

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

MICHAEL LEON HALEY, SR.,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
SUPERINTENDENT	:	
DEBRA SAUERS, et al.,	:	NO. 10-5061
Respondents.	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

July 31, 2012

Before the Court for Report and Recommendation is the *pro se* petition of Michael Leon Haley, Sr. (“Haley” or “Petitioner”) for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated at the State Correctional Institute at Forest in Marienville, Forest County, Pennsylvania, serving a sentence that arises out of a prosecution in Lehigh County.¹ In his petition, he asserts that he was denied his right to the effective assistance of counsel and that the Commonwealth denied him material evidence in a variety of ways, among a litany of other complaints. For the reasons set forth below, we find that the state court did not unreasonably apply any United States Supreme Court precedents as to the constitutional claims properly presented to it and that many of Petitioner’s claims were procedurally defaulted and not otherwise reviewable in this Court. Accordingly, we will recommend that the petition be denied.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

Haley was convicted by a jury sitting before the Honorable William H. Platt in the Lehigh County Court of Common Pleas on March 7, 2005 of attempted criminal homicide, aggravated assault, recklessly endangering another person, terroristic threats related to a knife attack on Lisa Krepich in Allentown. The offense occurred on April 16, 2004 after the two had taken drugs together at a local motel in a room registered to a “Michael Haley.” During her subsequent hospitalization following the attack, Ms. Krepich selected Petitioner’s photo from a photographic array. Another motel guest, Jason Baumer, also identified Petitioner in a photo array two days later as the man he saw accompanying a screaming woman at the motel. Haley was apprehended in Philadelphia on June 8, 2004 and found to be in possession of a small pocketknife stained with blood and containing DNA consistent with a mixture of that of Ms. Krepich and himself. *Commonwealth v. Haley*, No. 2611 EDA 2005, slip opin. at 1-5 (Pa. Super. Ct. Sept. 15, 2006). Haley was represented at trial and sentencing by Richard Webster, Esquire, of the Lehigh County Public Defender’s Office.²

The trial court sentenced Haley on April 8, 2005 to an aggregate term of imprisonment of 25 to 50 years pursuant to Pennsylvania’s “three strike” rule given his record of two prior convictions for what were determined to be crimes of violence. Still represented by members of the Defender’s Office that had provided trial representation, he asserted on appeal that: (1) the trial court erred in refusing to sever the attempted homicide charges from the theft of motor vehicle charges; (2) the trial

² Independent of the charges relating to the Krepich assault, Haley was also charged and tried on a separately-filed set of charges of theft by unlawful taking and unauthorized use of a vehicle, for which he was also convicted on March 7, 2005. These charges related to his use of a car owned by a girlfriend, Gabriele Rivera, from within a few days of the Krepich attack and continuing until he was found and arrested in Philadelphia on June 8, 2004 on the assault charges.

court erred in admitting selected portions of motel surveillance video and in limiting the defense's cross-examination of the victim;³ and (3) that the verdict was against the weight of the evidence. *Id.* at 6-7 (quoting Appellant's Brief at 9). The Superior Court determined that none of the claims had merit and affirmed the judgment of sentence. *Commonwealth v. Haley*, No. 2611 EDA 2005 (Pa. Super. Ct. Sept. 15, 2006).

On or about May 22, 2007, Haley sought relief, *pro se*, under the Pennsylvania Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-46 ("PCRA"). The PCRA Court appointed Albert V.F. Nelthropp, Esquire, to represent Haley and to file an amended petition. After Haley himself submitted several *pro se* supplements to his petition, and after counsel obtained requested trial transcripts, Attorney Nelthropp filed the amended petition for PCRA relief on November 24, 2008. (St. Ct. Dkt. Sheet.)⁴ That counseled amended petition asserted claims of trial court error, ineffective assistance of counsel, and due process violations relating to, *inter alia*, the continued participation of a juror who was acquainted with a Commonwealth witness; the failure of the prosecution to have turned over physical evidence for DNA testing before it was compromised, as well as fingerprint evidence; the admission of an edited version of surveillance video tape from the motel; the failure of the prosecution to have informed Petitioner of a voice identification made by a Commonwealth witness; an allegedly unduly suggestive identification; and the failure to call witnesses who would

³ The trial court permitted defense counsel to inquire as to whether Ms. Krepich had been promised any benefit from the Commonwealth in exchange for her testimony against Haley but curtailed cross-examination on the events surrounding her prostitution conviction in another county. *Commonwealth v. Haley*, No. 2611 EDA 2005 at 11-12 (Pa. Super. Ct. Sept. 15, 2006).

⁴ Prior to counsel filing the amended petition, and based upon what Haley perceived as "inactivity" in the progress of his PCRA petition, Haley sought to file a *pro se* petition to the Pennsylvania Supreme Court, asking it to assume jurisdiction of his PCRA petition, but that court instead forwarded his filing to his counsel of record.

testify regarding Haley's alibi and about the condition of the car reportedly used by the assailant as compared to the one to which Haley had access. (Am. PCRA Pet. dated 11/21/08.) The PCRA Court held an evidentiary hearing on March 5, 2009 at which Petitioner and Attorney Webster, as well as a putative trial witness, testified.

On or about May 31, 2008, while his PCRA petition was pending in state court, Haley filed a *pro se* petition in this Court. Because he had not yet exhausted available state court remedies and we determined that there was no appropriate basis to excuse the exhaustion requirement, we recommended that his petition be dismissed without prejudice. (Civ. No. 08-4844, Doc. No. 19.) The Court's Order entered on July 14, 2009 approved and adopted our Report and Recommendation and denied the petition, without prejudice. (Civ. No. 08-4844, Doc. No. 22.)

