contours of hearsay - may be deemed deficient. (*Id.* at 20-21 (citing *Thomas v. Varner*, 428 F.3d 491, 501 (3d Cir. 2005); *Everette v. Beard*, 290 F.3d 500, 514 (3d Cir. 2002); *Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir. 2002); *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988); *Madrigal v. Yates*, 662 F. Supp. 2d 1154, 1169-70 (E.D. Cal. 2012))). He claims that counsel's failure to deliver on the promises made in his opening "eviscerated" "the entire defense" and "resulted in the Commonwealth's case going unopposed despite available oppositional evidence," leading to an unfair trial.**{2024 U.S. Dist. LEXIS 57}** (*Id.* at 21). He also reminds the Court that counsel did not interview the law enforcement witnesses, including Harkins, who allegedly refuted that Dove downloaded the video. (*Id.* at 20).

Turning to the prejudice prong, he contends that counsel's alleged errors - including his broken promises regarding presenting Dove's testimony, "pure guesswork" that he would not appear even if subpoenaed, and request that the jury accept his questions and statements as evidence even though the court had instructed them otherwise - caused a breakdown in the adversarial system establishing prejudice *per se*. (*Id.* at 21-22 (citing *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984))). He cites a variety of cases for the proposition that the failure to produce promised evidence alone suffices to support an ineffectiveness claim. (*Id.* at 22 (citations omitted)). He maintains that such claims have been denied where counsel changed strategy, or where the promise was developed but in a manner different than promised, and that they have been granted where "the promises simply went unfulfilled." (*Id.* at 22-23 (citations omitted)). Petitioner insists that it is reasonably probable that at least one juror would have voted differently if counsel had presented Dove's testimony, which**{2024 U.S. Dist. LEXIS 58}** would have opposed Dunlap's calculation of a longer discrepancy and interposed six to seven minutes between the gunshots and emergency call. (*Id.* at 23). He claims that this longer delay - coupled with "the infirmities" in the surveillance audio, the lack of other evidence tying him to the murder discussed in the preceding section, and the acknowledged "critical" nature of Dove's testimony - might have caused a juror to doubt that the sounds were in fact gunshots or that Petitioner murdered Rhonda. (*Id.* at 24).

The Commonwealth's supplemental response essentially parrots its initial response, which this Court already warned the Commonwealth was inadequate. (Supp. Resp., ECF No. 31, at 16-18; *see also* Order, ECF No. 28). Remarkably, the relevant section - barely two pages long - makes no mention of the many cases cited by Petitioner in his Reply and fails to respond to many, if not most, of Petitioner's arguments, punting to the Court alone the responsibility to flesh out the merits of his contentions. The Commonwealth only adds that by cross-examining Dunlap and Harkins with Dove's preliminary hearing testimony, the defense presented for the jury's consideration its version of the time**{2024 U.S. Dist. LEXIS 59}** discrepancy and that counsel was not ineffective simply because the jury apparently remained unpersuaded. (*Id.* at 18).

Petitioner's supplemental reply adds the following additional material. (Supp. Reply, ECF No. 34, at 5-9). He observes that Dove downloaded the surveillance video on his initial visit to the crime scene, prior to Harkins's arrival, which explains why Dove did not need to download it again upon his later return to the scene with Harkins. (*Id.* at 5). He notes that Dove testified that the alley where Rhonda's body was found was 15 feet off camera, not 55 feet, as came out at trial. (*Id.* at 5-6). He points out

that counsel represented him for two years prior to trial. (*Id.* at 6). Petitioner explains how the inaccuracy of Dunlap's calculations are confirmed by the crime scene logs. (*Id.* at 8-9). He clarifies that his argument is not that Dunlap purposefully falsified his calculations but that he "simply made critical mistakes" in performing them, which he accuses the Commonwealth and state courts of failing to address. (*Id.* at 6-7). He claims that by using Dunlap's calculations, the jury could have concluded that Petitioner lied about his whereabouts when he stated that**{2024 U.S. Dist. LEXIS 60}** he was "not around" during the murder and suggests that he was at home at that time because he "only lived a short walking distance from where he met up with the victim . . . ." (*Id.* at 7).

2. Analysis

The confusion over whether the Superior Court on PCRA appeal applied a preponderance of the evidence standard or a reasonable probability standard comporting with *Strickland* requires this Court to conduct a *de novo* review. *Johnston*, 871 F.3d at 59; *Dennis*, 834 F.3d at 284. Applying that standard, the Court concludes that although counsel performed deficiently in breaking his promise to the jury, Petitioner was not prejudiced because it is not reasonably probable that the result of his trial would have been different absent counsel's mistake.

a. Deficient Performance

Counsel's performance was deficient. Distilled to its essence, his promise to the jury was that "[t]he evidence will show . . . [that] in terms of . . . the period of time . . . of their [Rhonda and Petitioner's] being together" on camera and "the time that the police arrived in response to the gunshots[,]" "it really is many, many minutes. I make that promise to you . . . ." (N.T. 9/9/14 at 41). But no such evidence was ever introduced or admitted. Counsel attempted to impeach Dunlap**{2024 U.S. Dist. LEXIS 61}** and Harkins with Dove's testimony that the time-stamp on the video was only a few minutes behind actual time, which would have meant that officers arrived minutes rather than seconds after the gunshots. But such attorney questioning or statements are not evidence, as the trial court repeatedly explained at the outset of trial. (N.T. 9/9/14 at 4, 8, 13-14); *see also Sandini*, 888 F.2d at 311 ("the arguments of counsel are simply not evidence"). Despite this forewarning, counsel proceeded through trial under the misimpression that evidence of a shorter time discrepancy was admitted "when [he] cross-examined the witnesses" with Dove's prior testimony.27 (N.T. 9/12/14 at 12). At the conclusion of the evidence, the court explained to counsel that to successfully present Dove's preliminary hearing testimony, he should have subpoenaed Dove; then, once he failed to appear, counsel could have taken steps to have him declared unavailable so that his prior testimony could be read into the record. (*Id.* at 14-21). But counsel never did this. Accordingly, he broke his promise to the jury that it would receive evidence of a shorter time discrepancy showing that the police arrived minutes rather than seconds after the gunshots**{2024 U.S. Dist. LEXIS 62}** are heard on the surveillance. Moreover, this broken promise28 constituted deficient performance because it was a result of counsel's misunderstanding of the law, not "part of a reasonable strategy supported by some unforeseeable event, or new development in the trial." *Elias v. Coleman*, No. 14-1337, 2017 WL 5192476, at *12 (W.D. Pa. Nov. 9, 2017).

b. Prejudice

Quoting the Third Circuit's pronouncement in *McAleese*, Petitioner posits that "the failure of counsel to produce evidence which is promised to the jury is a damaging failure sufficient in and of itself to support a claim of ineffective assistance of counsel." *McAleese v. Mazurkiewicz*, 1 F.3d 159 (3d Cir. 1993); *see Elias*, 2017 WL 5192476, at *21 (noting that *McAleese* "is the only Third Circuit case to somewhat address this issue"). Petitioner's reliance on this quotation is fraught with problems. To begin, the Third Circuit in *McAleese* determined that counsel made "no promise," rendering the statement *dictum*, as multiple courts have recognized. *See, e.g., Turner v. Williams*, 35 F.3d 872, 904

(4th Cir. 1994), *overruled on other grounds, O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996); *United States v. Kemp*, 362 F. Supp. 2d 591, 594 (E.D. Pa. 2005). Moreover, later in the opinion the Third Circuit seemed to reverse course, positing that "even if [it] could imply into the opening a promise" to present certain evidence, counsel's "later decision not to do so is not necessarily ineffective," further undermining the prior pronouncement. *McAleese*, 1 F.3d at 167; *see Elias*, 2017 WL 5192476, at *21 (noting "somewhat conflicting"**{2024 U.S. Dist. LEXIS 63}** language in *McAleese*). Indeed, the court ultimately concluded that counsel had not been ineffective and reversed the district court's grant of habeas relief. *McAleese*, 1 F.3d at 168; *see Hardman v. United States*, No. 3:09-0589, 2010 WL 1781553, at *6 (M.D. Tenn. May 3, 2010) (distinguishing *McAleese* on all these grounds). Additionally, even in the aftermath of *McAleese*, district courts in this circuit have continued to "reject[ ] a *per se* rule that unfulfilled promises made by defense counsel during opening statements will automatically result in a finding of deficient performance of counsel and prejudice to a defendant." *Elias*, 2017 WL 5192476, at *21 n.12.

