APPENDIX "1"

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

GEORGE H. FINK	:	**Civil No. 3:16-cv-1867**
	:	
Petitioner,	:	**(Judge Brann)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
ROBERT GILMORE, et al.	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION

I. Introduction

Pending before the court is a petition for writ of habeas corpus filed by the petitioner, George Fink. Fink is a state inmate in the Pennsylvania Department of Corrections and is currently incarcerated at the State Correctional Institution in Waynesburg, Pennsylvania ("SCI-Greene"). Fink was convicted in 2007 of first-degree murder, criminal trespass, and false imprisonment, charges that resulted from the strangling and death of his ex-girlfriend, and he was sentenced to life imprisonment. Fink now asks this court to grant him a new trial due to his trial counsel's alleged ineffectiveness and an alleged violation of his Miranda rights. However, a review of the state court record demonstrates that Fink's claims are without merit, and as such, we will recommend that his petition be denied.

II. Statement of Facts and of the Case

The factual background of the instant petition can be simply stated:[1] George Fink was charged with killing his ex-girlfriend, who was found dead at her home on January 21, 2006. She had been strangled, and her cause of death was ruled a homicide by asphyxiation. On January 20, 2006, the day before her death, Fink had asked his aunt to give him a ride to the area where the victim lived, Hunlock Creek. His aunt testified that she was concerned, as the victim had obtained a Protection From Abuse ("PFA") Order against Fink because he had threatened her on several previous occasions. Later that same day, Fink asked his cousin for a ride, and his cousin dropped him off in Hunlock Creek between 6:15 and 6:30p.m. The autopsy of the victim revealed that the victim had died 24-36 hours before she was found on January 21.

Several individuals testified at trial that Fink had threatened to kill his ex-girlfriend and himself on numerous occasions. A woman who was raising the victim's child testified that Fink had threatened to kill the victim and himself, and that he was upset that the victim was dating other people. A friend of Fink's testified that Fink told her that he was going to kill the victim and himself with a syringe, and

[1] The factual background of this Report and Recommendation is taken from the PCRA court's 2010 decision and the Pennsylvania Superior Court's opinion affirming the denial of Fink's petition for post-conviction relief. (Doc. 26-3, at 8); Commonwealth v. Fink, 2015 WL 6948436 (Pa. Super. Ct. Aug. 17, 2015) (Doc. 26-5, at 82).

the friend pleaded with Fink to "let it go." Fink's step-daughter also testified that Fink, on a number of occasions, stated that the victim "would go first."

Significantly, Fink gave a statement to the police after he was arrested on January 26, 2006, pursuant to a warrant for his failure to appear at a PFA hearing. Prior to this interview, Fink was read his Miranda rights and signed a waiver. After speaking with Pennsylvania State Police troopers, Fink requested a lawyer, but then initiated a conversation with Sergeant Whitaker, wherein he admitted that he went to the victim's home, waited for her, grabbed her from behind, duct taped her and cut himself in front of her. Thereafter, according to Fink, he and the victim attempted to engage in a sexual encounter, and the victim belittled Fink when he could not perform, after which he "snapped." This statement was consistent with what Fink told Dr. Richard Fischbein, who ultimately testified that Fink suffered from a major depression, recurrent, passive-aggressive personality disorder with borderline and histrionic features. Fink also told Dr. Fischbein that when he came to, his hands were around the victim's neck. Trial counsel had moved to suppress the statement made to police, but the motion was denied.

Fink proceeded to a bench trial after waiving his right to a jury trial, and the trial judge found him guilty of first-degree murder and related offenses. He was sentenced to a term of life imprisonment and received concurrent sentences for the other offenses. Fink appealed, and the Pennsylvania Superior Court affirmed his

conviction and sentence on July 19, 2012. (Doc. 26-3, at 71). Fink's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied on March 12, 2013. (Id., at 82).

Fink then filed a petition for post-conviction relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), and appointed counsel filed a supplemental petition, raising a claim that his appellate counsel failed to properly preserve his Miranda claim and his claim regarding the waiver of a jury trial, and also alleging that his trial counsel was ineffective for failing to challenge the time of death of the victim, failing to prepare for trial, and failing to assert the absence of the lack of DNA evidence on the victim. (Doc. 26-2, at 74). The PCRA court denied Fink's petition on October 6, 2010, finding that Fink's claims had no merit. (Doc. 26-3, at 8). Fink appealed to the Superior Court, which remanded the case and reinstated Fink's direct appeal rights. (Id., at 51). However, on direct appeal, Fink raised only one issue—the denial of his suppression motion in violation of Miranda—and the Superior Court found that Fink knowingly and voluntarily waived his Miranda rights, and that the trial court did not err in denying the motion. (Id., at 81). The Pennsylvania Supreme Court denied Fink's Petition for Allowance of Appeal on March 12, 2013. (Id., at 82).

Thereafter, Fink filed a second PCRA petition, and appointed counsel filed a supplemental petition. (Doc. 26-4, at 1, 12). In this petition, Fink raised six claims

of trial counsel's ineffectiveness, alleging that counsel failed to: challenge the time of death of the victim; adequately prepare for trial; argue the lack of DNA evidence on the victim; assert the bias of the trial judge; advise the defendant of his right not to testify; and ensure that the defendant knowingly waived his right to a jury trial. (Id., at 13). Ultimately, the PCRA court denied Fink's petition after a hearing, finding that his claims lacked merit. (Doc. 26-5, at 23). The Superior Court affirmed the denial of Fink's petition, adopting the PCRA court's reasoning and finding that counsel was not ineffective. (Id., at 89). Fink's Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on June 15, 2016.

Fink filed the instant petition for writ of habeas corpus on September 12, 2016. (Doc. 1).[2] In his petition, he raises five grounds on which he believes he is entitled to relief. He first claims that his Miranda rights were violated when the trial court denied his motion to suppress his statement to the police. He additionally raises several claims of ineffective assistance of trial counsel, alleging that counsel failed

[2] Fink's petition was stayed by this court on November 15, 2016 after Fink filed a motion for a stay and abeyance in order to present any unexhausted claims to the state courts. (Docs. 5, 8). A review of the state court record indicates that Fink believed that two of his ineffective assistance claims—failing to challenge the alleged bias of the trial judge and failing to advise Fink of his right to testify—had not been exhausted in state court. (Doc. 26-6, at 14). Thus, the district court stayed the instant petition in order to allow Fink an opportunity to exhaust these claims. We note, however, that these two claims were raised in Fink's second PCRA petition, which was appealed to the Pennsylvania Supreme Court and thus these claims were fully and properly exhausted. (Doc. 26-5, at 23, 82, 93).

to consult him regarding the trial strategy of arguing diminished capacity, failed to challenge the time of death of the victim, failed to assert the lack of DNA evidence on the victim, failed to advise him of his right not to testify, and failed to challenge the bias of the trial judge. For their part, the respondents contend that none of Fink's claims have merit, as they were thoroughly considered and denied by the state courts.

A review of the record demonstrates that the state courts considered Fink's claims and ultimately concluded that the claims were without merit. Accordingly, given the deference that must be afforded to the state court findings with respect to habeas claims like Fink's, for the following reasons, we will recommend that Fink's petition be denied.

III. Discussion

A. State Prisoner Habeas Relief–The Legal Standard.

(1) Substantive Standards

In order to obtain federal habeas corpus relief, a state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides in part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> .....
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. At the outset, a petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the United States," § 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. See e.g., Reed v. Farley, 512 U.S. 339, 354 (1994). Thus, claimed violations of state law, standing alone, will not entitle a petitioner to § 2254 relief, absent a showing that those violations are so

great as to be of a constitutional dimension. See Priester v. Vaughan, 382 F.3d 394, 401–02 (3d Cir. 2004).

(2) Deference Owed to State Courts

These same principles which inform the standard of review in habeas petitions and limit habeas relief to errors of a constitutional dimension also call upon federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under § 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law; see 28 U.S.C. § 2254(d)(l); or (2) was "based upon an unreasonable determination of the facts," see 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. See Rice v. Collins, 546 U.S. 333, 338–39 (2006); see also Warren v. Kyler, 422 F.3d 132, 139–40 (3d Cir. 2006); Gattis v. Snyder, 278 F.3d 222, 228 (3d Cir. 2002).

In addition, § 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. See 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings. See, e.g., Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam); Demosthenes v. Baal, 495 U.S. 731, 734–35 (1990). This principle applies to state court factual findings made both by the trial court and state appellate courts. Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006). Thus, we may not re-assess credibility determinations made by the state courts, and we must give equal deference to both the explicit and implicit factual findings made by the state courts. Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000). Accordingly, in a case such as this, where a state court judgment rests upon factual findings, it is well-settled that:

> A state court decision based on a factual determination, ..., will not be overturned on factual grounds unless it was objectively unreasonable in light of the evidence presented in the state proceeding. Miller–El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003). We must presume that the state court's determination of factual issues was correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Campbell v. Vaughn, 209 F.3d 280, 285 (3d Cir.2000).

Rico v. Leftridge–Byrd, 340 F.3d 178, 181 (3d Cir. 2003). Applying this standard of review, federal courts may only grant habeas relief whenever "[o]ur reading of the

PCRA court records convinces us that the Superior Court made an unreasonable finding of fact." Rolan, 445 F.3d at 681.

(3) Ineffective Assistance of Counsel Claims

These general principles apply with particular force to habeas petitions that are grounded in claims of ineffective assistance of counsel. It is undisputed that the Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack of a sentence based upon a claim of ineffective assistance of counsel must meet a two-part test established by the Supreme Court in order to survive. Specifically, to prevail on a claim of ineffective assistance of counsel, a petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) that, but for counsel's errors, the result of the underlying proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 691-92 (1984). A petitioner must satisfy both of the Strickland prongs in order to maintain a claim of ineffective counsel. George v. Sively, 254 F.3d 438, 443 (3d Cir. 2001).

At the outset, Strickland requires a petitioner to "establish first that counsel's performance was deficient." Jermyn v. Horn, 266 F.3d 257, 282 (3d Cir. 2001). This threshold showing requires a petitioner to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment.

Id. Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Id. However, in making this assessment "[t]here is a 'strong presumption' that counsel's performance was reasonable." Id. (quoting Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996)).

But a mere showing of deficiencies by counsel is not sufficient to secure habeas relief. Under the second Strickland prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." Id. This prejudice requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." Id.

Thus, as set forth in Strickland, a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer's "representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Thomas v. Varner, 428 F.3d 491, 499 (3d Cir. 2005) (quoting Strickland, 466 U.S. at 689). The petitioner must then prove prejudice

arising from counsel's failings. "Furthermore, in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" Rolan, 445 F.3d at 682 (quoting Strickland, 466 U.S. at 696) (internal quotations omitted).

