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

LONDELL BOND,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	
	:	
PHILADELPHIA DISTRICT	:	**NO. 13-1553**
ATTORNEY, ET AL.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI **October 23, 2018**
UNITED STATES MAGISTRATE JUDGE

Pending before this Court is a *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, by Londell Bond, an individual currently incarcerated in the State Correctional Institution at Dallas, Pennsylvania. On April 1, 2014, this Court issued a Report and Recommendation, recommending that Petitioner's petition for writ of habeas corpus be denied. (R&R, ECF No. 14). Petitioner objected to the Report and Recommendation, arguing the state court record was not reviewed by this Court before reaching a determination. (ECF No. 16). The Honorable C. Darnell Jones sustained Petitioner's objection and remanded the matter for the undersigned to review the state court record and "amend and/or supplement those portions of [the] merits-based analyses" as appropriate. (Order, ECF No. 17). Petitioner's state court proceedings concluded in July of 2018, and this Court received the record from state court in September of 2018. After a complete review of the state court record and the parties' submissions, I respectfully recommend that the petition be **DENIED**.

I. PROCEDURAL HISTORY[1]

On November 18, 2000, at approximately 12:30 a.m., Petitioner entered the B & E Ingram Bar in Philadelphia, produced a gun, and announced, "This is a hold-up." (N.T. 03/29/05 at 51, 72-77; *Commonwealth v. Bond*, 1100 EDA 2006 at 2, SCR No. D14, ECF No. 9-4). A patron at the bar, Edward "Butch" Carter, said, "Oh, no, you don't. Not in here," and grabbed Petitioner. (N.T. 03/29/05 at 51, 75-79; SCR No. D14 at 2). After a brief struggle, Petitioner shot Carter, who fell to the ground with a bullet wound in his chest. (*Id.* at 79-80, 84-85; SCR No. D14 at 2). Bar owner William Ingram and other patrons grabbed Petitioner in an attempt to apprehend him, but Petitioner was able to break free and escape. (*Id.* at 79-89; SCR No. D14 at 2). During the struggle, the bar patrons pulled off the assailant's hooded sweatshirt and skull cap. (*Id.* at 81, 89-90, 212-19; N.T. 03/30/05 at 9-11, 92; SCR No. D14 at 2). Carter was later pronounced dead. (N.T. 03/28/05 at 336-37, 339, 341; N.T. 03/30/05 at 59-60; SCR No. D14 at 4).

In June of 2003, Homicide Detective Richard Harris of the Cold Case Unit received information from fellow detectives about the Carter case. (N.T. 04/04/05 at 168-77). Based on the information, police developed a photo array that included Petitioner. (*Id.* at 176-77). Larry Lane, a bar patron who present during the shooting, identified Petitioner from the photographic array, (N.T. 03/28/05 at 231-35), and at a police lineup, (N.T. 03/30/05 at 183-89). In addition,

[1] The Court's recitation of the procedural history relies upon information contained in the state court record associated with the matter of *Commonwealth v. Londell A. Bond*, CP-51-CR-1104831-2003. Because matters related to Petitioner's criminal conviction remained pending until recently, this Court did not receive a copy of the state court record until September 24, 2018. (Orders, ECF Nos. 25-27). Documents contained in the SCR will be cited as "SCR No. ___." The state court record as received did not include transcripts of the underlying proceedings. These transcripts were requested and docketed at ECF Nos. 28-34. The Court has also consulted the Court of Common Pleas criminal docket which is available at https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-1104831-2003. (last visited October 23, 2018).

police had recovered a cigarette lighter from the pocket of the hooded sweatshirt left at the scene, which was subsequently found to have Petitioner's fingerprint. (N.T. 03/30/05 at 198-200; N.T. 03/31/05 at 26-28, 32-37, 77, 92-103). Petitioner's DNA was also found on the sweatshirt left at the crime scene. (N.T. 04/04/05 at 28-29, 69-96; *Bond*, 1100 EDA 2006 at 4, ECF No. 9-4).

Petitioner was arrested on July 16, 2003, and charged with murder and related crimes. (*Commonwealth v. Bond*, CP 0311-0483 at 4 (Phila. Ct. Cm. Pl. Feb. 5, 2007), SCR No. D12, ECF No. 9-2). The matter proceeded to a jury trial on March 29, 2005, in the Court of Common Pleas of Philadelphia County.[2] Crim. Docket at 11; (N.T. 03/29/05 at 4-6). At trial, the Commonwealth presented the eyewitness testimony of Mr. Lane and Mr. Ingram, as well as the physical evidence recovered by the police and medical authorities who investigated the crime. (N.T. 03/29/05 at 51-351; N.T. 03/31/05 at 19-173; N.T. 04/04/05 at 23-211). For its part, the defense presented the testimony of Petitioner's great aunt, Diane Barnes, who claimed that Petitioner had been working with her at a restaurant in New York on the night of the murder. (Alibi Notice, SCR No. D-1; N.T. 04/04/05 at 235-96). On April 5, 2005, the jury found Petitioner guilty of second-degree murder, robbery, and possession of an instrument of crime. (Crim. Docket at 13-14). Petitioner was subsequently sentenced to life in prison for second-degree murder and two and one-half to five years on the remaining convictions. (*Id.* at 14).