Petitioner's other cited cases also do not convince this Court to dispense with the usual prejudice analysis under *Strickland*. He observes that in formulating the proffered legal principle, *McAleese* relied upon two other circuit court cases, *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990), *superseded by statute on other grounds, Meyers v. Gomez*, 50 F.4th 628 (7th Cir. 2002), and *Anderson v. Butler*, 858 F.2d 16, 17-19 (1st Cir. 1988). But as noted in *Elias*, these two cases "had very different facts29 and neither . . . presumed that a broken promise, in and of itself, amounted to ineffective assistance of counsel." 2017 WL at *21 n.12; *see Harris*, 894 F.2d at 879 (still separately considering prejudice and finding that it had been established because the testimony promised by petitioner's counsel "would have greatly aided his case"); *Anderson*, 858 F.2d at 19 (criticizing the district court's failure to "deal directly with the**{2024 U.S. Dist. LEXIS 64}** matter of prejudice" and noting that the promised but omitted evidence was "powerful"); *see also Williams v. Woodford*, 859 F. Supp. 2d 1154, 1172 (E.D. Cal. 2012) (separately considering prejudice and concluding that "[t]he unfulfilled promises made by Williams's counsel were prejudicial not only because of the magnitude of their harm but because of just how close a case this was") (cited by Petitioner). He also cites the Ninth Circuit's opinion in *Saesee v. McDonald*, 725 F.3d 1045 (9th Cir. 2013), but the court in that case merely theorized30 that "in *some* cases-particularly cases where the promised witness was *key* to the defense theory of the case and where the witness's absence goes unexplained-a counsel's broken promise to produce the witness *may* result in prejudice to the defendant." *Id.* at 1049-50 (emphasis added).

Summarizing the breakdown set forth in *Elias*, Petitioner points out that in cases denying habeas relief the broken promise normally resulted from a change in strategy, or the promised evidence was presented in other ways, whereas in cases in which relief was granted the promise went unfulfilled for no apparent reason and the evidence at issue was "important" or even "central to the defense . . . ." (Reply, ECF No. 18, at 22-23 (citing *Elias* and cases cited therein)). Petitioner's**{2024 U.S. Dist. LEXIS 65}** summation is not inaccurate, but it is nonetheless unavailing. Although counsel's failure to present the promised evidence was inexcusable (establishing deficient performance under *Strickland*), no prejudice resulted from it because the size of the discrepancy between the time-stamp on the video and actual time was not a significant issue making it reasonably probable that any juror would have voted differently had the promised evidence of a shorter discrepancy been introduced. *See Strickland*, 466 U.S. at 694.

Petitioner insists that "Dove's evidentiary value" was substantial31 because his testimony would have established a "6 to 7 minute interval between the purported gunshots and the 911 call" and that in light of the previously proffered "infirmities in the audio portion of the tape" and absence of eyewitnesses, DNA, or murder weapon a juror could have had a reasonable doubt that the sounds heard on the

video were in fact gunshots. (Reply, ECF No. 18, at 24). This Court has already rejected Petitioner's arguments regarding the purported issues with the surveillance audio and the absence of certain types of evidence. *See supra* § III.A.2.b. But considering these factors in conjunction with a longer interval between the sounds**{2024 U.S. Dist. LEXIS 66}** heard on the audio and the emergency call does not establish prejudice. Even if the 9-1-1 caller waited up to six or seven minutes to call, it would not change the fact that the video showed Petitioner and Rhonda walking in the direction of the alley where her body was found a short time later with four gunshot wounds, nor would it change the fact that within 30 seconds of the pair walking off camera the same surveillance recorded four32 "popping noises" that were consistent with the sound of gunshots. (*See* Reply, ECF No. 18, at 12). And it would not change the fact that when specifically asked by neighbors the following day where he was on the night of Rhonda's murder, Petitioner made no mention of having been with her, but instead claimed to have been at a bar, then another bar, and that while walking on the street he had run into Tyheem, who denied this meeting. (N.T. 9/10/14 at 152, 172, 181; N.T. 9/11/14 at 60-61).

Petitioner's remaining arguments from his supplemental reply consist of a hodgepodge of unrelated contentions that do not save his claim. He notes that his counsel represented him for two years prior to trial, apparently to highlight his deficient performance in**{2024 U.S. Dist. LEXIS 67}** not further exploring Dove's testimony during this substantial period, (*see* Supp. Reply, ECF No. 34, at 5), but this Court has already determined that Petitioner has met that *Strickland* requirement. Petitioner walks the Court through how the crime scene logs confirm the inaccuracy of the longer discrepancy calculated by Dunlap, (*see id.* at 5, 8-9), but the Court has already concluded that even if Dove's testimony regarding a shorter discrepancy had been introduced and credited by the jury, it would not have mattered because it was not reasonably likely to lead to a different outcome at trial. *See supra* pp. 24-26. This conclusion also renders irrelevant whether Dunlap fabricated or simply miscalculated the length of the discrepancy, (*see id.* at 6-7), which in any event has been rejected in favor of Dove's calculation for present purposes. Petitioner again suggests a possible alibi, apparently that at the time of the murder he was at home consistent with his claim that he was "not around," (*see id.* at 7), but there is nothing about Dove's calculation that would change the Court's earlier consideration of this proffered defense. Whether Petitioner was last with Rhonda at 2:07 a.m., as calculated**{2024 U.S. Dist. LEXIS 68}** by Dunlap, or closer to the video's 1:57 a.m. time stamp, pursuant to Dove's calculations, "Petitioner only lived a short-walking distance from where he met up with the victim," and could have returned to his home by the 3-to-3:30 p.m. time frame when Harmon saw him asleep on their futon. (*Id.* at 7; N.T. 9/10/14 at 117); *see also Jackson*, 2004 WL 2064895, at *11. Finally, Petitioner adds that Dove would have testified that the alley where Rhonda's body was found was only 15, rather than 55, feet off camera, (Supp. Reply, ECF No. 34, at 5), but this new tidbit has nothing to do with his claim regarding the time discrepancy; in any event, Petitioner fails to explain how it benefits him.

Although Petitioner's counsel performed deficiently in failing to offer the evidence promised in his opening of a shorter discrepancy between the time-stamp on the surveillance and real time, this error did not prejudice Petitioner. Accordingly, the Court respectfully recommends that his claim be denied.

C. Failure to Present Dove's Testimony

In his related third claim, Petitioner asserts that "trial counsel rendered unconstitutional representation by failing to call former Detective Dove as a witness and/or failing to have his former**{2024 U.S. Dist. LEXIS 69}** testimony admitted into evidence." (Hab. Pet., ECF No. 2, at 54). Applying a reasonable probability standard, the PCRA court rejected this claim on prejudice grounds:

> The Petitioner was not prejudiced by trial counsel's failure to call former Detective Dove. Had Detective Dove been called to testify, he could have clarified his testimony at the preliminary

hearing, which would not bode well for the Petitioner. Detective Dove did not recover the video, Detective Dunlap did. Furthermore, Detective Dove did a cursory inspection and calculation, whereas Detective Dunlap performed the actual time differential. Most importantly, Detective Dove's proposed testimony[,] that the surveillance video was "minutes slow," was admitted into evidence, without being subject to cross-examination by the Commonwealth, thereby benefitting the Petitioner. N.T., 1/30/2013 at 82; N.T., 9/10/2014 at 66-67; N.T., 9/11/2014 at 162-64.*Roseboro*, CP-51-CR-0001397-2013, at 30 (ECF No. 31-2). On appeal, applying an unclear standard, *see supra* § III.A.2, the Superior Court adopted this reasoning, noting that the lower court had denied the claim because Petitioner "did not establish how [Dove's] testimony would have benefited his defense . . . ." *Roseboro*, 2021 WL 2012602, at *2.

