

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

MARK STEVEN CANN,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
TAB BICKLE, <i>et al.</i> ,	:	NO. 11-5078
Respondents.	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

March 30, 2011

Before the Court for Report and Recommendation is the *pro se* petition of Mark Steven Cann (alternatively “Cann” or “Petitioner”) for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is presently incarcerated at the State Correctional Institution in Huntingdon, Pennsylvania serving a term of eight to twenty-seven years, with an additional term of two years on probation imposed by the Berks County Court of Common Pleas for three counts of robbery, conspiracy to commit robbery, theft by unlawful taking, criminal conspiracy and false reports to law enforcement authorities.¹ In his petition, he raises claims under Pennsylvania Rules of Criminal Procedure 600, 602 and 122, under the Due Process Clause of the Fourteenth Amendment, under Section 9 of Article I of the Pennsylvania Constitution and, as pertains to his rights to a speedy trial and representation by effective counsel, under the Sixth Amendment. He also argues that his counsel was ineffective based on violations of several Pennsylvania Rules of

¹ We note that while Petitioner is currently confined within the Middle District of Pennsylvania, which includes Huntingdon County, *see* 28 U.S.C. § 118(b), venue is proper here in that his confinement grew out of a prosecution and conviction within the Eastern District of Pennsylvania. *See* 28 U.S.C. § 2241(d).

Professional Conduct. For the reasons set forth below, we find that the claims raised are either procedurally defaulted, not cognizable on federal habeas review, or were properly rejected by the state courts pursuant to a reasonable application of federal law. We accordingly **RECOMMEND** that the petition be **DENIED** and **DISMISSED**.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

Following a trial before the Honorable Thomas G. Parisi of the Berks County Court of Common Pleas, a jury, on May 10, 2006 found Cann guilty of three counts of robbery, conspiracy to commit robbery, theft, conspiracy to commit theft, and filing false reports to law enforcement authorities. On June 28, 2006 Judge Parisi sentenced him to six to twenty years on the robbery convictions, and an additional two to seven years for conspiracy to commit robbery—for a cumulative total of eight to twenty-seven years—and two years of probation for the false reports to law enforcement authority. The state court described the events giving rise to the convictions as follows:

² In preparing this Report, we have reviewed Cann’s *pro se* petition for the issuance of a writ of habeas corpus (Doc. No. 1) (“Pet.”) and accompanying exhibits (“Pet. Ex.”); his amendment to the petition (Doc. No. 4) (“Pet. Amend.”), exhibits (Doc. No. 7) (“Pet. Ex.”), letter to the Court (Doc. No. 8) (“Pet. Ltr.”), “Memorandum of Law” (Doc. No. 9) (“Pet. Mem.”) and letter regarding the Memorandum of Law (Doc. No. 11) (“Pet. Mem. Ltr.”); the District Attorney of Berks County’s response to the petition (Doc. No. 10) (“Resp.”), accompanying memorandum (“Resp. Mem.”) and appendix (“Resp. Appx.”); Petitioner’s reply (Doc. No. 13) (“Pet. Reply”); and the original state court record that we received from the Office of the Clerk of Courts of Berks County (“St. Ct. Rec.”), as well as the electronic docket, *Commonwealth v. Mark Steven Cann*, CP-05-CR-0002004-2005, available at: <http://ujportal.pacourts.us/DocketSheets/CPReport.aspx?docketNumber=CP-06-CR-0002004-2005> (“State Court Docket”). We have also reviewed the brief Cann filed in his PCRA appeal to the Superior Court, which is not included on our Court’s docket, but which we found on Westlaw, *see Brief for Appellant*, 2010 WL 5868078 (“Pet. App. Br.”), as well as the transcript of the PCRA hearing held on January 14, 2010, to consider the ineffective assistance of counsel allegation regarding Cann’s Rule 600 waiver, and accompanying exhibits. (“PCRA Hear. Trans.” and “PCRA Hear. Trans. Ex.”)

[Cann] worked as a delivery driver for a wholesale food supplier at the time of the crime. He was assigned, along with co-worker, Zhouyi Ouyiang (Ouyiang), to make deliveries from the Reading area to several restaurants in the Altoona area on the night of December 16, 2004. After delivery to a restaurant, Ouyiang and [Cann] received payment, usually in cash, and were then supposed to return to Reading.

[Cann] and Ouyiang were returning to the Reading area late that evening when [Cann] decided to stop at a grocery store, which was about fifteen to twenty minutes from their employer's place of business. Ouyiang, who had been sleeping between one to two hours during the ride back, testified that it was unusual for [Cann] to stop so late, and that [Cann] parked the delivery truck in a dark area of the parking lot that was away from the store's front entrance.

Ouyiang waited in the delivery truck while [Cann] went into the store. When [Cann] returned, there were two people with him. Ouyiang saw one person[, later identified as Laurel Galvin,] point a knife at [Cann], while the other person, a Hispanic male later identified as Bryan Roman (Roman), climbed into the cab of the truck and demanded money. When Ouyiang initially resisted, Roman grabbed a gold chain around Ouyiang's neck, the chain broke, and Roman took the gold charm. Ouyiang then handed Roman an envelope filled with cash. The two people then ran from the scene.³

³ Cann, proceeding *pro se*, filed a lawsuit against the detective who investigated this offense, asserting civil rights claims under the Fourth and Fourteenth Amendments. *See Cann v. Wanner*, 2006 WL 1805977, at *1 (E.D.Pa.). In granting the detective's motion to dismiss, the District Court provided a further description of the facts:

Christopher Kretz, an employee at the Giant Food store, stated that he witnessed two individuals approach the truck and that it appeared that they were talking to Cann outside the vehicle. Kretz stated that he believed one of the individuals to be female and the other male, and that the interaction 'actually looked like a drug deal.' Other witnesses standing in front of the store stated that they saw two individuals walk across the parking lot prior to Cann's entering the store and that it seemed that the individuals had then disappeared for a short time, possibly hiding behind a parked car. These witnesses also stated that when Cann walked out of the store the two individuals reappeared and approached him. Like Kretz, these witnesses believed one of the individuals to be female and

(continued...)

At trial, Laurel Galvin (Galvin) testified that [Cann] conspired with her to stage the robbery because [Cann] believed his employer cheated him out of his pay. According to Galvin, [Cann] instructed her to find a male to help her stage the robbery. Galvin enlisted the aid of Roman, as well as [his cousin] Matthew Roman[, (who waited in the car during the robbery and served as the getaway driver)]. Each of [Cann's] co-conspirators testified against him at trial and gave details concerning the robbery.

Commonwealth v. Cann, No. 1994 MDA 2008 (Pa. Super. Ct. September 18, 2009) (quoting *Commonwealth v. Cann*, No. 1268 MDA 2006, unpublished memorandum at 1-3 (Pa. Super. filed Feb. 22, 2007)) [Pet. Ex. 2].

³(...continued)

the other male.

Ouyiang stated that as Cann opened the door of the truck he heard Cann say something and saw a male individual with a gun and a knife. The male took Cann's wallet but did not open it, and then tossed it on the floor of the truck. He entered the truck and demanded money from Ouyiang. When Ouyiang told him that he did not speak English, the male struck Ouyiang in the head with his gun. Ouyiang then handed over \$2,429.00 in cash that he had in two bank envelopes; the male also grabbed a gold chain off of Ouyiang's neck. Neither Cann's wallet nor any other of his property were stolen; he was not struck during the robbery.