On direct appeal to the Superior Court, Petitioner raised the following claims: (1) the trial court erred in denying a request for a mistrial after the prosecutor engaged in misconduct during closing argument by commenting on Petitioner's post-arrest silence; (2) the evidence was insufficient to sustain a conviction for second-degree murder; and (3) the verdicts were against the weight of the evidence. (Appellant Br. 8, 12, ECF No. 9-3). The Superior Court affirmed

[2] Petitioner's first trial ended in a mistrial. *See Commonweatlh v. Bond*, CP-51-CR-1104831-2003 (Phila.Cnty. Com. Pl.), Criminal Docket at 11 [hereinafter "Crim. Docket"].

Petitioner's judgments of sentence. (*Bond*, 1100 EDA 2006, ECF No. 9-4, SCR No. D14). The court held that the evidence was sufficient to support a conviction for second-degree murder; that there was no prosecutorial misconduct during closing argument; and that Petitioner had waived the argument that the murder and robbery convictions were against the weight of the evidence. (*Id.* at 4-8). The Supreme Court of Pennsylvania denied discretionary review. (*Commonwealth v. Bond*, 173 EAL 2008 (Pa. July 30, 2008), ECF No. 9-5; SCR No. D15). Petitioner did not file a writ of *certiorari* with the United States Supreme Court.

On September 5, 2008, Petitioner sought relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA") by filing a *pro se* petition raising six claims of ineffective assistance of counsel. (*Pro se* Pet., ECF No. 9-6; SCR No. D17). The PCRA Court appointed counsel, James S. Bruno, Esquire, who filed an amended petition raising a single claim - that trial counsel was ineffective for failing to object, request a mistrial, or request a cautionary instruction after eyewitness Larry Lane referred to "mug shots" when recounting his identification of Petitioner's photograph in an array. (Amended Pet., ECF No. 9-7, SCR Nos. D22-23).

On September 3, 2010, the PCRA Court appointed Gary Sanford Server, Esquire, as new PCRA counsel to replace attorney Bruno.[3] Crim. Docket at 24; (Order, SCR D-34, D-34A; *Commonwealth v. Bond*, 3364 EDA 2016, 2017 WL 4464382, at *1 (Pa. Super 2017)). Attorney Server filed a brief on behalf of Petitioner on June 22, 2011, asserting that trial counsel was

[3] PCRA appellate counsel Bruno failed to comply with several court orders related to Petitioner's PCRA proceedings. For example, Bruno failed to comply with a March 29, 2010, order from PCRA court ordering him to file a 1925(b) statement of errors complained of on appeal. (Orders, SCR D-30; Letter from the Court dated July 19, 2010, SCR D-31). Bruno also failed to comply with an order from the Superior Court to address *pro se* allegations of ineffectiveness. (SCR D-31). Bruno's conduct with regard to Petitioner is detailed in documents submitted by Petitioner from the Pennsylvania Disciplinary Board proceedings referred to in greater detail *infra*. (*See generally* Exhibits A-F, Mot. to Expand Record, ECF No. 21; *see also* Joint Stip. of Facts ¶¶ 7-85, ECF No. 21).

ineffective for: (1) failing to object or ask for a cautionary instruction after the reference to "mug shots," (2) failing to object to alleged hearsay evidence introduced by Detective Harris; and (3) failing to object to alleged hearsay statements by the victim. (Appellant PCRA Br., ECF No. 9-10; SCR Nos. 33-35). The Superior Court affirmed the dismissal of the petition. (*Commonwealth v. Bond*, 732 EDA 2010 (Pa. Super. Ct. Jan. 18, 2012), ECF No. 9-11).

Specifically, the Superior Court held that Petitioner's claim that trial counsel was ineffective for failing to object after references to "mug shots" was without merit. (*Id.* at 3-6). The court further held that Petitioner's other two claims had been waived due to noncompliance with Pennsylvania Rule of Appellate Procedure 1925(b), which requires that all issues raised on appeal be set forth in the appellant's statement of matters complained of on appeal. (*Id.* at 6). Nevertheless, the panel addressed each issue on the merits, and found that the claims were groundless. (*Id.* at 6-10). The Pennsylvania Supreme Court denied review on August 1, 2012. (*Commonwealth v. Bond*, 49 A.3d 441, 69 EAL 2012 (Pa. 2012)).[4]

On March 25, 2013, Petitioner filed the instant petition for writ of habeas corpus, which he subsequently amended, raising the following claims:

(1) Trial court erred in denying a request for a mistrial based on prosecutorial misconduct by referring to Petitioner's post-arrest silence during summation;

(2) Trial counsel was ineffective for failing to challenge Larry Lane's references to Petitioner's "mug shots;"

[4] On August 20, 2012, *pro se* Petitioner filed a second PCRA petition raising a claim under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that a mandatory sentence of life without parole for an individual under the age of eighteen at the time of his crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. (2nd PCRA Pet., ECF No. 9-13). Petitioner does not raise any claims predicated on *Miller* in the instant habeas petition. On April 3, 2015, Petitioner filed an amended PCRA petition alleging that former PCRA counsel Bruno was ineffective due to a mental health issue, and that this newly discovered evidence excuses the untimely filing of his August 2012 PCRA petition. Petitioner's arguments regarding former counsel Bruno are discussed in greater detail *infra*.