1. The Parties' Positions{2024 U.S. Dist. LEXIS 70}

Many of Petitioner's arguments in support of this claim mirror those made above. He claims that counsel, who had been representing him for nearly 16 months at the time of trial and knew of Dove's existence and "critical" former testimony, performed deficiently by failing to subpoena him as a witness and, if he failed to appear, have him declared unavailable so that his testimony could be admitted, all due to a misapprehension of evidentiary and hearsay law.33 (Hab. Pet., ECF No. 2, at 54-55, 57-58). He observes that although Dove was the "centerpiece of the defense" counsel never interviewed Dove or learned his whereabouts, placing counsel's conduct "heavily outside an objective professional standard of reasonableness." (*Id.* at 54, 58). He posits that Dove's testimony was required to avoid prejudice by safeguarding the adversarial process given the magnitude of the sentence Petitioner faced (and ultimately received). (*Id.*). He also contends that the Superior Court's statement, quoted above, that Dove's testimony would not have benefited him is unsupported by the PCRA opinion and the record. (*Id.* at 56). On the contrary, he insists that Dove's testimony was better aligned with the defense's**{2024 U.S. Dist. LEXIS 71}** timeline than Dunlap's, which placed Petitioner "with the victim within 30 seconds of alleged gunshots [and] also discredited Petitioner's statement to two Commonwealth witnesses that he 'was not around' when the victim was killed." (*Id.* at 58). He reminds the Court that at the PCRA evidentiary hearing further development of this claim was not permitted. (*Id.* at 55).

Petitioner enumerates three findings that the PCRA court should have made instead of the "objectively unreasonable" ones it determined: (1) Dove downloaded and analyzed the surveillance and concluded that it was "a little, . . . within minutes off"; (2) this analysis was more accurate and trustworthy than Dunlap's time calculation;34 and (3) attorney questions and arguments are not evidence for the jury's consideration. (*Id.*). Petitioner observes that the PCRA judge (who also presided over trial) had instructed the jury at trial consistent with this third finding but reached a contrary conclusion in her opinion, stating that the testimony was "admitted" when counsel cross-examined Dunlap and Harkins with it. (*Id.* at 57).

Additionally, Petitioner cites three instances of purported prejudice stemming from the**{2024 U.S. Dist. LEXIS 72}** failure to present Dove's testimony (also cited in regard to his second claim): (1) Dove's testimony would have placed the gunshot-type sounds "at [a] much longer time frame" after Rhonda and Petitioner were shown walking off camera than Dunlap's calculations, consistent with Petitioner's contention that he was "not around" and apparently at his nearby home when Rhonda was killed; (2) it would have cast doubt on Dunlap's faulty calculations, which the jury likely "never scrutinized"; and (3) it would have shown that Petitioner was simply "in the wrong place at the wrong time," with Petitioner arriving on the scene approximately one hour after the camera caught Rhonda pacing in front of the store before meeting up with an unidentified individual. (*Id.* at 59-60).

Petitioner also reiterates that there was no eyewitness, murder weapon, DNA, confession or motive;

that he has steadfastly maintained his innocence and rejected a plea agreement "for much less time in prison"; and that by all witness accounts Rhonda and Petitioner had a "mother/son relationship." (*Id.* at 60-62). Additionally, he points to testimony refuting other testimony that he was not seen in the area anymore after the murder**{2024 U.S. Dist. LEXIS 73}** and notes that he continued to live there. (*Id.* at 60-62). He suggests Rhonda was killed in a robbery and cites unspecified "preliminary hearing[ ] law enforcement testimony . . . that Rhonda had been dragged ten feet into the alley," which was not connected to the alley where he stashed his drugs. (*Id.* at 60-61 & n.3). He claims that this prior testimony, which law enforcement witnesses "recanted" and "repudiate[ed]" at trial, did not comport with the prosecution's version of events that he lured Rhonda into the alley. (*Id.* at 61). Petitioner maintains that the dragging theory is supported by the fact that Rhonda was discovered with one shoe "almost off her foot," "inferentially from the dragging motion" because "the Medical Examiner testified that one [sic: once(?)] shot Rhonda would have collapsed immediately." (*Id.*). He again notes the presence of "a secondary crime scene" including a recovered, but later vanished, bracelet possibly belonging to Rhonda. (*Id.*).

The Commonwealth's initial response to Petitioner's arguments consists of approximately one page and largely refers the Court to the PCRA opinion. (Resp., ECF No. 15, at 11-12). Without further elaboration, it claims that**{2024 U.S. Dist. LEXIS 74}** Dove's testimony regarding the downloading of the video and the size of the discrepancy between the time-stamp and real time did not contradict the testimony of the testifying detectives. (*Id.* at 11). It observes that the jury "heard" Dove's testimony when counsel referenced it in his closing and cross-examined Commonwealth witnesses with it and that the testimony regarding the discrepancy specifically "was admitted into evidence at trial," although it does not indicate when this occurred. (*Id.* at 11-12). It adds that Petitioner was not prejudiced "[f]or the foregoing reasons and those set forth by the state court . . . ." (*Id.* at 12).

In his reply, Petitioner repeats that, contrary to the state court findings: (1) Dove was the first to recover and analyze the surveillance, finding that the time-stamp on it was "within minutes"; (2) Dove and Dunlap "did basically the same inspection" and time calculation, as opposed to Dove supposedly only conducting a "cursory" review of the footage; and (3) Dove's preliminary hearing testimony was never admitted into evidence.35 (*Id.* at 25-27). Applying *de novo* Pennsylvania's five-part test for ineffectiveness based on counsel's failure to call a witness,**{2024 U.S. Dist. LEXIS 75}** and noting that the test is not contrary to *Strickland*, Petitioner argues that it has been met because at the time of trial: (1) Dove, a longtime law enforcement officer and assigned lead investigator in Rhonda's murder, existed; (2) Dove was available to testify, as repeatedly confirmed by the prosecutor; (3) counsel knew of Dove's existence, as well as his prior testimony "critical" to the defense; (4) Dove was ready to cooperate; and (5) Petitioner was prejudiced without any testimony from him because it left him unable to credibly rebut Dunlap, "the Commonwealth's key witness." (Reply, ECF No. 18, at 27-28 (citing *Moore v. DiGuglielmo*, 489 F. App'x 618, 626 (3d Cir. 2012); *Stewart v. Ferguson*, No. 3:17-0893, 2021 WL 465411 (M.D. Pa. Feb. 9, 2021))).

Petitioner again contends that counsel performed deficiently by failing to call Dove as a witness and moving to present his "critical" preliminary hearing testimony if he refused to testify. (*Id.* at 29). Addressing prejudice further, he reiterates that demonstrating a shorter time discrepancy than testified to by Dunlap "was a major component of trial counsel's strategy" and that the PCRA court never stated, as the Superior Court noted, that Dove's testimony "would have benefited the defense." (*Id.* at 28-30). He reminds the Court that it must consider not only the significance**{2024 U.S. Dist. LEXIS 76}** of the absent evidence but also its place within the totality of the evidence. (*Id.* at 29-30 (citing *Branch v. Sweeney*, 758 F.3d 226 (3d Cir. 2014); *Brown*, 425 F. Supp. 3d 395)). He submits that considering all the evidence Dove's testimony would have materially benefited his defense, which he maintains was "no less plausible" than the Commonwealth's case against him. (*Id.* at 30 (citing

Armstrong v. Lumpkin, No. 21-40130, 2022 WL 2867163 (5th Cir. 2022))).