Although sometimes couched in different language, the standard for evaluating claims of ineffectiveness under Pennsylvania law is substantively consistent with the standard set forth in Strickland. See Commonwealth v. Pierce, 527 A.2d 973, 976–77 (Pa.1987); see also Werts v. Vaugh, 228 F.3d 178, 203 (3d Cir.2000) ("[A] state court decision that applied the Pennsylvania [ineffective assistance of counsel] test did not apply a rule of law that contradicted Strickland and thus was not 'contrary to' established Supreme Court precedent"). Accordingly, a federal court reviewing a claim of ineffectiveness of counsel brought in a petition under 28 U.S.C. § 2254 may grant federal habeas relief if the petitioner can show that the state court's adjudication of his claim was an "unreasonable application" of Strickland. Billinger v. Cameron, 2010 U.S. Dist. LEXIS 63759, at *11, 2010 WL 2632286 (W.D. Pa. May 13, 2010). In order to prevail against this standard, a petitioner must show that the state court's decision "cannot reasonably be justified under existing Supreme Court precedent." Hackett v. Price, 381 F.3d 281, 287 (3d

Cir. 2004); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009) (where the state court's application of federal law is challenged, "the state court's decision must be shown to be not only erroneous, but objectively unreasonable.") (internal citations and quotations omitted).

This additional hurdle is added to the petitioner's substantive burden under Strickland. As the Supreme Court has observed a "doubly deferential judicial review that applies to a Strickland claim evaluated under the § 2254(d)(1) standard." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009); see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas"). This doubly deferential standard of review applies with particular force to strategic judgment like those thrust upon counsel in the instant case. In this regard, the Court has held that:

> "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id., at 688, 104 S. Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id., at 689, 104 S. Ct. 2052. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id., at 690, 104 S. Ct. 2052.

Knowles v. Mirzayance, 556 U.S. 111, 124, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). The deference which is owed to these strategic choices by trial counsel is great.

> Therefore, in evaluating the first prong of the Strickland test, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. The presumption can be rebutted by showing "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) (footnote omitted).

Lewis v. Horn, 581 F.3d 92, 113 (3d Cir. 2009).

B. Fink's Claims Have Been Thoroughly Analyzed by the State Courts and are Without Merit.

In his petition, Fink claims that the trial court violated his Miranda rights by allowing his statement to the police to be admitted at trial. Further, he raises five claims of ineffective assistance of trial counsel. However, the state courts considered all of Fink's claims and determined that his claims were without merit. Thus, given the deference that must be afforded to the state court decisions when reviewing habeas petitions like Fink's, for the reasons set forth below, we will recommend that his petition be denied.

1. *Miranda* Violation

Fink first alleges that his Miranda rights were violated when his statement to the police was permitted to be introduced at trial. He claims that the state police continued to question him after he requested an attorney, and thus, the trial court erred when it denied his motion to suppress the statement he made to the police. In order to prevail on this claim, Fink must demonstrate that the state court's findings

were either (1) "contrary to" or involved an unreasonable application of clearly established case law; see 28 U.S.C. § 2254(d)(1); or, (2) were "based upon an unreasonable determination of the facts." See 28 U.S.C. § 2254(d)(2).

We begin by observing that at the time of Fink's Luzerne County prosecution, the parameters of the Supreme Court's ruling in Miranda had been well-established for over 40 years. As the Supreme Court has long observed:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Miranda v. Arizona, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Thus, under Miranda, once a suspect invokes his right to remain silent by "indicat[ing] in any manner that he does not wish to be interrogated, the police may not question him." Id. The prohibition against further interrogation of a suspect who invokes his right to remain silent in an integral part of the holding in Miranda. As the Supreme Court subsequently observed:

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means ... to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored...." 384 U.S., at 479, 86 S. Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id., at 474, 86 S. Ct., at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

Michigan v. Mosley, 423 U.S. 96, 103–04, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975).

The consequences that flow from a failure to scrupulously honor an invocation of this right to remain silent were also well settled at the time of Fink's state prosecution. When police fail to scrupulously honor an invocation of this right, suppression of evidence obtained in violation of a suspect's Miranda rights is required. See, e.g., United States v. Lafferty, 503 F.3d 293, 299 (3d Cir. 2007); United States v. Tyler, 164 F.3d 150, 153 (3d Cir. 1998).

Likewise, under Miranda, once a suspect has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981). However, a suspect can initiate further communication when he "evince[s] a willingness and a desire for a generalized discussion about the investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045–46, 103 S. Ct. 2830, 2835, 77 L. Ed. 2d 405 (1983). Moreover, a suspect can initiate further communication with police by simply approaching the officers and asking in essence, "Well, what is going to happen to me now?" Id. at 1045.

Here, Fink challenged the denial of the suppression motion on direct appeal, and the Superior Court affirmed the trial court's decision, finding as a factual matter that Fink had knowingly waived his Miranda rights when he spoke to the police officers. The court noted that Fink had been arrested by the police on a bench warrant for failing to appear for a PFA hearing, and that he was given his Miranda rights when he was taken into custody. (Doc. 26-3, at 75). Fink signed a waiver of his rights and made statements concerning the PFA and his relationship with the victim. (Id.) Once at the police station, the troopers again made sure that Fink understood his rights before questioning him about the victim's death, and Fink was given several

breaks during the troopers' questioning. (Id. at 75-76). After Fink made several inculpatory statements regarding the victim's death, he had indicated that he wanted to call an attorney, after which the troopers promptly ended the interview. (Id., at 76).

Although Fink had stated that he thought he should call an attorney, he expressed that he wanted to continue speaking with Sergeant Whittaker, who informed Fink that the interview had been terminated. (Id.) However, Fink again asked to speak with Whittaker, wherein Fink, without being questioned, confessed to Whittaker that he had broken into the victim's home, duct taped her, and later became enraged and "snapped." (Id.) Fink then acknowledged this confession to the other troopers, and subsequently signed another waiver of his rights before making a formal statement to the police. (Id. at 77).

On these facts, the Superior Court found that Fink had knowingly and intelligently waived his rights. The court noted that Fink was advised more than once of his rights, and that he signed multiple waivers of those rights before speaking with the police. Additionally, Fink was given several breaks over the eight-hour period of interrogation. Ultimately, although Fink had mentioned he wanted to speak with an attorney, he later initiated communication with Whittaker, even after Whittaker had informed him that the interview had ended. The court also found Fink's contention that he was in a weakened mental state to be unpersuasive, as he had been

released from the hospital and was not taking any medication. Section 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. See 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings applies to state court factual findings made both by the trial court and state appellate courts. Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006). Thus, we may not re-assess credibility determinations made by the state courts, and we must give equal deference to both the explicit and implicit factual findings made by the state courts. Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000). Moreover, when a state court judgment rests upon a factual finding, it is well-settled that this finding "will not be overturned on factual grounds unless it was objectively unreasonable in light of the evidence presented in the state proceeding. Miller–El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003). We must presume that the state court's determination of factual issues was correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Campbell v. Vaughn, 209 F.3d 280, 285 (3d Cir.2000)." Rico v. Leftridge–Byrd, 340 F.3d 178, 181 (3d Cir. 2003).

On this score, we cannot conclude that the court's decision was contrary to established law or based on an unreasonable determination of the facts. Rather, the court's decision was firmly grounded in the facts presented at trial and was directly

in line with the Supreme Court's mandate in Miranda and based on a totality-of-the-circumstances determination that Fink knowingly, intelligently, and voluntarily waived his rights and made a statement to the police. Accordingly, Fink is not entitled to habeas relief on this claim.

2. Ineffective Assistance of Counsel

Fink also raises five claims of ineffective assistance of trial counsel. He alleges that trial counsel was ineffective for failing to: discuss the strategy of diminished capacity with him, investigate or challenge the victim's time of death, challenge the lack of DNA evidence on the victim, challenge the bias of the trial judge, and advise the petitioner of his right not to testify. The state courts addressed these claims, ultimately concluding that the claims were meritless. We agree.

First, Fink claims that trial counsel failed to discuss the strategy of diminished capacity with him, and that he was adamant about asserting his innocence at trial. The PCRA court found that counsel's decision to pursue this defense was admittedly inconsistent with a claim of innocence but found that Fink suffered no prejudice from the decision given the Commonwealth's evidence against him. (Doc. 26-3, at 28). Indeed, Fink's statement to the police placed him at the scene of the crime, indicated that he duct-taped the victim before cutting himself with a pocket knife, and evidenced that he had "snapped" after the victim had belittled him. (Id., at 24). In addition to Fink's statement, the testimony of a witness who had given Fink a ride

placed him at the scene, and several other witnesses testified to the multiple times Fink had threatened the victim's and his own life. (Id., at 25).

On this score, the PCRA court found that, although counsel's strategy was inconsistent with claiming innocence, it was not so objectively unreasonable that no competent attorney would have followed it. (Id., at 28). Moreover, the court found that Fink was not prejudiced by counsel's decision to pursue a diminished capacity defense, noting that there would be no value to an alibi defense once Fink's statement, as well as the other evidence placing him at the scene and speaking to his motive and intent, was permitted into evidence. (Id., at 29). Indeed, although Fink contends that counsel should have explored an alibi defense, the fact remained that Fink's own statement placed him at the scene at or around the time of the victim's death and his DNA was found on a knife. (Id., at 24).

The respondents, for their part, raise the issue of the Supreme Court's recent decision in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), in which the Court held that it is a violation of the Sixth Amendment for counsel to concede a client's guilt against his wishes. However, McCoy was a case involving a direct appeal, rather than a habeas corpus petition under § 2254. Indeed, the Supreme Court has held that:

> [R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the prisoner's claims on the merits. . . . [Section] 2254(d)(1) requires federal courts to "focu[s] on what a state court knew and did," and to measure state-court decisions "against this Court's precedents *as of* '*the time the state court renders its decision.*'"

Greene v. Fisher, 565 U.S. 34, 38 (2011) (emphasis in original) (holding that the Supreme Court's analysis in Teague v. Lane, 489 U.S. 288 (1989), which governs the retroactivity of new rules, is distinct from the AEDPA).