The PCRA Court ultimately denied the petition, and the Superior Court affirmed on May 4, 2010. On June 8, 2010, Haley filed with the Clerk of this Court a "Motion to proceed with Petitioner's Original Writ of Habeas Corpus," indicating that he had exhausted his state court remedies and wished to proceed with his original petition, filed at No. 08-4844, "with leave to amend." (Civ. No. 08-4844, Doc. No. 23.)⁵ Before that motion was ruled upon,⁶ Haley submitted a new form petition for habeas corpus relief under 28 U.S.C. § 2254, which was received on September 24, 2010, docketed as Civil Action No. 10-5061, and assigned to Judge Sánchez as a

⁵ Judge Sánchez's July 14, 2009 order in Civil Action No. 08-4844 had directed the Clerk to place that case in suspense, even as it dismissed the petition without prejudice.

⁶ The Court denied the motion to proceed with the original petition several months later as moot, in light of the fact that Haley had filed a new form habeas petition in the interim, which had already been referred to us for development and the preparation of a report and recommendation. *See* Order, Mar. 21, 2011 (Civ. No. 08-4844, Doc. No. 25). The 2008 case was later marked as "closed" by Order of Judge Sánchez on October 21, 2011. (Civ. No. 08-4844, Doc. No. 26.)

related case to Civil Action No. 08-4844. Haley attached to his petition a document entitled “Memorandum” that sets out further allegations in paragraph form nominally supporting each of the grounds for relief in his petition, as well as an appendix of documents relating to his prosecution, direct appeal, and post-conviction review proceedings. (Doc. No. 1.)

His current form petition identifies his grounds for relief as follows:

- Ground One: trial counsel was ineffective: (a) in failing to compel or seek production of DNA evidence, fingerprints, alleged criminal instruments, and testimony relating thereto when the Commonwealth failed to produce this evidence; (b) in failing to object to the inclusion of a juror who knew and conversed with a Commonwealth witness; and (c) in failing to timely object on prejudicial matters to preserve those issues for presentation on appeal;⁷
- Ground Two: the Commonwealth “denied” him *Brady* material “through deliberate denial, willful perjury & contamination of DNA evidence, fingerprint evidence, testimony of State witnesses, etc.”;
- Ground Three: the Commonwealth violated his due process rights by “preventing any impartial factfinding from being done” in a “malicious” prosecution of him that was based upon suggestive identification evidence, hearsay, “manufactured evidence,” “coached & perjured testimony,” and “other unlawful acts”; and
- Ground Four: “The State’s corrective process has deliberately prevented & precluded Petitioner from any impartial and/or meaningful challenge to his convictions in Pennsylvania Courts, depriving him [of] due process & causing inordinate delay,” where Petitioner’s appointed PCRA counsel “has completely and incompetently refused to act in Petitioner’s best interests” and the PCRA court and Pennsylvania Supreme Court have failed to assist Petitioner in remedying the situation.

(Pet. at 9-10.)⁸ On or about March 25, 2011 (received on April 11, 2011), he filed a supplement to

⁷ Haley does not delineate these “prejudicial matters” in the petition itself but we presume that the matters he believes his counsel should have objected to and/or pursued on appeal are those set out in his memorandum, *e.g.*, at paragraphs 21-22, 32-41, and 45-48.

⁸ As to each ground, Petitioner also refers the Court to his attached memorandum. Numbered paragraphs 1 through 48 concern Ground One; paragraphs 49 through 51 concern Ground Two; paragraphs 52 through 57 concern Ground Three; and paragraphs 58 through 92 concern Ground Four.

his petition, suggesting that he was constructively denied counsel throughout the state court processes, repeating many specific instances of allegedly deficient performance by counsel that were asserted in the memorandum that accompanied his form petition. (Doc. No. 7.) The Lehigh County District Attorney's Office filed a response to the petition on behalf of Respondents on June 13, 2011, arguing that many of the claims asserted in the petition were procedurally defaulted and that those claims that were properly exhausted failed on the merits. (Doc. No. 13.) Haley filed a reply brief with supporting materials on July 30, 2011. (Doc. No. 16.)

II. LEGAL STANDARDS

Respondents contend that certain claims asserted by Petitioner are procedurally defaulted and that others fail on the merits under the standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). It is appropriate, therefore, for us to set out the general standards under which we must consider a Section 2254 petition and then discuss those cognizable claims for which Petitioner has satisfied his obligation to first exhaust available state court remedies.