The Commonwealth's supplemental response mostly parrots its prior inadequate one. Also parroting the PCRA court opinion, it further speculates that if Dove had been called to testify maybe he would "have clarified his testimony at the preliminary hearing and retracted that statement." (Supp. Resp., ECF No. 31, at 19). Additionally, the Commonwealth posits that Petitioner was not prejudiced by the omission of Dove's testimony because Dunlap's testimony, and his being subjected to cross-examination, "was more important and relevant than any testimony Dove could have offered." (*Id.*).

2. Analysis

An attorney's decision to call or subpoena witnesses is a matter of trial strategy to be analyzed under *Strickland. Henderson v. DiGuglielmo*, 138 Fed. App'x 463, 469 (3d Cir. 2005). Although the United States Constitution does not require counsel to call every witness identified by his client, *Strickland* considers whether the attorney made a tactical decision "in**{2024 U.S. Dist. LEXIS 77}** the exercise of reasonable professional judgment." 466 U.S. at 690; *Bowen v. Blaine*, 243 F. Supp. 2d 296, 311 (E.D. Pa. 2003) (citing *United States v. Balzano*, 916 F.2d 1273, 1294 (7th Cir. 2001)). To establish prejudice for failure to call a witness, Petitioner must show a reasonable probability that the result of the proceeding would have been different had the witness testified. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991). Applying *de novo* review, Petitioner's claim fails because, despite counsel's deficient performance, it did not prejudice Petitioner.

a. Deficient Performance

In short, counsel failed to present or even investigate "critical" (according to counsel) testimony of the assigned lead detective in his client's first-degree murder case. Instead, he incorrectly assumed that his use of the detective's prior testimony from another proceeding to cross-examine witnesses constituted evidence for the jury's consideration, despite being present for the judge's instruction to the jury stating exactly the opposite. Only realizing his error at the conclusion of the evidence (and after being reminded of it by opposing counsel and the court), he then claimed that the prior testimony was admissible based on the detective's unavailability, although he had never taken the necessary steps (such as issuing him a subpoena and waiting for him not to appear at**{2024 U.S. Dist. LEXIS 78}** trial) to have him deemed so. These actions were not reasonable tactical or strategic decisions but mistakes. *See Strickland*, 466 U.S. at 690. Accordingly, counsel performed deficiently.

b. Prejudice

Petitioner maintains that Dove's testimony was critical to his defense because "Dunlap's results showed Petitioner was with the victim within 30 seconds of alleged gunshots" and that these calculations "also discredited Petitioner's statement to two Commonwealth witnesses that he 'was not around' when the victim was killed," whereas Dove's testimony would have interposed a "much longer time frame than Detective Dunlap's version of 26 seconds after Petitioner and the victim leave view of the camera" before the sounds are heard. (Hab. Pet., ECF No. 2, at 58-59). He insists that Dove's more accurate and plausible calculations would have given the jury reason to scrutinize and doubt those performed by Dunlap, but without the former's testimony the adversarial system collapsed and he was left with no defense. (*Id.* at 57, 59; Reply, ECF No. 18, at 29-30). However, the fundamental problem with Petitioner's contentions is that it is not Dunlap's calculations that place Petitioner with Rhonda within 30 seconds of the sounds**{2024 U.S. Dist. LEXIS 79}** the jury determined to be gunshots, but the surveillance itself. Whether these events occurred at 1:57-1:58 a.m. (as reflected on the screen time), at 2:07-2:08 a.m. (pursuant to Dunlap's calculations), or somewhere in between these two times (pursuant to Dove's preliminary hearing testimony), the key fact remains the same:

approximately 26 seconds after Petitioner and Rhonda walk off camera together in the direction of an alley where her body, with four gunshots, is found a short time later, the same surveillance records four popping noises consistent with gunshots.36 (N.T. 9/10/14 at 46-48, 124-25; N.T. 9/11/14 at 76-77).

Petitioner's remaining arguments have already been addressed or otherwise lack merit. To his list of purportedly important evidence missing from this case - such as eyewitness testimony, a murder weapon, DNA or motive - he adds that he has not confessed and has even turned down a "lucrative" plea bargain, (Hab. Pet., ECF No. 2, at 60-62), but Petitioner's continued assertion of his innocence, although his right, does not sway the prejudice analysis. Nor is the analysis changed by Rhonda's interaction with other individuals on the night of her murder, her allegedly**{2024 U.S. Dist. LEXIS 80}** "mother/son" relationship with Petitioner, Petitioner's robbery theory,37 or his contention that was he merely near the scene of the crime at the wrong time, all of which this Court has addressed previously. Petitioner asserts that the Superior Court's determination that Dove's testimony would not have benefited him is unsupported by the PCRA opinion and the record, (Hab. Pet., ECF No. 2, at 56; Reply, ECF No. 18, at 28-30), but on this *de novo* review the Court reaches its own prejudice conclusions and does not base them upon the Superior Court's findings, rendering this assertion irrelevant. Likewise irrelevant is Petitioner's pointing out that some witnesses refuted others' testimony that he was no longer seen in the neighborhood after being confronted about Rhonda's murder. (Hab. Pet., ECF No. 2, at 60-62). This red herring has nothing to do with the effects of failing to admit Dove's testimony at trial.

Petitioner's counsel performed deficiently in failing to present or even investigate the testimony of the assigned lead detective in his client's first-degree murder trial, but Petitioner suffered no prejudice from this mistake. Therefore, the Court respectfully recommends that**{2024 U.S. Dist. LEXIS 81}** his claim be denied.

D. Failure to Investigate Dunlap's Expert Report

In his fourth and final claim, Petitioner posits that counsel was ineffective for failing to investigate and obtain an expert report from Dunlap regarding his conversion of the time shown on the surveillance video to real time. (Hab. Pet., ECF No. 2, at 63). Petitioner raised this claim at the PCRA stage, but the court rejected it "for a number of reasons, the most salient being that irrespective of conflicting time differentials, it is indisputable that the shots are heard approximately thirty seconds after the Petitioner and the decedent walk out of the camera's view in the direction of the alley" where Rhonda's body was discovered a short time later. *Roseboro*, CP-51-CR-0001397-2013, at 9-10 (ECF No. 31-2). The court further explained that the defense's conclusion that Dunlap's calculations were faulty was "based . . . on a false premise," that when the initial officers on the scene, Officers Levitt and Robertson, radioed that they had arrived is the same time as when they appear on the video in their patrol car, when in fact Levitt testified that they first arrived on the street corner, which would have been off camera. *Id.* at 10. The court also noted**{2024 U.S. Dist. LEXIS 82}** that subsequent to their actual arrival, the officers patrolled the area and spoke to the man in the truck and that a police car can be seen on the video passing the corner before returning on camera at the "arrival" time proffered by the defense. *Id.* It points out that Dunlap hit on this basis for the difference between his and the defense's timelines in his testimony when he explained that they could be reconciled if arriving officers reported being "on scene" while nonetheless outside of the view of the surveillance system. *Id.* (citing N.T. 9/10/14 at 39-40, 72-73).

Accordingly, the PCRA court concluded that the defense would have lost any motion *in limine* to preclude Dunlap's testimony had an expert report been produced. *Id.* It added that an expert report was also unnecessary to address the reason for the different calculations, "which the defense was

aware of prior to trial, and which was discussed on the record prior to trial." *Id.* at 11. Finally, it observed that the jury was presented with the defense's timeline, but "they chose to discredit it." *Id.* On appeal, the Superior Court cited these reasons in adopting the lower court's opinion as its own. *Roseboro*, 2021 WL 2012602, at *2.