Accordingly, several courts have held that McCoy does not apply retroactively to habeas petitions like Fink's. See e.g., Simmons v. Huss, 2019 WL 1746271, at *5 (E.D. Mich. April 18, 2019) ("Petitioner cannot rely on McCoy to support his claim . . . . McCoy was decided after the Michigan Court of Appeals adjudicated Petitioner's claim");; United States v. Jose, 2018 WL 3747449, at *4 (E.D. Pa. Aug. 7, 2018) ("While McCoy instructs our guidance on the type of structural error warranting reversal on direct appeal, it could not directly address the waiver of Strickland prejudice applying when a convicted person seeks habeas relief"). As one court has recently observed: "Because McCoy was decided after completion of Applicant's first state post-conviction proceeding, the decision does not provide the clearly established law applicable to Applicant's ineffective assistance claim. See Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (stating that 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"); Stevens v. Ortiz, 465 F.3d 1229, 1235-38 (10th Cir. 2006) (same)." Quintana v. Trani, 2019 WL 1331990, at *16 (D. Colo. Mar. 25, 2019). Moreover, even those cases that have acknowledged the potential application of McCoy have

narrowed the scope of that decision to capital cases, or cases in which there was a direct conflict between the accused and counsel over whether to admit guilt to the crime. Id. Therefore, some courts have expressed a reluctance to extend McCoy to situations where the disagreement between the accused and counsel involves tactical matters that fall short of an outright admissions of guilt. Id.

In the instant case, Fink's trial took place in 2007, eleven years prior to the McCoy decision. At that time, the controlling Supreme Court authority was Florida v. Nixon, 543 U.S. 175, 186, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565 (2004), which held that counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial did not automatically render counsel's performance deficient. Therefore, when we view this case through the lens prescribed by § 2254, which calls upon us to consider "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," Lockyer, 538 U.S. at 71–72, we find that counsel's choice was consistent with the principles announced by the Court in Florida v. Nixon, and therefore did not transgress any clearly established law.

However, even if we were to find that McCoy had some application in the habeas context, in our view, the circumstances of the instant case are vastly different than the circumstances in McCoy, and we find that McCoy does not afford Fink relief. In McCoy, the defendant was adamant that he was innocent of the murders

for which he was charged, and that the police had framed him for the crimes. McCoy, 138 S. Ct. at 1506. He claimed that he was out of the state when the killings occurred, and that the police actually killed the victims when a drug deal went wrong. Id. The Supreme Court held that trial counsel violated the Sixth Amendment when he conceded McCoy's guilt at the first phase of the capital murder case, given that it was ultimately McCoy's decision whether he wanted to concede his guilt or assert his innocence. Id., at 1509.

Thus, McCoy involved only the most stark of conflicts in defense strategy: a defendant who insists on his innocence in a capital case where counsel tactically wishes to concede guilt. In contrast, in the instant case, counsel was not conceding absolute guilt, and Fink was not asserting total innocence. Rather, counsel sought to pursue a line of defense that was based upon Fink's inability to form a criminal intent, and Fink was proposing a different, fanciful, and speculative defense based upon the conjecture that after he strangled his victim into a helpless state, an unknown, motiveless, anonymous pillow-wielding killer smothered the victim to death for no apparent reason. Furthermore, the Court's decision in McCoy seemed premised on the notion that an actual choice of defenses existed, since there was evidence that could be presented to support either of the proposed lines of defense urged by the accused and counsel. No such true choice between viable defenses existed in the instant case.

Fink does not dispute that he was at the victim's house on the night of the murder, or that he duct taped and strangled her. Instead, Fink posited his own theory that, after he left the victim's house, a third party went into the victim's house and killed her. Thus, he claimed that counsel should have hired an expert to challenge the victim's time of death, which in turn could have provided him with an alibi defense for the hours after he had left the victim's home. On this score, Fink's case is strikingly different than McCoy, where McCoy claimed that he was out of state at the time of the killings, and his posited alibi defense was based on a set of factual circumstances that differed from the defense that his counsel asserted. Here, Fink's assertion of innocence and his alibi defense are based solely on his own speculative version of events that, after he strangled the victim, which he admitted to, someone else entered the house and killed her, and thus, he had an alibi for the period of time after he had left the victim's house. Accordingly, as Fink's story goes, if counsel had retained an expert to challenge the victim's time of death, Fink could have asserted an alibi defense for the hours after he had left the victim's home.

In our view, this case presents a markedly different set of circumstances than McCoy, as trial counsel in this case was faced with a wildly speculative scenario concocted by Fink and was told that Fink wanted to assert his innocence in the form

of an alibi defense based on this speculative scenario.[3] This was not a situation in which Fink was claiming that he had not been at the crime scene and that someone else committed the crime; rather, he had admitted to being at the crime scene, waiting for the victim to come home, duct taping her, and then "snapping" and waking up to his hands around the victim's neck. However, he speculated, in the absence of any evidence, that his actions were not the cause of the victim's death, and that someone else must have entered her home after he had left and killed her. In truth, though, Fink's case did not present a disputed choice between competing defenses that had some evidentiary support. Rather, Fink's claim that an anonymous killer with no motive may have happened by and smothered the victim following his manual strangulation of her was nothing more than a fore lone hope masquerading as a speculation impersonating a defense. On these facts, we cannot conclude that counsel's decision to present a diminished capacity defense, rather than an alibi

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[3] We note that the circumstances of the instant case also present a situation that may have implicated the Supreme Court's decision in Nix v. Whiteside, 475 U.S. 157 (1986). In Nix, the Supreme Court held that trial counsel does not render ineffective assistance when he refuses to allow a defendant to present false testimony at trial. Id., at 166. The defendant in that case insisted on testifying to a version of events that contradicted his earlier admissions to his counsel, and counsel refused to allow him to testify as such. Id., at 160-61. Similarly, in this case, trial counsel was faced with a situation in which Fink was asserting his innocence by way of a version of events that was based entirely on his own speculation, after he had admitted to counsel that he was present at the victim's home at or around the time of death and had admitted to strangling the victim. Thus, under Nix, counsel cannot be deemed ineffective for refusing to present such testimony at trial.

defense, violated the Sixth Amendment in light of McCoy. Accordingly, this claim does not entitle Fink to habeas relief.

Next, Fink argues that counsel was ineffective for failing to challenge both the location of DNA evidence and the victim's time of death. These claims were addressed by the PCRA court in its 2010 decision denying Fink's first PCRA petition. There, the court held that, even if counsel could be deemed ineffective for failing to challenge these two evidentiary aspects, Fink suffered no prejudice given the overwhelming evidence against him. (Doc. 26-3, at 29). As the court observed, "an alternative time of death or lack of DNA under the victim's fingernails or on her pillow did not offer a substantially greater chance of success." (Id., at 28). Indeed, Fink's DNA was found on the duct tape that was used to bind the victim's hands, and his own statement placed him at the victim's house around the time of her death. Additionally, Fink's posited evidentiary issues were based on his speculative assertion that someone else had entered the victim's home and killed her after he left. However, as counsel testified at the PCRA hearing, "we had no one else there who could have caused [the victim's] death other than Mr. Fink," and thus, counsel had no reason to challenge the time of death. (Doc. 26-5, at 3). Ultimately, the court noted that there was not a reasonable probability that the outcome would have been different had counsel challenged the time of death or the location of the DNA evidence.

Here, we cannot conclude that the court's decision was an unreasonable application of Strickland or based on an unreasonable determination of the facts. Rather, the court found that, even if counsel had been ineffective, the overwhelming evidence against Fink, which included his own statement that he was present at the crime scene and evidence of his DNA on the tape used to bind the victim, negated any prejudice that could have come from counsel's ineffectiveness. Moreover, as we have already explained, these evidentiary issues are based on Fink's concocted theory that someone else killed the victim after he left her home, a theory that Fink had no evidence to support. Thus, in our view, these claims do not afford Fink any relief.

Finally, Fink raises two additional claims of ineffective assistance that were raised in his second PCRA petition. He alleges that trial counsel was ineffective for failing to challenge the trial judge's bias and for failing to advise him of his right not to testify. These claims were heard by the PCRA court in 2014 and were denied on their merits.

The court first addressed Fink's claim that counsel did not adequately inform him of his right to testify. After quoting the trial transcript, wherein the trial judge made sure that counsel had spoken with Fink regarding his right to testify, the PCRA court noted that, "[i]t is clear that, at a minimum, during trial twenty minutes were spent discussing the issue of whether Fink should testify." (Doc. 26-5, at 38-39).

Indeed, at trial, the trial judge inquired in Fink's presence about Fink's choice not to testify:

> COUNSEL: Your Honor, at this time the Defense will rest. We have no more witnesses to offer. We spoke with Mr. Fink and he has chosen not to testify in this case and we felt it's in his best interest.
> THE COURT: You have reviewed with him the right to testify if he chooses to?
> COUNSEL: Yes, we have.
> THE COURT: He does not have to testify. It's his constitutional right and he's invoking that right and the fact that he cannot be used as an inference against him in trial nor will the Court consider that as an inference in this case. Did you review that with him?
> COUNSEL: Yes, Your Honor.

(Doc. 26-1, at 82).

On this score, we cannot conclude that the PCRA court's denial of this claim was based on an unreasonable determination of the facts, or on an unreasonable application of Strickland. From the transcript of the proceedings, it is clear that Fink was aware of his right to testify, and that he ultimately chose not to take the stand. Thus, this claim does not warrant relief.

Finally, with respect to the claim that counsel failed to object to the alleged bias of the trial judge, we conclude that this claim does not afford Fink any relief. At the PCRA hearing, trial counsel was asked if he had been aware that the trial judge was under investigation at the time of trial, to which counsel responded: "I would have been totally unaware of any investigation or any wrongdoing by [the

trial judge] at the time of this trial." (Doc. 26-4, at 83). Later in the hearing, Fink's PCRA counsel asked trial counsel if he was aware that there had been a complaint filed with the Judicial Conduct Board against the trial judge, to which trial counsel responded that he was "not aware of anything which would have led me to believe that [the trial judge] would be inappropriate to serve as a Trial Judge for this case." (Doc. 26-5, at 2). On this score, the PCRA court found that there was no evidence to show that counsel was aware of any potential bias or wrongdoing by the trial judge. (Id., at 46). The court noted that the only exhibit attached by Fink in support of this claim was a Pennsylvania Law Weekly article from 2009, which was dated two years after Fink's trial, and concluded that counsel could not have known this information prior to trial. (Id., at 45-46). Moreover, Fink has not presented any evidence in his instant petition from which we could reach a different conclusion. Thus, this claim is without merit, and Fink is not entitled to relief.

We are mindful that the Supreme Court has observed that a "doubly deferential judicial review . . . applies to a Strickland claim evaluated under the § 2254(d)(1) standard." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009); see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas"). Given this deferential standard, we cannot conclude that the state courts' decisions were an unreasonable application of Strickland or based on an

unreasonable determination of the facts. To the contrary, the courts' analyses of these ineffective assistance of counsel claims are thorough and well-supported by both the law and the facts of the petitioner's case. Accordingly, these claims do no warrant habeas relief and we recommend that Fink's petition be denied.