(3) PCRA counsel Bruno was ineffective for failing to raise claims that trial counsel had failed to:

(a) object to alleged hearsay testimony by Detective Harris;

(b) retain a DNA expert or object to alleged misconduct;

(c) file a suppression motion based on a technical defect in the affidavit of probable cause to arrest Petitioner;

(d) allege his "actual innocence" based on the asserted non-commission of a robbery due to allegedly insufficient evidence;

(e) allege juror bias; and

(f) object or request a cautionary instruction in response to the hearsay testimony of William Ingram.

(Hab. Pet., ECF No. 1; Am. Hab. Pet, ECF No. 5). The Commonwealth filed a response, asserting that all of Petitioner's claims should be dismissed as procedurally defaulted, meritless, or both. (Resp., ECF No. 9). Petitioner filed a Reply. (Reply, ECF No. 12). The matter was assigned to the Honorable C. Darnell Jones, who referred it to the undersigned for a Report and Recommendation. (Order, ECF No. 2).

On April 1, 2014, the undersigned issued a Report and Recommendation respectfully recommending that the instant Petition be denied in its entirety. (ECF No. 14). Petitioner filed objections to the Report and Recommendation on April 21, 2014. (ECF No. 16). On April 25, 2014, Judge Jones rejected the undersigned's Report and Recommendation, noting that the "state court record was not available at the time [the undersigned] reviewed Petitioner's habeas claims." (Order, ECF No. 17). He went on to state that:

> Several of Petitioner's claims are procedurally defaulted. However, to the extent that a merit-based analysis was conducted on all of his claims, an independent analysis of the state courts' findings was necessary in order to determine that they were not unreasonable. In several instances, this reasonableness analysis required trial transcripts, as Petitioner's claims relate in part to

> comments made by counsel for both sides and at least one juror, as well as instructions given to the jury by the court.

(*Id.*) Judge Jones remanded the case so that the undersigned could "review the transcripts in context," and "amend and/or supplement" as appropriate the merits-based review. (*Id.*).

In the meantime, Petitioner's second PCRA petition remained pending in state court. *Pro se* Petitioner filed an Amended PCRA petition on April 3, 2015. Crim. Docket at 27; (Amended Mem. of Law in Support of Motion for Post-Conviction Collateral Relief, SCR). In his amended petition, Petitioner added a new claim that he was entitled to relief based on after-discovered evidence of former attorney Bruno's suspension from the practice of law.[5] (*Id.*). On October 4, 2016, the PCRA Court dismissed the petition, and Petitioner filed a timely appeal. (*Commonwealth v. Bond*, 3364 EDA 2016, 2017 WL 4464382, at *1 (Pa. Super 2017); Crim. Docket at 27-28; PCRA Court Opinion, Dec. 30, 2016, SCR). On appeal, Petitioner argued that his first collateral review counsel, Bruno, was ineffective due to a mental health issue. (Appellate Br., 2017 WL 4438450, at *1). The Superior Court concluded that Petitioner's PCRA petition was untimely, and that Petitioner did not establish an exception to the PCRA time-bar because he did not exercise due diligence in discovering his prior counsel's mental health condition. (*Bond*, 3364 EDA 2016, 2017 WL 4464382, at *3). On July 25, 2018, the Supreme Court of Pennsylvania denied Petitioner's petition for allowance of appeal. (*Commonwealth v. Bond*, 189 A.3d 992 (Pa. July 25, 2018) (table); Appellate Docket 3, 72 EAL 2018).

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[5] On March 30, 2015, Petitioner filed a Motion for Expansion of the Record to include documents related to disciplinary proceedings against Attorney Bruno. (ECF No. 21). The documents included *inter alia*: a November 13, 2014, Order of the Pennsylvania Disciplinary Board suspending Attorney Bruno from the practice of law for a period of two years retroactive followed by a two year period of probation after reinstatement; the Report and Recommendation of the Disciplinary Board; and Joint Stipulations of Fact, Law and Exhibits submitted by the parties to disciplinary proceedings. (*See* Exhibits A-F, Mot. to Expand Record, ECF No. 21). This Court granted the motion on February 17, 2016, (Order, ECF No. 24), and has considered the evidence submitted by Petitioner in the instant matter.

II. LEGAL STANDARDS

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

The Supreme Court has explained that, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413.

The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-389). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citing *Williams*, 529 U.S. at 389).

B. Exhaustion and Procedural Default

Pursuant to the AEDPA, "a district court ordinarily cannot grant a petition for a writ of habeas corpus arising from a petitioner's custody under a state court judgment unless the petitioner first has exhausted his available remedies in state court." *Houck v. Stickman*, 625 F.3d 88, 93 (3d Cir. 2010) (citing 28 U.S.C. § 2254(b)). A petitioner will not be deemed to have exhausted available state remedies if he has the right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c); *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999) ("[W]e ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts.").

In order for a claim to be exhausted, "'[b]oth the legal theory and facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court.'" *Tome v. Stickman*, 167 Fed. Appx. 320, 322-23 (3d Cir. 2006) (quoting *Evans v. Court of Common Pleas, De. County, Pa.*, 959 F.2d 1227, 1231 (3d Cir. 1992)). A state prisoner must "fairly present" his

federal claims to the state courts before seeking federal habeas relief by invoking "one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845; *see Halloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) (quoting *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) ("'Fair presentation' of a claim means that the petitioner 'must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.'")). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Warden SCI Waymart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683.