After the individuals ran away, Cann called 911...Detective Wanner, the investigating officer assigned to the robbery, arrived at the scene and ordered Cann to come to the Cumru Police Station. Accompanied by his girlfriend, Laurel Galvin, Cann went to the station and was questioned by Wanner. Wanner also questioned Galvin concerning several phone calls between her and Cann on December 16[...]. During the course of the investigation, Galvin confessed to Wanner that she and Cann had planned the robbery and told him that she had been Cann's girlfriend at the time.

Id. at *1-*2.

At Cann's trial, where he was represented by court-appointed counsel Paul Herbein, Esquire,⁴ the Commonwealth called as witnesses Yi Lu, who owned the food supplier that employed Cann and Ouyiang (N.T. 05/08/06 at 56-64), Andrew Mantione, who worked at the Giant supermarket where the robbery took place and, along with Kretz, witnessed the incident (N.T. 05/08/06 at 65-77), Ouyiang (N.T. 05/09/06 at 79-94), Officer Shugars, the police officer who responded to Cann's call about the robbery (N.T. 05/09/06 at 95-104), Erin Galvin Lopez, Laurel Galvin's sister (N.T. 05/09/06 at 104-114), Bryan Roman (N.T. 05/09/06 114-139; 142-151), Matthew Roman (N.T. 05/09/06 151-167), and Laurel Galvin (N.T. 05/09/06 at 170-199). Cann did not testify, nor did he offer any witnesses. (*See, e.g.*, N.T. 05/09/06 at 203.) Petitioner, through counsel, characterized the robbery as masterminded and carried out by Galvin, who allegedly needed money to support her heroin addiction, and whose relationship with Cann had recently deteriorated. (*See, e.g.*, N.T. 05/08/06 at 54-55.) Petitioner argued that a police report that Galvin filed against him several days after the robbery for allegedly stealing her jewelry supported the theory that she was attempting to frame him. (*Id.* at 55.) On the whole, Attorney Herbein attempted to attack the credibility of Cann's co-conspirators and their respective accounts of the incident. (*See, e.g.* N.T. 05/08/06 at 114-199.)

On August 10, 2006, following sentencing and while still represented by Attorney Herbein, Cann filed an appeal requesting a new trial. *See Brief of Appellant*, Resp. Appx. at A49. *See also Commonwealth v. Cann*, No. CP-06-CR-2004-2005 (Berks Ct. Comm. Pl. August 17, 2006)[St.

⁴ Cann was represented by Assistant Public Defender Abby L. Rigdon, Esquire, for his arraignment and throughout the pretrial motions stage. *See St. Ct. Rec. See also Pet.* at 8(a). Upon Attorney Rigdon's departure from the public defender's office on October 28, 2005, shortly before trial was scheduled to commence, the court appointed Attorney Herbein to take over Cann's case. This is the subject of one of Cann's claims for habeas relief, which we discuss below, as is the continuance that Attorney Herbein subsequently requested upon his appointment in order to have more time to prepare for trial.

Ct. Rec.]. Specifically, Cann petitioned the court to interview a juror who initially gave inconsistent answers when the jury was polled after announcing a unanimous verdict at his trial (which alone provided grounds for a mistrial, in his view), and challenged his conviction as being against both the sufficiency and the weight of the evidence March 30, 2012. (*Id.* at 3-4, 6, 8.) Following upon the issuance of the trial court's memorandum opinion on August 17, 2006, the Superior Court affirmed the conviction on February 22, 2007. *Commonwealth v. Cann*, No. 1268 MDA 2006 (Pa. Super. Ct. February 22, 2007)[St. Ct. Rec.]. Trial counsel Herbein withdrew as counsel on March 6, 2007. *See* State Court Docket.

Cann did not seek review with the Pennsylvania Supreme Court, but did seek relief, *pro se*, under the Pennsylvania Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-46 ("PCRA"). *See Motion for Post Conviction Collateral Relief*, filed 03/14/2007 [St. Ct. Rec.]. *See also* State Court Docket. In this petition, Cann alleged that "the Court violated [his] Rule 600/1100 rights,"⁵ and that his court-appointed attorney, Paul Herbein, "put no defense on whatsoever. He called no witnesses and he rested the case when the District Attorney rested theirs. He filed no motions for relief when I told him to." *See Motion for Post Conviction Collateral Relief*. Additionally, Cann argued that "there were no African Americans in the jury pool." *Id.* Rather than rule on the motion on the merits, by order of March 27, 2007, the PCRA court appointed Attorney Gail Chiodo, Esquire to represent Cann and allowed her to file an amended petition. *Order of Judge Parisi*, filed 03/27/2007 [St. Ct. Rec.]. Attorney Chiodo subsequently withdrew as counsel and Lara Glenn Hoffert, Esquire, was appointed on June 21, 2007. *See* State Court Docket. *See also* 'No Merit' Letter Pursuant to

⁵ Rule 1100, enacted in 1973, was renumbered Rule 600 on March 1, 2000, effective April 1, 2001. *See* Pa.R.Crim.P. Rule 600, CREDIT(S).

Finley and Turner requesting Leave of Court to Withdraw as Counsel, filed 07/03/2008 [St. Ct. Rec.].

After seeking and receiving several extensions of time to submit an amended PCRA petition, Attorney Hoffert, on July 3, 2008, filed a “No Merit” letter pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) and *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), requesting leave of court to withdraw as counsel. *See id.* *See also* Pet. at 8(a). Cann then filed a Notice of Appeal and a Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b) on November 5, 2008, which was prior to the PCRA court’s dismissal of his petition on November 19, 2008. *See* State Court Docket. On September 18, 2009, the Superior Court issued its memorandum opinion, in which it denied most of Cann’s PCRA claims as lacking merit but remanded for hearing the question of whether trial counsel was ineffective for failing to argue that there had been a Rule 600 violation. *See* State Court Docket. *See also* *Commonwealth v. Cann*, No. 1994 MDA 2008 (Pa. Super. Ct. September 18, 2009), and *Commonwealth v. Cann*, No. CP–06–CR–2004–2005 (Berks Ct. Comm. Pl. May 28, 2010) [St. Ct. Rec.]. The PCRA court held the evidentiary hearing on January 14, 2010, and issued an opinion denying this remaining claim for relief on May 28, 2010. *See* State Court Docket. *See also* *Commonwealth v. Cann*, No. CP–06–CR–2004–2005 (Berks Ct. Comm. Pl. May 28, 2010) [St. Ct. Rec.].

Cann filed a notice of appeal from this dismissal on June 15, 2010 and on February 1, 2011, after the filing of both parties’ briefs, the Superior Court issued a memorandum opinion affirming the order of dismissal. *See* *Commonwealth v. Cann*, No. 1011 MDA 2010 (Pa. Super. Ct. February 1, 2011) [St. Ct. Rec.] *See also* State Court Docket. The Pennsylvania Supreme Court denied Cann’s petition for allowance of appeal on September 12, 2011. *See* *Com. v. Cann*, 29 A.3d 370 (table) (Pa.