1. The Parties' Positions

Petitioner**{2024 U.S. Dist. LEXIS 83}** underscores the supposed importance of Dunlap's testimony to the prosecution's case and notes that although his counsel knew nothing of it other than what came out at the preliminary hearing, in the intervening 16 months counsel never obtained an expert report from him or otherwise investigated his testimony. (Hab. Pet., ECF No. 2, at 63). He points out that counsel requested a report from Dunlap for the first time while he was on the witness stand at trial, but Dunlap did not have one. (*Id.* at 65). He repeats that Dunlap's trial testimony went uncontradicted because counsel never presented Dove's testimony, even though counsel highlighted the differences in their calculations in his opening. (*Id.* a 64-65).

Petitioner observes that the trial judge stated in a sidebar that Dunlap's time calculations were off before reversing course in her PCRA opinion. (*Id.* at 65). Nonetheless, he "partially agrees" with the analysis in that opinion because:

> PCRA counsel erroneously stated that the first Officers arrived on the scene before they were actually seen on the videotape. The time on the scene as reported by the Officers was not the scene of the crime, it was the general scene where their investigation**{2024 U.S. Dist. LEXIS 84}** started. This same argument was not supported by the record when trial counsel misargued the times. . . .38(*Id.* at 65-66). But Petitioner continues to insist that Dunlap's calculations were incorrect because, according to him, they would show Robertson walking off camera at the same time that Levitt radioed in the discovery of Rhonda's body by Robertson, even though the latter still had to walk an additional 55 feet to the alley and another 10 feet down the alley before finding it, with the paramedics also arriving and pronouncing Rhonda dead within two minutes of Robertson disappearing from view. (*Id.* at 66-67, 69-70). He maintains that these and other errors by Dunlap constituted "red flags" that should have prompted counsel, who had no expertise in video or audio technology, to investigate obtaining an expert report from him, as required by the Pennsylvania Professional Rules of Conduct (RPC). (*Id.* at 67, 69, 71). Petitioner claims that doing so was "critical to the sophisticated mechanics of deciphering screen-time and finding a reliable time" and necessary for his counsel or jurors to understand the defects in Dunlap's testimony where no opposing evidence was presented. (*Id.* at**{2024 U.S. Dist. LEXIS 85}** 70).

Next, Petitioner attacks the PCRA court's conclusion that the length of the time discrepancy is a red herring because, regardless of the exact time, gunshots are heard within 30 seconds after Petitioner and Rhonda walk off screen together in the direction of the nearby alley where her bullet-riddled body was discovered. (*Id.* at 70 (citing N.T. 11/25/19 at 85-86; *Roseboro*, CP-51-CR-0001397-2013, at 11-13 (ECF No. 31-2))). He again posits that this approximately 30-second period is itself "dependent" and "based on Dunlap's conversion from screen-time to real time." (*Id.* at 70, 72). Moreover, he submits that it is "objectively unreasonable" to find the length of the discrepancy irrelevant because Dove's calculations would place the emergency call sufficiently long39 after the popping sounds - four to seven minutes as stated elsewhere in his brief, as opposed to only a maximum of two minutes based on Dunlap's calculations - that a reasonable juror may have found that the sounds were not gunshots. (*Id.* at 71; *see* Reply, ECF No. 18, at 23 (six to seven minutes based on Dove's calculations), 38 (four to five minutes based on his calculations); *see also* N.T. 9/9/14 at 50; N.T. 9/11/14 at 76). Petitioner repeats that both Dove and Dunlap could**{2024 U.S. Dist. LEXIS 86}** not have been correct and that the former's calculations were more accurate. (Hab. Pet., ECF No. 2, at

71).

He also restates the alleged issues with the surveillance audio, which he contends were ignored by his counsel and the PCRA court. (*Id.* at 72). As noted above, these purported issues include the number of popping or supposedly related noises heard on the audio versus the number of gunshots at the crime scene, the location of the surveillance microphone inside the store, its inability to pick up certain external sounds (like passing cars or a bouncing basketball), the distance of Rhonda's body from the surveillance area, the lack of an expert opinion regarding the audio, and Dunlap's limitations in dealing with audio. (*Id.* at 73). He concludes that in light of this evidence it is reasonably probable that investigation into Dunlap's expert report demonstrating the inaccuracy of his calculations would have convinced the jurors that none of the six sounds heard on the audio after Petitioner and Rhonda walked off camera together were gunshots. (*Id.*).

Additionally, Petitioner takes issue with the PCRA court's finding that the jury discredited the alternative theory put forth by counsel.**{2024 U.S. Dist. LEXIS 87}** (*Id.* at 74 (citing *Roseboro*, CP-51-CR-0001397-2013, at 11-13)). Insofar as the court was referring to the broken promises issue, he repeats his arguments as to that claim. (*Id.*). To the extent that it referred to the timing of Levitt and Robertson's arrival on the "general scene" of the crime, he reiterates that he has abandoned this specious claim. (*Id.* at 74-75). However, he maintains that the state courts both failed to address Dunlap's faulty time conversion, requiring a *de novo* review. (*Id.* at 75). Pursuant to such a review, he submits that under *Strickland* he has established deficient performance and prejudice. (*Id.*) According to Petitioner, counsel performed deficiently by failing to investigate Dunlap's findings and, instead, apparently relying on his use (but not the actual admission into evidence) of Dove's prior testimony "to present a competing perspective" on the times set forth in the surveillance. (*Id.*). Petitioner adds that he was prejudiced due to the reasonable probability of a different result had counsel investigated Dunlap's expert report, in light of Petitioner's close relationship with Rhonda and his lack of a reason to kill her. (*Id.*).

In its response, the Commonwealth again directs the Court to the PCRA opinion "[i]n**{2024 U.S. Dist. LEXIS 88}** the interest of efficiency . . . ." (Resp., ECF No. 15, at 12-13). It adds that counsel cross-examined Dunlap at length with the defense's theory about the timing of the surveillance and that although Dunlap stuck to his version this does not mean that he testified falsely. (*Id.* at 13). It continues that the prosecution introduced "ample evidence," apparently accepted by the jury, to rebut the defense's timeline. (*Id.*). It also parrots the PCRA court conclusion that an expert report was not required to explain the timing discrepancy, especially since counsel was aware of it and discussed it with the court prior to trial. (*Id.* at 13-14).

Much of Petitioner's reply repeats the arguments in his habeas petition and regarding his other claims,40 at times almost verbatim. (*See generally* Reply, ECF No. 18, at 30-39). Petitioner's primary additions are his citations to United States Supreme Court cases for the proposition that an attorney must make a "fully informed[,] deliberate" and "reasonable investigation" of the facts of a matter and to Third Circuit cases for the proposition that a failure to conduct "any" investigation normally results in a finding of ineffectiveness. (*Id.* at 33-34 (quoting and citing**{2024 U.S. Dist. LEXIS 89}** *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *United States v. Travillion*, 759 F.3d 281, 293 n.23 (3d Cir. 2014); *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989); *United States v. Baynes*, 622 F.2d 66, 69 (3d Cir. 1980))). He also fleshes out his earlier reference to the Pennsylvania RPC, specifically noting that RPC 1.1, governing "Competence," and the explanatory comments thereto require an attorney to provide the thoroughness, preparation and, as applicable, particular expertise reasonably necessary for the representation in light of the complexity and specialized nature of the matter, which may also require him or her to consult with another attorney of established competence in the area.

Pa. R.P.C. 1.1 & explanatory cmts. [1] - [3]. Petitioner maintains that because his counsel had no expertise in analyzing the accuracy of a video time-stamp he was required by this rule to retain an expert other than Dunlap to review the issue. (Reply, ECF No. 18, at 37). He underscores the importance of the video, noting that it was shown to the jury four times, including once after it asked to review it again. (*Id.*).