A federal court may not consider a procedurally defaulted claim unless "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To demonstrate cause, the petitioner must show that "'some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Fogg v. Phelps*, 414 Fed. Appx. 420, 429-30 (3d Cir. 2011) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To show

prejudice, a petitioner must show more than a potential for prejudice, but rather that the error "'worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Murray*, 477 U.S. at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). To demonstrate a fundamental miscarriage of justice, a petitioner must show that a "'constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Murray*, 477 U.S. at 496). This "actual innocence" is satisfied if petitioner can show that, in light of new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Id.*; *Houck*, 625 F.3d at 93.

In addition, the Supreme Court in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) identified a limited exception to procedural default of ineffective assistance of trial counsel claims. *Martinez* held that ineffective assistance of counsel during initial state collateral review can qualify as cause to excuse the default of a trial counsel ineffectiveness claim if: (1) state law required waiting until post-conviction review to raise *Strickland* claims; (2) the underlying *Strickland* claim is "substantial," that is, it has "some merit;" and (3) it is shown that collateral review counsel was ineffective under the *Strickland* standard. *Martinez*, 132 S. Ct. at 1315, 1318-19. However, *Martinez* does not extend to procedurally defaulted claims of ineffective assistance of appellate counsel. *See Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2065 (2017) (declining to extend *Martinez* to defaulted claims of ineffective assistance of appellate counsel); *Greene v. Superintendent Smithfield SCI*, No. 16-3636, slip op. at 15-16 (3d Cir. Feb. 9, 2018).

III. DISCUSSION

Petitioner raises the following claims in his *pro se* petition for writ of habeas corpus: (1) the trial court erred by not declaring a mistrial based on prosecutorial misconduct during the closing argument; (2) trial counsel was ineffective for failing to object to the references to "mug shots;" and (3) trial counsel was ineffective for: (a) failing to object to alleged hearsay testimony by police Detective Harris; (b) failing to retain an independent DNA expert or object to prosecutorial misconduct; (c) failing to file a suppression motion based on a technical defect in the affidavit of probable cause to arrest Petitioner; (d) failing to allege Petitioner's "actual innocence" based on the insufficiency of the evidence presented at trial; (e) failing to allege juror bias; and (f) failing to object or ask for cautionary instructions after Ingram, the bar owner, made alleged hearsay statements during his testimony at trial.

For the reasons set forth below, I recommend that the first two claims be denied on the grounds that the state court adjudications were not unreasonable under § 2254(d), and that the remaining claims be denied as procedurally defaulted and/or meritless.

A. Prosecution's Comment Regarding Petitioner's Alibi

Petitioner first claims that the prosecutor violated his due process rights by noting to the jury that Petitioner had never attempted to contact his alibi witness to confirm his whereabouts on the night of the robbery and shooting. (Hab. Pet. at 8-10; Mem. of Law at 1-7). The record reflects that Petitioner's great aunt, Diana Barnes, appeared as an alibi witness for Petitioner at trial, and testified that Petitioner had been working with her in a restaurant in New York at the time of the robbery and murder. (Alibi Notice, SCR No. D-1; N.T. 04/04/05 at 235-96; *see also Bond*, 1100 EDA 2006 at 9, n.6, ECF No. 9-4). When asked whether she could corroborate her testimony, Ms. Barnes conceded that she could not, and also revealed that Petitioner had never contacted her to confirm his alibi. (N.T. 04/04/05 at 240-41, 246-48, 266, 270-73, 281). The

prosecution emphasized this latter point during closing argument, suggesting to the jury that if Ms. Barnes' testimony were true, Petitioner would have attempted to contacted her: "In addition, [Petitioner], from the date of his arrest, until the summer of '04, writes, calls, does anything to [Ms.] Barnes to say, I was living with you and working for you, never, ever. Why?" (*Id.* at 119).

At the end of the prosecutor's closing argument, defense counsel requested a mistrial on the ground that the prosecutor's comment was an impermissible reference to Petitioner's post-arrest decision to remain silent. (*Id.* at 127-31). The trial judge denied the request for a mistrial, (*id.* at 132-33), but gave the following cautionary instruction to the jury:

> Just initially, in reference to the closing argument of the prosecutor, any comments that were made by the prosecutor regarding what happened to the defendant after his arrest and concerning the alibi witness must be disregarded.
>
> The defendant has no burden of proof in this case. It is the Commonwealth that always has burden of proving the case beyond a reasonable doubt, and that burden never shifts to the defense.
>
> The defendant has a constitutional right to remain silent, and it cannot be held against him if he exercises that right.

(*Id.* at 134). Petitioner now claims that, this instruction notwithstanding, the prosecution's remark violated his due process rights and the rules announced in *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that a prosecutor may not cause the jury to draw an impermissible inference of guilt from a defendant's post-*Miranda* warnings silence), and *Griffin v. California*, 380 U.S. 609 (1965) (holding that the Fifth Amendment does not permit comment by the prosecution on the accused's silence at trial). (Mem. of Law 1-4, ECF No. 1-2).

The Superior Court considered this claim on direct appeal and determined that it was meritless. The court explained that, contrary to Plaintiff's contention, the challenged comment does not implicate his constitutional rights because it was not a comment on his failure to speak

to police. (*Bond*, 1100 EDA 2006 at 11, ECF No. 9-4). Rather, according to the Superior Court, the prosecutor was challenging the reliability of Ms. Barnes's alibi by asking the jury to consider why Petitioner had not attempted to contact her previously, if he had in fact been living in New York and working with her at the relevant time. (*Id.*). The court further noted that, in any event, any prejudice to the Petitioner stemming from this comment was cured when the trial court gave a cautionary instruction. (*Id.* at 12).