2011). On February 14, 2011, Cann filed a second PCRA petition, again proceeding *pro se*, which he requested to withdraw and which the PCRA court denied three days later.⁶ *See* State Court Docket. On September 12, 2011, the Supreme Court of Pennsylvania denied Cann’s “Petition for Leave to File an Amended Allowance of Appeal and Petition for Allowance of Appeal.” *Id. See also Com. v. Cann*, 29 A.3d 370 (table) (Pa. 2011).

Cann’s subsequent *pro se* petition for the issuance of a writ of habeas corpus (“Pet.”) was docketed in our Court on August 8, 2011. (Doc. No. 1) On September 12, 2011, he filed an amendment to his petition (Doc. No. 4) (“Pet. Amend.”), and on September 21, 2011, he filed exhibits in support (Doc. No. 7) (“Pet. Ex.”). On October 13, 2011, he filed a copy of a letter he had sent to the Chief Clerk of Court at the Berks County Courthouse (Doc. No. 8) (“Pet. Ltr.”), and on October 19, 2011, he filed a “Memorandum of Law” (Doc. No. 9) (“Pet. Mem.”) and letter regarding the Memorandum of Law (Doc. No. 11) (“Pet. Mem. Ltr.”).⁷ The District Attorney of Berks County (on behalf of the “Respondent,” the Commonwealth of Pennsylvania, or “the Commonwealth”) filed a response on October 21, 2011 (Doc. No. 10) (“Resp.”), with an accompanying memorandum (“Resp. Mem.”), asserting that the petition should be denied in that Cann’s claims were either procedurally defaulted or should be dismissed on the merits. (Resp. at 3.) Cann then filed his reply

⁶ In his petition, Cann describes that he realized that he “needed to file an allowance of appeal with the Supreme Court of Pennsylvania” and so “wrote the Clerk of Courts in Berks County and stated that it was [his] intention to withdraw [his] second P.C.R.A. petition, but P.C.R.A. Judge Parisi beat [him] to the punch” when he “dismissed [Cann’s] second P.C.R.A. petition without any court hearing or opinion.” (Pet. at 7.) In Cann’s view, this was “illegal, but he did it anyway.” In that Cann has not developed this assertion of illegality anywhere else on any of his habeas or P.C.R.A. petitions, we do not interpret this it as a separate claim for habeas relief.

⁷ Cann also filed a letter to Michael E. Kunz, the Clerk of Court of the Eastern District of Pennsylvania, seeking to correct an error he made in his Memorandum of Law, which was docketed in our Court on October 24, 2011 (Doc. No. 11).

to Respondent's brief (Doc. No. 13) ("Pet. Reply"), which was docketed on November 14, 2011.

II. STANDARD OF REVIEW

A. Exhaustion and Procedural Default

Out of a sense of comity and federalism, federal court habeas relief is available only for claims where the petitioner has exhausted the corrective processes available in the state court system to protect the rights of persons in state custody. *See* 28 U.S.C. § 2254(b)(1). In order to satisfy this obligation to exhaust available state court remedies and give these courts a full and fair opportunity to resolve a federal constitutional claim, the state prisoner must "fairly present" his claims in "one complete round of the state's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "Fairly presenting" a federal claim to the state courts requires the petitioner to present both the factual and legal substance of the claim in such a manner that the state court is on notice that the federal claim is being asserted. *See McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

Where a claim upon which the petitioner seeks habeas relief was not properly presented to the state court or was presented but not considered based upon a state procedural rule that was both independent of the federal question presented and adequate to support the denial of relief, the petitioner is considered to have defaulted that claim. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 749 (1991). Such a claim cannot provide a basis for federal habeas relief unless the petitioner can show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or [unless he] demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750. *See also Teague v. Lane*, 489 U.S. 288, 308 (1988) (plurality opinion); *Wainwright v. Sykes*, 433 U.S. 72 (1976). To establish cause, the petitioner must show

“that some objective factor external to the defense impeded [his] efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Attorney error rising to the level of a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1994), may establish “cause.” See *Carrier*, 477 U.S. at 488; *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). To establish prejudice, the petitioner must show “actual prejudice resulting from the errors of which he complains.” *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). The fundamental miscarriage of justice exception requires that petitioner supplement his claims with a “colorable showing of factual innocence.” *Id.* at 495. The burden is on the petitioner to show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

B. Claims Adjudicated by the State Court

In cases where the claims presented in the federal habeas petition were adjudicated on the merits in the state courts, the federal court shall not grant habeas relief unless the adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has made it clear that a habeas writ may issue under the “contrary to” clause of Section 2254(d)(1) only if the “state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.” *Bell v.*

Cone, 535 U.S. 685, 694 (2002). A writ may issue under the “unreasonable application” clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court “unreasonably applies it to the facts of the particular case.” *Id.* This requires the petitioner to demonstrate that the state court’s analysis was “objectively unreasonable.” *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). Working from this standard, we must evaluate each of Petitioner’s five claims to determine if any were decided “contrary to or involved an unreasonable application of clearly established federal law.”

III. DISCUSSION

Cann filed his petition under § 2254 on August 8, 2011, and his amended petition on September 12, 2011.⁸ Initially, we note that Respondent has not challenged its timeliness. Our independent review confirms that Cann’s petition was in fact filed within the one-year statute of limitation imposed by 28 U.S.C. § 2244(d)(1). Accordingly, we turn to his particular claims for relief.

The petition and amendment thereto collectively set forth five general grounds for relief, although his subsequent memorandum of law presents the claims in a somewhat different manner. For clarity, we have grouped related claims into five categories. They are: (1) that he was deprived of his right to release on nominal bail for not being taken to trial within 180 days under Pennsylvania

⁸ We observe that although it was not filed in our court until August 8, Cann dated the petition August 5, 2011. He then filed an amendment to the petition on September 12, 2011, and a memorandum of law on October 19, 2011. The Commonwealth filed its response on October 21, 2011, in which it appears to address only “his petition,” and not his subsequent filings. (*See Resp. at 3. See also Resp. Mem. at 5.*) In that, in its response, “the Commonwealth has dispensed with a seriatim answer for the sake of clarity,” we are unable to determine precisely which of Cann’s filings the response pertains to, but do not consider this dispositive for our review of the merits of Cann’s claims.

Rule of Criminal Procedure 600(E) (“Rule 600(E)”); (2) that he was deprived of his speedy trial rights under Pennsylvania Rule of Criminal Procedure 600(A)(2) (“Rule 600(A)(2)”), under the Sixth Amendment to the United States Constitution, and under Article 1, Section 9 of the Pennsylvania Constitution; (3) that he was deprived of his Sixth Amendment right to the effective assistance of counsel when Attorney Herbein waived his Rule 600 rights, including failing to seek nominal bail, and when he violated the Pennsylvania Rules of Professional Conduct 1.2(a), 1.2(c), 1.4(a), and 1.4(b) by “never communicat[ing] with [Cann] in any type of reasonable manner”; (4) that he was deprived of his due process rights under the Fourteenth Amendment and under Pennsylvania Rule of Criminal Procedure 122(B) (“Rule 122(B)”) when the state court appointed Attorney Herbein without his having requested a court-appointed attorney; and (5) that his rights under Pennsylvania Rule of Criminal Procedure 602 (“Rule 602”) were violated when the court held a hearing regarding waiver of his Rule 600 rights without his being present. (*See, e.g.*, Pet. at 5-6, Pet. Mem. at 2-11, Pet. Amend. at 3-4.)