Turning from the sufficiency of counsel's performance to prejudice, Petitioner states that at least one juror would have reasonably doubted his guilt if evidence of a longer delay of four to five minutes between the popping sounds and 9-1-1 call had been introduced, in light of the aforementioned purported problems**{2024 U.S. Dist. LEXIS 90}** with the audio portion of the surveillance. (*Id.* at 38). He claims that at trial the prosecutor stopped the audio after the first four sounds because he wanted to avoid having the jury hear the additional ones that were inconsistent with the firing of only four shots. (*Id.*). He recites his issues with the allegedly "minimal investigation" by police, adding to them that even though police knew within hours that he was with Rhonda "very shortly" before her murder he and his clothes were not tested for gunpowder or DNA and he was not identified as a suspect or arrested until months later. (*Id.* at 39).

The Commonwealth's supplemental response omits its prior references to the state court but otherwise reproduces its prior argument verbatim.

2. Analysis

To provide "reasonable professional assistance," an attorney must conduct a sufficient investigation. *See Strickland*, 466 U.S. at 690-91. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* In other words,**{2024 U.S. Dist. LEXIS 91}** "counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Applying a *de novo* standard, this Court concludes that counsel performed deficiently because his less-than-thorough investigation was not an exercise of reasonable professional judgment. However, Petitioner's claim fails because he was not prejudiced as a result of this deficient performance.

a. Deficient Performance

Counsel performed deficiently in failing to investigate Dunlap's anticipated testimony regarding his conversion of the surveillance time-stamp to actual time, such as by timely demanding a report from him. At a pretrial hearing a few weeks before trial, counsel informed the court that he had recently learned that Dunlap would testify at trial regarding the video and added: "So I have nothing from Dunlap. We didn't know anything about Dunlap. My client is probably hearing the name, Dunlap, for the first time." (N.T. 8/21/2014 at 38). Nonetheless, he did not seek any information from Dunlap prior to trial or a continuance for the purpose of doing so. Rather, he waited until Dunlap was testifying at trial to request "a copy of [his] report."**{2024 U.S. Dist. LEXIS 92}** (N.T. 9/10/14 at 62). Dunlap denied having authored one but instead produced typewritten notes, which counsel then reviewed for the first time despite the fact that Dunlap had prepared them "[t]he week that the video was recovered" back in 2012. (*Id.* at 64). As Petitioner notes, counsel appears to have premised his lackadaisical approach to Dunlap's testimony on the admission of Dove's competing testimony arriving at a shorter discrepancy between screen and real time, but that never happened, as set forth above. *See supra* §§ III.B-C. Because counsel did not "fully inform[ ]" himself about Dunlap's anticipated testimony, and instead relied, mistakenly, on the anticipated admission of other testimony tending to undercut Dunlap's conclusions, counsel rendered deficient performance in this matter. *See Wiggins*, 123 S. Ct. at 2538; *cf. Williams*, 120 S. Ct. at 395 (failure to conduct a reasonable investigation due to misunderstanding

of state law constituted deficient performance).

b. Prejudice

Quoting Third Circuit case law, Petitioner posits that the "failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness." (Reply, ECF No. 18, at 33-34 (quoting *Travillion*, 759 F.3d at 293 n.23; *Gray*, 878 F.3d at 711)). However, this pronouncement, initially made**{2024 U.S. Dist. LEXIS 93}** in *Gray* and quoted by *Travillion*, is not dispositive of his claim. To begin, although Petitioner asserts in the instant claim that counsel did not investigate Dunlap's testimony, and similarly asserted in his prior claim that counsel failed to investigate Dove's testimony, *see supra* § III.C, he has by no means established that counsel did not conduct "any" pretrial investigation such as would bring this case within the purview of these cases. *See Travillion*, 759 F.3d at 293 n.23; *Gray*, 878 F.3d at 711. Moreover, even in Petitioner's cited cases, the Third Circuit separately considered prejudice, despite counsel's deficient performance, which it sometimes also referred to as "ineffectiveness." *See Travillion*, 759 F.3d at 293 n.23 ("This *per se* deficiency, however, is not dispositive, as we have found Travillion was not prejudiced by the actions of trial counsel."); *Gray*, 878 F.3d at 711 (separately considering prejudice because, "[o]f course, the fact that counsel was ineffective is not in itself sufficient to grant relief under *Strickland*"); *Baynes*, 622 F.2d at 66 (remanding case for consideration of prejudice). Accordingly, notwithstanding counsel's deficient performance, Petitioner must show resulting prejudice.

Petitioner stresses that if Dunlap's testimony allowing for no more than two minutes between the popping sounds on the**{2024 U.S. Dist. LEXIS 94}** audio and the emergency call had been properly investigated and opposed with Dove's testimony showing that the gap was actually between four and seven minutes, it is reasonably probable that one or more jurors would have concluded that the sounds were not gunshots at all, thereby rendering the accompanying video surveillance far less harmful to his defense.41 (Hab. Pet., ECF No. 2, at 70, 72). He highlights the importance of the video, as acknowledged by the trial court and the jury, who asked to review it a fourth time after having already been shown it three times. (Reply, ECF No. 18, at 37). However, this Court disagrees that a different result would have been reasonably probable if the jury had been provided evidence that the elapsed time before the emergency call was actually two to five minutes longer than suggested by Dunlap's testimony. Such a short amount of additional interposed time would not have changed any juror's mind. Without speculating as to all the reasons that a person who at 2 a.m. hears a scream outside followed by gunshot-sounding noises may not call the police instantaneously, suffice it to say that jurors' common sense and experience tells them that this may**{2024 U.S. Dist. LEXIS 95}** be the case. And the jurors heard the sounds for themselves - no less than four times - and were able to independently evaluate whether they were gunshots.42 Additionally, Petitioner ignores other incriminating evidence against him, such as the fact he was caught on camera walking with Rhonda in the direction of where her body was discovered within half an hour later, yet when neighbors confronted him the next day regarding his involvement in the murder he failed to mention having even seen her; rather, he maintained that he was at two bars before running into Tyheem, who refuted Petitioner's supposed alibi. (N.T. 9/11/14 at 60-61; N.T. 9/10/14 at 152, 172, 181).

Petitioner's remaining arguments are that the police only conducted a "minimal investigation" that did not involve testing him and his clothes for gunpowder or Rhonda's DNA and that he was not identified as a suspect or arrested until months after the murder. (Reply, ECF No. 18, at 39). To the extent that Petitioner simply rehashes his argument above regarding the lack of physical evidence tying him to the murder scene, it has already been addressed and rejected. *See supra* §§ III.A.2.b., B.2.b. Further, the allegedly minimal**{2024 U.S. Dist. LEXIS 96}** investigation conducted by police was, in any event, their own and therefore does not advance his claim that counsel also conducted little or no investigation, particularly as to Dunlap's testimony. In addition, it is unclear how the timing of his

identification as a suspect or his arrest furthers the instant claim that his counsel failed to procure an expert report from Dunlap or otherwise investigate his testimony prior to trial. Insofar as Petitioner implies that the "delay" in pegging him as Rhonda's killer reflects the prosecution's weak case, such that it is reasonably probable that his trial would have concluded differently if Dunlap's testimony had been properly investigated and countered, this Court has repeatedly summarized the other evidence against him and finds it overwhelming. Because Petitioner has failed to demonstrate prejudice, the Court respectfully recommends that this claim be denied.

IV. CONCLUSION

For the reasons set forth herein, I respectfully recommend that Petitioner's petition for writ of habeas corpus be denied.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW this 7TH day of February, 2024, I respectfully RECOMMEND that the petition for **{2024 U.S. Dist. LEXIS 97}** writ of habeas corpus be DENIED without the issuance of a certificate of appealability.

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

BY THE COURT:

/s/ Lynne A. Sitarski

LYNNE A. SITARSKI

United States Magistrate Judge

Footnotes

1

Pennsylvania and federal courts employ the prisoner mailbox rule, pursuant to which *pro se* filings are deemed filed when given to prison officials for mailing. *See Perry v. Diguglielmo*, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. Ct. 1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Commonwealth v. Castro*, 2001 PA Super 17, 766 A.2d 1283, 1287 (Pa. Super. Ct. 2001). In this case, Petitioner certified that he gave his habeas petition to prison officials on August 19, 2022, and it will be deemed filed on that date. (Hab. Pet., ECF No. 2, at 19).