The Superior Court's conclusion is neither contrary to, nor an unreasonable application of, federal law as determined by the United States Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(1)-(2). As the state court explained, the prosecutor did not comment on Petitioner's silence in the face of post-arrest questioning. (N.T. 04/05/05 at 112-21). The prosecutor commented on Petitioner's failure to contact Ms. Barnes. (*Id.* at 119). Nothing in the Constitution shields a defendant from a prosecutor's fair attempt to discredit a witness. This situation differs significantly from *Griffin*[6] and *Doyle*[7], the cases upon which Petitioner relies. In those cases, a defendant's post-arrest silence was used as substantive evidence of guilt and/or as

[6] *Griffin* prohibits a prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. *Griffin*, 380 U.S. at 614. In *Griffin*, the Court struck down a state law that permitted a jury to draw an adverse inference with respect to facts that were within the defendant's knowledge but about which the defendant had declined to testify. *Id.* at 613-15. The Court held that the Fifth Amendment forbids both instructions by the court that such silence is evidence of guilt as well as "comment by the prosecution on the accused's silence." *Id.* at 615.

[7] In *Doyle,* the Supreme Court addressed "whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest." *Doyle,* 426 U.S. at 611. The Court held that the prosecutor's "use of the defendant's post-arrest silence in this manner violates due process," and reversed and remanded the defendants' convictions. *Id.* In so ruling, the Court emphasized that "[s]ilence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of [his] *Miranda* rights," and "[t]hus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id.* at 617.

impeachment of an exculpatory story presented for the first time at trial, without regard to the fact that *Miranda* warnings specifically allow for an individual to remain silent post-arrest. Thus, these cases are not applicable here. Furthermore, even if the prosecutor's statements could be construed as an improper commentary on Petitioner's post-arrest silence, Petitioner's due process rights were protected by the judge's curative instruction to the jury. *See Gov't of the Virgin Islands v. Davis*, 561 F.3d 159, 164 (3d Cir. 2009) (citing *Greer v. Miller*, 483 U.S. 756, 764-65 (1987)).

Accordingly, I conclude that Petitioner is not entitled to habeas relief on this claim, and respectfully recommend that this claim be denied.

B. Ineffective Assistance of Counsel for Failing to Object to References to Petitioner's "Mug Shots"

Petitioner next claims that trial counsel rendered ineffective assistance by failing to object when eyewitness Larry Lane testified that he had identified Petitioner from a group of "mug shots." Petitioner argues that Lane, by using the phrase "mug shots," impermissibly revealed to the jury that Petitioner had engaged in prior criminal activity.

It is well established that ineffective-assistance-of-counsel claims are evaluated pursuant to the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, counsel is presumed to have acted reasonably and effectively unless a petitioner can demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced petitioner. *Id.* at 687. The first prong requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The second prong requires a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* "Counsel cannot be deemed ineffective for failing to raise a meritless claim." *Werts*, 228 F.3d at 202.

Petitioner contends that trial counsel was ineffective by failing to object to Lane's use of the term "mug shots." Eyewitness Lane testified at Petitioner's March 2005 criminal trial. (N.T. 03/29/05 at 191-328). On direct examination, Lane confirmed that he identified Petitioner from a photo array shown to him by police in July 2003. (*Id.* at 231-33). He described the photo array as containing "mug shots." (*Id.* at 232). On cross-examination, Lane again referred to the photographs as "mug shots." (*Id.* at 294, 304). Trial counsel did not object to Lane's reference to "mug shots." (*Id.* at 232, 294, 304).

In reviewing this claim on PCRA appeal, the Superior Court determined that trial counsel could not be deemed ineffective for failing to challenge Lane's testimony because Petitioner had failed to demonstrate that the testimony was prejudicial. The Superior Court explained that, under Pennsylvania law, the question to be answered when there is a reference to a photographic identification is "whether the jury could reasonably infer from the facts presented that an accused had engaged in prior criminal activity." (*Bond*, 732 EDA 2010 at 4-6, ECF No. 9-11) (citing *Commonwealth v. Cambridge* 563 A.2d 515, 517 (Pa. Super. 1989)). According to the Superior Court, absent testimony as to how the photograph became part of the police files, the most that can be inferred is that the defendant "had prior contact with the police and not a prior record or a previous conviction." (*Id.* at 5-6) (quoting *Commonwealth v. Lawrence*, 596 A.2d 165, 169 (Pa. Super. 1991), *abrogated on other grounds by Commonwealth v. Jette*, 23 A.3d 1032 (Pa. 2011)). Because in this case there was no testimony as to how the photograph became part of the police files, the Superior Court concluded that Lane's references to Petitioner's "mug shots" were not prejudicial.

This adjudication was not an unreasonable under 28 U.S.C § 2254(d). In this case, Lane provided over 100 pages of trial testimony, using the term "mug shot" three times to describe

photographs shown to him by the police. (N.T. 03/29/05 at 232, 294, 304). The Superior Court reasonably determined, consistent with Pennsylvania law, that the passing references to "mug shots" were not prejudicial to Petitioner; the fact that the police department had a photograph of Petitioner does not in itself reasonably imply that he had previously been convicted of a crime. *See Commonwealth v. Shawley*, 563 A.2d 1175, 1179 (Pa. 1989); *see also Martinez v. Shannon*, No. 06-2657, 2007 WL 2702782, at **7-8 (E.D. Pa. Sept. 12, 2007) (finding no due process violation where defense counsel used the term "mug shot" during cross-examination). Because Petitioner has failed to demonstrate that he was prejudiced by Lane's testimony, trial counsel cannot be deemed ineffective for failing to object to it. *See United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument.").