IV. Recommendation

Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus in this case be DENIED, and that a certificate of appealability should not issue.

The petitioner is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 11th day of June, 2019.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

APPENDIX "2"

CLOSED,HABEAS,PROSE,REOPEN

United States District Court
Middle District of Pennsylvania (Scranton)
CIVIL DOCKET FOR CASE #: 3:16-cv-01867-MWB

Fink v. Gilmore et al
Assigned to: Honorable Matthew W. Brann
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 09/12/2016
Date Terminated: 12/30/2019
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

George H Fink

represented by **George H Fink**
HD9391
SCI Greene
SPECIAL MAIL - OPEN ONLY IN THE PRESENCE OF THE INMATE
175 Progress Drive
Waynesburg, PA 15370
PRO SE

V.

Respondent

Robert Gilmore

represented by **James L McMonagle , Jr.**
Luzerne County District Attys. Office
Luzerne County Courthouse
200 No River Street
Wilkes-Barre, PA 18711
570-825-1674
Email: james.mcmonagle@luzernecounty.org
ATTORNEY TO BE NOTICED

Respondent

PA State Attorney General

represented by **James L McMonagle , Jr.**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/12/2016	1	PETITION for Writ of Habeas Corpus, filed by George H Fink.(lh) (Entered: 09/13/2016)

09/12/2016	2	MOTION for Leave to Proceed in forma pauperis by George H Fink.(lh) (Entered: 09/13/2016)
09/13/2016	3	PRO SE LETTER ISSUED w/ Notice & Consent Form. (Attachments: # 1 AO 85 FORM) (lh) (Entered: 09/13/2016)
09/28/2016	4	ORDER 1. Petitioner shall within forty-five (45) days of the date of this order complete and file with the court the attached Notice of Election.2.Failure of Petitioner to comply with thisOrder will result in this Court ruling onthe motion, document or pleading ascaptioned.Signed by Honorable Richard P. Conaboy on 9/28/16. (cc) (Entered: 09/28/2016)
11/10/2016	5	MOTION for Stay and Abeyance by George H Fink.(lh) (Entered: 11/10/2016)
11/10/2016	6	NOTICE OF ELECTION by George H Fink re 1 Petition for Writ of Habeas Corpus. (lh) (Entered: 11/10/2016)
11/15/2016	7	MEMORANDUM (Order to follow as separate docket entry)However, in order to keep this matter moving forward, within thirty (30) days of the termination of Petitioners state court proceedings regarding his pending federal claims, he will be required to file a written status report with the Court detailing the conclusion of his state court exhaustion efforts and including a copy of the relevant Superior and/or Supreme Courts dispositions. An appropriate Order will issue. Signed by Honorable Richard P. Conaboy on 11/15/16. (cc) (Entered: 11/15/2016)
11/15/2016	8	ORDER DISMISSING CASE AND NOW, THEREFORE, THIS 15th DAY OF NOVEMBER, 2016, in accordance with the accompanying Memorandum, IT IS HEREBY ORDERED THAT:1. Petitioners request that disposition of his pending habeas corpus petition be stayed (Doc. 5) is GRANTED.2.Adjudication of Finks federal habeas corpus action is STAYED.3.Within thirty (30) days of the termination of his state court proceedings, Petitioner is directed to file a written status report with the Court detailing the conclusion of his Pennsylvania state court exhaustion efforts and including a copy of the Superior and/or Supreme Courts disposition. 4.For administrative purposes only, the Clerk of Court is directed to mark this matter CLOSED.Signed by Honorable Richard P. Conaboy on 11/15/16. (cc) (Entered: 11/15/2016)
01/23/2017	9	Copies of Documents including from Pennsylvania Superior Court by George H Fink.. (ep) (Entered: 01/23/2017)
09/27/2017	10	Letter re: updated status report by George H Fink. (lh) (Entered: 09/27/2017)
10/10/2017	11	Letter from George Fink re: copy of hearing. (lh) (Entered: 10/10/2017)
11/21/2017	12	Letter from George Fink, Sr., re: appointment of attorney issues. (lh) (Entered: 11/21/2017)
11/29/2017	13	Letter from LP indicating that this office is not allow to give legal advice. (lp) (Entered: 11/29/2017)
02/06/2018	14	Letter from George Fink dated 2/1/18 re: filing of appeal to the PA Supreme Court on February 1, 2018. (lh) (Entered: 02/06/2018)
08/06/2018	15	

		Wriiten STATUS REPORT filed by George H Fink. (Attachments: # 1 Con't.) (ao) (Entered: 08/06/2018)
09/24/2018	16	Letter from George Fink re: status of order/notice. (lh) (Entered: 09/24/2018)
01/17/2019		VERBAL ORDER REFERRING CASE to Magistrate Judge Carlson. (jw) (Entered: 01/17/2019)
01/17/2019		VERBAL ORDER - Case Reassigned to Honorable Matthew W. Brann. Honorable Richard P. Conaboy no longer assigned to the case. (kc) (Entered: 01/17/2019)
01/17/2019		DOCKET ANNOTATION: Reopened case per JVW. (lh) (Entered: 01/17/2019)
02/04/2019	18	Letter from Mr. Fink requesting assignment of Judge and status of case. (lh) (Entered: 02/04/2019)
02/12/2019	19	NOTICE OF REFERRAL. Signed by Magistrate Judge Martin C. Carlson on February 12, 2019. (kjn) (Entered: 02/12/2019)
02/12/2019	20	ORDER - IT IS ORDERED that, on or before February 25, 2019 the petitioner shall complete and file the enclosed election form. Signed by Magistrate Judge Martin C. Carlson on February 12, 2019. (kjn) (Entered: 02/12/2019)
02/12/2019	21	ORDER - Respondents, on or before March 25, 2019, shall file an initial response to the petition for writ of habeas corpus. All documents filed by the parties and by the Court shall be served upon the Luzerne County District Attorney and the Office of Attorney General. Show Cause Response due by 3/25/2019. Signed by Magistrate Judge Martin C. Carlson on February 12, 2019. (kjn) (Entered: 02/12/2019)
03/01/2019		VERBAL ORDER REFERRING CASE to Magistrate Judge Martin C. Carlson. (admin,) (Entered: 03/01/2019)
03/25/2019	22	First MOTION for Extension of Time to *to file initial response to Petitioner's Petition for Writ of Habeas Corpus* by Robert Gilmore, PA State Attorney General.(McMonagle, James) (Entered: 03/25/2019)
03/25/2019	23	ORDER granting 22 Motion to Extend Time. Respondent is granted an extension of time to file an initial response to Petitioner's PWHC. Answer due no later than 4/24/2019. Signed by Magistrate Judge Martin C. Carlson on March 25, 2019. (kjn) (Entered: 03/25/2019)
04/24/2019	24	Second MOTION for Extension of Time to *File Response to Petitioner's Request for Habeas Corpus Relief* by Robert Gilmore, PA State Attorney General.(McMonagle, James) (Entered: 04/24/2019)
04/24/2019	25	ORDER granting 24 Motion to Extend Time. Respondent is granted a 30 day extension to file an initial response; due no later than 5/24/2019. Signed by Magistrate Judge Martin C. Carlson on April 24, 2019. (kjn) (Entered: 04/24/2019)
05/24/2019	26	RESPONSE TO PETITION FOR HABEAS CORPUS by Robert Gilmore, PA State Attorney General by Robert Gilmore, PA State Attorney General. (Attachments: # 1 Appendix Part I, # 2 Appendix Part II, # 3 Appendix Part III,

		# 4 Appendix Part IV, # 5 Appendix Part V, # 6 Appendix Part VI)(McMonagle, James) (Entered: 05/24/2019)
06/11/2019	27	REPORT AND RECOMMENDATION re 1 Petition for Writ of Habeas Corpus filed by George H Fink - IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus in this case be DENIED, and that a certificate of appealability should not issue. Objections to R&R due by 6/25/2019. Signed by Magistrate Judge Martin C. Carlson on June 11, 2019. (kjn) (Entered: 06/11/2019)
06/12/2019	28	Letter dtd 6/3/19 from George Harold Fink (ao) (Entered: 06/12/2019)
06/28/2019	29	MOTION to Remand to Magistrate Judge by George H Fink.(ep) (Entered: 06/28/2019)
07/08/2019	30	REPLY by Robert Gilmore, PA State Attorney General. *to Petitioner's Motion for Remand.* (McMonagle, James) (Entered: 07/08/2019)
08/09/2019	31	REQUEST for copy of docket for the past 6 months by George H Fink. Copy of docket sent explaining that this one copy is free this time, but that in the future his request would need to include payment of 10 cents per page and include a self-addressed stamped envelope. (ep) (Main Document 31 replaced on 8/9/2019) (ep). (Entered: 08/09/2019)
08/16/2019	32	ORDER - IT IS HEREBY ORDERED that 27 Magistrate Judge Carlson's Report and Recommendation is rejected and the action is remanded to him; 29 Fink's Motion to Remand is granted in part; Fink may file his traverse on/before 9/13/19. Signed by Honorable Matthew W. Brann on 8/16/19 (lg) (Entered: 08/16/2019)
09/19/2019	33	ORDER - IT IS ORDERED that Fink shall file his traverse no later thanSeptember 30, 2019. The petitioner is further placed on notice that a failure to comply with this deadline may result in the Court deeming the petitioner tohave waived his opportunity to submit a traverse. Signed by Magistrate Judge Martin C. Carlson on September 19, 2019. (kjn) (Entered: 09/19/2019)
09/25/2019	34	MOTION for Leave to File an Out of Time, Pro Se, Traverse by George H Fink. (kpf) (Entered: 09/25/2019)
09/25/2019	35	ORDER granting 34 Motion for Leave to File a traverse out of time. Signed by Magistrate Judge Martin C. Carlson on September 25, 2019. (kjn) (Entered: 09/25/2019)
10/01/2019	36	REPORT AND RECOMMENDATION re 1 Petition for Writ of Habeas Corpus filed by George H Fink - IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus in this case be DENIED, and that a certificate of appealability should not issue. Objections to R&R due by 10/15/2019. Signed by Magistrate Judge Martin C. Carlson on October 1, 2019. (kjn) (Entered: 10/01/2019)
10/11/2019	37	MOTION for Extension of Time to FOR 60 DAYS TO RESPOND TO THE COURT'S OCTOBER 1, 2019 R & R by George H Fink.(kpf) (Entered: 10/11/2019)

10/16/2019	38	ORDER granting 37 Motion to Extend Time. IT IS HEREBY ORDERED that the deadline for Petitioner to file Objections to Magistrate Judge Martin C. Carlson's Report and Recommendation is extended until 12/16/2019. Signed by Honorable Matthew W. Brann on 10/16/2019. (jr) (Entered: 10/16/2019)
12/30/2019	39	ORDER ADOPTING REPORT AND RECOMMENDATION - IT IS HEREBY ORDERED that 36 Magistrate Judge Carlson's Report and Recommendation is adopted; 1 Petition for Writ of Habeas Corpus is denied; the Court declines to issue certificate of appealability; Clerk directed to close this case. Signed by Honorable Matthew W. Brann on 12/30/19. (case closed)(lg) (Entered: 12/30/2019)

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01/13/2020 11:08:04			
PACER Login:	ca0024:2519119:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:16-cv-01867-MWB
Billable Pages:	4	**Cost:**	0.40

APPENDIX "3"

ALD-216 June 4, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-1194**

GEORGE H. FINK, Appellant

v.

SUPERINTENDENT GREENE SCI, et al.

(M.D. Pa. Civ. No. 3-16-cv-01867)

Present: MCKEE, SHWARTZ, and PHIPPS, 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

Fink's application for a certificate of appealability is denied. For substantially the reasons provided by the Magistrate Judge, jurists of reason would not debate the District Court's conclusion that Fink did not show that his Fifth Amendment right to remain silent or his Sixth Amendment right to the effective assistance of counsel was violated. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Smith v. Illinois, 469 U.S. 91, 95 (1984); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

By the Court,

s/ Peter J. Phipps
Circuit Judge

Dated: July 15, 2020
CLW/cc: Mr. George H. Fink
James L. McMonagle, Esq.

A True Copy:

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

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

GEORGE H. FINK	:	**Civil No. 3:16-cv-1867**
	:	
Petitioner,	:	**(Judge Brann)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
ROBERT GILMORE, et al.	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION

I. Introduction

On January 21, 2006, Charlene DeWitt was found dead, strangled in her home. DeWitt's estranged boyfriend, George Fink, was later charged and convicted of her murder. As the state courts have observed, the testimony at Fink's trial "provided overwhelming circumstantial evidence of guilt." Com. v. Fink, No. 1683 MDA 2014, 2015 WL 6948436, at *16 (Pa. Super. Ct. Aug. 17, 2015). Multiple witnesses testified that Fink threatened to kill DeWitt and was stalking her in the days preceding her death. Id. Several witnesses described Fink's efforts to travel to DeWitt's home on the day she died. Id. Fink's DNA was found on duct tape which had been used to bind the victim. Id. Fink acknowledged that he was at the victim's house the day she died. Moreover, Fink made admissions to the police implicating himself in DeWitt's murder, and at trial the court heard further testimony in the form

of "Fink's own statement that he snapped, blacked out, and awakened with his hands around her neck," an admission that the state courts aptly described as "damning." Id. at *16.

It is against this stark backdrop that we now consider Fink's petition for writ of habeas corpus. Notwithstanding this overwhelming and damning evidence of his guilt, Fink seeks to set aside this conviction based upon what he regards as the ineffective assistance of his counsel. In particular, Fink faults counsel for failing to pursue a line of defense that was utterly unsupported by the evidence—an alibi defense coupled with the claim that DeWitt fell victim to some anonymous strangler after Fink deposited his DNA at the crime scene on the day that she died, a defense as to which the state courts have observed that: "There was no evidence to support [the existence of] another intruder." Id.

Fink is a state inmate in the Pennsylvania Department of Corrections and is currently incarcerated at the State Correctional Institution in Waynesburg, Pennsylvania ("SCI-Greene"). Fink was convicted in 2007 of first-degree murder, criminal trespass, and false imprisonment, charges that resulted from the strangling and death of his ex-girlfriend, and he was sentenced to life imprisonment. Fink now asks this court to grant him a new trial due to his trial counsel's alleged ineffectiveness and an alleged violation of his Miranda rights.

This case is fully briefed by the parties and is, therefore, ripe for resolution.[1] However, a review of the state court record demonstrates that Fink's claims are without merit, and as such, we will recommend that his petition be denied.

II. Statement of Facts and of the Case

The factual background of the instant petition can be simply stated:[2] George Fink was charged with killing his ex-girlfriend, who was found dead at her home on January 21, 2006. She had been strangled, and her cause of death was ruled a homicide by asphyxiation. On January 20, 2006, the day before her death, Fink had asked his aunt to give him a ride to the area where the victim lived, Hunlock Creek. His aunt testified that she was concerned, as the victim had obtained a Protection From Abuse ("PFA") Order against Fink because he had threatened her on several previous occasions. Later that same day, Fink asked his cousin for a ride, and his

[1] This case has a protracted procedural history. It was filed on September 12, 2016. (Doc. 1.) At Fink's request, the case was then stayed in November of 2016. (Doc. 8.) The case remained stayed until February of 2019, when we ordered a response to the petition. Upon receiving that response, Fink failed to timely file a traverse, and we submitted an initial Report and Recommendation. (Doc. 27.) Fink then sought leave to file a belated traverse which was granted. (Doc. 32.) Fink was instructed to file his traverse by September 13, 2019 but failed to do so. Instead, he submitted a tardy traverse on September 25, 2019. (Doc. 34.) Nonetheless we have treated this late pleading as timely filed and now address the merits of Fink's claims.

[2] The factual background of this Report and Recommendation is taken from the PCRA court's 2010 decision and the Pennsylvania Superior Court's opinion affirming the denial of Fink's petition for post-conviction relief. (Doc. 26-3, at 8); Commonwealth v. Fink, 2015 WL 6948436 (Pa. Super. Ct. Aug. 17, 2015) (Doc. 26-5, at 82).

cousin dropped him off in Hunlock Creek between 6:15 and 6:30 p.m. The autopsy of the victim revealed that the victim had died 24-36 hours before she was found on January 21.

Several individuals testified at trial that Fink had threatened to kill his ex-girlfriend and himself on numerous occasions. A woman who was raising the victim's child testified that Fink had threatened to kill the victim and himself, and that he was upset that the victim was dating other people. A friend of Fink's testified that Fink told her that he was going to kill the victim and himself with a syringe, and the friend pleaded with Fink to "let it go." Fink's step-daughter also testified that Fink, on a number of occasions, stated that the victim "would go first."

Significantly, Fink gave a statement to the police after he was arrested on January 26, 2006, pursuant to a warrant for his failure to appear at a PFA hearing. Prior to this interview, Fink was read his Miranda rights and signed a waiver. After speaking with Pennsylvania State Police troopers, Fink requested a lawyer, but then initiated a conversation with Sergeant Whitaker, wherein he admitted that he went to the victim's home, waited for her, grabbed her from behind, duct taped her and cut himself in front of her. Thereafter, according to Fink, he and the victim attempted to engage in a sexual encounter, and the victim belittled Fink when he could not perform, after which he "snapped." This statement was consistent with what Fink told Dr. Richard Fischbein, who ultimately testified that Fink suffered from a major

depression, recurrent, passive-aggressive personality disorder with borderline and histrionic features. Fink also told Dr. Fischbein that when he came to, his hands were around the victim's neck. Trial counsel had moved to suppress the statement made to police, but the motion was denied.

Fink proceeded to a bench trial after waiving his right to a jury trial, and the trial judge found him guilty of first-degree murder and related offenses. He was sentenced to a term of life imprisonment and received concurrent sentences for the other offenses. Fink appealed, and the Pennsylvania Superior Court affirmed his conviction and sentence on July 19, 2012. (Doc. 26-3, at 71). Fink's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied on March 12, 2013. (Id., at 82).

Fink then filed a petition for post-conviction relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), and appointed counsel filed a supplemental petition, raising a claim that his appellate counsel failed to properly preserve his Miranda claim and his claim regarding the waiver of a jury trial, and also alleging that his trial counsel was ineffective for failing to challenge the time of death of the victim, failing to prepare for trial, and failing to assert the absence of the lack of DNA evidence on the victim. (Doc. 26-2, at 74). The PCRA court denied Fink's petition on October 6, 2010, finding that Fink's claims had no merit. (Doc. 26-3, at 8). Fink appealed to the Superior Court, which remanded the case and reinstated

Fink's direct appeal rights. (Id., at 51). However, on direct appeal, Fink raised only one issue—the denial of his suppression motion in violation of Miranda—and the Superior Court found that Fink knowingly and voluntarily waived his Miranda rights, and that the trial court did not err in denying the motion. (Id., at 81). The Pennsylvania Supreme Court denied Fink's Petition for Allowance of Appeal on March 12, 2013. (Id., at 82).

Thereafter, Fink filed a second PCRA petition, and appointed counsel filed a supplemental petition. (Doc. 26-4, at 1, 12). In this petition, Fink raised six claims of trial counsel's ineffectiveness, alleging that counsel failed to: challenge the time of death of the victim; adequately prepare for trial; argue the lack of DNA evidence on the victim; assert the bias of the trial judge; advise the defendant of his right not to testify; and ensure that the defendant knowingly waived his right to a jury trial. (Id., at 13). Ultimately, the PCRA court denied Fink's petition after a hearing, finding that his claims lacked merit. (Doc. 26-5, at 23).

In rejecting the claims advanced Fink's petition, the PCRA court emphasized the extraordinary strength of the Commonwealth's case, noting that:

> The testimony of [multiple witnesses] provided overwhelming circumstantial evidence of guilt which was not only consistent with the Defendant's statement but provided evidence of motive and intent. Fink's DNA was on the duct tape, and the glue from the duct tape was on the victim. There was no evidence to support another intruder, and Fink's own statement that he snapped, blacked out, and awakened with his hands around her neck were damning.

Com. v. Fink, No. 1683 MDA 2014, 2015 WL 6948436, at *16 (Pa. Super. Ct. Aug. 17, 2015).

The Superior Court affirmed the denial of Fink's petition, adopting the PCRA court's reasoning and finding that counsel was not ineffective. (Id., at 89). Fink's Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on June 15, 2016.

Fink then filed the instant petition for writ of habeas corpus on September 12, 2016. (Doc. 1).[3] In his petition, he raises five grounds on which he believes he is entitled to relief. He first claims that his Miranda rights were violated when the trial court denied his motion to suppress his statement to the police. He additionally raises several claims of ineffective assistance of trial counsel, alleging that counsel failed to consult him regarding the trial strategy of arguing diminished capacity, failed to challenge the time of death of the victim, failed to assert the lack of DNA evidence on the victim, failed to advise him of his right not to testify, and failed to challenge

[3] Fink's petition was stayed by this court on November 15, 2016 after Fink filed a motion for a stay and abeyance in order to present any unexhausted claims to the state courts. (Docs. 5, 8). A review of the state court record indicates that Fink believed that two of his ineffective assistance claims—failing to challenge the alleged bias of the trial judge and failing to advise Fink of his right to testify—had not been exhausted in state court. (Doc. 26-6, at 14). Thus, the district court stayed the instant petition in order to allow Fink an opportunity to exhaust these claims. We note, however, that these two claims were raised in Fink's second PCRA petition, which was appealed to the Pennsylvania Supreme Court and thus these claims were fully and properly exhausted. (Doc. 26-5, at 23, 82, 93).

the bias of the trial judge. For their part, the respondents contend that none of Fink's claims have merit, as they were thoroughly considered and denied by the state courts.

A review of the record demonstrates that the state courts considered Fink's claims and ultimately concluded that the claims were without merit. In particular, like the state courts, we conclude that the overwhelming evidence of Fink's guilt means that the petitioner cannot make the showing of prejudice necessary to set aside this murder conviction. Accordingly, given the deference that must be afforded to the state court findings with respect to habeas claims like Fink's, for the following reasons, we will recommend that Fink's petition be denied.

III. Discussion

A. State Prisoner Habeas Relief–The Legal Standard.

(1) Substantive Standards

In order to obtain federal habeas corpus relief, a state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides in part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

> (A) the applicant has exhausted the remedies available in the courts of the State;
> .....
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. At the outset, a petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the United States," § 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. See e.g., Reed v. Farley, 512 U.S. 339, 354 (1994). Thus, claimed violations of state law, standing alone, will not entitle a petitioner to § 2254 relief, absent a showing that those violations are so great as to be of a constitutional dimension. See Priester v. Vaughan, 382 F.3d 394, 401–02 (3d Cir. 2004).

(2) Deference Owed to State Courts

These same principles which inform the standard of review in habeas petitions and limit habeas relief to errors of a constitutional dimension also call upon federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under § 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law; see 28 U.S.C. § 2254(d)(l); or (2) was "based upon an unreasonable determination of the facts," see 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. See Rice v. Collins, 546 U.S. 333, 338–39 (2006); see also Warren v. Kyler, 422 F.3d 132, 139–40 (3d Cir. 2006); Gattis v. Snyder, 278 F.3d 222, 228 (3d Cir. 2002).

In addition, § 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and

convincing evidence that this factual finding was erroneous. See 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings. See, e.g., Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam); Demosthenes v. Baal, 495 U.S. 731, 734–35 (1990). This principle applies to state court factual findings made both by the trial court and state appellate courts. Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006). Thus, we may not re-assess credibility determinations made by the state courts, and we must give equal deference to both the explicit and implicit factual findings made by the state courts. Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000). Accordingly, in a case such as this, where a state court judgment rests upon factual findings, it is well-settled that:

> A state court decision based on a factual determination, ..., will not be overturned on factual grounds unless it was objectively unreasonable in light of the evidence presented in the state proceeding. Miller–El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003). We must presume that the state court's determination of factual issues was correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Campbell v. Vaughn, 209 F.3d 280, 285 (3d Cir.2000).

Rico v. Leftridge–Byrd, 340 F.3d 178, 181 (3d Cir. 2003). Applying this standard of review, federal courts may only grant habeas relief whenever "[o]ur reading of the PCRA court records convinces us that the Superior Court made an unreasonable finding of fact." Rolan, 445 F.3d at 681.

This principle applies with particular force in the instant case. While Fink attacks the state court's suppression rulings, and the state court findings regarding the performance of his counsel, he largely ignores that facts found by the state courts. Instead, Fink relies upon his own, discredited factual narrative to advance these legal claims. Under §2254(e) this he cannot do. Thus, Fink's failure to account for the substantive standard of review that applies here fatally undermines many of the arguments he advances in this petition.

(3) Ineffective Assistance of Counsel Claims

These general principles apply with particular force to habeas petitions that are grounded in claims of ineffective assistance of counsel. It is undisputed that the Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack of a sentence based upon a claim of ineffective assistance of counsel must meet a two-part test established by the Supreme Court in order to survive. Specifically, to prevail on a claim of ineffective assistance of counsel, a petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) that, but for counsel's errors, the result of the underlying proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 691-92 (1984). A petitioner must satisfy both of the Strickland prongs in order

to maintain a claim of ineffective counsel. George v. Sively, 254 F.3d 438, 443 (3d Cir. 2001).

At the outset, Strickland requires a petitioner to "establish first that counsel's performance was deficient." Jermyn v. Horn, 266 F.3d 257, 282 (3d Cir. 2001). This threshold showing requires a petitioner to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. Id. Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Id. However, in making this assessment "[t]here is a 'strong presumption' that counsel's performance was reasonable." Id. (quoting Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996)).

But a mere showing of deficiencies by counsel is not sufficient to secure habeas relief. Under the second Strickland prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." Id. This prejudice requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." Id. Thus, as set forth in Strickland, a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer's "representation fell below an objective standard of

reasonableness." Strickland, 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Thomas v. Varner, 428 F.3d 491, 499 (3d Cir. 2005) (quoting Strickland, 466 U.S. at 689).

The petitioner must then prove prejudice arising from counsel's failings. "Furthermore, in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" Rolan, 445 F.3d at 682 (quoting Strickland, 466 U.S. at 696) (internal quotations omitted). Thus:

> [T]o show prejudice under Strickland, a petitioner must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is one "sufficient to undermine confidence in the outcome." Id. Prejudice is reviewed in light of the totality of the evidence at trial and the testimony at the collateral review hearing. Rolan, 445 F.3d at 682.

Collins v. Sec'y of Pennsylvania Dep't of Corr., 742 F.3d 528, 547 (3d Cir. 2014).

Although sometimes couched in different language, the standard for evaluating claims of ineffectiveness under Pennsylvania law is substantively consistent with the standard set forth in Strickland. See Commonwealth v. Pierce,

527 A.2d 973, 976–77 (Pa.1987); see also Werts v. Vaugh, 228 F.3d 178, 203 (3d Cir.2000) ("[A] state court decision that applied the Pennsylvania [ineffective assistance of counsel] test did not apply a rule of law that contradicted Strickland and thus was not 'contrary to' established Supreme Court precedent"). Accordingly, a federal court reviewing a claim of ineffectiveness of counsel brought in a petition under 28 U.S.C. § 2254 may grant federal habeas relief if the petitioner can show that the state court's adjudication of his claim was an "unreasonable application" of Strickland. Billinger v. Cameron, 2010 U.S. Dist. LEXIS 63759, at *11, 2010 WL 2632286 (W.D. Pa. May 13, 2010). In order to prevail against this standard, a petitioner must show that the state court's decision "cannot reasonably be justified under existing Supreme Court precedent." Hackett v. Price, 381 F.3d 281, 287 (3d Cir. 2004); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009) (where the state court's application of federal law is challenged, "the state court's decision must be shown to be not only erroneous, but objectively unreasonable.") (internal citations and quotations omitted).

This additional hurdle is added to the petitioner's substantive burden under Strickland. As the Supreme Court has observed a "doubly deferential judicial review that applies to a Strickland claim evaluated under the § 2254(d)(1) standard." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009); see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (noting that the review of ineffectiveness claims is "doubly

deferential when it is conducted through the lens of federal habeas"). This doubly deferential standard of review applies with particular force to strategic judgment like those thrust upon counsel in the instant case. In this regard, the Court has held that:

> "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id., at 688, 104 S. Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id., at 689, 104 S. Ct. 2052. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id., at 690, 104 S. Ct. 2052.

Knowles v. Mirzayance, 556 U.S. 111, 124, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). The deference which is owed to these strategic choices by trial counsel is great.

> Therefore, in evaluating the first prong of the Strickland test, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. The presumption can be rebutted by showing "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) (footnote omitted).

Lewis v. Horn, 581 F.3d 92, 113 (3d Cir. 2009).

Once again, with respect to his multi-faceted ineffective assistance of counsel claim Fink's petition runs afoul of these settled standards of review. Thus, Fink's ineffectiveness claims rest upon his own factual narrative, a narrative which ignores

the factual findings made by the state courts and discounts the overwhelming evidence of his guilt.

B. Fink's Claims Have Been Thoroughly Analyzed by the State Courts and are Without Merit.

In his petition, Fink claims that the trial court violated his Miranda rights by allowing his statement to the police to be admitted at trial. Further, he raises five claims of ineffective assistance of trial counsel. However, the state courts considered all of Fink's claims and determined that his claims were without merit. Thus, given the deference that must be afforded to the state court decisions when reviewing habeas petitions like Fink's, for the reasons set forth below, we will recommend that his petition be denied.

1. *Miranda* Violation

Fink first alleges that his Miranda rights were violated when his statement to the police was permitted to be introduced at trial. He claims that the state police continued to question him after he requested an attorney, and thus, the trial court erred when it denied his motion to suppress the statement he made to the police.

The initial difficulty with this contention is that it is based upon Fink's own subjective factual narrative, which emphasizes his invocation of his Miranda rights but ignores the fact that the evidence shows, and state courts have found, that he then reinitiated the interrogation. Thus, Fink's Miranda claim rests upon a factual narrative which was rejected by the state courts and invites us to embrace that factual

narrative. This we cannot do. Instead, in order to prevail on this claim, Fink must demonstrate that the state court's findings were either (1) "contrary to" or involved an unreasonable application of clearly established case law; see 28 U.S.C. § 2254(d)(1); or, (2) were "based upon an unreasonable determination of the facts." See 28 U.S.C. § 2254(d)(2).

We begin by observing that at the time of Fink's Luzerne County prosecution, the parameters of the Supreme Court's ruling in Miranda had been well-established for over 40 years. As the Supreme Court has long observed:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Miranda v. Arizona, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Thus, under Miranda, once a suspect invokes his right to remain silent by "indicat[ing] in any manner that he does not wish to be interrogated, the police may not question him." Id. The prohibition against further interrogation of a suspect who invokes his right to remain silent in an integral part of the holding in Miranda. As the Supreme Court subsequently observed:

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means ... to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored...." 384 U.S., at 479, 86 S. Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id., at 474, 86 S. Ct., at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

Michigan v. Mosley, 423 U.S. 96, 103–04, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975).

The consequences that flow from a failure to scrupulously honor an invocation of this right to remain silent were also well settled at the time of Fink's state prosecution. When police fail to scrupulously honor an invocation of this right, suppression of evidence obtained in violation of a suspect's Miranda rights is

required. See, e.g., United States v. Lafferty, 503 F.3d 293, 299 (3d Cir. 2007); United States v. Tyler, 164 F.3d 150, 153 (3d Cir. 1998).

Likewise, under Miranda, once a suspect has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981). However, a suspect can initiate further communication when he "evince[s] a willingness and a desire for a generalized discussion about the investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045–46, 103 S. Ct. 2830, 2835, 77 L. Ed. 2d 405 (1983). Moreover, a suspect can initiate further communication with police by simply approaching the officers and asking in essence, "Well, what is going to happen to me now?" Id. at 1045.

Here, Fink challenged the denial of the suppression motion on direct appeal, and the Superior Court affirmed the trial court's decision, finding as a factual matter that Fink had knowingly waived his Miranda rights when he spoke to the police officers. The court noted that Fink had been arrested by the police on a bench warrant for failing to appear for a PFA hearing, and that he was given his Miranda rights when he was taken into custody. (Doc. 26-3, at 75). Fink signed a waiver of his rights and made statements concerning the PFA and his relationship with the victim. (Id.)

Once at the police station, the troopers again made sure that Fink understood his rights before questioning him about the victim's death, and Fink was given several breaks during the troopers' questioning. (Id. at 75-76). After Fink made several inculpatory statements regarding the victim's death, he had indicated that he wanted to call an attorney, after which the troopers promptly ended the interview. (Id., at 76).

Although Fink had stated that he thought he should call an attorney, he expressed that he wanted to continue speaking with Sergeant Whittaker, who informed Fink that the interview had been terminated. (Id.) However, Fink again asked to speak with Whittaker, wherein Fink, without being questioned, confessed to Whittaker that he had broken into the victim's home, duct taped her, and later became enraged and "snapped." (Id.) Fink then acknowledged this confession to the other troopers, and subsequently signed another waiver of his rights before making a formal statement to the police. (Id. at 77).

On these facts, the Superior Court found that Fink had knowingly and intelligently waived his rights since he "evince[d] a willingness and a desire for a generalized discussion about the investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045–46, 103 S. Ct. 2830, 2835, 77 L. Ed. 2d 405 (1983). The court noted that Fink was advised more than once of his rights, and that he signed multiple waivers of those rights before speaking with the police. Additionally, Fink was given

several breaks over the eight-hour period of interrogation. Ultimately, although Fink had mentioned he wanted to speak with an attorney, he later initiated communication with Whittaker, even after Whittaker had informed him that the interview had ended. The court also found Fink's contention that he was in a weakened mental state to be unpersuasive, as he had been released from the hospital and was not taking any medication.

Section 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. See 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings applies to state court factual findings made both by the trial court and state appellate courts. Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006). Thus, we may not re-assess credibility determinations made by the state courts, and we must give equal deference to both the explicit and implicit factual findings made by the state courts. Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000).Moreover, when a state court judgment rests upon a factual finding, it is well-settled that this finding "will not be overturned on factual grounds unless it was objectively unreasonable in light of the evidence presented in the state proceeding. Miller–El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003). We must presume that the state court's determination of factual issues was correct, and the petitioner bears the burden of

rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Campbell v. Vaughn, 209 F.3d 280, 285 (3d Cir.2000)." Rico v. Leftridge–Byrd, 340 F.3d 178, 181 (3d Cir. 2003).

We cannot conclude that the state courts' decisions denying Fink's motion to suppress these statements were contrary to established law or based on an unreasonable determination of the facts. Rather, the court's decision was firmly grounded in the facts presented at trial and was directly in line with the Supreme Court's mandate in Miranda which permits continued interrogation when a suspect "evince[s] a willingness and a desire for a generalized discussion about the investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045–46, 103 S. Ct. 2830, 2835, 77 L. Ed. 2d 405 (1983). Further these decisions were based on a well-founded totality-of-the-circumstances determination that Fink knowingly, intelligently, and voluntarily waived his rights and made a statement to the police. Accordingly, Fink is not entitled to habeas relief on this claim.

2. Ineffective Assistance of Counsel

Fink also raises five claims of ineffective assistance of trial counsel. He alleges that trial counsel was ineffective for: (1) failing to agree to an alibi defense and choosing a strategy of diminished capacity with him; (2) failing to investigate or challenge the victim's time of death; (3) failing to challenge the lack of DNA evidence on the victim; (4) failing to challenge the bias of the trial judge; and (5)

failing to advise the petitioner of his right not to testify. The state courts addressed these claims, ultimately concluding that the claims were meritless. We agree.

In considering these claims, we recognize that the analytical paradigm prescribed by the Supreme Court requires both a showing of constitutionally deficient performance by counsel and prejudice to the petitioner. This second element, prejudice, is critical to a successful habeas claim and entails an evaluation of the strength of the government's case since "in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" Rolan, 445 F.3d at 682 (quoting Strickland, 466 U.S. at 696) (internal quotations omitted). Thus:

> [T]o show prejudice under Strickland, a petitioner must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is one "sufficient to undermine confidence in the outcome." Id. Prejudice is reviewed in light of the totality of the evidence at trial and the testimony at the collateral review hearing. Rolan, 445 F.3d at 682.

Collins v. Sec'y of Pennsylvania Dep't of Corr., 742 F.3d 528, 547 (3d Cir. 2014).

The requirement that a petitioner prove prejudice to prevail on an ineffective assistance of counsel claim has particular relevance in this case where the state courts have correctly concluded that the evidence of Fink's guilt was overwhelming. It is

against the backdrop of this compelling evidence of Fink's guilt that we consider his claims that he suffered such prejudice that there is a reasonable probability that the outcome of his case would have been different had counsel chosen another course at trial.

First, Fink claims that trial counsel erred in pursuing a strategy of diminished capacity over his objections since he was adamant about asserting his innocence at trial through an alibi defense. The PCRA court found that counsel's decision to pursue this defense was admittedly inconsistent with a claim of complete innocence but found that Fink suffered no prejudice from the decision given the compelling nature of the Commonwealth's evidence against him. (Doc. 26-3, at 28). Indeed, Fink's statement to the police placed him at the scene of the crime, indicated that he duct-taped the victim before cutting himself with a pocket knife, and acknowledged that he had "snapped" after the victim had belittled him. (Id., at 24). In addition to Fink's statement, the testimony of a witness who had given Fink a ride placed him at the scene, and several other witnesses testified to the multiple times Fink had threatened the victim's and his own life. (Id., at 25).

On these facts, the PCRA court found that, although counsel's strategy was inconsistent with claiming innocence, it was not so objectively unreasonable that no competent attorney would have followed it. (Id., at 28). Moreover, the court found that Fink was not prejudiced by counsel's decision to pursue a diminished capacity

defense, noting that there would be no value to an alibi defense once Fink's statement, as well as the other evidence placing him at the scene and speaking to his motive and intent, was permitted into evidence. (Id., at 29). Indeed, although Fink contends that counsel should have further explored an alibi defense, the fact remained that Fink's own statement placed him at the scene at or around the time of the victim's death and his DNA was found at the scene on the duct tape used to bind the victim. (Id., at 24). Further, Fink admitted that he "blacked out, and awakened with his hands around her neck," an admission that the state courts aptly described as "damning."

The respondents, for their part, raise the issue of the Supreme Court's recent decision in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), in which the Court held that it is a violation of the Sixth Amendment for counsel to concede a client's guilt against his wishes.[4] However, McCoy was a case involving a direct appeal, rather than a habeas corpus petition under § 2254. This is a significant distinction since the Supreme Court has also held that:

> [R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the prisoner's claims on the merits. . . . [Section] 2254(d)(1) requires federal courts to "focu[s] on what a state court knew and did," and to measure state-court decisions "against this Court's precedents *as of* '*the time the state court renders its decision.*'"

[4] Notably, in his traverse Fink does not rely upon McCoy, stating "[h]owever inlighting [sic] McCoy is, Strickland is the controlling essence of the Grounds raised [by the petitioner]." (Doc. 34 at 4.) Therefore, Fink apparently concedes that Strickland, rather than McCoy, applies here.

Greene v. Fisher, 565 U.S. 34, 38 (2011) (emphasis in original) (holding that the Supreme Court's analysis in Teague v. Lane, 489 U.S. 288 (1989), which governs the retroactivity of new rules, is distinct from the AEDPA). Recognizing that § 2254 petitions are judged by the Court's precedents at the time of the state court decision, several courts have held that McCoy does not apply to habeas petitions like Fink's which were decided by the state courts long before the Supreme Court's decision in McCoy. See e.g., Barbee v. Davis, 728 F. App'x 259, 267 n.6 (5th Cir.), cert. denied, 139 S. Ct. 566, 202 L. Ed. 2d 406 (2018); Crump v. Halvorson, No. 18-CV-1334 (MJD/ECW), 2019 WL 3431787, at *8 (D. Minn. June 10, 2019), report and recommendation adopted, No. 18-CV-1334 MJD/ECW, 2019 WL 3429848 (D. Minn. July 30, 2019); Simmons v. Huss, 2019 WL 1746271, at *5 (E.D. Mich. April 18, 2019) ("Petitioner cannot rely on McCoy to support his claim . . . . McCoy was decided after the Michigan Court of Appeals adjudicated Petitioner's claim"); Quintana v. Trani, 2019 WL 1331990, at *16 (D. Colorado March 25, 2019) ("Because McCoy was decided after completion of Applicant's first state post-conviction proceeding, the decision does not provide the clearly established law applicable to Applicant's ineffective assistance claim"); United States v. Jose, 2018 WL 3747449, at *4 (E.D. Pa. Aug. 7, 2018) ("While McCoy instructs our guidance on the type of structural error warranting reversal on direct appeal, it could not

directly address the waiver of Strickland prejudice applying when a convicted person seeks habeas relief"). As one court has recently observed:

> Because McCoy was decided after completion of Applicant's first state post-conviction proceeding, the decision does not provide the clearly established law applicable to Applicant's ineffective assistance claim. See Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (stating that "clearly established Federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision); Stevens v. Ortiz, 465 F.3d 1229, 1235-38 (10th Cir. 2006) (same).

Quintana v. Trani, No. 15-CV-01569-PAB, 2019 WL 1331990, at *16 (D. Colo. Mar. 25, 2019).

Moreover, even those cases that have acknowledged the potential application of McCoy have narrowed the scope of that decision to capital cases, or cases in which there was a direct conflict between the accused and counsel over whether to admit guilt to the crime. Id. Therefore, some courts have expressed a reluctance to extend McCoy to situations where the disagreement between the accused and counsel involves tactical matters that fall short of an outright admissions of guilt. Quintana, 2019 WL 1331990, at *16.

In the instant case, Fink's trial took place in 2007, eleven years prior to the McCoy decision. At that time, the controlling Supreme Court authority was Florida v. Nixon, 543 U.S. 175, 186, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565 (2004), which had held that counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial did not automatically render counsel's

performance deficient. Therefore when we view this case through the lens prescribed by § 2254, which calls upon us to consider "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," Lockyer v. Andrade, 538 U.S. 63, 71–72, 123 S. Ct. 1166, 1172, 155 L. Ed. 2d 144 (2003), we find that counsel's choice was consistent with the principles announced by the Court in Florida v. Nixon and therefore did not transgress any clearly established law.

Judged against what was the then-prevailing legal benchmark set by the Supreme Court in Florida v. Nixon, we further find that the state courts correctly concluded that Fink did not suffer demonstrable prejudice as a result of counsel's choice to pursue a diminished capacity defense. In the instant case, counsel was not conceding absolute guilt, and Fink was not asserting total innocence. Rather, counsel sought to pursue a line of defense that was based upon Fink's inability to form a criminal intent, and Fink was proposing a different, fanciful, and speculative defense based upon the conjecture that after he strangled his victim into a helpless state, an unknown, motiveless, anonymous pillow wielding killer smothered the victim to death for no apparent reason. While Fink asserts that counsel unreasonably rejected his preferred line of defense, an alibi defense, no such true choice between viable defenses existed in the instant case. Counsel had no such choice between viable defenses because Fink cannot dispute that he was at the victim's house on the night

of the murder, that he duct-taped her, and that he then strangled her. Instead, Fink posited his own theory that, when he left the victim's house, she was battered but alive and a third party went into the victim's house and killed her. Thus, he claimed that counsel should have hired an expert to challenge the victim's time of death, which in turn could have provided him with an alibi defense for the hours after he had left the victim's home. Simply put, Fink's assertion of innocence and his alibi defense are based solely on his own speculative version of events that, after he strangled the victim, which he admitted to, someone else entered the house and killed her, and thus, he had an alibi for the period of time after he had left the victim's house. Accordingly, as Fink's story goes, if counsel had retained an expert to challenge the victim's time of death, Fink could have asserted an alibi defense for the hours after he had left the victim's home.

In our view, trial counsel in this case was faced with a wildly speculative scenario concocted by Fink and was told that Fink wanted to assert his innocence in the form of an alibi defense based on this speculative scenario. Further, Fink proposed to advance this fanciful defense in the face of his own admissions that he had restrained the victim, bound her with duct tape, snapped and then awakened with his hands around her neck. In fact, we note that the circumstances of the instant case also present a legal-ethical dilemma for defense counsel that may have implicated the Supreme Court's decision in Nix v. Whiteside, 475 U.S. 157 (1986). In Nix, the

Supreme Court held that trial counsel does not render ineffective assistance when he refuses to allow a defendant to present false testimony at trial. Id., at 166. The defendant in that case insisted on testifying to a version of events that contradicted his earlier admissions to his counsel, and counsel refused to allow him to testify as such. Id., at 160-61. Similarly, in this case, trial counsel was faced with a situation in which Fink was asserting his innocence by way of a version of events that was based entirely on his own speculation, after he had admitted to counsel that he was present at the victim's home at or around the time of death and had admitted to strangling the victim. Thus, under Nix, counsel cannot be deemed ineffective for refusing to present such testimony at trial. Therefore, Fink's case did not present a disputed choice between competing defenses that had some evidentiary support. Rather, Fink's claim that an anonymous killer with no motive may have happened by and smothered the victim following his manual strangulation of her was nothing more than a forlorn hope masquerading as a speculation impersonating a defense. On these facts, we cannot conclude that counsel's decision to present a diminished capacity defense, rather than an alibi defense, prejudiced his defense since the defense of choice urged by Fink bordered on the frivolous. Accordingly, this claim does not entitle Fink to habeas relief.

Next, Fink argues that counsel was ineffective for failing to challenge both the location of DNA evidence and the victim's time of death. These claims were

addressed by the PCRA court in its 2010 decision denying Fink's first PCRA petition. There, the court held that, even if counsel could be deemed ineffective for failing to challenge these two evidentiary aspects, Fink suffered no prejudice given the overwhelming evidence against him. (Doc. 26-3, at 29). As the court observed, "an alternative time of death or lack of DNA under the victim's fingernails or on her pillow did not offer a substantially greater chance of success." (Id., at 28). Indeed, Fink's DNA was found on the duct tape that was used to bind the victim's hands, and his own statement placed him at the victim's house around the time of her death. Additionally, Fink's posited evidentiary issues were based on his speculative assertion that someone else had entered the victim's home and killed DeWitt after he left. However, as counsel testified at the PCRA hearing, "we had no one else there who could have caused [the victim's] death other than Mr. Fink," and thus, counsel had no reason to challenge the time of death. (Doc. 26-5, at 3). Ultimately, the court noted that there was not a reasonable probability that the outcome would have been different had counsel challenged the time of death or the location of the DNA evidence.

Here, we cannot conclude that the court's decision was an unreasonable application of Strickland or was based on an unreasonable determination of the facts. Rather, the court found that, even if counsel had been ineffective, the overwhelming evidence against Fink, which included his own statement that he was present at the

crime scene and evidence of his DNA on the tape used to bind the victim, negated any prejudice that could have come from counsel's ineffectiveness. Moreover, as we have already explained, these evidentiary issues are based on Fink's concocted theory that someone else killed the victim after he left her home, a theory that Fink had no evidence to support. Thus, in our view, these claims do not afford Fink any relief.

Fink raises two additional claims of ineffective assistance that were presented in his second PCRA petition. He alleges that trial counsel was ineffective for failing to challenge the trial judge's bias and for failing to advise him of his right not to testify. These claims were heard by the PCRA court in 2014 and were denied on their merits.

The court first addressed Fink's claim that counsel did not adequately inform him of his right to testify. After quoting the trial transcript, wherein the trial judge made sure that counsel had spoken with Fink regarding his right to testify, the PCRA court noted that, "[i]t is clear that, at a minimum, during trial twenty minutes were spent discussing the issue of whether Fink should testify." (Doc. 26-5, at 38-39). Indeed, at trial, the trial judge inquired in Fink's presence about Fink's choice not to testify:

> COUNSEL: Your Honor, at this time the Defense will rest. We have no more witnesses to offer. We spoke with Mr. Fink and he has chosen not to testify in this case and we felt it's in his best interest.

> THE COURT: You have reviewed with him the right to testify if he chooses to?
> COUNSEL: Yes, we have.
> THE COURT: He does not have to testify. It's his constitutional right and he's invoking that right and the fact that he cannot be used as an inference against him in trial nor will the Court consider that as an inference in this case. Did you review that with him?
> COUNSEL: Yes, Your Honor.

(Doc. 26-1, at 82).

Given this colloquy, we cannot conclude that the PCRA court's denial of this claim was based on an unreasonable determination of the facts, or on an unreasonable application of Strickland. From the transcript of the proceedings, it is clear that Fink was aware of his right to testify, and that he ultimately chose not to take the stand. Thus, this claim does not warrant relief.

Finally, with respect to the claim that counsel failed to object to the alleged bias of the trial judge, we conclude that this claim does not afford Fink any relief. At the PCRA hearing, trial counsel was asked if he had been aware that the trial judge was under investigation at the time of trial, to which counsel responded: "I would have been totally unaware of any investigation or any wrongdoing by [the trial judge] at the time of this trial." (Doc. 26-4, at 83). Later in the hearing, Fink's PCRA counsel asked trial counsel if he was aware that there had been a complaint filed with the Judicial Conduct Board against the trial judge, to which trial counsel responded that he was "not aware of anything which would have led me to believe

that [the trial judge] would be inappropriate to serve as a Trial Judge for this case." (Doc. 26-5, at 2). On this score, the PCRA court found that there was no evidence to show that counsel was aware of any potential bias or wrongdoing by the trial judge. (Id., at 46). The court noted that the only exhibit attached by Fink in support of this claim was a Pennsylvania Law Weekly article from 2009, which was dated two years after Fink's trial, and concluded that counsel could not have known this information prior to trial. (Id., at 45-46). Moreover, Fink has not presented any evidence in his instant petition from which we could reach a different conclusion. Thus, this claim is without merit, and Fink is not entitled to relief.

We are mindful that the Supreme Court has observed that a "doubly deferential judicial review . . . applies to a Strickland claim evaluated under the § 2254(d)(1) standard." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009); see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas"). Given this deferential standard, we cannot conclude that the state courts' decisions were an unreasonable application of Strickland or based on an unreasonable determination of the facts. To the contrary, the courts' analyses of these ineffective assistance of counsel claims are thorough and well-supported by both the law and the facts of the petitioner's case. Accordingly, these claims do not warrant habeas relief and we recommend that Fink's petition be denied.

IV. Recommendation

Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus in this case be DENIED, and that a certificate of appealability should not issue.

The petitioner is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 1st day of October 2019.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

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

GEORGE H. FINK, Petitioner, v. ROBERT GILMORE, and PA STATE ATTORNEY GENERAL, Respondents.	No. 3:16-CV-01867 (Judge Brann) (Magistrate Judge Carlson)

ORDER

DECEMBER 30, 2019

George H. Fink, a Pennsylvania state prisoner, filed a 28 U.S.C. § 2254 petition seeking to vacate his convictions and sentence.[1] In his petition, Fink asserts that his *Miranda*[2] rights were violated, and that his trial counsel was ineffective in several respects.[3] On October 1, 2019, Magistrate Judge Martin C. Carlson issued a Report and Recommendation recommending that this Court deny the petition.[4] Fink sought and received an extension of time to file objections to the Report and

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1 Doc. 1.
2 *Miranda v. Arizona*, 384 U.S. 436 (1966).
3 Doc. 1.
4 Doc. 36.

Recommendation.[5] Objections were thus due on December 16, 2019, but no timely objections were filed.

Where no objection is made to a report and recommendation, this Court will review the recommendation only for clear error.[6] Regardless of whether timely objections are made, district courts may accept, reject, or modify—in whole or in part—the findings or recommendations made by the magistrate judge.[7] After reviewing the record, the Court finds no error—clear or otherwise—in Magistrate Judge Carlson's conclusion that Fink's petition is without merit. Consequently, **IT IS HEREBY ORDERED** that:

1. Magistrate Judge Martin C. Carlson's Report and Recommendation (Doc. 36) is **ADOPTED**;
2. Fink's 28 U.S.C. § 2254 petition (Doc. 1) is **DENIED**;
3. The Court declines to issue certificate of appealability;[8] and
4. The Clerk of Court is directed to **CLOSE** this case.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge

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5 Docs. 37, 38.

6 Fed. R. Civ. P. 72(b), advisory committee notes; *see Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987) (explaining that court should in some manner review recommendations regardless of whether objections were filed).

7 28 U.S.C. § 636(b)(1); Local Rule 72.31.

8 *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (setting forth legal standard).