A. Exhaustion of State Remedies, Procedural Default

A prerequisite to the issuance of a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment is that the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). In order for a petitioner to satisfy this requirement and give the state courts "one full opportunity to resolve any constitutional issues," he must have "fairly presented" the federal claim to the state courts "by invoking one complete round of the established appellate review process." *Picard v. Connor*, 404 U.S. 270, 275 (1971); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This requirement ensures that state courts have

“an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights.” *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). Where a claim 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 shows “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.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The procedural default doctrine and the cause and prejudice standard are “grounded in concerns of comity and federalism.” *Id.* at 730. 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). The Supreme Court recognized in *Coleman* that attorney error in a direct review appeal may provide cause to excuse a procedural default if a court-appointed attorney on appeal performed in a constitutionally-deficient manner. *Coleman*, 501 U.S. at 754. More recently, the Court recognized that attorney error on collateral review — which in Pennsylvania is the first opportunity for review of claims of trial counsel ineffectiveness⁹ — could also constitute cause for a procedural default of claims of ineffective assistance of trial counsel, again, if the attorney error that caused the default rose to the level of deficient performance recognized in *Strickland v. Washington*, if post-conviction counsel had been

⁹ *See Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002) (announcing that, “as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review”).

appointed by the court, and if the underlying trial counsel ineffectiveness claim was demonstrated to have “some merit.” *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012). To establish prejudice in the *Coleman* standard to excuse a default, the petitioner must show “actual prejudice resulting from the errors of which he complains.” *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). To establish a fundamental miscarriage of justice, a petitioner must provide new evidence showing 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) (emphasis in original).

B. Standard for Issuance of the Writ

Pursuant to the governing statutory provision, enacted as part of AEDPA, in cases where a claim presented in a federal habeas petition was 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). In addition, this standard obligates the federal courts to presume that the “state courts know and follow the law” and precludes the federal court from determining the result of the case without according all proper deference to the state court’s prior determinations. *Id.* at 24.

III. DISCUSSION

Haley’s form petition and appended memorandum, as well as his supplement to his petition filed some ten months later, reflect a litany of complaints about his criminal prosecution and sentencing, as well as the appeals and collateral review processes. In the interest of providing some order to the task before the Court — determining whether Haley has demonstrated that he satisfies the various requirements of 28 U.S.C. §§ 2244 and 2254 as to justify setting aside his state court judgment of conviction — we will first address those claims that we can discern from his federal petition papers that satisfy the exhaustion requirement contained in § 2254(b)(1)(A). We will then address his remaining contentions.

A. Exhausted claims

The bases for habeas relief that Haley has presented to this Court for which he exhausted remedies available in the state court are his claims that: (1) his Due Process rights as recognized by *Brady* were violated when DNA evidence was admitted at trial without proper samples having first been provided to the defense for examination by its expert and that a new trial was warranted once it was apparent that only contaminated samples had been provided to the defense expert for testing, and his contention that trial and appellate counsel were ineffective within the meaning of *Strickland v. Washington* in failing to seek to suppress this DNA evidence and to litigate this issue on appeal;

(2) whether trial counsel was ineffective for failing to object to the continued participation of Juror No. 11 after he disclosed an acquaintance with a Commonwealth witness; and (3) whether trial counsel and appeal counsel were ineffective for failing to object to and litigate the admissibility of testimony of a police officer regarding a telephone call she received from someone claiming to have information about the assault, whom she later came to believe was Petitioner trying to cast suspicion on someone else.¹⁰

1. Claims involving alleged *Brady* violation based upon DNA evidence used at trial

Haley claims that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it did not turn over DNA evidence in a timely manner and when, according to Petitioner, it deliberately contaminated the DNA evidence. In *Brady*, the Supreme Court recognized that due process requires that the government provide a defendant with evidence that is material to guilt or to punishment and favorable to him. In order to obtain post-conviction relief based upon a *Brady* violation, the defendant must make each of three showings: (1) the evidence at issue is favorable to

¹⁰ Another nominally exhausted claim raised by Haley is that trial counsel was ineffective for failing to challenge allegedly inaccurate information provided at the sentencing hearing at which his status as a “three strikes offender” was determined. He first raised this claim, however, in a “Supplement” to his habeas petition that he submitted on March 25, 2011 at the earliest. This was long after the AEDPA limitations period set out in 28 U.S.C. § 2244(d) expired on or about September 13, 2010. See 28 U.S.C. § 2244(d)(1)(A) (providing for one-year period to begin running from when conviction became final to filing of habeas petition); *id.* § 2244(d)(2) (allowing for tolling during pendency of state collateral review process). This claim accrued when his conviction became final on October 15, 2006. By the time he initiated PCRA proceedings on May 22, 2007, 219 days of the AEDPA limitations period had passed. Another 358 days passed from when the period of tolling permitted by § 2244(d)(2) concluded on April 18, 2010 until the date that he asserted he submitted his Supplement for filing: March 25, 2011 (postmarked April 6, 2011 and received April 11, 2011). While Haley did raise to the PCRA Court and on appeal the questions of whether the imposition of the three strike sentence was “appropriate” and whether counsel’s failure to object constituted ineffectiveness, he cannot obtain habeas relief from this Court where this claim was not brought within the limitations period.

him, because it is either exculpatory or impeaching; (2) the State suppressed the evidence, either willfully or inadvertently; and (3) prejudice ensued. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In applying the *Brady* standard to cases in which the State failed to preserve evidentiary material whose exculpatory value is unknown, the Supreme Court has determined that, “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

Haley raised claims on PCRA review relating to this DNA evidence and how samples of blood found on the knife he was carrying upon his arrest were provided to him. The PCRA Court recognized him to be raising both a claim grounded in the Due Process Clause as well as an ineffectiveness claim under the Sixth Amendment. *See Commonwealth v. Haley*, Nos. 2297, 2527 of 2004, slip opin. at 28 (Lehigh Comm. Ct. Pl. June 26, 2009). *But see id.* at 29 n.28 (observing that Haley’s brief was often unclear and imprecise as to the nature of the claim brought). In an analysis that was adopted by the Superior Court, the PCRA Court made the following determinations in applying the *Brady* standard: (1) the DNA evidence that was not provided to Haley in its original form was only “potentially useful,” as Haley failed to make any proffer that it was “materially exculpatory evidence”; (2) the Commonwealth did not “suppress” the evidence willfully or inadvertently, but rather the DNA samples were compromised due to no fault of the Commonwealth; and (3) Haley was not prejudiced because counsel followed a trial strategy of using a defense expert to raise reasonable doubt based upon the samples. *Id.* at 30-32. Further explaining its finding that Haley had not established the bad faith element required by the Supreme Court in *Youngblood*, the PCRA Court continued:

In this case, the evidence does not support the Defendant's claim that the Commonwealth acted in bad faith by producing contaminated samples for DNA analysis by his forensic experts. In [*Commonwealth v.*] *Snyder*, [963 A.2d 396 (Pa. 2009)], the samples were not available for defense analysis, because of the conscious act to destroy them. In this case, the DNA samples were compromised by the moisture that was produced when the refrigeration unit, where the samples were stored, stopped working because of a power failure. The samples were compromised through no fault or knowledge of the Commonwealth and the Commonwealth was not responsible for the unit's malfunction. The DNA samples were not spoiled to prevent the Defendant from conducting his own DNA analysis. Apparently, the DNA samples were not the only evidence stored inside the refrigeration unit when it malfunctioned. NTT, p. 760.

Commonwealth v. Haley, Nos 2297, 2527 of 2004, slip opin. at 34-35 (Lehigh Comm. Pl. Ct. June 26, 2009). The PCRA Court also determined that Haley did not suffer prejudice from the production of the compromised samples, as he was provided with the results of the Pennsylvania State Police analyst and also used the results of the defense expert's analysis at trial to challenge the conclusiveness of the determinations that the Commonwealth expert reached. *Id.* at 35.¹¹

¹¹ As the PCRA Court recounted in its opinion, a hearing was promptly held on September 29, 2004 after Haley filed an omnibus pretrial motion that included a request for discovery. The Commonwealth agreed to provide to the defense by mid-November the results of its DNA analysis of blood found on the pocketknife on Haley's person upon his arrest although the 123-page report following the analysis of the sample by a Pennsylvania State Police ("PSP") laboratory was not ultimately completed until December 15, 2004. At trial, it was disclosed that the defense forensic biologist was provided with fingernail clippings from Ms. Krepich, which she determined contained only the victim's own DNA; blood stained evidence from the crime scene; and DNA extracts, which, as related to the knife blade, initially appeared empty, causing her to assume that the samples had been completely consumed in analysis. (N.T. Vol. V, 3/4/05 at 858-59.) It was only when she reviewed the paperwork that she noticed that the PSP analyst marked that the PSP lab had only used half of the sample, at which point, she inquired about remaining samples, which were found and provided to her a few days before her testimony. While her analysis showed DNA most likely from both a man and a woman, she found the results to be inconsistent with both Haley and Krepich. (*Id.* at 830.) She also believed the PSP overstated its conclusion regarding the results of its testing showing a "match" to Haley and Krepich. Unfortunately, the DNA samples that the defense witness tested also showed signs of contamination, which she acknowledged could have been one of the

Having reviewed the record, we conclude that the state court applied neither *Brady* nor *Strickland* in an unreasonable manner when it denied PCRA relief both as to the aspect of the underlying claims challenging the late disclosure of the expert report as to the DNA evidence and to the contamination of the actual sample, as well as to any ineffectiveness claims related to these developments. Haley's submissions do not focus upon how the state court unreasonably applied *Brady* or *Youngblood* in denying him PCRA relief on this claim. Rather, he repeats his bald assertions that the evidence was compromised based upon "the deliberate action" of the State. (Pet'r Mem. ¶ 8.)¹² The state court's factual finding that no bad faith on the part of the Commonwealth caused the contamination of the evidence is one that this Court cannot set aside absent clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Haley has presented no such evidence. Accordingly, the state court's analysis of this claim did not reflect an unreasonable application of *Brady* or *Youngblood*. Moreover, because there was no merit to this *Brady* challenge, neither counsel at trial nor on appeal performed in a constitutionally deficient manner in not seeking to suppress the DNA evidence that the prosecution used or litigate this issue on direct appeal.¹³

several possible explanations for the difference between her results and those of the PSP.

¹² The memorandum that Haley submitted with his petition is identical to the one he submitted with his 2008 petition — which was before any state court had rendered a decision on the claims raised in his PCRA petition. Therefore, except for claims that had been presented to the state court on direct appeal, his submissions could not (and do not) express his claims with reference to the reasonableness of the state court's application of federal constitutional principles.

¹³ As the PCRA Court also noted, the record did not support the proposition that counsel's failure to object to the admission of the DNA evidence reflected inattention on his part. The PCRA Court credited Attorney Webster's testimony at the 2009 evidentiary hearing that he decided not to make this weak objection because he had a better strategy:

The Defendant's forensic DNA expert analyzed the samples, and defense counsel used the expert's analysis results to his client's advantage as part of his trial strategy.

Therefore, habeas relief is not warranted on this aspect of Haley's petition.

2. Ineffective assistance of counsel claims

Haley's other two exhausted claims implicate the effectiveness of his counsel's representation at trial. The Supreme Court's standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and has been re-affirmed consistently since then. Pursuant to *Strickland*, counsel is presumed to have acted 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. To satisfy the deficient performance prong of this analysis, the petitioner must show "'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. ---, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687). In considering this part of the standard, the reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id* (quoting *Strickland*, 466 U.S. at

During his PCRA testimony, Mr. Webster said that he decided against challenging the admissibility of the Commonwealth's evidence of the DNA results analysis and instead chose to present the results of the analysis performed by the defense DNA expert and to argue that the different analysis results represented by the defense expert challenged the conclusiveness of the Commonwealth's DNA analysis results and raised reasonable doubt of his client's guilt. NTH, pp. 60-61, 66, 68, and 78-79.

Commonwealth v. Haley, Crim. Nos. 2297, 2527 of 2004, slip opin. at 35 (Lehigh Comm. Pl. Ct. June 26, 2009). In giving deference to counsel's strategic decision based upon his knowledge of the facts, the state court applied *Strickland* to this ineffectiveness claim in a reasonable manner. Haley is therefore not entitled to habeas relief on this ineffectiveness claim pursuant to 28 U.S.C. § 2254(d)(1).

689). The Court recognized that there are “countless ways to provide effective assistance in any given case” and that “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 788-89 (quoting *Strickland*, 466 U.S. at 689). In assessing whether counsel performed deficiently, the court must “reconstruct the circumstances of counsel’s challenged conduct’ and ‘evaluate the conduct from counsel’s perspective at the time.” *Id.* at 789 (quoting *Strickland*, 466 U.S. at 689).

a. Ineffectiveness claim regarding the seating of Juror Number 11

Haley contends that Attorney Webster performed in a constitutionally deficient manner in not objecting to the continued participation of Juror No. 11 in the trial and that counsel on appeal was also deficient in not pursuing this matter on appeal. Haley presented this ineffectiveness claim to the state court on PCRA review, arguing that Webster performed deficiently because there was no reason not to challenge the juror’s continued service in light of an initial reply that he might not be impartial.

Again, the PCRA Court opinion approved by the Superior Court provides the rationale for the state court’s rejection of this claim. The PCRA Court reviewed the transcript in detail, describing how it was on the third day of trial, prior to Jason Baumer testifying as a Commonwealth witness, that Juror Number 11 informed the court that he recognized Baumer by sight, although he did not recognize him by name and thus had not reacted during jury selection when Baumer’s name was mentioned as a potential trial witness. The juror explained that he knew Baumer from work, that he had never associated with him, and that he knew him only to extend greetings. He expressed that it felt “a little weird” and that he felt “a little uncomfortable” serving as a juror in a case in which Baumer would be a witness, initially acknowledging that his previous acquaintance with him

might affect his fairness and impartiality. However, after further questioning that revealed the little contact between them, Juror Number 11 volunteered that, “as far as what I have to do, I don’t think it would influence me.” *Commonwealth v. Haley*, Crim. Nos. 2297, 2527 of 2004, slip opin. at 7-8 (Lehigh Comm. Pl. Ct. June 26, 2009) (quoting N.T. Vol. III, 3/2/05 at 405-06). Counsel was invited to voice any objection to Juror Number 11’s continued service but, after questioning him further about the recency of their acquaintance, he declined. Juror Number 11 then affirmed that he could evaluate Baumer’s testimony as he would any other witness. *Id.* at 9 (quoting N.T. 3/2/05 at 407).

The state court also recounted Attorney Webster’s explanation at the PCRA hearing of his decision not to challenge the continued service of Juror Number 11, including his testimony that he made a strategic decision not to object because he believed that the juror would be fair and impartial based on his colloquy answers. *Commonwealth v. Haley*, Crim Nos. 2797, 2527 or 2004, slip opin. at 13 (Lehigh Comm. Pl. Ct. June 26, 2009) (quoting N.T. PCRA hr’g, 3/5/09 at 55-56, 80-82). The state court accepted this as a reasonable explanation for this aspect of his representation. It also noted that Haley presented neither any evidence nor argument that any successful motion to replace Juror Number 11 would have resulted in “a reasonable probability” of a different outcome of the trial. Accordingly, the state court denied relief on this *Strickland* claim.

Haley contends in this Court that, because alternate jurors were available, Webster should have sought the replacement of the juror who had an acquaintance with a Commonwealth eyewitness. He focuses upon Juror Number 11’s statement that he felt “uncomfortable” but ignores that he said he could be fair. The state court’s analysis of this claim demonstrates that there was no basis upon which to seek the replacement of Juror Number 11 with an alternate juror. Because the

defense had no viable grounds to seek the juror's replacement and Haley could not show that there was a reasonable likelihood of a different outcome had counsel made an objection, the state court quite reasonably found that his ineffectiveness claim was without merit. The state court's rejection of his claim of ineffective assistance by trial and appellate counsel did not represent an unreasonable application of *Strickland*. Accordingly, habeas relief is not warranted on this claim.

b. Ineffectiveness claim regarding admission of officer's testimony of phone conversation with Petitioner

Haley's second exhausted *Strickland* claim concerns how counsel handled testimony that emerged from one of the police officers who investigated the Krepich assault, Criminal Investigator Heather Kleckner Rhoads. The claim particularly concerns her testimony as to a telephone conversation on April 22, 2004, a few days after the incident, that she had with someone whose voice she later recognized as Petitioner's. (Pet'r Mem. ¶ 24.) She testified that the caller reported that it was his friend, "Shawn," who had picked up the woman at a particular corner, that this woman injected drugs into her leg, and that she cut herself with her own blade. When Officer Rhoads subsequently took Haley into custody on June 8, 2004, some six weeks later, she recognized his voice as the caller from April. Petitioner asserts ineffective assistance of counsel claims arising from counsel's failure to object to this testimony, complaining that this was "identification" testimony that had not been disclosed to him in discovery.

On PCRA review, Petitioner argued that Officer Rhoads's testimony should not have been admitted and therefore reflected a viable ineffectiveness claim because: (1) it was unfairly prejudicial; (2) it was not disclosed to him pre-trial; and (3) it was not substantiated due to her failure to record the April 22nd telephone contact in her police report. Although the PCRA Court found that

Haley had not presented his ineffectiveness claim in the context of the state equivalent of *Strickland* nor offered any discussion as to how those requirements were satisfied, it also found that these ineffectiveness challenges would fail on their merits. It noted that Haley's arguments were predicated on the characterization of Officer Rhoads's testimony as "identification evidence" that was not disclosed prior to trial and admitted in violation of Rule 573 of the Pennsylvania Rules of Criminal Procedure.¹⁴ *Commonwealth v. Haley*, Nos. 2797, 2527 of 2004, slip opin. at 16-17 (Lehigh Comm. Pl. Ct. June 26, 2009). While that rule specifically requires that the Commonwealth

¹⁴ The rule, entitled "Pretrial Discovery and Inspection," provides the following with respect to "disclosure by the Commonwealth":

(1) *Mandatory*: In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth;

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth;

(c) the defendant's prior criminal record;

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;

(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and

(g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

provide to the defense “the circumstances and results of any identification of the defendant by voice, photograph, or in person identification . . . ,” Pa. R. Crim. P. 573(B)(1)(d), the Comment to the rule clarified that the terms “identification” or “in-person identification” “are intended to refer to all forms of identifying a defendant by means of *the defendant’s person being in some way exhibited to a witness for the purpose of an identification: e.g., a line-up, stand-up, show-up, one-on-one confrontation, one-way mirror, etc.*” (emphasis added). The PCRA Court noted that the circumstances in Haley’s case were significantly distinct from the identification events that are within the scope of Rule 573:

In this case, Investigator Rhoads recognized the Defendant’s voice as being the voice of the caller in the April 2004 telephone call as a result of hearing the Defendant speak while in her custody at the police station following the Defendant’s arrest in June 2004. . . . Investigator Rhoads was performing a legitimate police activity when speaking with and in questioning the in-custody Defendant, when she recognized his voice. The investigation did not occur as a result of the Defendant being asked to speak as part of a formalized event held for the specific purpose of identifying his voice. Investigator Rhoads’ recognition of the Defendant’s voice and her realization that he was the caller with whom she spoke during the April telephone call was not an identification within the purview of Pa.R.Crim.P. 573(B)(1)(d), because the awareness occurred while Investigator Rhoads was simply doing her duty as a police officer and was not the product of an event that was specially arranged to identify the Defendant’s voice.

Commonwealth v. Haley, Nos. 2797, 2527 of 2004, slip opin. at 17-19 (Lehigh Comm. Pl. Ct. June 26, 2009). The PCRA Court thus concluded that because her testimony was not an identification within the meaning of Rule 573(B)(1)(d), it was not subject to mandatory disclosure. Moreover, inasmuch as trial counsel *did*, in fact, make objections to her testimony,¹⁵ and as the court found that

¹⁵ Counsel objected at trial on several grounds: relevance (N.T. 3/3/05 at 609), hearsay (*id.* at 613, 616, 617), and Officer Rhoads’s lack of “qualification” to recognize or identify Haley’s voice (*id.* at 610). On cross-examination, he highlighted that she made no reference to the phone call or her identification of Haley’s voice in her report. (*Id.* at 618-19.)

there was no merit to Haley's argument that Rhoads's testimony was subject to mandatory disclosure under this rule requiring the sanction of suppression, the court determined that appellate counsel could not be deemed ineffective for omitting a challenge to the admissibility of Officer Rhoads's testimony. *Id.* at 18-19.

In his papers here, Haley continues to assert that this evidence was subject to mandatory disclosure and therefore could have been suppressed.¹⁶ He has not convinced us that there was such a clear basis for the suppression of this evidence that counsel should have objected on the grounds of Rule 573. Moreover, the prejudice to Haley is questionable. There was substantial evidence tying him more directly to the crime than this testimony that he sought to interest the police in someone named "Shawn" or to dupe the police into believing that the victim stabbed herself. The state court's analysis of this claim demonstrates that there was no basis to challenge the performance of appellate counsel in not litigating on appeal the admission of Officer Rhoads's testimony on this issue. Because Haley had no grounds to seek the exclusion of this evidence, appellate counsel's failure to litigate the issue of trial counsel's ineffectiveness does not constitute a *Strickland* violation. We cannot grant relief under § 2254 on this claim.

B. All remaining claims asserted in the petition and accompanying memorandum are procedurally defaulted¹⁷

Petitioner has not presented his grounds for relief with optimal clarity but rather has put before the Court a litany of complaints about the trial process and his representation, many of which

¹⁶ At the same time, Haley also characterizes Officer Rhoads's account as fabricated, asserting that this "alleged incident" "never occurred." (Pet'r Mem. ¶ 25.)

¹⁷ As discussed above, to the extent that additional claims were set forth in the "Supplement" to his petition that Haley submitted on March 25, 2011 (Doc. No. 7), those claims are untimely.

reflect misunderstandings about what actually happened at trial (e.g., complaints about the failure of counsel to have objected to something where the record shows that he did, in fact, do so). Having read Haley's petition liberally, as we must with a *pro se* petitioner, we discern that he seeks federal habeas relief on various other grounds all implicating either the Due Process Clause or the Sixth Amendment right to counsel. Our review of the state court record — particularly the Rule 1925 opinions of the Court of Common Pleas and the PCRA Court, and the two opinions of the Superior Court relying upon the lower courts' opinions, coupled with Petitioner's briefs to the Superior Court — demonstrates, however, that Haley did not fairly present these claims to the state court and thus did not fulfill his duty under 28 U.S.C. § 2254(b) to first exhaust remedies available in the state court. As the time in which he could have done so has now passed pursuant to 42 Pa. Cons. Stat. § 9545(b), Haley has procedurally defaulted these claims. This Court could not grant relief on any of these defaulted claims unless Haley could demonstrate cause for his default of the claim and establish that he would suffer prejudice were the court not to consider the claim. Alternatively, he could obtain review if he could demonstrate that this Court's failure to consider the merits of any of these claims would result in a miscarriage of justice in light of new evidence that he is, in fact, actually innocent.

There is no evidence in this case that Haley is actually innocent of any of the crimes for which he was convicted, notwithstanding his bald assertion that he is “an innocent citizen wrongfully convicted.” *See* Pet'r Reply ¶ 66 (contending that “a grave miscarriage of justice shall occur” if the Court refuses to address issues raised in his petition); *id.* ¶ 68 (asserting that the record shows “a colorable claim of [him] being actually innocent”). Therefore, we do not find the miscarriage of justice exception to permit consideration of any defaulted claims.

Nor has he demonstrated any cause for his default of these claims that would permit us to consider their merits, notwithstanding his belief that he has done so. *See id.* ¶ 64. In his reply brief, he refers to the “incompetence” of appointed counsel in his PCRA proceedings, which “clearly deprived him of his right to effective assistance at this critical stage of his proceedings,” citing to *Cronic* and *Strickland*. *See, e.g.*, Pet’r Reply ¶¶ 22, 23, 25, 28, 33. *See also id.* ¶ 37 (asserting that he demonstrated cause and prejudice). He contends that “because [PCRA counsel] rendered ineffective assistance of counsel at this stage of Petitioner’s proceedings, this Court must entertain the claims.” *Id.* ¶ 44.

Ineffective assistance rendered by appointed counsel on collateral review, in circumstances where collateral review provides the first opportunity to litigate claims of ineffective assistance of trial counsel, can qualify as “cause” for the procedural default analysis if the ineffectiveness of that post-conviction counsel satisfies the *Strickland* standard. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The analysis of collateral counsel’s performance is not pertinent, however, unless the underlying claim of trial counsel ineffectiveness is “substantial,” *e.g.*, “it has some merit.” *See id.* at 1318. We will assume for these purposes that the *Martinez* exception applies to defaults caused by appointed counsel in Pennsylvania PCRA proceedings. As we set forth below, however, we find that the defaulted claims upon which Haley appears to seek relief on the grounds of trial counsel ineffectiveness do not meet this criteria.

1. Fingerprint evidence

Petitioner asserts that trial counsel performed deficiently in failing to request fingerprint evidence from cups found in the motel room listed on an evidentiary log. He contends that examination of that evidence would have demonstrated that he was not in that room and given

credence to his alibi. We cannot say there is a reasonable likelihood that examination of the cups — even if such examination ruled out Haley as a source of any fingerprint — would have significantly helped Petitioner. (Pet’r Mem. ¶¶16-18.) There was no evidence that the assailant had handled cups in the room, nor any basis upon which the jury could conclude that only the assailant would have been in a position to handle the cups. This claim is not so substantial that we could consider Attorney Nelthropp, in his representation on PCRA review, to have been ineffective according to the *Strickland* standard in not raising this claim. *See, e.g., United States v. Garvin*, 270 Fed. Appx. 141 (3d Cir. 2008) (finding no ineffectiveness in not investigating whether fingerprint evidence was obtainable and exculpatory where there was no reason to believe that a favorable result of fingerprint testing was reasonably probable). Haley has not established cause for the default of this claim, and we will not consider it further.

2. Knife and key ring

Haley asserts that trial counsel also performed in a constitutionally deficient manner in failing to object to the identification by the victim at trial of a pen knife and key ring on the grounds that the inventory log had listed a small pen knife and a key ring with two attached keys *as separate items*. He contends that trial counsel also failed to impeach the victim’s testimony with the inventory list, which would have shown that the prosecution had “manufactured” the items “for the purpose of misrepresentation at trial.” (Pet’r Mem. ¶¶ 10-15.) He asserts that the Commonwealth failed to divulge this evidence in its “manufactured” state to him pre-trial and that he was prejudiced and entitled to a curative instruction after the Commonwealth withdrew the PIC charge. We see no significant prejudice that Haley suffered on account of this alleged discrepancy, nor do we have any reason to believe that the Commonwealth mishandled this evidence in any way. The claim of trial

counsel ineffectiveness as to this evidence is not so substantial that we could consider Attorney Nelthropp, in his representation on PCRA review, to have been ineffective within the meaning of *Strickland* in not raising this claim. Haley has not established cause for the default of this claim of trial counsel ineffectiveness, and we will not consider it further.