Accordingly, I conclude that Petitioner is not entitled to habeas relief on this claim, and respectfully recommend that his claim be denied.

C. Claims that were Defaulted Although Presented to the State Courts

Petitioner's claims concerning trial counsel's failure to object to alleged hearsay statements (claims 3(a) & 3(f)) are procedurally defaulted. Although Petitioner presented these claims in his PCRA petition, he failed to properly include the claims in his statement of matters complained of on appeal pursuant to Pennsylvania Rule of Criminal Procedure 1925(b). Accordingly, the Superior Court found both claims waived. (*Bond*, 372 EDA 2010 at 6, ECF No. 9-11) (citing Pa.R.A.P. 1925(b)(4)(vii) and *Commonwealth v. Hill*, 609 Pa. 410, 427 (Pa. 2011) for the proposition that "any issues not raised in a Rule 1925(b) statement will be deemed waived"). State court findings of waiver due to a deficient 1925(b) statement have been found to be independent and adequate state grounds, precluding habeas review. S*ee, e.g., Pugh v.*

Overmyer, No. 15-364, 2017 WL 3701824, at *10 (M.D. Pa. Aug. 28, 2017) (collecting cases); *Manley v. Gilmore*, No. 15-2624, 2016 WL 9280154, at *9 (E.D. Pa. Feb. 24, 2016), *report and recommendation adopted*, No. 1502624, 2017 WL 2903050 (E.D. Pa. July 7, 2017); *Miles v. Tomaszewski*, No. 04-3157, 2004 WL 2203726, at *3 (E.D. Pa. Sept. 14, 2004), *report and recommendation adopted*, No. 04-3157, 2004 WL 2457732 (E.D. Pa. Oct. 27, 2004). Petitioner is therefore ineligible for habeas relief on these claims.[8]

Furthermore, to the extent that the Superior Court provided an alternative ruling denying these claims on their merits, that decision was not unreasonable under § 2254(d). In the first claim, Petitioner alleges that trial counsel was ineffective for failing to challenge Detective Harris' testimony that he had prepared a photographic array (including Petitioner's photo) based on information he had received from two other detectives. (Am. Memo. of Law 5-9, ECF No. 22-26); (*Bond*, 372 EDA 2010 at 8, ECF No. 9-11). According to Petitioner, Detective Harris' testimony was impermissible hearsay that violated his right to confront his accuser under *Crawford v. Washington*, 541 U.S. 36 (2004).

The Superior Court properly rejected Petitioner's claim. First, contrary to Petitioner's contention, Detective Harris' testimony was not hearsay because he did not introduce an-out-of-court statement into evidence, and he did not introduce the information he received from the other detectives for its substantive truth. *See* Pa.R.E. 801(c) (providing that hearsay is an out of court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement"). Detective Harris testified that in June 2003 he received information from two

[8] *Martinez* cannot be invoked to excuse the default of these two claims as it does not extend to procedurally defaulted claims of ineffective assistance of appellate counsel. *See Davila*, 137 S. Ct. at 2065.

homicide detectives that led to the development of a photo array containing the photograph of Petitioner. (N.T. 04/04/05 at 175-77). In pertinent part, Detective Harris testified as follows:

> Q. Can you tell the Ladies and Gentlemen of the Jury who Detectives Bass and Boyle are?
> A. They are detectives that are assigned also to the Cold Case Squad.
>
> Q. Without telling us, what information did they give you -- did they give you information --
> A. That's correct.
>
> Q. -- in reference to the shooting death of Mr. Edward Carter?
> A. Yes, they did.
>
> Q. Did the information include a name or names of the gunman, the get away driver and others who may have been involved in this case?
> A. That's correct.
>
> DEFENSE COUNSEL: I'm going to object, unless it's alleged, Your Honor.
>
> THE COURT: Sustained.
>
> Q. Did the information include the name or names of people who allegedly were the shooter, the get-away driver and others who may have been involved in this case?
> A. Yes
>
> Q. With that information, what, if anything, did you do?
> A. We developed a photo display containing a photo of the defendant seated there, and also we resubmitted the fingerprint that we had that was recovered from the cigarette lighter, and also the clothing for DNA examination.

(*Id.*).

Similarly, Detective Harris' testimony does not implicate *Crawford*. Under *Crawford*, an out-of-court statement of an unavailable declarant offered against an accused to prove the truth of the matter asserted is generally inadmissible without opportunity for cross-examination. *Crawford*, 541 U.S. at 58-68. However, because Detective Harris did not introduce the out-of-

court statement of an unavailable declarant or introduce a statement for the truth of the matter asserted, *Crawford* is clearly inapplicable here. Accordingly, trial counsel cannot be deemed ineffective for failing to object to Detective Harris's testimony.

