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

AARON CHRISTOPHER WHEELER	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD T. VAUGHN, et al.	:	NO. 01-428

MEMORANDUM

Padova, J. **January , 2004**

Before the Court is Aaron Christopher Wheeler's pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Court denies the Petition in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 16, 1991, at approximately 7:50 PM, Petitioner and co-defendant Jesse Bond entered a take out restaurant at 6825 Ogontz Avenue, in Philadelphia, Pennsylvania. Bond ordered a soda from the restaurant owner, Jennifer Lee, who was standing behind the counter. As Ms. Lee turned around to prepare the soda, Bond stepped behind the counter, pointed a gun at her, and announced his intention to rob the store. Bond then shot Ms. Lee four times before he and Petitioner exited the restaurant.

On June 10, 1993, after a bench trial, the Honorable Arthur S. Kafrissen of the Philadelphia Court of Common Pleas convicted Petitioner on four counts of aggravated assault, robbery, criminal conspiracy and possession of an instrument of crime. Post-verdict motions were denied and, on June 6, 1994, Judge Kafrissen sentenced Petitioner to an aggregate term of 330 to 660 months of

imprisonment.[1] Trial counsel filed a notice of appeal on Petitioner's behalf with the Pennsylvania Superior Court, raising two issues: (1) whether the suppression court committed reversible error in failing to suppress Petitioner's statement to the police, and (2) whether the trial court committed reversible error in returning guilty verdicts on all four charges when the evidence showed only that Petitioner was merely present at the scene of the crime. The judgment was affirmed by the Pennsylvania Superior Court on February 22, 1996. Commonwealth v. Wheeler, 677 A.2d 1268 (Pa. Super. Ct. 1996). On April 22, 1997, the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Wheeler, No. 194 E.D. Alloc. Docket 1996.

On October 17, 1997, Petitioner filed a pro se petition pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), setting forth numerous claims for relief.[2] The PCRA court

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[1] Petitioner is also serving two consecutive life sentences for two homicide convictions, which are not the subject of the instant Petition.

[2] The claims were as follows: (A) The suppression court violated Petitioner's equal protection and due process rights under the Fourteenth Amendment by ruling on pretrial motions after the judge admitted that he was biased against Petitioner; (B) the pretrial motions ruled on by the suppression court judge must be re-litigated before an impartial judge; (C) a new trial should be granted because state and federal law prohibits the substitution of judges after evidence probative of guilt or innocence has been heard by the court; (D) trial counsel was ineffective based on (1) counsel's abandonment of Petitioner during the pretrial stage, leaving Petitioner alone to argue his motion to dismiss the case, (2) counsel's advising Petitioner to waive his preliminary hearing and arraignment without first explaining the consequences of such

appointed counsel for Petitioner, but his counsel sought to withdraw by the filing of a "no merit" letter with the PCRA court. The PCRA court granted counsel's request to withdraw and dismissed the PCRA petition on February 9, 1999. Petitioner appealed the order dismissing his PCRA petition to the Superior Court, which affirmed the dismissal on January 31, 2000. Commonwealth v. Wheeler, 754 A.2d 24 (Pa. Super. Ct. 2000). The Pennsylvania Supreme Court denied review on June 6, 2000. Commonwealth v. Wheeler, 759 A.2d 385 (Pa. 2000).

On January 26, 2001, Petitioner filed a pro se Petition for Writ of Habeas pursuant to 28 U.S.C. § 2254. The Petition asserts the following issues:

> (A) The suppression court violated Petitioner's equal protection and due process rights under the Fourteenth Amendment by ruling on pretrial motions after the judge admitted that he was biased against Petitioner;
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> (B) The pretrial motions ruled on by the suppression court judge must be re-litigated before an impartial judge;
>
> (C) A new trial should be granted because state and federal law prohibits the substitution of judges after evidence probative of guilt or innocence has been heard

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waiver, (3) counsel's failure to communicate with Petitioner regarding preparation of his defense and failure to file a motion to dismiss, (4) counsel's failure to challenge an improper "deal" allegedly entered into by both the prosecution and Judge Pamela Cohen with witness Anthony Sheppard, and (5) counsel's failure to provide Petitioner with copies of discovery submissions so that he could assist in the preparation of his defense; (E) the suppression court's denial of his motion to dismiss violated his constitutional right to a speedy trial; (F) The trial verdict was contrary to the law;(G) The trial verdict was against the weight of the evidence.

by the court;

(D) Trial counsel was ineffective based on (1) counsel's abandonment of Petitioner during the pretrial stage, leaving Petitioner alone to argue his motion to dismiss the case, (2) counsel's advising Petitioner to waive his preliminary hearing and arraignment without first explaining the consequences of such waiver, (3) counsel's failure to communicate with Petitioner regarding preparation of his defense and failure to file a motion to dismiss, (4) counsel's failure to challenge an improper "deal" allegedly entered into by both the prosecution, and Judge Pamela Cohen, with witness Anthony Sheppard, and (5) counsel's failure to provide Petitioner with copies of discovery submissions so that he could assist in the preparation of his defense;

(E) The suppression court's denial of his motion to dismiss violated his constitutional right to a speedy trial;

(F) The trial verdict was contrary to the law;

(G) The trial verdict was against the weight of the evidence;

(H) The trial court erred in sentencing Petitioner to consecutive terms of imprisonment when all the charges arose out of the same incident and should have merged for sentencing purposes;

(I) The trial court erred by failing to suppress the testimony of witness Anthony Sheppard under applicable state and federal professional responsibility rules;

(J) The prosecutor's conduct violated applicable state and federal professional responsibility rules;

(K) Because the prosecutor's conduct violated applicable state and federal professional responsibility rules, the testimony of witness Anthony Sheppard should be suppressed;

(L) The record contains sufficient evidence of prosecutorial misconduct to remand for a new trial;

(M) The PCRA court committed reversible error by accepting PCRA counsel's submission of a "no merit"

letter because (1) counsel filed said letter without first investigating the facts of the case and researching the applicable law, as the letter did not detail the nature and extent of any investigation or research, (2) counsel's letter did not explain why Petitioner's case was meritless, (3) the court failed to independently review the record and Petitioner's claims, (4) the court did not inform Petitioner of any defects in his PCRA petition or give him an opportunity to cure any defects;

(N) The PCRA court committed reversible error by accepting counsel's "no merit" letter because (1) counsel never communicated with Petitioner during the entire year in which his petition was pending, (2) counsel did not forward a copy of the letter to Petitioner, (3) counsel falsely stated that she reviewed Petitioner's submissions, when he never submitted anything to her because he was not even aware that counsel had been appointed;

(O) The suppression court committed reversible error in failing to suppress a statement by Petitioner that was taken in violation of the "six-hour" rule under Pennsylvania law; and

(P) The trial court committed reversible error in returning verdicts of guilty on all four charges because the prosecution's evidence only showed that Petitioner was merely present at the scene of the crime.

The Court referred this case to Magistrate Judge Carol Sandra Moore Wells for a Report and Recommendation pursuant to 28 U.S.C. § 636. On May 30, 2003, the Magistrate Judge filed a Report and Recommendation ("Report") recommending that the Petition for Writ of Habeas Corpus be denied in all respects, without an evidentiary hearing. Petitioner timely filed objections to the Magistrate Judge's Report. In addition to challenging the Report in its entirety, Petitioner objects to the Magistrate Judge's failure to rule on two of his motions prior to the issuance of the Report.

II. LEGAL STANDARD

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b).

III. DISCUSSION

A. Magistrate Judge's Failure to Rule on Petitioner's Motions

1. Petitioner's outstanding discovery motion

On December 24, 2001, Petitioner filed an application for leave to conduct discovery in connection with the instant Petition. (Doc. No. 7.) On January 4, 2002, the Magistrate Judge denied the motion without prejudice, in anticipation that any relevant documents would be attached to Respondents' forthcoming Answer to the Petition. (Doc. No. 10.) Respondents filed the Response to the Petition on January 31, 2002. (Doc. No. 13.) Attached as exhibits to the Response were copies of the Superior Court decision affirming Petitioner's convictions on direct appeal, the order of the Pennsylvania Supreme Court denying allowance of direct appeal, the "no merit" letter filed by his court-appointed PCRA counsel, the PCRA court opinion dismissing Petitioner's petition, the Superior Court decision affirming the PCRA court, the order of

Pennsylvania Supreme Court denying allowance of PCRA appeal, Petitioner's PCRA petition, and Petitioner's PCRA appellate brief.

On February 6, 2002, Petitioner filed a renewed application for leave to conduct discovery. (Doc. No. 14.) In the application, Petitioner listed a number of document requests, which included copies of transcripts from prior proceedings, witness lists from his trial, documentation of the alleged "deal" between the prosecution and witness Anthony Sheppard and of the sentence imposed on Sheppard for cooperating, any drawings of the alleged perpetrators of the crimes for which he was convicted, any notes or interviews of Petitioner's counsel concerning representation of Petitioner, police reports of Petitioner, all orders and other decisions rendered by the state courts, the appellate brief filed by counsel on Petitioner's behalf, and any other exculpatory evidence. Petitioner alleges that the Magistrate Judge never ruled on this motion. Without access to the above documents, Petitioner contends that he could not fully pursue the instant Petition. The docket confirms that the Magistrate Judge never ruled on Petitioner's motion for leave to conduct discovery. Accordingly, the Court has considered the merits of Petitioner's discovery motion in the first instance.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 905 (1997). Instead,

Habeas Corpus Rule 6(a) ("Rule 6(a)") provides that "[a] party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6(a) 28 U.S.C. foll. § 2254. A petitioner establishes "good cause" for discovery under Rule 6(a) "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." Bracy, 520 U.S. at 908-09 (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)); see also Marshall v. Hendricks, 103 F.Supp. 2d 749, 760 (D.N.J. 2000)(noting that good cause is established "[i]f a petitioner can point to specific evidence that might be discovered that would support a constitutional claim").

In his application for discovery, Petitioner contends that the Respondents' opposition brief misstated portions of the trial court record. Specifically, Petitioner alleges that, contrary to the Respondents' assertions, the trial record does not establish that three independent witnesses testified that co-defendant Jesse Bond was accompanied and assisted by a second man and that Petitioner suggested robbing the convenience store. Petitioner requests copies of the trial transcripts for the purpose of showing the Court "that the Respondents have misstated the record to the Court in their response in numerous places." (Pet. Disc. Mot. ¶ 7.)

Petitioner's discovery request is clearly prompted by his concern that this Court will rely solely on the Respondents' characterization of the trial court record in ruling on the claims in the instant Petition. Petitioner's fears are unfounded, however, as the entire trial court record has been submitted to, and carefully reviewed by, this Court. Any evidence in the trial record that supports his constitutional claims has, as a practical matter, already been discovered. As Petitioner's request for production of the trial record is without merit, his objection is overruled in this respect.

Petitioner also requests production of numerous other documents and materials, baldly alleging that "without these documents he will be denied of his right to file one all-inclusive habeas petition." (Pet. Disc. Mot. ¶ 6.) Without specific allegations in support of these discovery requests, it is impossible for the Court to determine whether Petitioner may, if discovery were permitted, be able to demonstrate that he is entitled to habeas relief. As a "fishing expedition" for evidence to support claims does not constitute good cause for habeas discovery, Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir. 1994), his objection is overruled in this respect.[3]

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[3] Included in Petitioner's discovery motion is a request for the appointment of counsel. Petitioner may well have intended this request to be contingent on the granting of his discovery motion. See Habeas Rule 6(a)("If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for

2. Petitioner's newly discovered evidence motion

On May 22, 2002, Petitioner filed with the Magistrate Judge a motion to supplement his habeas petition with newly discovered evidence. (Doc. No. 18.) The newly discovered evidence pertains to a "no merit" letter that was filed by Patricia Dugan, who had

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a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g)."). Nevertheless, having independently considered Petitioner's request for appointment of counsel, the Court declines to exercise its discretionary power to appoint counsel in this case.

Any person seeking relief under § 2254 may be granted counsel if "the court determines that the interests of justice so require and such person is financially unable to obtain representation." 18 U.S.C. § 3006A(g). "Factors influencing a court's decision include the complexity of the factual and legal issues in the case, as well as the pro se petitioner's ability to investigate facts and present claims." Reese v. Fulcomer, 946 F.2d 247, 264 (3d Cir. 1991); cf. Tabron v. Grace, 6 F.3d 147, 155-56 (3d Cir. 1993)(holding that district courts should consider the following factors in determining whether to appoint counsel pursuant to 28 U.S.C. § 1915(e)(1):(1) the plaintiff's ability to present his or her own case,(2) the complexity of the legal issues,(3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue such investigation,(4) the amount a case is likely to turn on credibility determinations,(5) whether the case will require the testimony of expert witnesses, and (6) whether the plaintiff can attain and afford counsel on his own behalf). In this case, Petitioner has demonstrated "a good understanding of the issues and the ability to present forcefully and coherently his contentions." Reese, 946 F.2d at 264 (quoting La Mere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987)). Indeed, without the assistance of counsel, Petitioner was able to draft a nineteen-page, single-spaced brief in support of his habeas petition that clearly articulates his thoughtful arguments. Furthermore, the legal and factual issues raised in the Petition are not especially complex. Moreover, Petitioner has provided the Court with no evidence that he has made any attempt to retain counsel on his own. The Court finally notes that this habeas proceeding will not require the testimony of expert witnesses. Accordingly, the interests of justice do not require the appointment of counsel in this case.

been appointed by the state court to represent Petitioner on his collateral appeal under the PCRA.[4] In the motion, Petitioner contends that Dugan has admitted that, contrary to statements made in her "no merit" letter, she did not communicate with Petitioner about the issues raised in his PCRA appeal or otherwise receive information from him about his case before filing the "no merit" letter with the PCRA court. Petitioner maintains that the PCRA court's decision to dismiss his petition, which he assumes was based exclusively on Dugan's "no merit" letter, has been called into question by this newly discovered evidence. The docket confirms that the Magistrate Judge did not rule on Petitioner's newly discovered evidence motion prior to the filing of the Report and Recommendation. Accordingly, the Court has considered the merits of Petitioner's newly discovered evidence motion in the first instance.

As an initial matter, the Court observes that the "newly discovered evidence" cited by Petitioner far from establishes that Dugan made the admissions attributed to her by Petitioner. To support his contentions that Dugan filed a misleading "no merit" letter, Petitioner cites language from an appellate brief filed by Dugan in a malpractice suit that he brought against her.

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[4] Under Pennsylvania law, court-appointed PCRA counsel will be permitted to withdraw from the case upon submission of, inter alia, a "no merit" letter explaining why the issues sought to be raised by the PCRA petitioner are without merit. Commonwealth v. Finley, 550 A.2d 213, 215 (Pa. Super. Ct. 1988).

Specifically, the brief states that "Attorney Dugan asserted that she had reviewed Plaintiff's claims as well as the Post-Conviction Relief Act and concluded that Mr. Wheeler had no cognizable claim for relief." (Ex. to Newly Disc. Evid. Mot.) It appears that Petitioner dubiously assumes that Attorney's Dugan failure to specifically note in her brief that she communicated with him before filing the "no merit" letter constitutes an admission that she, in fact, did not. Moreover, Petitioner's presumption that the PCRA court solely relied on Dugan's "no merit" letter in dismissing his PCRA petition is even more doubtful, as Pennsylvania law requires PCRA courts to independently review the record before granting a withdrawal request by PCRA counsel and dismissing the petition. See Finley, 550 A.2d at 215 (setting forth requirements for withdrawal and dismissal). Indeed, the order by Judge Joseph of the Philadelphia Court of Common Pleas denying Petitioner's appeal of its dismissal of his PCRA petition states that "[t]his Court carefully reviewed the record and the letter prepared by counsel . . . ." (Resp. Ex. C) (emphasis added). However, even if the PCRA court had erred by relying solely on the "no merit" letter, errors in PCRA proceedings are not cognizable on habeas review. See Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998)("[T]he federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's

conviction; what occurred in the petitioner's collateral proceeding does not enter into a habeas calculation."). As the introduction of the newly discovered evidence cannot have any bearing on this Court's resolution of the instant habeas petition, Petitioner's objection is overruled.

B. Procedural Default

1. Exhausted claims

In his habeas petition, Petitioner raises a number of claims that the state courts declined to review on the merits because of procedural infirmities. It is well-established that federal courts are precluded from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state law that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). It is equally well-settled that a state prisoner's federal habeas petition should be dismissed if the prisoner has failed to exhaust any available state remedies. Id. at 731. Exhaustion principles are implicated when the independent and adequate state ground is a state procedural default, as "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." Id. at 732. A habeas petitioner who has procedurally defaulted his federal claims in state court technically satisfies the exhaustion requirements since

there are no longer any state remedies available to him. Id. However, the independent and adequate state ground doctrine prevents habeas petitioners from relying on this technical exhaustion to overcome the state procedural default, thereby ensuring that "the State's interest in correcting their own mistakes is respected in all federal habeas cases." Id. The Court of Appeals for the Third Circuit ("Third Circuit") has stated that the independent and adequate state ground doctrine applies only if "(1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions." Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996). Under the third prong, the state procedural rule must have been "firmly established and regularly followed" as of the date on which the procedural default occurred. Id. (quoting Ford v. Georgia, 498 U.S. 411, 423-24 (1991)).

In this case, the state court relied on Pennsylvania's waiver rule in rejecting claims H, I, J, K, L, M, and N of the Petition. Section 9544(b) of the PCRA provides in unmistakable terms that PCRA courts are barred from reviewing issues that "the petitioner could have raised . . . but failed to do so before trial, at trial, during unitary review, on appeal or in a prior postconviction proceeding." 42 Pa. C.S.A. § 9544(b). Petitioner first presented

claims H, I, J, K, L, M, and N in his PCRA appellate brief to the Superior Court. The court deemed these claims waived and, consequently, unreviewable. See Commonwealth v. Wheeler, No. 621 EDA 1999, at 3 n.2 ("In his pro se brief to this Court, [Petitioner] lists several other issues which were not included in his [PCRA] petition [such as] merger of sentences, misconduct by the prosecution, and various other errors by the PCRA court and counsel. We do not consider these issues."). Petitioner does not dispute that the state appellate courts refused to review claims H, I, J, K, L, M, and N on the merits. Furthermore, the waiver rule set forth in these provisions had been regularly applied by Pennsylvania courts at the time of the filing of Petitioner's PCRA appeal. See, e.g., Commonwealth v. Appel, 689 A.2d 891, 898 (Pa. 1997) (noting that waiver is applied where petitioner could have raised issue before trial, at trial, on appeal or in a prior post-conviction proceeding); Commonwealth v. Stark, 698 A.2d 1327, 1329 (Pa. Super. Ct. 1997)(same). Accordingly, federal review of claims H, I, J, K, L, M and N is barred by this state procedural default.

The state court relied on the PCRA's previous litigation rule in rejecting Petitioner's sufficiency of evidence arguments contained in claims F and P. Section 9544(a) of the PCRA states in unmistakable terms that an issue is considered previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the

issue." 42 Pa. C.S.A. § 9544(a). In refusing to consider claims F and P on PCRA review, the Superior Court correctly observed that these claims were "addressed in the direct appeal and is therefore previously litigated." Commonwealth v. Wheeler, No. 621 EDA 1999, at 3 n.2.[5] Petitioner does not dispute that the state appellate courts refused to review claims F and P on the merits. Furthermore, the previous litigation rule set forth in these provisions had been regularly applied by Pennsylvania courts at the time of the filing of Petitioner's PCRA appeal. Commonwealth v.

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[5] Petitioner set forth two claims on direct appeal: "[1] The Suppression Court committed reversible error in failing to suppress [Petitioner's] statement [to police] which was taken in violation of the six hour rule, [2] The Trial Court committed reversible error in returning verdicts of guilty on all four charges as the Commonwealth's evidence showed only that [Petitioner] was present at the scene of the crime." (Notice of Appeal, 6/30/95.) The Pennsylvania Superior Court construed Petitioner's sufficiency of the evidence claim as being contingent upon a finding of suppression court error in failing to suppress Petitioner's statement to the police. See Commonwealth v. Wheeler, No. 2455 Phila. 1994, at 5 ("[Petitioner] contends that, without his statement, the evidence was insufficient to support his convictions."). It is unclear whether the sufficiency of the evidence claims in Petitioner's habeas petition (claims F and P) encompass the additional argument that the evidence adduced at trial was insufficient to convict Petitioner on all four counts even if his statements to the police were not excluded from the trial court record. To the extent that either claim F or P sets forth a properly preserved sufficiency of the evidence argument that was not addressed by the state courts, the Court concludes that any such claim is without merit. The Court's comprehensive review of the trial court record confirms the detailed findings by the Magistrate Judge that the evidence adduced at Petitioner's trial - which included evidence of his statements to the police - was sufficient to convince a rational juror beyond a reasonable doubt that Petitioner was guilty of all four counts. See Report, at 16-18.

Lark, 698 A.2d 43, 47 (Pa. 1997) (declining to address previously litigated issue on merits); Commonwealth v. Morris, 684 A.2d 1037, 1044 (Pa. 1996)(same); see also Laird v. Horn, 159 F.Supp. 2d 58, 76 (E.D. Pa. 2001)(noting that previous litigation rule may serve as independent and adequate state ground barring federal habeas review). Accordingly, federal review of claims F and P is barred by this state procedural default.

The state court also relied on the PCRA's procedural provisions in rejecting claims D(1) and D(3) of the Petition. Section 9543 of the PCRA states in unmistakable terms that to be eligible for PCRA relief, a petitioner "must plead and prove by a preponderance of the evidence" four independent elements. 42 Pa. C.S.A. § 9543. Under the second element, which is articulated in subsection (a)(2), a petitioner must sufficiently demonstrate that his conviction resulted from one or more of the circumstances exhaustively listed thereunder. In refusing to consider claims D(1) and D(3) on PCRA review, the Pennsylvania Superior Court observed that "[a] claim of ineffectiveness for failing to raise a speedy trial issue used to be cognizable under former PCRA under § 9543(a)(2)(v). This particular subsection, i.e., (a)(2)(v), has been deleted from the new act."[6] Commonwealth v. Wheeler, No. 621

[6] In claim D(3) of the Petition, Petitioner asserts that trial counsel was ineffective for "failing to communicate with [Petitioner] in hope of preparing a defense for trial and for failing to file his own motion to dismiss the case pursuant to [Pennsylvania's speedy trial statute]" (emphasis added). The

EDA 1999, at 4 (internal citation omitted). Petitioner does not dispute that the state appellate courts refused to review claims D(1) and D(3) on the merits. Furthermore, during the entire pendency of Petitioner's PCRA appeal,[7] it was well-settled under Pennsylvania law that an ineffectiveness claim based on counsel's failure to pursue a speedy trial motion was not cognizable under any of the other (a)(2) subsections of § 9543. See, e.g., Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988); Commonwealth v. Dukeman, 565 A.2d 1204, 1206 (Pa. Super Ct. 1989).[8]

Court finds that the independent and adequate state ground doctrine is applicable to Petitioner's claim in D(3) to the extent that D(3) asserts an ineffectiveness claim based on counsel's failure to file a speedy trial motion. Inasmuch as D(3) relates to counsel's ineffectiveness for failing to communicate with Petitioner in preparing for trial, the claim will be addressed by this Court on the merits.

[7] Following the denial of the Petitioner's Petition For Allowance of Appeal from Superior Court on June 6, 2000, the Pennsylvania Supreme Court held in another case that § 9543(a)(2)(ii) encompasses "all constitutionally-cognizable claims of ineffective assistance of counsel . . . ." Commonwealth ex. rel. Dadario v. Goldberg, 773 A.2d 126, 130 (Pa. 2001). Relying on Dadario, in 2002 the Pennsylvania Superior Court explicitly held that an ineffectiveness claim based on counsel's failure to pursue a speedy trial motion is cognizable under the PCRA statute, overruling past precedent to the contrary. Commonwealth v. Prout, 814 A.2d 693, 695 (Pa. Super. Ct. 2002). As Petitioner's PCRA appeal was no longer under review by the state courts on the date of the Dadario decision, the pronouncements therein were not retroactively applied to Petitioner by the state courts.

[8] After observing that claim D(1) was not cognizable on PCRA review, the Superior Court stated that "[m]oreover, the reason the trial court denied the rule 1100 motion was that [Petitioner] was unavailable, on trial elsewhere, during the specified time period." Commonwealth v. Wheeler, 621 EDA 1999, at 4. Even if the Superior Court technically reached the merits of claim D(1) by virtue of its

Accordingly, federal review of claims D(1) and D(3), inasmuch as claim D(3) relates to trial counsel's failure to raise a speedy trial claim, is barred by this state procedural default.

The state court also relied the PCRA's procedural provisions in rejecting claim (D)(2) of the Petition. Specifically, the Superior Court held that Petitioner's ineffectiveness claim based on counsel's waiver of the arraignment and preliminary hearing was not cognizable on PCRA review because "[t]he purpose of the PCRA is to provide relief for persons convicted of crimes they did not commit and persons serving illegal sentences. The only non-sentencing issues that are cognizable under the PCRA are those alleging a violation that resulted in an unreliable verdict." Commonwealth v. Wheeler, No. 621 EDA 1999, at 3 (internal citations omitted). Petitioner does not dispute that the state appellate courts refused to address claim D(2) on the merits. Furthermore, during the entire pendency of Petitioner's PCRA appeal, it was well-settled under Pennsylvania law that ineffectiveness claims based on counsel's pretrial conduct was not cognizable on PCRA

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inclusion of this additional statement, an alternative ruling on the merits does not foreclose application of the independent and adequate state ground doctrine. See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989)("[A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.")(emphasis in original).

review.[9] See, e.g., Commonwealth v. Neal, 713 A.2d 657, 661 (Pa. Super. Ct. 1998)(holding that ineffectiveness claims based on pretrial matters are not cognizable under PCRA); Commonwealth v. Lassen, 659 A.2d 999, 1007 (Pa. Super. Ct. 1995)(holding that claims relating to counsel's stewardship in pretrial matters are not cognizable under PCRA and citing extensive case law). Accordingly, federal review of claim D(2) is barred by this state procedural default.

2. Unexhausted claim

In order to exhaust the available state court remedies with respect to a claim, a petitioner must fairly present all the claims that he will make in his habeas corpus petition in front of the highest available state court, including courts sitting in discretionary appeal. O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). Thus, "[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court

[9] As discussed above, supra note 4, any modification of Pennsylvania law effected by the pronouncements of Pennsylvania Supreme Court's in Dadario had no bearing on the Petitioner's PCRA appeal, which was no longer under review by the state courts at that time.

as will be employed in the federal court." Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1231 (3d Cir. 1992). The burden of establishing that a habeas claim was fairly presented in state court falls upon the petitioner. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . . ." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). Procedural default bars federal review of those claims precluded by state law. Coleman, 501 U.S. at 729.

On his counseled direct appeal in state court, Petitioner asserted that the "[t]he suppression court committed reversible error in failing to suppress [Petitioner's] statement which was taken in violation of the six hour rule."[10] (Notice of Appeal, 6/30/95.) Although Claim O in the Petition states the issue in

[10] The six-hour rule was originally set forth in Commonwealth v. Davenport, 370 A.2d 301 (Pa. 1977), wherein the Pennsylvania Supreme Court held that "[i]f the accused is not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment shall not be admissible at trial." Id. at 306. The Pennsylvania Supreme Court subsequently modified the six-hour rule in Commonwealth v. Duncan, 525 A.2d 1177 (Pa. 1987), stating "[i]f the statement is obtained within the six hour period, absent coercion or other illegality, it is not obtained in violation of the right of an accused and should be admissible, [and] only statements obtained after the six hour period has run should be suppressed on the basis of Davenport." Id. at 1182-83.

identical terms, the brief accompanying his Petition further argues that the suppression court's decision violated his "constitutional right against self-incrimination, due process, and the equal protection of the law." (Pet. Brief, Claim O.) There is no indication in the state records that the claim presented by Petitioner on his direct appeal in state court included this additional federal constitutional component. As the state courts were never "fairly presented" with the federal constitutional component of Claim O, this claim is unexhausted.[11] Petitioner cannot return to the state courts to file a successive PCRA petition on his unexhausted claim, however, because the one-year statute of limitations for such petitions has expired. See 42 Pa. Cons. Stat. § 9545(b)(1).[12] As Petitioner's judgment became final

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[11] To the extent the Claim O asserts that the suppression court erred as a matter of state law, the claim does not state a cognizable basis for federal habeas relief. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.")(citations omitted).

[12] Section 9545(b)(1) provides, in pertinent part:

> Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and petitioner proves that:
>
> (i) the failure to raise such a claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of the United States;

in 1997, any attempt to file for relief in the state courts would be well beyond the one-year statute of limitations. Moreover, Petitioner has not alleged, not would the state court likely find, that any of the three exceptions to the PCRA statute of limitations apply in this instance. Accordingly, federal review of claim O is barred by this procedural default.

3. Exceptions to procedural default

Where a state prisoner has procedurally defaulted his federal claims in state court, federal habeas review of the claims is barred "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. The Magistrate Judge concluded that Petitioner failed to demonstrate cause and actual prejudice or a fundamental miscarriage of justice because of actual innocence. Although Petitioner does not dispute the Magistrate Judge's findings on the issue of cause and actual prejudice, he argues that the Magistrate Judge failed to

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> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. Cons. Stat. § 9545(b)(1).

properly consider his claim of actual innocence.

To invoke the fundamental miscarriage of justice exception, petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). To establish the requisite probability, the petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have convicted him. Schlup v. Delo, 513 U.S. 298, 329 (1995). Petitioner must "support his allegation of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence - that was not presented at trial." Id. at 324. Petitioner does not offer any new evidence, much less reliable new evidence, in support of his actual innocence claim. Instead, he contends that receipt of the documents requested in his February 4, 2002 discovery motion, which had not been decided as of his filing of Objections to the Magistrate Judge's Report and Recommendation, would enable him to satisfy his burden of showing actual innocence. As this Court has ruled in the instant memorandum that Petitioner is not entitled to production of the documents and materials requested in his February 4, 2002 discovery application, it follows that Petitioner's unsupported claim of actual innocence must be rejected. Petitioner has, therefore, failed to establish cause and actual prejudice or a fundamental miscarriage of justice sufficient

to overcome the procedural default of claims D(1), D(2), D(3), F, H, I, J, K, L, M, N, O and P. Accordingly, the Court is precluded from considering the merits of these claims.

C. Petitioner's Remaining Claims

The Court has considered the merits of Petitioner's remaining claims. Pursuant to 28 U.S.C. § 2254, federal courts may grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Since it was filed after April 24, 1996, the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214. Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). Section 2254(d)(1), as amended by AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (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.A. § 2254(d)(1).

Under the AEDPA, a state court's legal determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1). This phrase refers to the "holdings, as opposed to the dicta" of the United States Supreme Court's decisions as of the time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000). Courts look to principles outlined in Teague v. Lane, 489 U.S. 288 (1989), to determine whether a rule of law is clearly established for habeas purposes. Williams, 529 U.S. at 379-80, 412. "[W]hatever would qualify as an old rule under [the Court's] Teague jurisprudence will constitute clearly established Federal law," except that the source of that clearly established law is restricted to the United States Supreme Court. Id. at 412.

To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts initially must determine whether the state court decision regarding each claim was contrary to clearly established Supreme Court precedent. Werts v. Vaughn, 228 F.3d 178, 197 (3d Cir. 2000). A state court decision may be contrary to clearly established federal law as determined by the United States Supreme Court in two ways. Williams, 529 U.S. at 405. First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. Id. Alternatively, a state court decision is contrary to Supreme Court

precedent where the state court confronts a case with facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. Id. at 406. If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, then the court may grant habeas relief at this juncture. Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 890 (3d Cir. 1999).

If the state court decision is not contrary to precedent, the court must evaluate whether the state court decision was based on an unreasonable application of Supreme Court precedent. Id. A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. Williams, 529 U.S. at 407. A state court determination also may be set aside under this standard if the court unreasonably refuses to extend the governing legal principle to a context in which the principle should control or unreasonably extends the principle to a new context where it should not apply. Ramdass v. Angelone, 530 U.S. 156, 166 (2000); Williams, 529 U.S. at 407.

To grant a habeas corpus writ under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. Williams, 529 U.S. at 409; Werts, 228

F.3d at 197. A federal court cannot grant habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court's conclusions is insufficient to justify relief. Williams, 529 U.S. at 411; Matteo, 171 F.3d at 891. In determining whether the state court's application of the Supreme Court precedent is objectively unreasonable, habeas courts may consider the decisions of inferior federal courts. Matteo, 171 F.3d at 890.

Section 2254 further mandates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1). The presumption of correctness is rebuttable only through clear and convincing evidence. Id. Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

The district court may only grant relief on a habeas claim involving state court factual findings where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254 (d)(2); see Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001); Watson v. Artuz, No. 99Civ.1364(SAS), 1999 WL

1075973, at *3 (S.D. N.Y. Nov. 30, 1999) (listing cases). The district court must conclude that the state court's determination of the facts was objectively unreasonable in light of the evidence available to the state court. Weaver, 241 F.3d at 1030 (citing Williams, 529 U.S. at 409); Torres v. Prunty, 223 F.3d 1103, 1107-8 (9th Cir. 2000); see also Watson, 1999 WL 1075973, at *3. Mere disagreement with the state court's determination, or even erroneous factfinding, is insufficient to grant relief if the court acted reasonably. Weaver, 241 F.3d at 1030.

1. Bias of suppression court judge

Although alleged separately, claims A, B, and C in both Petitioner's PCRA and habeas petitions set forth the single issue of whether the rulings made by the suppression court judge on Petitioner's pretrial motions were rendered unconstitutional by the judge's admission that he could not impartially preside over Petitioner's trial. At the June 9, 1993 suppression hearing, Judge Arnold New of the Philadelphia Court of Common Pleas heard evidence and argument on Petitioner's motion to suppress inculpatory statements that he made to the police on the night of his arrest. During the course of the hearing, it was brought to Judge New's attention that Petitioner and his co-defendant had been recently convicted of homicide in a related trial. Before breaking for a lunch recess, Judge New denied Petitioner's suppression motion. (6/9/93 N.T. at 78). He further advised that "based upon what I

heard so far, there is no way that I can give [co-defendant] and Mr. Wheeler a fair trial. They have been interrelated to two homicides to such a degree on the motions to supression [sic]. And I notice the convictions by the juries. There is no way in my mind that I feel that I can give them a fair trial." (Id. at 80). Judge New further remarked to Petitioner and his co-defendant that "[t]here is a presumption in my mind that you are guilty based upon the elements I have heard." (Id. at 82). Upon returning from the luncheon recess, Judge New heard evidence and argument on Petitioner's pro se motion to dismiss under Pennsylvania Rule of Criminal Procedure 1100 ("Rule 1100"),[13] Pennsylvania's speedy trial provision. This motion was also denied by Judge New. Following the suppression hearing, Petitioner's case was reassigned to Judge Arthur S. Kafrissen for trial.

In addressing Petitioner's claims A, B, and C on collateral review,[14] the Pennsylvania Superior Court characterized the issue

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[13] Pennsylvania Rule of Criminal Procedure 1100, which has since been recodified as Rule 600, provides: "No defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days excluding time described [under the rule]. Any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail." Pa. R. Crim P. 600.

[14] Petitioner did not raise claims A, B, and C in the state courts on direct appeal. Under the PCRA, a claim is waived where the petitioner could have, but failed to, raise the issue on direct appeal. Commonwealth v. Wharton, 811 A.2d 978, 984 n.7 (Pa. 2002). Even though the PCRA court could have properly found that Petitioner waived claims A, B, and C by failing to raise the issues on direct appeal, the PCRA courts did not rely on this independent and adequate state procedural bar. Accordingly, review of claims

as whether "the trial judge should have recused himself because he was prejudiced against [Petitioner]." Commonwealth v. Wheeler, No. 621 EDA 1999, at 2. The court concluded that Petitioner's claim was meritless, as "[i]n fact, the [suppression court judge] announced, following a suppression hearing, that he could not act as an impartial judge in a waiver trial, because he knew too much about a related homicide trial involving [Petitioner] and a co-defendant, both of whom had been convicted by juries." Id. at 3. However, Judge New's decision to recuse himself from the trial does not resolve the question of whether his prior rulings on Petitioner's motions were decided in a neutral and detached manner. Accordingly, the Court makes a de novo determination of this issue. See Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001)("It follows that when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA . . . do not apply . . . [and] the federal habeas court must conduct a de novo review over pure legal questions and mixed questions of law and fact . . . ."). However, the factual determinations of the state court "are still presumed to be correct, rebuttable only upon a showing of clear and convincing

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A, B, and C by this Court is not precluded by the Pennsylvania waiver rule. See Holloway v. Horn, 161 F.Supp. 2d 452, 481 (E.D. Pa. 2001) (observing that habeas court is not bound by existence of state procedural bar that was not relied upon by state courts).

evidence." Id.

There is a due process right to have "a neutral and detached judge" preside over judicial proceedings. Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972); see Johnston v. Love, 940 F.Supp. 738, 774 (E.D. Pa. 1996)("Although not specifically framed as such by petitioner, petitioner's claim that the trial judge was biased raises the issue of due process"). Federal habeas review of the alleged bias of a state court judge is confined to the narrow question of whether the petitioner's right to due process has been violated. Cf. United States ex. rel. Perry v. Cuyler, 584 U.S. 644, 645 (3d Cir. 1978)("[W]e cannot [on § 2254] exercise the far broader supervisory powers that this court has over the federal district courts within our circuit."). A state judge's conduct must be "significantly adverse to defendant before it violate[s] the constitutional requirement of due process and warrant[s] federal intervention." Garcia v. Warden, Dannemora Correctional Facility, 795 F.2d 5, 8 (2d Cir. 1986). In general, the standard for evaluating whether a habeas petition alleges judicial bias amounting to a denial of due process is whether the state judge was actually biased against the petitioner. See, e.g., Margoles v. Johns, 660 F.2d 291, 296 (7th Cir. 1981)(holding that "[a] litigant is denied due process if he is in fact treated unfairly" by the judge)(emphasis added). The mere appearance or likelihood of bias will only support a due process violation where "the judge

[is] unable to hold the balance between vindicating the interests of the court and the interests of the accused." Taylor v. Hayes, 418 U.S. 488, 501 (1974); see United States v. Wilensky, 757 F.2d 594, 598 (3d Cir. 1985)(stating that proper inquiry is whether the judge's conduct "pervaded the overall fairness of the proceeding").

During the suppression hearing, Judge New conceded only that he could not impartially preside over Petitioner's waiver trial. By contrast, he never expressed any doubt that he could act in a neutral and detached fashion in deciding the motions pending before him in the suppression hearing. Judge New's admission that he could not impartially preside over Petitioner's trial was based on his preconceived notions of Petitioner's guiltiness of the charged offenses. Although this admission undoubtedly impaired Judge New's ability to act as an impartial fact-finder at trial, it does not follow that Judge New was unable to resolve Petitioner's pretrial motions, the legal outcome of which did not turn on a determination of guilt or innocence, in a neutral and detached manner. Thus, there is no evidence that Judge New's resolution of the pretrial motions was infected by actual bias against Petitioner.

Viewed in isolation, Judge New's remarks may well show an the appearance of bias that calls into question his ability to have impartially decided the pretrial motions. When properly considered in the larger context of the suppression hearing, however, the remarks were not so pervasive as to convince this Court that Judge

New was unable to hold the balance between vindicating the interests of the court and the interests of Petitioner. As Petitioner has failed to show that the Judge New's remarks rose to the level of a due process violation, habeas relief must be denied with respect to claims A, B, and C of the Petition.

2. Ineffective assistance of counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, id. at 687, and set forth a two-prong test for determining ineffective assistance of counsel. A defendant first must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. "In evaluating counsel's performance, [the Court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy,'" Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999)(quoting Strickland, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, [] it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly

deferential standard to be applied in scrutinizing counsel's performance.'" Id. (citing United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable." Id. Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Petitioner makes three claims of ineffective assistance of counsel. In claim D(3) of his Petition, Petitioner asserts that trial counsel was ineffective for failing to communicate with him in preparing for trial.[15] Although Petitioner properly preserved claim D(3) for collateral review in state court, the PCRA courts did not address this claim on the merits.[16] Accordingly, the Court

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[15] Claim D(3) also asserts that trial counsel was ineffective for failing to file a speedy trial motion. As previously discussed, the Court is precluded from reviewing this aspect of D(3), which was procedurally defaulted in state court.

[16] On collateral review, the Pennsylvania Superior Court did conclude that Petitioner had waived any ineffectiveness claim based on the failure of appellate counsel to communicate with him regarding his PCRA petition. This argument, which was set forth in claim N, is independent of Petitioner's ineffectiveness claim based on trial counsel's failure to communicate, which is set forth in

has made a de novo determination on the merits of claim D(3). Appel, 250 F.3d at 210.

In his brief to the Pennsylvania Superior Court on PCRA review, Petitioner asserted that "[a]t no point during the eighteen (18) months and eight (8) or nine (9) days [prior to trial] did counsel ask or even attempt to ask defendant anything about this crime." (PCRA Brief, at 13.) The brief submitted in support of his habeas petition alleges, in an even more conclusory fashion, that "[c]ounsel failed to communicate with the Petitioner." (Habeas Brief, Claim D(3).) Without any explanation of how the outcome of Petitioner's trial would have been different if counsel had communicated with him, however, Petitioner cannot establish prejudice sufficient to support an ineffectiveness claim. See, e.g., Biggins v. Carroll, CIV.A. No. 99-188, 2002 WL 31094810, at *7 (D. Del. 2002)(rejecting ineffectiveness claim based on counsel's lack of communication where there was no showing of prejudice). Accordingly, habeas relief must be denied with respect to claim D(3) of the Petition.

Petitioner also makes a claim of ineffectiveness of trial counsel in claim D(4), relating to an allegedly improper "deal" between the prosecution and Tony Sheppard, a witness called by the prosecution during Petitioner's trial. Sheppard, who had participated in the robbery for which Petitioner was on trial,

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claim D(3).

testified under oath that he had pleaded guilty to charges stemming from the incident and agreed to testify on behalf of the prosecution in exchange for a sentence of five years of probation. Petitioner maintains that trial counsel was ineffective for failing to challenge the propriety of this "deal" between the Commonwealth and Sheppard. On collateral review, the Pennsylvania Superior Court rejected Petitioner's claim, opining that "[g]iven Shepard's [sic] disclosure of his situation in court, [Petitioner] has failed to show that he was prejudiced thereby." Commonwealth v. Wheeler, No. 621 EDA 1999, at 4.

This ruling by the Pennsylvania Superior Court is neither contrary to, nor an unreasonable application of, federal law. The disclosure in open court of the agreement between the prosecution and Sheppard actually shielded Petitioner from potential prejudice, as it provided the trial judge with evidence critical to assessing the witness's credibility. While the failure to make a sufficient showing of prejudice is, in and of itself, fatal to Petitioner's ineffectiveness claim, the Court further observes that trial counsel's performance in these circumstances was entirely reasonable. Contrary to Petitioner's assertions, trial counsel strenuously challenged the alleged "deal" between the prosecution and Sheppard, even unsuccessfully moving for a mistrial after Sheppard testified that he "agreed to cooperate on other trials if needed." (See 6/10/03 N.T. at 108 ("Objected to, Judge. I don't

know what that means, and I'm going to have to move for a mistrial.")). Accordingly, habeas relief must be denied with respect to this aspect of claim D(4) of the Petition.

Petitioner also asserts, in claim D(4), that trial counsel was ineffective for failing to challenge an allegedly improper "deal" between Sheppard and Judge Cohen, the trial judge before whom Sheppard had pled guilty. Specifically, Petitioner maintains that Sheppard testified on the record that the Judge Cohen advised him that he would go to jail if he did not testify against Petitioner. Because the state courts did not address this particular aspect of Petitioner's properly preserved claim, this Court has made a de novo determination of this aspect of claim D(4). Appel, 250 F.3d at 210.

Under de novo review, the Court finds that trial counsel's conduct did not violate Petitioner's Sixth Amendment right to effective assistance of counsel. Contrary to Petitioner's assertions, trial counsel took pains to establish the impropriety of any "deal" between Judge Cohen and Sheppard, as evidenced by the following exchange on cross-examination of Sheppard:

> Q.: How many times have you talked to the District Attorney's Office about this case?
>
> A.: Never.
>
> Q.: Never?
>
> A.: Never.
>
> Q.: You talked to [the District Attorney] about

> it yesterday for the first time?
>
> A.: Yeah. I thought you said the District Attorney's Office.
>
> Q.: And did she tell you or you tell her that you had to testify and help the Commonwealth to convict these two men so that you could satisfy the condition of your probation?
>
> A.: I'm sure that she basically knew.
>
> Q.: She made you know that you had to come across and help convict them so that you can maintain your probation, right?
>
> A.: Yes.

(6/10/93 N.T. at 114.) In light of the efforts by trial counsel to attack Sheppard's credibility, the Court finds that Petitioner has failed to overcome the strong presumption that counsel's performance was reasonably effective under the Sixth Amendment with respect to claim D(4) of the Petition. Accordingly, habeas relief must be denied with respect to this aspect of claim D(4) of the Petition.

In claim D(5) of his Petition, Petitioner asserts that trial counsel was ineffective for failing to provide Petitioner with copies of discovery materials so that he could assist counsel in preparing for trial. Although Petitioner properly preserved claim D(5) for collateral review in state court, the PCRA courts did not address this claim on the merits. Accordingly, this Court will exercise de novo review of this claim. Appel, 250 F.3d at 210.

Petitioner alleges that he filed with the trial court a

notarized request for a copy of discovery materials on March 29, 1992. The court granted the request, and the District Attorney sent copies of the relevant documents and materials to Petitioner's trial counsel. Petitioner alleges that he then made several unsuccessful requests to his trial counsel for copies of the discovery materials. Without access to the discovery materials, Petitioner claims that he was unable to determine which witnesses he wanted to trial counsel to call at trial. However, "[t]he decisions of which witnesses to call to testify are strategic and therefore left to counsel." United States v. Pungitore, 965 F.Supp. 666, 674 (E.D. Pa. 1997). Thus, even if Petitioner would have received a copy of the requested discovery materials, trial counsel would not have been obligated to heed his suggestions on which witnesses to call at trial. Petitioner has failed to show a reasonable probability that, but for trial counsel's failure to provide him with copies of the discovery materials, the outcome of his trial would have been different. Accordingly, habeas relief must be denied with respect to claim D(5) of the Petition. See Carillo v. United States, 995 F.Supp. 587, 591 (D. V.I. 1998)(rejecting ineffectiveness claim based on counsel's failure to share discovery documents with petitioner).

2. Trial court error in denying speedy trial motion

In claim E of his Petition, Petitioner argues that the suppression court's rejection of his Rule 1100 motion violated his

constitutional right to a speedy trial.[17] Although Petitioner included this claim in his PCRA petition, the state courts did not address the claim on collateral review.[18] Accordingly, this Court has made a de novo determination on the merits of the claim. Appel, 250 F.3d at 210.

On federal habeas review, the proper inquiry for the court is whether the petitioner's federal constitutional right to a speedy trial has been violated, not whether the trial court committed error under the state speedy trial provisions. See Wells v. Petsock, 941 F.2d 253, 256 (3d Cir. 1991)("Our review of a federal habeas petition is limited to remedy deprivations of a petitioner's federal constitutional rights. We 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 a guide to implement a federal constitutional guarantee."). The

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[17] Although Petitioner brought his motion pursuant to Rule 1100, he testified at the June 9, 1993 hearing on the motion that the delay in bringing him to trial violated both his federal constitutional rights and state law. In rejecting the Rule 1100 motion, the presiding judge did not address whether Petitioner's federal constitutional rights had been infringed by the delay.

[18] Petitioner did not raise claim E in the state courts on direct appeal. Under the PCRA, a claim is waived where the petitioner could have, but failed to, raise the issue on direct appeal. Even though the PCRA courts could have properly found that Petitioner waived claim E by failing to raise the issue on direct appeal, the PCRA courts did not rely on this independent and adequate state procedural bar. Accordingly, review of claim E by this Court is not precluded by the Pennsylvania waiver rule. See fn. 14, supra.

Speedy Trial Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." In Barker v. Wingo, 407 U.S. 514, 532 (1972), the United States Supreme Court adopted a balancing test to determine whether a trial delay infringes the Sixth Amendment right to a speedy trial. The Court identified four factors be to considered in the speedy trial inquiry: the length of the delay, the validity of the reasons for the delay, whether the defendant affirmatively asserted his right, and whether the defendant was prejudiced by the delay. Id. at 530-32.

Turning first to the length of delay factor, the United States Supreme Court has observed that "[s]imply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay, since, by definition, he cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness." Doggett v. United States, 505 U.S. 647, 652 (1992). "Presumptive prejudice marks the point at which courts deem the delay unreasonable enough to trigger a Barker enquiry." Id. The delay is measured from the date of formal accusation, i.e., the earliest date of arrest, until the commencement of trial. Hakeem v. Beyer, 990 F.2d 750, 760 (3d Cir. 1993). The police arrested Petitioner on November 27, 1991, and the trial commenced on June 10, 1993, a

delay of eighteen and one-half months. A delay of eighteen and one-half months is presumptively prejudicial, requiring inquiry into the remaining Barker factors. See id. ("We have held that a 'delay of fourteen months is . . . not dispositive in and of itself, but is sufficiently lengthy to warrant an inquiry into the other facts.'")(quoting United States ex. rel. Stukes v. Shovlin, 464 F.2d 1211, 1214 (3d Cir. 1972)).

Under the second Barker factor, the reason for the delay, "deliberate attempt[s] to delay the trial in order to hamper the defense should be weighted heavily against the government." Barker, 407 U.S. at 531. Neutral reasons, such as negligence, will be weighed against the prosecution, "but less heavily absent 'any showing of bad faith or dilatory purpose by the prosecution.'" Id. at 766 (quoting Government of Virgin Islands v. Pemberton, 813 F.2d 626, 628 (3d Cir. 1987)). Conversely, "[w]hen the reason for the delay originates with the defendant or his counsel, such delay will not be considered for the purposes of determining whether the defendant's right to speedy trial has been infringed." Wells, 941 F.2d at 258. After holding a hearing on Petitioner's speedy trial motion, during which Petitioner testified on the issue, Judge New concluded: "I am accepting it based on the Quarter Sessions file that the continuance[s] reduced 237 days in which the reason for the [delay] is because [defense counsel or defendant] were unavailable, on trial elsewhere but nonetheless unavailable under

the law." (6/9/93 N.T. at 109.) This factual finding is entitled to a presumption of correctness, as it is fairly supported by the record of the hearing. See Hakeem v. Beyer, 990 F.2d 750, 767 (3d Cir. 1993) ("Findings on the cause of delay are entitled to a . . . presumption of correctness if petitioner had a fair opportunity to present his version of the events and the state's findings on the issue are fairly supported by the record."). Petitioner has offered no rebuttal evidence that is "so clear, direct, weighty and convincing as to enable the [fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

Moreover, not entirely reflected in Judge New's calculation is an additional amount of time during which Petitioner was not ready to proceed to trial. Specifically, at the June 9, 1993 hearing the prosecutor testified that he wanted to try the robbery case against Petitioner before two separate homicide cases that were also pending against Petitioner "so that [the robbery conviction] would be [an] aggravating factor[] in the homicide[] [cases]." (6/9/93 N.T. at 91.) In May 2002, the prosecutor advised Petitioner's counsel of his desire to try the robbery case first, at which point Petitioner's counsel "expressed . . . [his] wish that the robberies not be tried first," (id. at 97), as he "would be unable to try the [robbery] case any time soon." (Id. at 94.) The second homicide

case against Petitioner did not conclude until February 2003, and Petitioner's counsel was thereafter unavailable for the majority of the time leading up to the June 10, 2003 trial on the robbery charges. Moreover, there is no evidence that the prosecution made any deliberate attempts to delay the trial in order to hamper the defense or otherwise acted with an improper motive. To the contrary, as discussed above, the prosecutor "spent a considerable amount of time" unsuccessfully imploring Petitioner's counsel to proceed to trial on the robbery case sooner rather than later. (Id. at 97.) Accordingly, the second Barker factor weighs against the finding of a violation of Petitioner's Sixth Amendment right to a speedy trial.

The third Barker factor requires an inquiry into whether the Petitioner affirmatively asserted his speedy trial right in a timely and proper manner. Hakeem, 990 F.2d at 764. A habeas petitioner must demonstrate that he made a "reasonable assertion of [the] speedy trial right." Id. (quoting Pemberton, 813 F.2d at 629)). Petitioner did make several assertions of his speedy trial right prior to trial. On January 28, 1993, Petitioner filed a pro se motion with the state trial court, claiming that his case should be dismissed because of unconstitutional delay by the prosecution and Petitioner's counsel in bringing the case to trial. On March 23, 1993, Petitioner filed another pro se motion with the state trial court, again asserting that his speedy trial rights were

being violated. According to the state court records, however, Petitioner's counsel was on trial elsewhere when Petitioner filed each of his pro se motions. As Petitioner was unready for trial on the dates on which he submitted his pro se speedy trial motions, these assertions of his Sixth Amendment right carry only minimum weight. See id. ("Repeated assertions of the [speedy trial] right do not . . . balance this factor in favor of a petitioner when other actions indicate that he is unwilling or unready to go to trial."). Although Petitioner was ready to proceed to trial when asserted his speedy trial right at the June 9, 1993 pretrial hearing before Judge New, courts have given minimal weight to speedy trial assertions occurring shortly before trial. Id. (citing United States v. Kalady, 941 F.2d 1090, 1095 (10th Cir. 1991); Martin v. Rose, 744 F.2d 1245, 1252 (6th Cir. 1984)). Accordingly, while Petitioner has asserted his speedy trial right on several occasions, the circumstances surrounding those assertions detract significantly from the weight accorded to Petitioner's claim under the third Barker factor.

Under the fourth Barker factor, the Court must examine the prejudice to the Petitioner from the delay. The Third Circuit has observed that prejudice is the "most critical Barker factor." Wells, 941 F.2d at 258. Three types of prejudice can result from a pretrial delay: oppressive pretrial incarceration, the accused's anxiety and concern over the outcome of the defense, and impairment

of the defense. Id. Petitioner asserts that his eighteen and one-half months of pretrial incarceration was oppressive and caused him to experience severe anxiety.

To establish prejudice based on oppressive pretrial incarceration, a petitioner must identify "sub-standard conditions or other oppressive factors beyond those that necessarily attend imprisonment." Hakeem, 990 F.2d at 761. Petitioner contends that his pretrial incarceration was oppressive because of physical altercations he had with other inmates after refusing to have sexual intercourse with them. However, as at least one court has observed, "[g]iven that prisons cannot realistically monitor every cell at every moment, cell fights are an inevitable fact of prison life . . . ." Madrid v. Gomez, 889 F.Supp. 1146, 1269 (N.D. Cal. 1995); see also Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980)(recognizing that a "prison setting is, at best, tense . . . sometimes explosive, and always potentially dangerous")(citation omitted). In the absence of evidence that the physical altercations that Petitioner had with other inmates occurred at a level and frequency sufficient to create a pervasive risk of harm, the Court cannot conclude that Petitioner was subjected to oppressive pretrial incarceration. Moreover, while time alone may, in some cases, rise to the level of oppressive pretrial incarceration, Doggett v. United States, 505 U.S. 647, 655 (1992), credit for time served "mitigate[s] the potential oppressive

effects of . . . incarceration." Hakeem, 990 F.2d at 762 (quoting Gray v. King, 724 F.2d 1199, 1204 (5th Cir. 1984)). The state court record in this case reveals that Petitioner did receive credit for all the pretrial time he served.

Petitioner also attempts to establish prejudice based on the anxiety he allegedly experienced during his eighteen and one-half months of pretrial incarceration. To establish prejudice based on anxiety and concern over the outcome of the litigation, a petitioner must show that his anxiety extended beyond that which "is inevitable in a criminal case." Hakeem, 990 F.2d at 762 (quoting United States v. Dreyer, 533 F.2d 112, 116 (3d Cir. 1976)). Vague allegations of anxiety are insufficient to establish prejudice. Id. Instead, a petitioner must produce evidence of "psychic injury." Id. (citing Dreyer, 533 F.2d at 115-16). In his Petition, Petitioner alleges that he was "heavily sedated on psychotropic medication" during his pretrial incarceration in order to cope with anxiety. (Habeas Pet., Claim E.) During the June 9, 1993 hearing, Petitioner testified that he experienced a "substantial [amount] of anxiety and depression being away from my wife and five children, waiting to be brought to trial on these allege[d] charges" and was placed on "psychiatric medication which I am still on to this very day to deal with the anxiety." (6/9/93 N.T. at 106-107.) While Petitioner's testimony advances his prejudice claim, his showing pales in comparison to the evidence

produced by successful defendants in other cases. See, e.g., Dreyer, 533 F.2d at 116 (defendant submitted a psychiatrist report concluding that "the events of the last two years have created such pathological stress in [the defendant] over such a long time that she now has a deeply disturbed personality pattern"). In any event, whatever prejudice suffered by Petitioner under the fourth Barker factor is outweighed by the remaining Barker factors. As the eighteen and one-half month delay between Petitioner's arrest and trial did not violate Petitioner's Sixth Amendment right to a speedy trial, habeas relief must be denied with respect to claim E of the Petition.

3. Trial verdict was against the weight of the evidence

In claim G of his Petition, Petitioner argues that the trial court verdict was against the weight of the evidence. Although the Pennsylvania Superior Court concluded that Petitioner waived this claim by not including it in his PCRA petition, the Court finds that Petitioner did, in fact, include a claim in his PCRA petition alleging that the trial verdict was against the weight of the evidence. Nevertheless, a claim asserting that the trial court decision was against the weight of the evidence is not a cognizable basis for habeas relief. Harmon v. McCullough, No. 99-3199, 2000 WL 804431, at *3 (E.D. Pa. June 22, 2000)(citing Tibbs v. Florida, 457 U.S. 31, 42-45 (1982)). Accordingly, habeas relief must be denied with respect to claim G of the Petition.

IV. CONCLUSION

Following a de novo review of the Petition and Report, the Court overrules all of Petitioner's objections, adopts the Magistrate Judge's Report to the extent that it is consistent with this Memorandum, and denies the Petition. An appropriate Order follows.

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

AARON CHRISTOPHER WHEELER	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD T. VAUGHN, et al.	:	NO. 01-428

O R D E R

AND NOW, this day of January, 2004, upon careful and independent consideration of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 1) and all attendant and responsive briefing, and after review of the Report and Recommendation of the United States Magistrate Judge Carol Sandra Moore Wells, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation, and the Record before the Court, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED;**
2. The Report and Recommendation is **APPROVED** and **ADOPTED** to the extent that it is consistent with the accompanying Memorandum;
3. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED;**
4. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2); and

5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

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John R. Padova, J.