As we set out below, we conclude that these claims were either procedurally defaulted, properly rejected by the state courts pursuant to a reasonable application of federal law, or are not cognizable on federal habeas review.

A. Ground One: Right to Nominal Bail

Petitioner first contends that his rights were violated under Rule 600(E), which provides that

No defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days excluding time described in

paragraph (C) above.⁹ Any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail.

Pa.R.Crim.P. Rule 600(E). As Cann describes, he “was arrested on February 2, 2005, and went to trial on May 8, 2006,” resulting in pretrial detention for far longer than the 180 days at which he should have been eligible for nominal bail. (Pet. at 5-6.) In support of his claim that his rights were violated, Cann points out that his previous attorney, Abby Rigdon, “had brought a motion for nominal bail based on the Rule 600(E) violation and it was denied.”¹⁰ (*Id.* at 6. *See also* Pet.

⁹ Paragraph (C) states that:

In determining the period for commencement of trial, there shall be excluded therefrom:

(1) the period of time between the filing of the written complaint and the defendant’s arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;

(2) any period of time for which the defendant expressly waives Rule 600;

(3) such period of delay at any stage of the proceedings as results from:

(a) the unavailability of the defendant or the defendant’s attorney;

(b) any continuance granted at the request of the defendant or the defendant’s attorney.

Pa.R.Crim.P. Rule 600(C). Subsection (1) does not apply in this case, but Cann states claims pursuant to subsections (2) and (3) based on his contention that he never authorized his attorney to waive Rule 600 on his behalf. (*See, e.g.*, Pet. at 5-7.)

¹⁰ Cann elaborates that

At the hearing of October 26, 2005, Ms. Rigdon brought up the motion for lower bail, but stated on the record that [Cann] is not waiving his Rule 600 rights. She made this statement because the Commonwealth deliberately delivered late discovery to Ms. Rigdon, then said on the record that the Commonwealth was ready

(continued...)

Amend. 4.) In other words, he contends that the state court violated his rights by not releasing him on nominal bail. (*See, e.g.*, Pet. Mem. at 2.)

Respondent only addresses this claim in the context of a perceived allegation about Cann’s trial counsel’s ineffectiveness for failing raise the Rule 600(E) violation, which we consider in a separate subsection below.¹¹ (*See, e.g.* Resp. Mem. at 5.) In that Petitioner, however, has specifically alleged that “the Commonwealth violated” his Rule 600(E) rights “when Judge Thomas G. Parisi and the Commonwealth denied an oral motion by [Cann’s] then attorney of record...for lower bail” (Pet. Mem. at 3), we consider the Rule 600(E) claim separately from the ineffective assistance of counsel claim, but note at the same time that it does not warrant relief.

Federal court review of a habeas corpus petition is limited to remedying deprivations of a petitioner’s federal constitutional rights. *Wells v. Petsock*, 941 F.2d 253, 256 (3d Cir. 1991). As our Court of Appeals has explained, “[w]e can take no cognizance of a non-constitutional harm to the defendant flowing from a state’s violation of its own procedural rule, even if that rule is intended as

¹⁰(...continued)

to go to trial regardless of the fact that they had delivered to Ms. Rigdon the late discovery that she had been waiting weeks for. The record will reflect that Ms. Rigdon brought up the motion for lower bail and since the Assistant D.A. Dennis Skayhan wasn’t present, the motion was tabled until Mr. Skayhan could be consulted.

(Pet. Mem. at 3.) Petitioner went on to note that the following day, upon calling the Public Defender’s office, he learned that Ms. Rigdon no longer worked for the defenders and that he was disqualified from future representation by the office. Cann also alleges—as a separate ground for relief—ineffective assistance of counsel, regarding his subsequently appointed counsel’s failure to re-raise the violation of his Rule 600(E) rights, which we address in a later section.

¹¹ As we noted above, Respondent interprets Cann’s habeas petition as only stating three grounds for relief, all of which turn on trial counsel’s ineffectiveness. (*See, e.g.*, Resp. Mem. at 5.)

a guide to implement a federal constitutional guarantee.” *Id.* Here, the only basis Petitioner advances for the deprivation of his rights was a state procedural rule—he does not identify a federal constitutional right that was violated and that undermines the legality of his current detention. *See, e.g., Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir. 2002) (noting that the challenged action must implicate the legality of the conviction or the length of the sentence). As Cann does not ground this particular claim for relief in a Sixth Amendment or other federal constitutional violation, it does not provide a basis for habeas relief for the same reasons we discuss in the ensuing subsection.

B. Ground Two: Speedy Trial Rights

Cann has argued that he was deprived of his speedy trial rights under Pennsylvania Rule of Criminal Procedure 600, under the Pennsylvania Constitution, Article 1, Section 9 (which guarantees that “[i]n all criminal prosecutions the accused hath a right to...a speedy public trial by an impartial jury of the vicinage”), and under the Sixth Amendment to the United States Constitution (which similarly guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”). *See* Pa.R.Crim.P. Rule 600. *See also* Pa. Const. Art. 1, § 9, U.S. Const. Amend. VI. Although Respondent appears to interpret Cann’s arguments regarding his speedy trial rights only in the context of an ineffectiveness claim, Cann has stated in his petition that on PCRA, he did not mean to prove only that he had received ineffective assistance of counsel as a result of his trial attorney’s treatment of the Rule 600 issue, but also “that the trial court violated [his] Rule 600 right to trial in 365 days,” (Pet. at 7).¹² Accordingly, we consider this question as a separate substantive habeas claim.

¹² He also questioned “whether the court has been prejudicial in ignoring this fact while the Defendant has raised this violation in his original P.C.R.A. petition.” (Pet. at 19.)

While our review of the record leads us to conclude that Cann’s passionate and steadfast campaign to protect his Rule 600 rights certainly was unambiguously asserted,¹³ we again are unable to find that it is grounds for habeas relief, as his speedy trial claims under Rule 600(A)(2) and the Pennsylvania Constitution are not the proper subject of habeas review, in that they are based on state, and not federal law. *See, e.g., Wells v. Petsock*, 941 F.2d 253, 256 (3d Cir. 1991) (refusing to consider Rule 1100/Rule 600 violation when analyzing Sixth Amendment speedy trial claim, “even if that [state procedural] rule is intended as a guide to implement a federal constitutional guarantee.”) *See also Cunningham v. Kerestes*, Civ. A. No. 07-4237, 2008 WL 8423704, at *12 (E.D.Pa., Aug. 19, 2008). Any speedy trial claim based on the state procedural rule is not cognizable on federal habeas corpus relief, as the Sixth Amendment does not require a defendant to be brought to trial within any specified period of time. *See, e.g., Wells*, 941 F.2d at 256. *See also Barker v. Wingo*, 407 U.S. 514, 530-32 (1972) (identifying factors to consider in Sixth Amendment speedy trial analysis and eschewing rigid limitations contained in state statutes). Petitioner’s claim for relief on this ground is unavailing.

The only potential ground for relief on Cann’s speedy trial rights claim, therefore, would have to be based on Petitioner’s assertion that his Sixth Amendment rights were violated under the standards developed in federal case law. Our review of the record demonstrates that Petitioner did

¹³ *See, e.g.* Letter to Berks County Court of Common Pleas (docketed on May 3, 2005) [St. Ct. Rec.], Letter to Berks County Court of Common Pleas (docketed on August 10, 2005) [St. Ct. Rec.], Letter from Cann to Attorney Herbein, dated November 28, 2005 (PCRA Hear. Trans. Ex. B), Letter from Cann to Attorney Herbein, dated December 28, 2005, (PCRA Hear. Trans. Ex. C), Letter from Cann to Attorney Herbein, dated January 29, 2006 (PCRA Hear. Trans. Ex. E), Letter to Berks County Court of Common Pleas (docketed on February 24, 2006), Letter from Cann to Attorney Herbein, dated March 16, 2006 (PCRA Hear. Trans. Ex. G), Letter from Cann to Attorney Herbein, dated February 26, 2007 (PCRA Hear. Trans. Ex. K).

not fairly present this Sixth Amendment issue to the Pennsylvania Superior Court either on direct appeal (*see Brief of Appellant*, Resp. Appx. at A49), or when he appealed the dismissal of his PCRA action. Neither his 1925(b) Statement, nor his *Brief for Appellant* contained any assertion that his Sixth Amendment speedy trial rights had been violated. *See* 2010 WL 5868078 (“Pet. App. Br.”). Rather, the only arguments Cann made on appeal regarding his speedy trial rights were under the Pennsylvania Constitution and Rules of Criminal Procedure (Rule 600), or in the context of an ineffective assistance of counsel claim¹⁴ (*see, e.g.*, Pet. App. Br. at 4-5). The alleged violation of speedy trial rights under the Sixth Amendment was raised for the first time as a separate substantive ground in the amended federal habeas petition he submitted to this Court. (*See* Pet. Amend. at 3-4. *See also* Pet. Mem. at 8.) Given that Cann would now be precluded from bringing a federal speedy-trial claim to the state court due to the PCRA one year time-bar and the prohibition against piecemeal litigation, *see* 42 Pa. Cons. Stat. §§§ 9545(b)(1), 9543(a)(3), 9544(b), this claim is procedurally defaulted.

¹⁴ We observe that in his “Statement of the Argument” on appeal from the PCRA court’s dismissal, after the evidentiary hearing on whether Herbein had provided “ineffective assistance of trial counsel for waiving Rule 600 without his permission,” Cann included the following:

I. Was Attorney Paul Herbein ineffective assistance of counsel for failing to assert a Rule 600 violation? Suggested answer: Yes. United States Constitution of America, Amendment VI, the accused shall enjoy the right to a speedy trial.”

(Pet. App. Br. at 4.) There is no mention, however, of a Sixth Amendment speedy trial right violation in his original PCRA petition. *See Motion for Post Conviction Collateral Relief*, filed 03/14/2007 [St. Ct. Rec.] (alleging only that “the Court violated [his] Rule 600/1100 rights,” that his court-appointed attorney, Paul Herbein, “put no defense on whatsoever,” and that “there were no African Americans in the jury pool.”). This is corroborated by the *Finley* letter filed by Cann’s appointed PCRA counsel, which does not mention the Sixth Amendment. (*See ‘No Merit’ Letter Pursuant to Finley and Turner requesting Leave of Court to Withdraw as Counsel*, filed 07/03/2008 [St. Ct. Rec.].

In light of this default, we cannot further consider this claim as a basis for habeas relief unless Petitioner satisfies either the cause and prejudice standard or the fundamental miscarriage of justice standard under *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).¹⁵ Cann has not, however, presented us with a basis upon which we could find, under the standards of *Coleman*, cause for the failure to have presented this claim earlier, nor is any such reason otherwise apparent from the pleadings or the state court documents we have reviewed. Similarly, Cann does not allege or assert any new evidence tending to show his innocence such that our failure to consider the merits of this claim would result in a fundamental miscarriage of justice. Moreover, at this point in time, Petitioner is barred by the limitation provisions of the PCRA from bringing this claim in state court. *See* 42 Pa. Cons. Stat. § 9545(b)(1) (“Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final.”). Accordingly, we deem the Sixth Amendment speedy trial right violation claim to have been procedurally defaulted and find no basis either suggested by Petitioner or upon our own independent review to excuse that procedural default. We therefore may not grant relief,¹⁶ and cannot recommend

¹⁵ The United States Supreme Court has established that if claims have been procedurally defaulted, the Court may not review them unless Petitioner establishes either: (1) cause for the default of this claim and actual prejudice as a result of the alleged violation of federal law, or (2) that a fundamental miscarriage of justice will result if this Court does not consider the claim, i.e., due to evidence of his actual innocence of the crime for which he was convicted. *See Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

¹⁶ Even if we did not view this claim as procedurally defaulted, and instead considered it on the merits, we would conclude that it does not provide a basis for relief. The Supreme Court has established a balancing test for determining violations of defendants’ speedy trial rights, which weighs the “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Courts in our Circuit have determined that far longer delays did not violate an accused’s rights. *See, e.g., Conroy v. Leone*, 316 Fed.Appx. 140 (3d Cir. 2009) (finding that a delay of four years between a defendant’s arrest and
(continued...)

that habeas relief be granted on this claim.

C. Ground Three: Ineffective Assistance of Trial Counsel

Petitioner has made claims regarding the adequacy and performance of his trial counsel, Attorney Herbein. In his petition and amendment thereto, Cann raises two ineffectiveness claims: the first based on Herbein’s waiver of Cann’s Rule 600 rights, and the second is that Attorney Herbein violated the Pennsylvania Rules of Professional Conduct 1.2(a), 1.2(c), 1.4(a), and 1.4(b) when he “never communicated with [Cann] in any type of reasonable manner.” (*See, e.g.*, Pet. Mem. at 6).

1. Standard for Claims of Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test to evaluate claims of ineffective assistance of counsel in violation of the Sixth Amendment. Under *Strickland*, counsel is presumed to have acted reasonably and effectively unless the petitioner can demonstrate both that “counsel’s representation fell below an objective standard of reasonableness” and that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 686-88, 693-94.

When the Pennsylvania Superior Court has addressed a claim on the merits, our analysis must be guided by the deferential standard of review provided for in § 2254(d). As the *Strickland* standard itself is a “general standard,” and the Supreme Court recognizes that a state court “has even more

¹⁶(...continued)

his trial on conspiracy to commit armed robbery and theft, trafficking in and receiving stolen property, and unlawful drug possession did not violate his speedy trial rights under the Sixth Amendment.)

latitude to reasonably determine that a defendant has not satisfied that standard,” our review of a state court decision on the merits of an ineffectiveness claim is “doubly deferential.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). In these circumstances, we “take a highly deferential look at counsel’s performance, *Strickland, supra*, at 689, through the deferential lens of § 2254(d), *Mirzayance, supra*, at n.2.” *Cullen v. Pinholster*, --- U.S. ---, 131 S.Ct. 1388, 1403 (2011). *See also Harrington v. Richter* -- U.S. ---, 131 S. Ct. 770, (Jan. 19, 2011) (in which the Supreme Court recently reiterated that “the standards established by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” (internal citations omitted).)

2. Waiver of Speedy Trial Rights and Violations of the Rules of Professional Conduct

Cann alleges that Herbein “never responded to any of my letters telling him to file for nominal bail,” and also that he waived Cann’s Rule 600 speedy trial rights without his permission and indeed against his direct orders not to do so. (Pet. at 5.)¹⁷ Cann further asserts that he “did everything in his power to communicate with attorney Herbein before his trial began on May 8, 2006. But regardless of the many letters [he] wrote to attorney Herbein, [...] attorney Herbein chose to ignore the defendant.” (Pet. Mem. at 6.) In support of his assertion that “Herbein ignored all of my letters to him ordering him not to waive my Rule 600 rights,” Cann observes that at the remanded PCRA evidentiary hearing, “held on January 14, 2010, Herbein admitted on the record to receiving all of [Cann’s] letters, specifically the letters ordering him not to waive [Cann’s] Rule 600 rights.”

¹⁷ In his initial petition, Cann also asserted that Herbein never advocated for the “dismissal of all charges for not taking me to trial within 365 days as Pennsylvania law dictates,” pursuant to Rule 600(G). (Pet. at 5.) He conceded in his subsequently filed Memorandum of Law, however, that he was “in error as [to] the interpretation of this law,” as since he “was never on bail...this law doesn’t apply to his case.” (Pet. Mem. at 7.)

(Pet. at 6.) *See also* PCRA Hear. Trans. at 22-24.

Respondent counters that Cann did not exhaust the issue of his counsel's ineffectiveness for "waiving his right to a speedy trial without his permission and/or over his objection." (Resp. Mem. at 5.)¹⁸ Although Respondent acknowledges that the Superior Court remanded for an evidentiary hearing on the issue of "ineffective assistance of trial counsel for waiving Rule 600 without his permission," the Commonwealth claims that the Superior Court's interpretation of Cann's appellate brief as only addressing "the failure to file a motion for nominal bail pursuant to Pa. R. Crim. P. 600(E)" means that Cann forfeited the other Rule 600 claims.¹⁹ (*Id.*) Respondent does not specifically address Petitioner's Rules of Professional Conduct allegations.²⁰ (*See, e.g., id.*)

¹⁸ Respondent made the same argument with respect to Cann's allegation of ineffectiveness regarding Attorney Herbein's failure to file a motion to dismiss the case after 365 days of incarceration (Resp. Mem. at 5), but that issue is now moot due to Cann's concession in his Memorandum of Law that he misinterpreted that aspect of Rule 600. (*See* Pet. Mem. at 7.)

¹⁹ Respondent alleges that, with regard to the Superior Court's narrow interpretation of Cann's claims, "the fault lies with Cann for failing to specify his claims in his *pro se* brief in such a fashion as to [have] permit[ted] the Superior Court to decipher them." (Resp. Mem. at 6.)

We observe that in his amended petition, Cann states that

it must also be noted that at th[e] remanded P.C.R.A. hearing [held on January 14, 2010], asst. D.A. Hobart pulled the hearing away from the real issue of the Rule 600 time calculation & violation of the defendant's speedy trial rights. Even though [Cann] objected with Hobart on this issue, Judge Parisi rule in the D.A.'s favor & left the defendant with only the one issue as to whether or not atty. Herbein was ineffective asst. of counsel for failing to assert a Rule 600 violation.

(Pet. Amend. at 4.)

²⁰ In the alternative, Respondent does address this claim on the merits, arguing that Attorney Herbein's "request for a continuance of the trial constituted excludable time." (Resp. Mem. at 12.) We observe that, as Cann points out, Respondent at times mis-cites Rule 600(A)(2)—representing (continued...)

Irrespective of any procedural default issues, and even assuming that Cann has properly exhausted each aspect of this claim, Petitioner has not met his burden under *Strickland* in that he has not demonstrated a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” e.g. that he was prejudiced as a result of the Rule 600 waiver. 466 U.S. at 694. Cann has not articulated any basis on which Attorney Herbein’s failure to assert a Rule 600 violation or to respond to his communications in a timely manner impacted the strength of the arguments made on his behalf at trial, or how it impacted the ultimate outcome of the case.²¹ *See Strickland*, 466 U.S. at 686-88, 693-94 (holding that in order to establish ineffective

²⁰(...continued)

that trial must commence no later than 365 days from the date on which the complaint is filed—when in fact the Rule requires that a defendant be brought to trial within 180 days. (*See, e.g.* Resp. Mem. at 15.) We note this for clarity’s sake, although it does not ultimately impact our analysis, as we may not consider this claim on the merits. With similar lack of impact, we also note that Respondent has cited and analyzed a claim under Rule 600(G), despite the fact that Cann was never released on bail and himself acknowledged that accordingly, it was not the proper subject of review. *See, supra*, n.18 (citing Pet. Mem. at 7).

²¹ Our review of the correspondence Cann sent to Attorney Herbein (and Cann’s elaboration of that correspondence), lead us to conclude that he did not suggest any trial strategy or provide any directions about the course of the representation at trial that would have impacted the determination of his guilt or innocence. Instead, it seem to focus only on the Rule 600 issue and, later, on the failure of Attorney Herbein to maintain consistent communication with Cann.

We do acknowledge that on PCRA review, Cann did attempt to make arguments regarding the impact of Attorney Herbein’s unresponsiveness, but none of those arguments raised any issues regarding the ultimate outcome of his trial. In his appellate brief on PCRA review, for example, Cann did assert that “[b]ecause of Herbein’s unprofessional error, Appellant suffered pre-trial oppression,” but he still neglected to explain how this impacted the ultimate result of his trial. (*See, e.g.*, Pet. App. Br. at 5.) He further stated that

If [he] had been given nominal bail as was his right, and if Herbein had done his job, as he was hired to do, the outcome would have been different. [Cann] would have been free on bail instead of suffering prolonged oppressive pretrial incarceration.

(continued...)

assistance, a party must be able to demonstrate that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”) Instead, Cann has merely identified behavior that does not comport with the self-regulating standards the legal profession has set out for attorney conduct. Any perceived lack of diligence on the part of counsel will not give rise to federal habeas relief.

3. Waiver of Nominal Bail

Cann has argued that he is entitled to habeas relief due to the allegedly deficient performance of Attorney Herbein with respect to his failure to raise a violation of Rule 600(E), in that he was detained for over 180 days prior to his being brought to trial.

Respondent does not contest that Cann has “fairly presented” this claim to the state courts. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Following upon an evidentiary hearing specifically on this issue, the PCRA court denied relief as to this claim on the merits, *see Commonwealth v. Cann*, No. 1011 MDA 2010 (Pa. Super. Ct. February 1, 2011) [St. Ct. Rec.], and thus it is now properly before us for consideration. On appeal after the remand and evidentiary hearing before the PCRA court, the Pennsylvania Superior Court rejected the notion that Petitioner’s conviction should be vacated due to this alleged ineffectiveness, concluding that Cann “failed to satisfy the prejudice prong of the ineffectiveness test,” *id.* at 1, because he “failed to prove that the outcome of his trial would have been different if his counsel had succeeded in securing nominal bail for [him] in the pretrial stage.” (*Id.* at 3.) Accordingly, we may find that Cann is entitled to habeas

²¹(...continued)

(*Id.* at 10.) Even if we were to accept that there may have been some lack of professionalism on the part of counsel, it does not go to the question of a federal constitutional right that could constitute a proper basis for habeas relief.

relief on this ground only if he can demonstrate that the “state court applie[d] a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decide[d] the] case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 694 (2002).

We find nothing “objectively unreasonable” in the state court’s conclusion that Petitioner’s trial counsel was not ineffective for failing to challenge a Rule 600(E) violation. *See Woodford*, 537 U.S. at 25. The Superior Court reasonably carried out clearly established federal law in applying the test for ineffective assistance of counsel, and deciding not to disturb the determinations made by the PCRA court regarding counsel’s performance, for the reasons set out below. *See* 28 U.S.C. § 2254(d).

The Superior Court remanded Cann’s case to the PCRA court for a lengthy evidentiary hearing on this precise issue. Nearly seventy pages of notes of testimony detail the degree to which the PCRA court considered the merits of this claim, including by accepting into evidence all of Cann’s correspondence with Attorney Herbein. (*See, e.g.* PCRA Hear. Trans. at 15-23. *See also* PCRA Hear. Trans. Ex.) Informed by the evidentiary hearing transcript, the PCRA court (as we set out within) determined that Attorney Herbein’s “decision to request a continuance extending [Cann]’s case beyond the Rule 600 time had a reasonable basis,” in that “the Rule 600 time was extended at the request of trial counsel to ensure [Cann] received a fair trial.” (*Id.* at 5.) The Superior Court affirmed. *Commonwealth v. Cann*, No. 1011 MDA 2010 (Pa. Super. Ct. February 1, 2011) [St. Ct. Rec.].

The PCRA court’s decision following upon the evidentiary hearing thoughtfully considers whether Cann was prejudiced by Attorney Herbein’s actions, including the rationale motivating his

decision to waive Cann’s rights with respect to the interests Rule 600 was designed to protect. *See, e.g., Commonwealth v. Cann*, No. CP–06–CR–2004-2005 (Berks Ct. Comm. Pl. July 14, 2010)[St. Ct. Rec.]. *See also Commonwealth v. Cann*, No. CP–06–CR–2004-2005 (Berks Ct. Comm. Pl. May 28, 2010)[St. Ct. Rec.].

In its decision, the PCRA court set out the state standard for ineffectiveness claims, which requires the defendant to

establish each of the following: 1) his underlying claim is of arguable merit; 2) the course of conduct pursued by counsel did not have a reasonable basis designed to effectuate the defendant’s interests; and 3) counsel’s actions prejudiced the defendant, in that, but for counsel’s actions the outcome of the proceeding would have been different.

Commonwealth v. Cann, No. CP–06–CR–2004-2005 at 3 (Berks Ct. Comm. Pl. May 28, 2010)[St. Ct. Rec.] (citing *Commonwealth v. Meadows*, 787 A.2d 313 (Pa. 2001); *Commonwealth v. Ervin*, 766 A.2d 859, 862 (Pa. Super. 1001)). Applying this standard, the court concluded that “Attorney Herbein was not ineffective for failing to assert a violation of the Defendant’s rights under Rule 600,” as “nothing in the record establishes [that Cann] suffered prejudice from Attorney Herbein’s actions.” (*Id.* at 7.) The court substantiated this conclusion by citing Pennsylvania cases that have emphasized counsel’s discretion in requesting continuances, in order to prepare for trial. *See id.* (citing *Commonwealth v. Walley*, 396 A.2d 1280, 1283, which recognized that “to hold that counsel cannot unilaterally request continuances that delay the start of trial past the [Rule 600 time] would severely hamper [counsel’s] ability to effectuate trial strategy,” and citing *Commonwealth v. Wells*, which held that “[a]s counsel is vested with authority to agree to continuances for their client, ‘the exercise of such a choice cannot be ineffectiveness *per se*, nor can it be prejudicial in itself.’ *Wells*, 521 A.2d at 1391.” *Id.*)

Detailing the scheduling procedures in the Berks County Court of Common Pleas, the PCRA

court described that

The complaint...was filed on February 3, 2005. 459 days had passed when [Cann's] trial began on May 8, 2006. However, similar to *Wells*, the Rule 600 time was extended at the request of trial counsel to ensure [Cann] received a fair trial.

This Court recognizes that its operating procedure has been to schedule a single primary trial and one or more back-up trials on a given trial date. On August 8, 2005 [Cann] received a primary trial date of May 8, 2006 and back-up dates in October and November of 2005. When Attorney Herbein was subsequently appointed as defense counsel on October 28, 2005, several back-up trial dates had passed. On November 16, 2005, Attorney Herbein requested a continuance. This was without [Cann's] express consent and thereby tolled the Rule 600 time through a newly scheduled back-up trial date of December 19, 2005, and the primary trial date of May 8, 2006 in order to use this time to adequately prepare for trial. Since [Cann's] attorney moved for these continuances, this time is excludable under Rule 600. *See Guldin*, 463 A.2d at 1013. On December 19, 2005, the back-up trial date, the primary trial scheduled for this date commenced thereby precluding [Cann] from proceeding to trial at this time.

As the relevant cases point out, an attorney may exercise his discretion in delaying the start of trial beyond the Rule 600 time without the express consent of their client. Moreover, this decision does not constitute ineffectiveness *per se*. At the PCRA hearing, Attorney Herbein testified that the basis for these requests was to permit him time to adequately prepare for trial given that he had recently been appointed counsel for [Cann] on October 28th. Attorney Herbein indicated that he needed additional time to review the discovery, including relevant statements made to police, and the previous testimony of the co-defendant[s] and other witnesses expected to testify on the Commonwealth's behalf at [Cann's] trial. These continuances provided Attorney Herbein with the necessary time to formulate a trial strategy and prepare his cross-examinations of the potential Commonwealth witnesses. Thus, after considering the complexities of the case Attorney Herbein proceeded in the course which he determined was in [Cann's] best interest. Given the number of co-defendants involved and the serious nature of the charges [Cann] faced, this Court finds that Attorney Herbein acted reasonably

in exercising his discretion to extend [Cann's] robbery trial beyond the time set forth in Rule 600.

Commonwealth v. Cann, No. CP-06-CR-2004-2005 at 5-6 (Berks Ct. Comm. Pl. May 28, 2010)[St. Ct. Rec.]

As we independently concluded in the context of Cann's other Rule 600 claims, ineffectiveness by failure to have asserted Cann's right to nominal bail is not an appropriate basis for habeas relief because it does not go to the fairness of the trial or the effectiveness of counsel's representation at trial, which is the "core of habeas." *Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir. 2002). Our determination that this aspect of Cann's petition does not merit habeas relief is buttressed by the "doubly" deferential standard with which we are to evaluate the state court's conclusions on ineffectiveness claims. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). *See also Harrington v. Richter*, -- U.S. ---, 131 S. Ct. 770, 788 (Jan. 19, 2011). With that standard in mind, we are unable to find any basis upon which we could conclude that the Superior Court unreasonably interpreted and applied *Strickland* when it measured the performance of trial counsel with respect to waiving Cann's Rule 600(E) rights. We will not recommend that habeas relief be granted upon this claim.

D. Grounds Four and Five: Due Process Violations for Appointment of Counsel and Rule 602 Violation

Cann finally alleges that he was deprived of his due process rights under the Fourteenth Amendment and under Pennsylvania Rule of Criminal Procedure 122(B) ("Rule 122")²² when the

²² Rule 122 states that:

(B) When counsel is appointed,

(continued...)

court appointed Attorney Herbein without his having requested a court-appointed attorney; and that his rights under Pennsylvania Rule of Criminal Procedure 602 (“Rule 602”) were violated when the court held a hearing on waiver of his Rule 600 rights without him being present. (*See* Pet. at 6. *See also* Pet. Mem. at 4.)

With regard to the appointment of Attorney Herbein, he specifically states that “[w]ithout consulting [Cann] as to how he wanted to proceed, the court secretly appointed another attorney to represent him. The clerk of courts never served the order on [Cann] informing him of who his new attorney was.” (Pet. Mem. at 4-5.)²³ Cann further asserts that “Rule 602 was violated because [he]

²²(...continued)

(1) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries)

Pa.R.Crim.P. Rule 122.

²³ Cann substantiates this claim by describing that:

In the month of November of 2005, [Cann] wrote to the Berks County clerk of courts and asked the clerk who his new attorney was. It was only at that time that [Cann] learned the name of the attorney who was appointed to represent him. The information given to [Cann] was only the attorney[']s name. There was no address nor phone number supplied to [Cann], a clear violation of Pennsylvania Law, Rule 122. [Cann] got Paul Herbein’s address out of the phone book and wrote him a letter dated November 28, 2005.”

(Pet. Mem. at 4.) Cann also asserted that

There’s a process involved when petitioning the court for a court appointed attorney. The defendant must apply for one himself/herself. The court just can’t appoint one without the defendant’s knowledge.

(continued...)

wasn't present for the alleged Rule 600 hearing and the court hearing for the court appointed attorney." (*Id.* at 7.)

As these are claims based on Pennsylvania state law, we must conclude that they do not provide basis for habeas corpus relief—application of the writ is limited to remedying “deprivations of a petitioner’s federal constitutional rights.” *Wells v. Petsock*, 941 F.2d 253, 256 (3d Cir. 1991). Furthermore, habeas relief does not lie for any violation by a state of its own procedural rules, even if designed to protect constitutional safeguards. *Id.* Accordingly, these claims must be rejected.²⁴

With respect to the Fourteenth Amendment Due Process violation, Cann did raise this assertion on PCRA review, however only in his appellate brief after the evidentiary hearing.²⁵ In other words, it was not among the issues that he presented to the state appellate court in his 1925(b)

²³(...continued)

But in this case, they did. It’s illegal for the court to do so. It was a clear violation of Rule 122(B)(1).

(Pet. Amend. at 4.)

²⁴ We do observe that it appears to the case, as Cann argues, that Attorney Herbein waived Cann’s Rule 600 rights “without [his] permission or [his] presence...on November 16, 2005.” (Pet. at 7.) Pennsylvania case law does appear to suggest, as Cann articulates, that “[a] defendant’s Rule 600 waiver must be the informed and voluntary decision of the defendant.” (*Id.*) *See also Commonwealth v. Brown*, 875 A.2d 1128, 1135 (Pa. Super. 2005). Despite this case law, however, we do not agree with Cann’s assertion that “the Commonwealth and Judge Parisi violated the Federal and State Constitutional rights of the defendant when they illegally dismissed the Defendant’s P.C.R.A. petition based upon this illegal ruling.” (Pet. at 7.)

²⁵ In his PCRA appellate brief after the evidentiary hearing, Cann also asserted that “[t]here are two due process violations here.” (Pet. App. Br. at 7). The first violation he identified was that “[t]he court appointed attorney Paul Herbein without [his] knowledge or his permission,” and in support, he elaborated that his “due process rights were violated when Herbein was appointed without any say by [him, Cann] as to how he wanted to proceed.” (*Id.*) Cann continued, describing that “the second due process violation occurred when the Berks County Clerk of Court failed to notify [him, Cann] in writing as to the appoint[ment] of Paul Herbein.” (*Id.*)

Statement or his Statement of Questions Presented on Appeal in the PCRA action, or in his original PCRA petition. (*See Motion for Post Conviction Collateral Relief*, filed 03/14/2007 [St. Ct. Rec.] (alleging only that “the Court violated [his] Rule 600/1100 rights,” that his court-appointed attorney, Paul Herbein, “put no defense on whatsoever,” and that “there were no African Americans in the jury pool.”)) *See also Commonwealth v. Cann*, No. CP-06-CR-2004-2005 (Berks Ct. Comm. Pl. February 2, 2009)[St. Ct. Rec.][Pet. Ex. 1] (listing the grounds asserted in his “Statement of Matters Complained of on Appeal,” and failing to include any Fourteenth Amendment Due Process claims). Accordingly, the PCRA court never addressed this claim.²⁶ As he can no longer present this claim in state court due to state procedural rules, the claim is deemed both unexhausted and procedurally defaulted. Once again, his procedural default cannot be excused because he has not alleged any reasons for his failure to raise this claim in state court nor has he demonstrated actual innocence. Therefore, we will not consider the merits of this claim.

IV. CONCLUSION

For the reasons set out above, we find that none of Petitioner’s claims warrant habeas relief, as none of the claims were denied by the state court due to an unreasonable application of federal constitutional law, several of the claims were not cognizable on habeas review, and because Petitioner has failed to establish a basis for the Court to consider his procedurally defaulted claims. Further, Petitioner has also failed to convince us that his petition warrants further development

²⁶ In its opinion ruling on the evidentiary hearing, which was the only decision rendered after Cann raised this issue in his August 27, 2010 appellate brief, the Superior Court noted that [a]lthough at times throughout the litigation of his PCRA petition [Cann] has argued additional theories of relief, the sole issue presented on this appeal is whether [Cann’s] trial counsel rendered ineffective assistance of counsel by failing to assert a violation of Pennsylvania Rule of Criminal Procedure 600(E).” Accordingly, the state court never addressed Cann’s Fourteenth Amendment due process argument.

through an evidentiary hearing or that the interests of justice require that counsel be appointed. *See* 18 U.S.C. § 3006A.

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability (“COA”) should issue. A COA should not issue unless the petitioner demonstrates that jurists of reason would debate whether the petition states a valid claim for the denial of a constitutional right. Where the district court has denied a claim on procedural grounds, a COA is not appropriate as to that claim unless it appears in addition that jurists of reason would find the correctness of the procedural ruling to be debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, for the reasons set forth above, we do not believe a reasonable jurist would find the Court to have erred in denying the present petition, or that the correctness of the procedural aspects of this case could be debated. Accordingly, we do not believe a COA should issue.

Our Recommendation follows.

RECOMMENDATION

AND NOW, this 30th day of March, 2012, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED WITHOUT AN EVIDENTIARY HEARING**. It is **FURTHER RECOMMENDED** that a certificate of appealability should **NOT ISSUE**, as we do not believe that Petitioner has made a substantial showing of the denial of a constitutional right or that reasonable jurists would find the correctness of the procedural aspects of this Report debatable.

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/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

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

MARK STEVEN CANN,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
TAB BICKLE, <i>et al.</i> ,	:	NO. 11-5078
Respondents.	:	

ORDER

AND NOW, this day of , 2012, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, IT IS ORDERED that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for a writ of habeas corpus is **DENIED** without an evidentiary hearing; and
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

C. DARNELL JONES, II, J.