The Superior Court also reasonably rejected Petitioner's second hearsay-related claim, in which he argues that trial counsel was ineffective for failing to object to testimony offered by bar owner William Ingram regarding statements made by Petitioner and the victim during the shooting. Specifically, Ingram testified that he first heard Petitioner say, "hold it," or "this is a hold up," and then heard the victim say, "Oh no, you don't. Not in here." (*Bond*, 372 EDA 2010 at 9, ECF No. 9-11). The Superior Court explained that this testimony was not hearsay under Pennsylvania law because the victim's statement may have been admissible as a present sense impression under Pa. R.E. 803(1), or an excited utterance under Rule 803(2). Nor was the testimony a violation of *Crawford*, because the victim's statements were not testimonial in nature. *See United States v. Hinton*, 423 F.3d 355, 360 (3d Cir. 2005) ("[S]tatements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial are testimonial."). Accordingly, the Superior Court reasonably concluded that trial counsel was not ineffective for failing to challenge Ingram's testimony on these grounds.

D. Defaulted Claims that were Never Presented to the State Courts

Petitioner's four remaining ineffectiveness claims are all procedurally defaulted as a result of his failure to present them to the state courts in his PCRA petition. Petitioner argues that this Court should nonetheless consider these claims because he can establish cause to excuse the defaults, namely, that PCRA counsel Bruno was ineffective for failing to include in his amended PCRA petition all the claims of trial counsel ineffectiveness that Petitioner raised in his

pro se petition. *See Martinez*, 132 S. Ct. at 1318-1319.[9] Because Petitioner has failed to demonstrate that these remaining ineffectiveness claims are "substantial," he has not demonstrated cause to excuse the procedural default. *See id.*

1. Decision Not to Retain DNA Expert or Object to Alleged Misconduct by Prosecutor

Petitioner asserts that trial counsel was ineffective for failing to retain an expert to challenge the Commonwealth's DNA expert, Kevin Knox. Petitioner also argues that trial counsel should have objected to the prosecutor's use of Knox's perjured testimony. According to Petitioner, Knox falsely testified that DNA matching Petitioner's was found on "Area B" of the sweatshirt recovered from the crime scene, and also relied on lab reports that were inconsistent. (Memo. of Law 10-17, ECF No. 5). These claims are meritless.

First, Knox's testimony was not false or inconsistent. Knox prepared two reports related to DNA testing as part of the investigation of Edward Carter's homicide: (1) a September 4, 2004, DNA Identification Laboratory Report, and (2) a March 28, 2005, supplemental DNA Laboratory Report. (N.T. 04/04/05 at 65, 69-71; *see* Reports, Ex. E 74-75, ECF No. 5). Knox testified at the first trial that he relied on the September 2004 Report which indicated that Petitioner "cannot be excluded" from the recovered sweatshirt Area B. (N.T. 04/04/05 at 104-09; Exh. E, ECF No. 5). In the second trial, Knox relied on his initial September 2004 report as well as the March 28, 2005, supplemental report which indicated that Petitioner is "included" –

[9] In analyzing Petitioner's *Martinez* argument, the Court has considered the evidence related to the disciplinary proceedings against initial PCRA counsel Bruno submitted by Petitioner, along with his Motion to Expand the Record. Petitioner bases his *Martinez* argument solely on the conduct of attorney Bruno. The Court notes that attorney Bruno withdrew from the PCRA proceedings; the PCRA court appointed new collateral review counsel – attorney Server -- who filed an appeal on Petitioner's behalf. Petitioner does not allege that Server was ineffective. Consequently, Petitioner has not demonstrated how the ineffectiveness of Bruno impacted the ultimate resolution of his PCRA appeal. Nonetheless, the Court will consider Petitioner's *Martinez* claims.

as opposed to "not excluded" - in the Area B sweatshirt sample. (*Id.*). Knox also added statistical detail in the supplemental report that the frequency of the observed DNA types were "1 per 6.28 million in the random unrelated African American population." (*Id.* at 88-91, 141-45). Thus, Knox changed his terminology from "cannot be excluded" to "included," and he added the calculation of the frequency of the observed DNA types. (N.T. 04/04/05 at 141-45). These differences do not amount to inconsistencies in the reports, or in Knox's testimony. Because Petitioner has failed to demonstrate that Knox gave false or misleading testimony, he cannot show that counsel was ineffective for failing to object to the prosecutor's reliance on that testimony.

Furthermore, Petitioner has not demonstrated that he was prejudiced by the decision of trial counsel not to retain a DNA expert because he cannot identify any defense-favorable testimony that an expert would have produced. Rather, defense counsel employed the reasonable strategy of extensively cross-examining Knox in an attempt to highlight any supposed differences between the 2004 DNA Identification Laboratory Report and the 2005 DNA Identification Laboratory Report. (N.T. 4/4/05 at 101-137).

Accordingly, Petitioner's ineffectiveness claim relating to the DNA evidence is not substantial for *Martinez* purposes.

2. Failure to File Suppression Motion

Petitioner next asserts that his trial counsel was ineffective for failing to file a motion to suppress his arrest warrant. More specifically, Petitioner complains that police lacked jurisdiction to arrest him because of a technical defect in the affidavit of probable cause, that is, that it was never signed by a magistrate. (Mem. of Law 17-19, Exh. F, ECF No. 5).

Trial counsel was not ineffective for failing to file this suppression motion because it would have been frivolous. Even if Petitioner is correct that the affidavits of probable cause were never signed by a magistrate,[10] he would not be eligible for relief under Pennsylvania law. *See* Pa. R. Crim. P. 109 ("A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant."). Trial counsel cannot be deemed ineffective for failing to raise this meritless issue. *See United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999).

Petitioner's failure to establish deficient performance by trial counsel precludes review of this claim under *Martinez*.