2

In a related subclaim, Petitioner initially also challenged "PCRA counsel's failure to raise this issue[ ] as ineffectiveness of counsel for failure to protect the rights to cross-examine and confront," but he did not brief this subclaim further in his reply and explicitly waived it in his supplemental reply. (Hab. Pet., ECF No. 2, at 25; *see* Supp. Reply, ECF No. 34, at 2-3; *see also* Supp. Resp., ECF No. 31, at 9, 15-16 (agreeing that claim is procedurally defaulted)).

3

In considering a § 2254 petition, the federal courts examine the "last reasoned decision" of the state courts. *Simmons v. Beard*, 590 F.3d 223, 231-32 (3d Cir. 2009) (citing *Bond v. Beard*, 539 F.3d 256,

289-90 (3d Cir. 2008)).
4

Tyheem Hines is Rhonda's son. (N.T. 9/11/14 at 40). The Court refers to each by his or her first name to avoid confusion.
5

Petitioner claims that Tyheem testified at the preliminary hearing that it was his uncle, Brian Sweeny, who asked Tyheem if he had heard gunshots. (Hab. Pet., ECF No. 2, at 36). The preliminary hearing testimony has not been included in the SCR.
6

Petitioner bolds this testimony as the portion that his counsel should have objected to or for which he should have sought a curative instruction. (Hab. Pet., ECF No. 2, at 21). The Court includes the surrounding testimony for context.
7

It appears that the referenced testimony is at pages 95 through 99, not page 60, as cited by Petitioner.
8

Petitioner does not contend that the facts of any of these cases are akin to those here, and he freely volunteers that those in *Street* were "different." (Reply, ECF No. 18, at 13). Accordingly, the Court does not discuss the facts of these cases but considers them for the legal principles stated therein.
9

As the Commonwealth notes, immediately prior to reciting the Pennsylvania ineffectiveness standard comporting with *Strickland*, the Superior Court stated that a preponderance of the evidence standard applied to its determination, something not found in *Strickland*. *Roseboro*, 2021 WL 2012602, at *2.
10

Tyheem is also known as Randy. (N.T. 9/10/14 at 152, 170-72).
11

In light of this surveillance video and audio, the Court also rejects Petitioner's related contention that the evidence against him was "limited" and that the Commonwealth unfairly used the rumor testimony to improperly "bolster" and "cement" its otherwise flawed case, as in two of the cases he cites in support of that contention. (Reply, ECF No. 18, at 15-16); *see United States v. Sallins*, 993 F.2d 344, 348 (3d Cir. 1993) (refusing to find harmless error and reversing conviction for unlawful firearm possession on direct appeal where "the only admissible evidence linking [the defendant] to the possession of a gun" was hearsay testimony of a "presumably disinterested witness who allegedly saw precisely what the police said they saw," particularly where that police testimony was itself "hotly contested"); *Commonwealth v. Young*, 748 A.2d 166, 193-94 (Pa. 1999) (refusing to find harmless error under Pennsylvania law and reversing murder conviction on direct appeal where the hearsay "version of events were refuted on every critical point by the defense," including by providing an alibi from a third party). In Petitioner's third cited case, the dissent in *Commonwealth v. Markman*, 591 Pa. 249, 916 A.2d 586 (Pa. 2007), Justice Eakin actually found the admission of an improperly redacted confession to be harmless error in light of the other evidence against the defendant. *Id.* at 295-98. Thus, it is also unavailing.
12

Petitioner's remaining Pennsylvania state cases do not elucidate whether he was prejudiced such that he was deprived of a "fair trial" as guaranteed by the Sixth Amendment of the United States Constitution. *See Strickland*, 466 U.S. at 687; *see also* 28 U.S.C. § 2254(d)(1) (a petition for habeas

corpus may be granted if, *inter alia*, petitioner's conviction is contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of United States").
13

Petitioner also assumes that the jury did not pick up on Dunlap's apparent error, but this is speculation. As the trial court noted, it was the province of the jury to determine the facts, and the only indication that Petitioner points to that the jury credited Dunlap's testimony regarding the length of the discrepancy is the fact that it convicted him. Petitioner's supposition is even more tenuous given that, as set forth herein, it would have made no difference in the jury's decision even if it had credited this testimony from Dunlap.
14

Elsewhere in Petitioner's briefing, he calculates that Dove's testimony would have placed the emergency call between four and seven minutes after the gunshots. (Reply, ECF No. 18, at 23 (six to seven minutes based on Dove's calculations), 38 (four to five minutes based on his calculations)).
15

Rhonda's body was discovered by responding officers at 2:29 a.m. actual time. (Reply, ECF No. 18, at 9 (citing N.T. 9/10/14 at 22)).
16

The alleged fact that the alley where Rhonda's body was found was inaccessible from the one where Petitioner kept his drugs is rendered irrelevant by his observation that no evidence of motive was introduced. (Supp. Reply, ECF No. 34, at 1). The inaccessibility of one alley from the other would tend to undermine the prosecution theory that Rhonda was killed as the result of a drug deal gone wrong, but Petitioner points out that there was no evidence to support this theory anyway.
17

Petitioner also cites a lack of "statement evidence," but elsewhere he notes that at least some of the testifying witnesses gave statements to the police that tended to incriminate him. (Reply, ECF No. 18, at 10).
18

Regarding his next claim, Petitioner observes, correctly, that his counsel's arguments and statements are not evidence. *See infra* § III.B. Here Petitioner suggests the opposite is true, but he cannot have it both ways.
19

Petitioner cites *Wilson*, 589 F.3d at 666, for the proposition that "a witness under the influence of drugs undermines credibility calling into question the witness's ability to perceive events correctly, remembering those events and later accurately provide a narration." (Supp. Reply, ECF No. 34, at 4). In *Wilson*, the court held that failure to turn over evidence of a witness's drug and alcohol use violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In this case, Tyheem's substance use was part of the record for the jury to consider.
20

Tyheem is also known as Randy. (N.T. 9/10/14 at 152, 170-72).
21

It is questionable whether Petitioner actually asserted this claim before the Pennsylvania Superior Court. He did not assert it during his direct appeal, and on PCRA appeal he contended only that "trial counsel [was] ineffective for failing to call Detective Dove at trial," which he argues as a separate

claim in his habeas petition and which is therefore addressed separately in the next section. *See Commonwealth v. Roseboro*, No. 2833 EDA 2014, 2016 WL 903949, at *3 (Pa. Super. Ct. Mar. 9. 2016) (listing different claims on direct appeal); *Roseboro*, 2021 WL 2012602, at *1; *see infra* § III.C. Insofar as Petitioner did not previously raise the claim in state appellate court, it would be procedurally defaulted because the time to file a new PCRA petition asserting it has long passed. *See Commonwealth v. Roseboro*, 144 A.3d 193 (Pa. 2016) (table decision) (conclusion of Petitioner's direct appeal, with no subsequent petition for a writ of certiorari filed to the United States Supreme Court); *see also* 42 Pa. C.S. § 9545(b)(1) ("Any petition under this subchapter, including a *second or subsequent* petition, shall be filed within one year of the date the judgment becomes final . . . .") (emphasis added). Nonetheless, in light of Petitioner's *pro se* status, the similarity of the claim to the one raised on PCRA appeal (i.e., ineffective assistance for breaking promise to the jury to present Dove's testimony regarding the time discrepancy versus ineffective assistance for not calling him generally), and, significantly, the Commonwealth's failure to raise the defense of a procedural default, the Court addresses the merits of Petitioner's claim. *See Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 281 n.11 (3d Cir. 2018) ("The Commonwealth, however, has failed to raise and therefore waived any potential defense of procedural default.").

22

Petitioner notes that the prosecutor in his closing highlighted counsel's "unfulfilled promises," but the surrounding statements make clear that he was referencing the defense's promises "[t]hat there would be zero physical evidence, no evidence of what happened in the alleyway[,]" and "that there is no confession in this case," not that Dove's testimony would be introduced. (N.T. 9/12/24 at 121).

23

At the initial and appellate level PCRA stage, Petitioner raised a stand-alone claim regarding the denial of his request to hold an evidentiary hearing on his various claims, but he does not do so here. *Roseboro*, CP-51-CR-0001397-2013, at 31 (ECF No. 31-2); *Roseboro*, 2021 WL 2012602, at *1.

24

Petitioner elaborates that these instructions are what "took away the defense that counsel promised to the jury" because they prevented counsel's use of Dove's testimony within counsel's questioning from being considered as evidence. (Hab. Pet., ECF No. 2, at 47).

25

After Harkins confirmed that Dove downloaded the video in his presence, counsel asked him: "So that could mean one of two things; either he did it before at some other time when you were there or Detective Dove is not telling the truth?" (*See* N.T. 9/11/14 at 164). The prosecution objected to this question, and the court sustained the objection. (*Id.*).

26

In the preceding sentence of his brief, Petitioner appears to argue that it is Dove's testimony that "is less credible," but this statement is seemingly a typographical error. (Hab. Pet., ECF No. 2, at 51). Petitioner has consistently contended that Dove's calculation is more accurate. (Hab. Pet., ECF No. 2, at 33-35, 37-38; Reply, ECF No. 18, at 12).

27

Indeed, the Commonwealth apparently remains under this misimpression even now. (Supp. Resp., ECF No. 31, at 17-18 (referencing the use of the testimony to cross-examine Dunlap and Harkins and claiming that the testimony was "admitted at trial")).

28

Because this Court finds that counsel broke this promise, establishing deficient performance under

Strickland, it does not consider whether Petitioner made a related promise, also unfulfilled, that the evidence of a shorter discrepancy would necessarily be in the form of testimony from Dove. Although Petitioner insists that such evidence was the only way to establish the shorter discrepancy, even he acknowledges that "the exact promise made by trial counsel" was that "the evidence would show a discrepancy between the Commonwealth's expert [Dunlap] and the defense's theory of the disputed timelines." (Reply, ECF No. 18, at 18).
29

Cronic, the United States Supreme Court cited by Petitioner, involved even more disparate facts, where the Court inferred ineffective assistance because counsel, a junior real estate attorney appointed by the district court to represent the defendant on a 13-count mail fraud case, was given only 25 days to prepare for trial preparation although the government had over four years to investigate and review thousands of documents. 466 U.S. 648.
30

As in *McAleese, Saesee*'s discussion of the potentially prejudicial effect of a broken promise was *dictum* because no promise had been made. *Saesee*, 725 F.3d at 1050 ("No promise, no prejudice.").
31

Petitioner observes that at the conclusion of the evidence the trial court agreed with his counsel's assertion that Dove's testimony regarding the time discrepancy was "critical." (Reply, ECF No. 18, at 24). However, at the PCRA stage the same judge explained that even if "the time differential wasn't correct, no matter how you look at it, between twenty and thirty seconds, whatever time frame you are using, after the defendant, who admits that he was on video with the decedent walks off camera four pops are heard. It doesn't matter what time it is and the decedent is found in the alleyway right behind the store that captures the audio with four gunshot wounds." (Hab. Pet., ECF No. 2, at 22 (quoting N.T. 11/25/19 at 85-86)). Regardless, the state courts' view of the evidence is irrelevant on this *de novo* review.
32

Petitioner repeats his assertion that the "popping noises numbered five," but the evidence was that the fifth one was described differently than the first four that the jury apparently concluded were gunshots. (N.T. 9/10/14 at 76).
33

Petitioner further suggests that counsel performed deficiently by not obtaining a copy of Dunlap's expert report. (Hab. Pet., ECF No. 2, at 58). This contention constitutes his fourth habeas claim and is discussed in the following section. *See infra* § III.D.
34

Petitioner adds that "it is *untrue* that both Detectives derived at the same conclusion that the screen-time was slow as to real time," but this is a typographical error. (Hab. Pet., ECF No. 2, at 56 (emphasis added)). Petitioner has consistently maintained that the question is the size of the discrepancy. (*See* Reply, ECF No. 18, at 25-26 ("They [Dove and Dunlap] both concluded that screen-time was slow in relation to real time; what differed was their debate over how slow the screen-time was as to real time.")).
35

Because the Court agrees that the testimony was not admitted, as set forth in the preceding section, it does not rehash all the reasons advanced by Petitioner in support of this contention. (Hab. Pet., ECF No. 18, at 26-27).
36

Citing *Branch*, Petitioner reminds the Court that it must consider the "record as a whole," but it is Petitioner who fixates on the missing evidence, Dove's testimony, without properly considering it within the context of the remaining evidence. (Reply, ECF No. 18, at 29-30 (citing *Branch*, 758 F.3d 226)). Viewed in conjunction with the totality of the evidence, as the Court does here, it is not reasonably probable to have made a difference in the mind of any juror.
37

Petitioner somewhat fleshes out his theory that Rhonda may have been murdered as part of a robbery, although he continues to fail to cite to the portions of the record that supposedly corroborate his contentions. (Hab. Pet., ECF No. 2, at 60-62). In any event, his theory largely boils down to the fact that Rhonda must have been dragged into the alley by a robber, rather than lured there by Petitioner, because her body was discovered with one shoe partially off, and because a bracelet of unknown origin was discovered at the scene. (*Id.*). It is unclear how Dove's calculation of a shorter time discrepancy between the video time-stamp and real time would have furthered this theory, but even if his testimony had been admitted it is not reasonably probable that any jurors would have been swayed by Petitioner's speculative version of events.
38

Given the lack of clarity in Petitioner's contention, the Court repeats the relevant portion here. The gist of Petitioner's argument, however, appears to be that he agrees with the PCRA court's finding that the arrival time reported by Levitt and Robertson was prior to their appearance on surveillance because, in Petitioner's words, they reported their arrival "on not the actual crime scene but just the general scene (having not yet been seen on camera)." (Hab. Pet., ECF No. 2, at 68). He therefore "abandon[s]" any claim based upon the discrepancy and instead assert[s] that later "actual onscreen events . . . did not comport with Dunlap's conversion analysis." (*Id.*).
39

Plaintiff submits that "[w]ith the conversion being incorrect, the real time of the popping sounds were considered by the jury," but this appears to be a misstatement, as the ensuing sentence makes clear. (Hab. Pet., ECF No. 2, at 72). Petitioner's position is not that the real time of the gunshot-sounds was considered by the jury, but that Dunlap's incorrect conversion times "affected . . . the purported time of the alleged gunshots." (*Id.*).
40

Petitioner himself recognizes that many of his contentions duplicate earlier ones. (*See, e.g.*, Reply, ECF No. 18, at 31 ("[a]s shown earlier"), 35 ("[a]s shown in previous grounds"), 36 ("[a]s shown in Ground One"), 38 ("[a]s stated elsewhere herein").)
41

Petitioner restates his arguments, already rejected above, regarding the purported issues with the audio and adds to them that at trial the prosecutor stopped the surveillance footage before the fifth and sixth sounds, "which the ADA would reasonably want the jury not to hear because the additional noises did not agree with the evidence establishing only four shots were fired." (Reply, ECF No. 18, at 38). However, whatever the prosecutor's motivations in stopping the footage, it is undisputed that the jury later heard the additional sounds that Petitioner contends were also relevant. (N.T. 9/10/14 at 76).
42

Similarly, the jury could see and hear for itself that the sounds occurred within 30 seconds of Petitioner and Rhonda walking off camera together because these events were caught on the same surveillance system. Contrary to Petitioner's assertions, this brief window was not impacted by Dunlap's calculations. (*See* Hab. Pet., ECF No. 2, at 70, 72).

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