3. Jason Baumer

With regard to testimony by motel eyewitness Jason Baumer, Petitioner asserts that trial counsel was constitutionally deficient in failing to pursue suppression of Baumer's identification of Petitioner and in not properly objecting to usage of the identification. (Pet'r Mem. ¶ 32.) The record reveals that while trial counsel did not seek to suppress this identification, he did not allow it to go untested. On cross-examination, he impeached Baumer with his failure to wear glasses at the time of the incident; his retail theft conviction; and inconsistencies in his identifications from photo arrays, *e.g.*, he did not identify Haley in the first police array and did not identify anyone in an array done by trial counsel shortly before trial. *See* N.T. Vol. III, 3/2/05 at 426-39. Further, the trial court instructed the jurors regarding the circumstances under which they should "receive with caution" a witness's identification testimony — specifically with respect to the identifications made by Baumer and the victim Krepich. *See* N.T. Jury Charge, 3/7/05 at 24-26.

We find no basis for the state court to have suppressed this identification. It was a classic question for the jury to resolve as needed, which was apparently done here after counsel properly cross-examined the witness and the state court gave the proper cautionary instruction. There was no substantial claim that trial counsel was constitutionally ineffective in this regard such that Attorney Nelthropp, in his representation on PCRA review, could be deemed ineffective in a *Strickland* sense in not litigating this claim. Accordingly, Haley has not established cause for the

default of this claim. We will not consider it further.

4. Alleged coaching of victim

Haley also asserts that counsel failed to object to the prosecutor's alleged impermissible coaching of a witness's testimony. (Pet'r Mem. ¶¶15, 35.) Petitioner indicates that his due process rights were violated when the prosecutor "coached and otherwise instructed the alleged victim . . . Lisa Krepich, to state at trial that the [pen knife] was the weapon used in the . . . criminal acts against her." (Pet'r Mem. ¶¶14, 37.) Haley has pointed to nothing in the record to suggest that this is anything other than his bald assertion. This does not represent a substantial claim of trial counsel's ineffectiveness such that Attorney Nelthropp's failure to litigate the issue on PCRA review could establish cause for the default of this claim and permit review by this Court.

5. Officer Rhoads's alleged perjury

Haley also faults trial counsel for not properly addressing what he believes was perjured testimony offered by Officer Rhoads. He asserts that counsel "failed to advocate Petitioner's best interests in not objecting to trial court's refusal to act upon proof of the crime of perjury revealed itself [sic], [and] not requesting curative instructions for the factfinders not to believe or disregard the testimony of Kleckner[-Rhoads]" (Pet'r Mem. ¶ 39.) Again, Haley has pointed to nothing in the record to suggest that this assertion of perjury is anything other than a vain attempt to turn the evidentiary record into something that it is not. This contention does not reflect a substantial claim of trial counsel's ineffectiveness such that Attorney Nelthropp's failure to litigate the issue on PCRA review could establish cause for the default and permit review by this Court.

IV. CONCLUSION

We have construed Haley's petition as liberally as possible and considered the merits of the three claims implicated by Haley in his timely petition that were properly presented to the state court. We have determined that the state court's adjudication of the *Brady* violation regarding DNA samples did not reflect an unreasonable application of federal constitutional law because there was no evidence that the destruction of the samples was the result of bad faith. His claim of ineffective assistance of counsel regarding Juror Number 11 was properly rejected by the state court because there is no basis upon which any court could conclude that Petitioner was prejudiced by the fact that counsel did not seek to replace on the jury someone who had a former acquaintance with an independent witness presented by the Commonwealth but whom counsel believed could be fair. His third and final exhausted claim must also fail because the testimony of Officer Rhoades concerning a telephone call she received from Petitioner was not subject to mandatory disclosure and because counsel made appropriate attempts to limit the testimony of this witness and thus did not perform deficiently.

Moreover, all of the contentions raised in Petitioner's Supplement, to the extent not found elsewhere in his petition, are untimely and cannot be considered. All other claims asserted are procedurally defaulted. While we have considered whether ineffective assistance from appointed counsel on PCRA review *could* provide cause for the default of trial counsel ineffectiveness claims on initial review in the PCRA Court under *Martinez*, we have no trouble concluding that the underlying claims of trial counsel ineffectiveness were not sufficiently substantial justify PCRA counsel raising them. As Haley has not otherwise demonstrated cause to excuse the procedural default of any of these claims, and in the absence of any reliable evidence of actual innocence, the

Court cannot grant relief for Haley on these bases.

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 court 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 find it to be debatable whether the petition states a valid claim for the denial of a constitutional right. As to claims that are dismissed on procedural grounds, the petitioner bears the additional burden of showing that jurors of reason would also debate the correctness of the procedural ruling. *See 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. Accordingly, we do not believe a COA should issue. Our Recommendation follows.

R E C O M M E N D A T I O N

AND NOW, this 31st day of July, 2012, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED**. 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 Recommendation 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

MICHAEL LEON HALEY, SR.,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
SUPERINTENDENT	:	
DEBRA SAUERS, et al.,	:	NO. 10-5061
Respondents.	:	

ORDER

AND NOW, this day of , 2012, upon careful and independent consideration of the petition for a writ of habeas corpus and appended memorandum of law, Petitioner’s supplement, the response, and Petitioner’s reply to the response, 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**;
3. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not made a substantial showing of the denial of a constitutional right nor demonstrated that a reasonable jurist would debate the correctness of this ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and
4. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

JUAN R. SÁNCHEZ, J.