3. Sufficiency of the Evidence

Petitioner next argues that PCRA counsel Bruno was "ineffective for failing to raise trial counsel's ineffectiveness for failing to . . . raise [a] claim of [Petitioner's] actual innocence of second degree murder, in that no robbery was actually committed." (Hab. Pet. 9-10, ECF No. 1). According to Petitioner, "the state never produced any evidence that the death of the victim, Edward Carter, occurred as a result of [Petitioner] engaging in and/or making an attempt to take the patrons['] . . . property by force or threat of force pursuant to 18 Pa. C.S. § 3701 or [] any other offenses defined as [a] felony pursuant to § 2502(b)." (Mem. of Law 20, ECF No. 5). He

[10] It appears that they were indeed signed, albeit with a signature that was abstract and illegible. (Mem. of Law, Exh. F., ECF No. 5).

alleges that his trial counsel was ineffective for failing to raise this defense of "actual innocence."[11] This claim lacks merit.

As noted by the Commonwealth, Petitioner overlooks that his counsel did in fact challenge the sufficiency of the evidence on direct appeal. (Appellant Br., ECF No. 9-3). PCRA counsel cannot be ineffective for raising trial counsel ineffectiveness when trial counsel made the very arguments Petitioner claims should have been raised. Moreover, the Superior Court examined the evidence presented at trial and reasonably concluded that evidence supported Petitioner's second degree murder conviction. (*Id.* at 4-7). The Court noted that the jury, based on the testimony presented by eyewitnesses Lane and Ingram, determined that the "killing [of Carter] as in furtherance of the robbery." (*Id.* at 7). The evidence presented at trial supports the Court's conclusion and thus, this claim cannot be considered substantial. Accordingly, *Martinez* does not excuse the default.

4. Juror bias

Finally, Petitioner asserts that trial counsel was ineffective for failing to challenge a juror's "potential bias." According to Petitioner, trial counsel should have further questioned a juror who had been the victim of an armed robbery and car-jacking who stated her willingness to serve on the jury. (Mem. of Law 24-25, ECF No. 5). This claim is also not substantial under *Martinez*.

Juror Nicole Wilson explained that she had been the victim of an armed robbery and carjacking that had occurred two years prior to Petitioner's trial. (N.T. 03/28/05 at 124-27) The trial court questioned Ms. Wilson directly regarding her potential bias, noting that the present

[11] While petitioner uses the term "actual innocence" regarding this claim, he does not appear to argue that his procedural default should be excused because of the "actual innocence" exception. Rather, he argues that his default should be forgiven under *Martinez*.

case involved "an alleged robbery of an establishment as well where someone was actually shot." (*Id.* at 126-27). The court asked her, "The fact that you were the victim of an armed robbery, would that in any way impact your ability to be fair?" (*Id.* at 127). Ms. Wilson replied, "No." (*Id.*). The court further asked her whether she could "listen to this evidence and judge it fairly," and she answered, "Yes." (*Id.*). The court also asked whether she could "think of any reason, then, as to why [she] could not be fair," and she replied, "No, I kind of want to do it." (*Id.*). Neither counsel objected, and Ms. Wilson was accepted as a juror.

Traditionally, courts have distinguished between two types of juror bias: actual bias, and implied bias. *United States v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012) (citations omitted). Under Pennsylvania law, a juror should be disqualified as actually biased where he or she is unwilling or unable to "eliminate the influence of any scruples and render a verdict according to the evidence." *Commonwealth v. Michuck*, 686 A.2d 403, 407 (Pa. Super. 1996). The trial court possesses broad discretion in excusing prospective jurors for cause on the basis of actual bias. *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

Implied bias, by contrast, is a legal presumption based upon the juror's personal connections to the parties or the case itself. *Mitchell*, 690 F.3d at 144. This doctrine applies in "those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *United States v. Calabrese*, 942 F.2d 218, 227 n.3 (3d Cir. 1991) (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)). Bias may be implied, for example, where the prospective juror is a close relative of one of the trial participants or was a witness to the crime. *Smith v. Phillips*, 455 U.S. 209, 202 (1982) (O'Connor, J., concurring).

Here, the facts do not support an inference of juror bias, actual or implied, and Petitioner's counsel was not ineffective for declining to question the juror. The trial court questioned Ms. Wilson regarding her ability to be impartial, and specifically, any impact of her previous experience as a victim of robbery. Ms. Wilson explained that she was willing and able to serve as an impartial juror, and the trial court found that she could be fair and impartial. This factual finding is entitled to deference. *See Wainwright,* 469 U.S. at 428 (noting that a trial judge's finding that a potential juror is not biased is a finding of fact entitled to deference, particularly in the habeas context). Furthermore, Ms. Wilson's prior experience as a crime victim is not one of the "extreme situations" that require a finding of implied bias. *See Calabrese*, 942 F.2d at 227 n.3.

Accordingly, Petitioner's juror bias claim is not substantial for *Martinez* purposes.

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that the petition for writ of habeas corpus be **DENIED** with no certificate of appealability granted.[12]

Therefore, I respectfully make the following:

[12] Petitioner has failed to show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," or that jurists of reason would find this Court's procedural rulings debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

RECOMMENDATION

AND NOW, this 23RD day of October, 2018, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus be DENIED. There has been no substantial showing of the denial of a Constitutional right requiring the issuance of a certificate of appealability.

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

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE