



Doc. No. 1) with prejudice and without an evidentiary hearing; and,

3. There is no probable cause to issue a certificate of appealability as Mr. Rivera has not demonstrated reasonable jurists would debate the correctness of the procedural aspects of this ruling nor has he made a substantial showing of the denial of a constitutional right.

### *Analysis*

In September and October 2011, Amilicar Rivas Rivera and several co-conspirators allegedly committed almost thirty burglaries in and around Lancaster, Pennsylvania.<sup>4</sup> On February 12, 2013, Mr. Rivera pleaded guilty before the Honorable Joseph Madenspacher to fifty-four charges stemming from the burglaries.<sup>5</sup> Represented by attorney Elizabeth Low, Mr. Rivera entered into an open plea and agreed with the Commonwealth to limit his overall exposure to the sentencing guidelines.<sup>6</sup> Attorney Low and the assistant district attorney agreed several of the sentences relating to Mr. Rivera's second degree burglary charges and attempted burglary charges would run concurrently with one another and with Mr. Rivera's first degree burglary charges.<sup>7</sup> Judge Madenspacher accepted Mr. Rivera's guilty plea and sentenced Mr. Rivera to fifteen to thirty years imprisonment.<sup>8</sup> On February 22, 2013, Mr. Rivera filed a direct appeal seeking modification of his sentence, which Judge Madenspacher denied on February 26, 2013.<sup>9</sup> Mr. Rivera did not file a direct appeal to the Pennsylvania Superior Court. Mr. Rivera's sentence

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<sup>4</sup> ECF Doc. No. 42, p. 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

became final on April 10, 2013, thirty days after Judge Madenspacher's last order on March 11, 2013.<sup>10</sup>

***Mr. Rivera's first PCRA petition.***

On February 2, 2014, Mr. Rivera *pro se* timely filed his first Post Conviction Relief Act ("PCRA") petition, claiming Attorney Low provided ineffective assistance of counsel during his guilty plea process.<sup>11</sup> On April 7, 2014, Judge Madenspacher appointed R. Russell Pugh as Mr. Rivera's PCRA counsel. In his first amended PCRA petition, Mr. Rivera alleged he plead guilty involuntarily and unknowingly based on Attorney Low's ineffective assistance of counsel. Specifically, Mr. Rivera claimed innocence on several of the burglary charges and argued Attorney Low told him the Commonwealth would withdraw those charges if he plead guilty to the remaining charges, actions the Commonwealth never took.<sup>12</sup> On April 15, 2014, Mr. Rivera filed a second amended PCRA petition clarifying his arguments on the same claims.<sup>13</sup> On July 1, 2014, Judge Madenspacher held an evidentiary hearing on Mr. Rivera's PCRA ineffective assistance of counsel claims where both Mr. Rivera and Attorney Low testified. On October 31, 2014, Judge Madenspacher denied all of Mr. Rivera's PCRA petitions.<sup>14</sup>

Mr. Rivera timely appealed Judge Madenspacher's denial of his PCRA petition to the Pennsylvania Superior Court.<sup>15</sup> On December 3, 2014, Mr. Rivera filed his statement of matters complained of upon appeal arguing the PCRA court erred by denying post-conviction relief where

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.*

his “guilty plea was conditioned on the withdrawal of certain charges against him” but the charges were never withdrawn<sup>16</sup> and Attorney Low “was ineffective in a) inducing [Mr. Rivera] to plead guilty on an unrealized promise that certain charges would be withdrawn; and b) failing to ensure that the Commonwealth performed the promise made to her client.”<sup>17</sup> On June 19, 2015, the Superior Court affirmed Judge Madenspacher’s denial of Mr. Rivera’s PCRA petition.<sup>18</sup> The same day, Mr. Rivera’s PCRA counsel Mr. Pugh advised Mr. Rivera he could file a federal *habeas* petition if Mr. Rivera chose to do so.<sup>19</sup> Instead, Mr. Rivera petitioned the Pennsylvania Supreme Court for an allowance of appeal. On December 8, 2015, the Pennsylvania Supreme Court declined review.<sup>20</sup>

***Mr. Rivera’s second PCRA denial and appeal.***

On February 1, 2016, almost two years after filing his first PCRA petition, Mr. Rivera filed his second PCRA petition. On March 11, 2016, after giving Mr. Rivera notice under Pa. R.Crim.P. 907 of its intent to dismiss Mr. Rivera’s PCRA petition as untimely, the PCRA court denied Mr. Rivera’s PCRA petition.<sup>21</sup> The PCRA court declined to give Mr. Rivera’s second PCRA petition an evidentiary hearing.<sup>22</sup>

Once again, Mr. Rivera appealed the denial of his PCRA petition to the Pennsylvania

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<sup>16</sup> *Id.* at 5-6.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> ECF Doc. No. 46-2, p. 5.

<sup>20</sup> ECF Doc. No. 42, p. 6.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.*

Superior Court.<sup>23</sup> On February 21, 2017, the Pennsylvania Superior Court denied Mr. Rivera PCRA relief. The Superior Court denied relief because Mr. Rivera failed to timely file his second PCRA petition.<sup>24</sup> On July 21, 2017, Mr. Rivera petitioned for allowance of appeal in the Pennsylvania Supreme Court.<sup>25</sup> The Pennsylvania Supreme Court has not yet ruled on Mr. Rivera's petition.

***Mr. Rivera's habeas petition.***

On January 19, 2016, Mr. Rivera petitioned for a writ of *habeas corpus* in the United States District Court for the Middle District of Pennsylvania.<sup>26</sup> Mr. Rivera plead five grounds for relief:

1. Ineffective assistance of guilty plea counsel. Counsel induced Mr. Rivera to plead guilty and failed to tell Mr. Rivera he could plead guilty on some charges and go to trial on other burglary charges. Instead, Mr. Rivera claims counsel told him the Commonwealth would withdraw on five charges if Mr. Rivera first signed the guilty plea.
2. Ineffective assistance of PCRA counsel: Mr. Rivera argues PCRA counsel failed to file effective amended PCRA petition and failed to present evidence refuting the prosecutions arguments about the plea deal. Mr. Rivera also claims his PCRA counsel made false statements in PCRA counsel's brief and ignored Mr. Rivera's wishes when appealing to the Superior Court.
3. Prosecutorial misconduct: Mr. Rivera claims the prosecutor went outside the four corners of the record and presented a fabricated burglary charge. Mr. Rivera also argues the prosecutor allowed Mr. Rivera's guilty plea counsel to give false statements while she testified.
4. Abuse of discretion: Mr. Rivera claims the guilty plea judge abused his discretion by giving false statements in his opinion, misapplying rules of criminal procedure, and construing a letter Mr. Rivera sent the court as a motion.
5. Newly discovered evidence: Mr. Rivera claims he found a newspaper article purportedly

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 7-8.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> ECF Doc. No. 42, p. 8. The district court transferred the case to this District and we referred the issues to Judge Perkin for a report and recommendation.

exonerating him of several of the burglaries.

Mr. Rivera also filed a supporting Memorandum with thirteen additional allegations:

1. Counsel deprived Mr. Rivera of a voluntary plea because she lied to him about the Commonwealth's agreement to withdraw charges if Mr. Rivera plead guilty first.
2. Counsel had no reasonable basis for failing to tell Mr. Rivera about the ability to sever some of the burglary charges.
3. Mr. Rivera believed he could sever some of the burglary charges.
4. PCRA counsel acted ineffectively by filing an amended PCRA petition adding an additional burglary claim without Mr. Rivera's permission.
5. PCRA counsel acted ineffectively by failing to object to prosecutorial misconduct arising from the prosecutor introducing allegedly fabricated police reports. Mr. Rivera also claims the admission of the police reports constitutes plain error.
6. PCRA counsel acted ineffectively by failing to object to prosecutor's speculative questions and refused to introduce documents refuting prosecutor's speculation.
7. There is a conflict of interest between PCRA counsel and Mr. Rivera.
8. Counsel (not clear which one) acted ineffectively by failing to address prejudice caused by prosecutor's statements.
9. PCRA counsel acted ineffectively by inserting a burglary charge into a PCRA brief even though PCRA counsel knew Mr. Rivera did not wish to argue the charge.
10. Prosecutor violated Mr. Rivera's due process rights by mischaracterizing Mr. Rivera's PCRA claim in referring to irrelevant burglaries "infecting the trial with unfairness."
11. Prosecutor went outside the four corners of the record by referring to several burglaries Mr. Rivera allegedly participated in.
12. Judge Madenspacher abused his discretion by directing Mr. Rivera's letter be considered a motion when Mr. Rivera claims he sent the judge a proper motion two days earlier.
13. Judge Madenspacher abused his discretion by "[making] judgment on the 735 State Street info.," even though Mr. Rivera made Judge Madenspacher aware he did not wish to claim his innocence as to the charge.

Mr. Rivera now claims Judge Perkin erred by: 1) finding Mr. Rivera's second PCRA petition untimely and thus procedurally defaulted; 2) misconstruing Mr. Rivera's PCRA petition

by blaming PCRA counsel for procedural defaulted arguments; 3) accepting guilty plea counsel's statements she never told Mr. Rivera about the Commonwealth's agreement to withdraw charges if Mr. Rivera plead guilty; 4) rejecting Mr. Rivera's alibi arguments; 5) improperly relying upon the findings of the PCRA court and Pennsylvania Superior Court; and 6) improperly rejecting an allegedly exculpatory newspaper article and eye witness alibi testimony.

We address each of Mr. Rivera's arguments in turn mindful we must conduct a *de novo* review of those portions of the report to which objections are made.<sup>27</sup> Although the standard of review for objections is *de novo*, the extent of review lies within our discretion and we may otherwise rely on the recommendations of the magistrate judge to the extent we deem proper.<sup>28</sup> For portions of the Report and Recommendation to which no objection is made, we should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."<sup>29</sup> Regardless of whether timely objections are made by a party, we may accept, not accept, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.<sup>30</sup>

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<sup>27</sup> 28 U.S.C. 636(b)(1); *Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011).

<sup>28</sup> *Koch v. Exec. Office of United States Attorneys*, No. 16-1554, 2016 WL 6948268, at \*2 (M.D. Pa. Nov. 28, 2016)(citing *Rieder v. Apfel*, 115 F.Supp.2d 496, 499 (M.D. Pa. 2000)); *United States v. Raddatz*, 447 U.S. 667, 676 (1980)).

<sup>29</sup> *Koch*, 2016 WL 6948268, at \*2 (citing Fed. R. Civ. P. 72(b), advisory committee notes; *see also Univac Dental Co. v. Dentsply Intern., Inc.*, 702 F. Supp. 2d 465, 469 (M.D. Pa. 2010); *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987)) (judges should give some review to every report and recommendation)).

<sup>30</sup> *Koch*, 2016 WL 6948268, at \*2.

**1. Judge Perkin correctly concluded Mr. Rivera's second PCRA petition is time-barred and procedurally defaulted, barring federal *habeas* review.**

Mr. Rivera argues Judge Perkin incorrectly concluded his second PCRA is untimely, unexhausted, and procedurally defaulted. He also argues Judge Perkin ignored evidence demonstrating his second PCRA is timely, and Judge Perkin erroneously determined grounds two through five of his habeas petition and grounds two through thirteen of his memorandum of law are procedurally defaulted because they are pending review by the Pennsylvania Supreme Court. Mr. Rivera is incorrect on all accounts.

The *habeas corpus* relief Mr. Rivera seeks is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), codified at 28 U.S.C. § 2254(d). Mr. Rivera’s *habeas* petition can only succeed if Mr. Rivera can show: 1) he has exhausted his claims in state court; and 2) the state court’s resolution of his claim is contrary to, or is an objectively unreasonable application of clearly established federal law.<sup>31</sup>

Mr. Rivera must present all of his claims to the Pennsylvania Superior and Supreme courts before a federal district court may entertain a *habeas* petition.<sup>32</sup> Under the federal *habeas* statute as amended by AEDPA, “we may not grant a state prisoner's petition for a writ of *habeas corpus* unless the applicant has exhausted the remedies available in the courts of the State or there is an absence of available State corrective process.”<sup>33</sup> “The exhaustion requirements ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserve the role of the state courts in protecting federally guaranteed rights.”<sup>34</sup> “[S]tate

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<sup>31</sup> 28 U.S.C. § 2254(d)(1); *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002).

<sup>32</sup> 28 U.S.C § 2254(b)(1)(A); *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

<sup>33</sup> *Mattis v. Vaughn*, 128 F. Supp. 2d 249, 256 (E.D. Pa. 2001), *aff’d*, 80 Fed. Appx. 154 (3d Cir. 2003)(citing 28 U.S.C. § 2254(b)(1)(A) and (B)(i)(internal quotations omitted)).

<sup>34</sup> *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992).

remedies must be exhausted except in unusual circumstances.”<sup>35</sup> Principles of comity “dictate that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state court should have the first opportunity to review his claim and provide the necessary relief.”<sup>36</sup>

To satisfy the exhaustion requirement, Mr. Rivera must demonstrate he “fairly presented” his claim to the state court.<sup>37</sup> He must show his federal *habeas* claim is the “substantial equivalent” of the claim he submitted to the state court.<sup>38</sup> Mere similarity of the state and federal issues is not enough.<sup>39</sup> The relevant inquiry is whether Mr. Rivera presented the same facts and legal theory in the state court as in his federal *habeas* petition.<sup>40</sup> Mr. Rivera bears the burden of proving exhaustion of all state remedies for each claim.<sup>41</sup>

We generally bar federal *habeas* review when a petitioner fails to comply with state procedural rules regarding the state court’s review of a claim.<sup>42</sup> If a petitioner fails to exhaust state remedies and the petitioner is now procedurally barred from meeting the exhaustion requirements in the state court, federal *habeas* courts will deem the claim procedurally defaulted

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<sup>35</sup> *Rose v. Lundy*, 455 U.S. 509, 515 (1982).

<sup>36</sup> *O’Sullivan*, 526 U.S. at 844-45.

<sup>37</sup> *Duncan v. Henry*, 513 U.S. 364, 365 (1995).

<sup>38</sup> *Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir. 1989).

<sup>39</sup> *Duncan*, 513 U.S. at 366.

<sup>40</sup> *Nara v. Frank*, 488 F.3d 187, 198 (3d Cir. 2007).

<sup>41</sup> *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993).

<sup>42</sup> *Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991).

because state exhaustion is no longer available.<sup>43</sup>

Once we determine a claim is procedurally defaulted, we may not review the claim unless the petitioner can demonstrate: 1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or 2) the failure to consider the claim results in a fundamental miscarriage of justice.<sup>44</sup> To show cause for a procedural default, the petitioner must show some objective, external factor prevented them from complying with the state procedural rules. To demonstrate prejudice, the petitioner must show the external factor “worked to [petitioner’s] actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.”<sup>45</sup> To show a fundamental miscarriage of justice, petitioner must demonstrate actual innocence and must show it is more likely than not a reasonable juror would not have convicted him absent the alleged error.<sup>46</sup>

A *habeas* petition can only succeed if, in addition to the state claim being exhausted, the state court’s resolution is contrary to or constituted an objectively unreasonable application of federal law. “A state court decision is contrary to clearly established federal law if the state court (1) contradicts the governing law set forth in the [Supreme] Court’s cases or (2) confronts a set of facts that are materially indistinguishable from the decision of the [Supreme] Court and nevertheless arrives at a [different] result.”<sup>47</sup> A state court decision involves an unreasonable application of clearly established federal law if the state court identifies the correct governing rule

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<sup>43</sup> *Id.* at 735 n.1.

<sup>44</sup> *Id.* at 750.

<sup>45</sup> *Murray v. Carrier*, 477 U.S. 487, 494 (1986).

<sup>46</sup> *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

<sup>47</sup> *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004)(internal quotations and citations omitted).

but unreasonably applies it to the facts of the case or unreasonably extends the legal principle to a context where it does not apply.<sup>48</sup> An objectively unreasonable application requires the state court decision be both incorrect *and* unreasonable.<sup>49</sup> State court factual determinations are given considerable deference under the AEDPA.<sup>50</sup> A petitioner must establish the state court adjudication of their claim “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.”<sup>51</sup>

Mr. Rivera argues his second PCRA is timely because according to the AEDPA, he has one year from the date on which his sentence becomes final to seek *habeas* review.<sup>52</sup> He calculates the final-sentence date as March 28, 2013.<sup>53</sup> Mr. Rivera correctly states, as Judge Perkin did, he timely filed his first PCRA petition. Mr. Rivera also correctly notes the Pennsylvania Supreme Court denied his first PCRA petition on December 8, 2015. Mr. Rivera correctly argues he could only file one PCRA petition at a time. Mr. Rivera claims his first PCRA tolled the one-year state PCRA deadline to file a subsequent PCRA petition, giving him until December 2016 to file his second PCRA petition. Mr. Rivera correctly notes he filed his second PCRA petition on January 27, 2016. All would be well for Mr. Rivera, except he confuses federal AEDPA law and Pennsylvania PCRA law.

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<sup>48</sup> *Id.*

<sup>49</sup> *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)(emphasis added).

<sup>50</sup> *Lambert*, 387 F.3d at 239.

<sup>51</sup> 28 U.S.C. § 2254(d)(2).

<sup>52</sup> ECF Doc. No. 46, p. 2-3.

<sup>53</sup> Judge Perkin calculated Mr. Rivera’s final sentence date as April 10, 2013. Regardless which date is used, Mr. Rivera’s second PCRA is untimely as he filed it three years later in January 2016.

Pennsylvania's PCRA law is unlike the federal AEDPA. Under the AEDPA, a properly filed state PCRA petition tolls AEDPA's one-year deadline to file a federal *habeas* petition while the state PCRA petition is pending.<sup>54</sup> But the AEDPA's federal tolling provision "has no effect on the time limitation set forth under the Pennsylvania PCRA."<sup>55</sup> To be timely, a state PCRA petition, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final [.]"<sup>56</sup> "[T]he period for filing a PCRA petition is not subject to the doctrine of equitable tolling" except for three, narrow exceptions.<sup>57</sup> A PCRA petition may be filed outside of the one year limit only upon showing: 1) governmental interference in violation of state or federal constitutions caused the delay; 2) newly discovered evidence advances the petitioner's claim; and, 3) the Supreme Court or Pennsylvania Supreme Court recognizes a new constitutional right not available to the petitioner at the time of the petition and applies retroactively.<sup>58</sup> PCRA petitions filed in Pennsylvania after the one year deadline may not be exhausted by the state courts because they are too late. Because these late PCRA claims cannot be exhausted, they become procedurally defaulted and may not be reviewed as *habeas* petitions by the federal district court.<sup>59</sup>

Mr. Rivera's second PCRA petition is untimely because he did not file it within the one year deadline required by 49 Pa.C.S. § 9541. Mr. Rivera argues his first PCRA petition tolled the

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<sup>54</sup> *Lawrence v. Florida*, 549 U.S. 327 (2007)(citing 28 U.S.C. 2244(d)(2)).

<sup>55</sup> *Lewis*, 63 A.3d at 1278.

<sup>56</sup> *Id.* (citing 42 Pa.C.S. § 9545(b)(1)). A judgment is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3).

<sup>57</sup> *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999).

<sup>58</sup> 42 Pa.C.S. § 9545(b)(1).

<sup>59</sup> *See Mattis v. Vaughn*, 128 F. Supp. 2d 249, 256 (E.D. Pa. 2001).

statute of limitations for all subsequent PCRA petitions while his first petition wound its way through the Pennsylvania appellate system. Mr. Rivera is incorrect. While his first PCRA tolled the statute of limitations for a federal *habeas* petition under AEDPA, it did nothing to toll the one year deadline for filing *all* of Mr. Rivera's Pennsylvania PCRA petitions. Mr. Rivera's sentence became final on March 28, 2013, meaning he had until March 28, 2014 to file all his PCRA petitions. When Mr. Rivera filed his second PCRA petition in January 2016, the one year PCRA deadline had long since passed. Both the Lancaster County PCRA court which initially reviewed Mr. Rivera's second PCRA petition and the Pennsylvania Superior Court found Mr. Rivera's second PCRA petition untimely and declined to rule on it. This leaves Mr. Rivera's second PCRA petition unexhausted. Because Mr. Rivera's second PCRA claim is unexhausted, Judge Perkin correctly recommended we deny it as untimely and procedurally defaulted.<sup>60</sup>

Mr. Rivera also argues Judge Perkin improperly disregarded evidence demonstrating Mr. Rivera filed his second PCRA petition on January 19, 2016.<sup>61</sup> Mr. Rivera argues he provided Judge Perkin with three separate documents proving he mailed both his federal *habeas* petition and his second PCRA petition on January 19, 2016. Mr. Rivera claims the mailbox rule saves his *habeas* petition because he claims he mailed his petition within the one-year deadline. Even if Mr. Rivera did mail his second PCRA petition on January 19, 2016, Judge Perkin correctly finds Mr. Rivera's second petition falls far outside the one-year deadline to file his PCRA petitions. Mr. Rivera's second PCRA petition is untimely and procedurally defaulted regardless of the date he mailed it in January, 2016.

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<sup>60</sup> Judge Perkin also analyzed whether Mr. Rivera exhausted any claim in his second PCRA petition and could be presented in Mr. Rivera's *habeas* petition, although Mr. Rivera does not object on these grounds. Judge Perkin found Mr. Rivera exhausted his ineffective assistance of counsel claim because it is identical to the ineffectiveness claim in his first PCRA petition. Judge Perkin also found Attorney Low acted effectively during the guilty plea.

<sup>61</sup> ECF Doc. No. 46, p. 5.

Lastly, Mr. Rivera argues Judge Perkin prematurely found counts two through five of his *habeas* petition and counts two through thirteen of his memorandum are unexhausted because Mr. Rivera asserts his second PCRA petition is pending before the Pennsylvania Supreme Court.<sup>62</sup> Mr. Rivera argues he must present his PCRA claims to the Pennsylvania Supreme Court before we may entertain his *habeas* petition. Mr. Rivera argues because his second PCRA petition is still pending before the Pennsylvania Supreme Court, Judge Perkin prematurely found all but his first count unexhausted. Mr. Rivera would have us wait until the Pennsylvania Supreme Court ruled on his PCRA petition to do so.

Mr. Rivera loses either way. Under Pennsylvania Supreme Court Order No. 218, PCRA petitions are removed from the Court's discretionary review, making review unavailable.<sup>63</sup> This denial of review means a PCRA petitioner exhausts state appeal rights once the Pennsylvania Superior Court denies their PCRA petition, giving a petitioner the right to file a federal *habeas* petition. Mr. Rivera's second PCRA claim sits before the Pennsylvania Supreme Court. But under Supreme Court Rules, his federal *habeas* petition is proper and not premature. Even if we were to find Judge Perkin prematurely ruled on his *habeas* petition, it would be because he has not exhausted his state appellate rights, making his entire *habeas* petition improper.

**2. Judge Perkin properly found Mr. Rivera's ineffectiveness arguments are directed at PCRA counsel and not guilty plea counsel.**

Mr. Rivera argues Judge Perkin improperly construed his arguments for guilty plea counsel's ineffectiveness as to arguments for PCRA counsel's ineffectiveness.<sup>64</sup> "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction

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<sup>62</sup> *Id.*, p. 6.

<sup>63</sup> *Id.*

<sup>64</sup> ECF Doc. No. 46, p. 8.

proceedings shall not be a ground for relief in a proceeding arising under section 2254.”<sup>65</sup> Judge Perkin found Mr. Rivera “appears to assign blame for the failure to exhaust many if not all [of his PCRA] claims on PCRA counsel.”<sup>66</sup> Mr. Rivera objects. Mr. Rivera attempts to conflate the unreviewable alleged mistakes of his PCRA counsel with the alleged mistakes of his guilty plea counsel. Mr. Rivera claims his PCRA counsel failed to correct the mistakes of guilty plea counsel by not exhausting Mr. Rivera’s state remedies which led to procedural default.<sup>67</sup> However, Mr. Rivera fired his guilty plea counsel soon after his plea and employed PCRA counsel during his appeal. Only PCRA counsel could have exhausted Mr. Rivera’s options for state relief. Mr. Rivera’s claim for relief is based not on the alleged error of guilty plea counsel, but on the alleged error of PCRA counsel to exhaust all forms of state relief. Section 2254(i) denies Mr. Rivera relief for alleged ineffectiveness of PCRA counsel during state appeal. Mr. Rivera’s arguments fail.

Mr. Rivera also argues Judge Perkin improperly ignored a letter from PCRA counsel to Mr. Rivera allegedly demonstrating ineffectiveness. Mr. Rivera claims PCRA counsel acted ineffectively by sending Mr. Rivera a letter representing he exhausted his state remedies after the Pennsylvania Superior Court denied his PCRA petition. Based on Pennsylvania Supreme Court Order No. 218, PCRA counsel informed Mr. Rivera he did not need to appeal to the Pennsylvania Supreme Court, but could file a *habeas* petition upon receiving the Pennsylvania Superior Court’s denial.<sup>68</sup> Mr. Rivera argues this letter constitutes ineffective assistance of counsel, because based on PCRA counsel’s advice, he failed to exhaust his state relief and suffered procedural default.

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<sup>65</sup> 28 U.S.C.A. § 2254(i).

<sup>66</sup> ECF Doc. No. 42, p. 28.

<sup>67</sup> ECF Doc. No. 46, p. 8.

<sup>68</sup> ECF Doc. No. 46-2, p. 5.

PCRA counsel correctly and effectively informed Mr. Rivera of his *habeas* rights. Pennsylvania Supreme Court Order No. 218 allows a PCRA petitioner to file a federal *habeas* petition upon receiving the Pennsylvania Superior Court's dismissal order.<sup>69</sup> The Superior Court's order exhausts the state law claim. Based on PCRA counsel's objectively correct advice, the *Strickland v. Washington* analysis is unnecessary.<sup>70</sup> Judge Perkin did not err by declining to address PCRA counsel's letter.

### **3. Judge Perkin properly analyzed guilty plea counsel's effectiveness.**

Mr. Rivera claims Judge Perkin erred by improperly accepting guilty plea counsel's testimony. Mr. Rivera argues guilty plea counsel failed to tell him he could plead guilty to some burglaries and go to trial on others.<sup>71</sup> Mr. Rivera claims guilty plea counsel deprived him of constitutionally effective counsel by admitting at the PCRA hearing she did not tell Mr. Rivera about the possibility of severing the burglary charges. Relying on the PCRA court's transcripts, Judge Perkin disagreed, and found guilty plea counsel acted properly. Judge Perkin is correct.

To prove ineffective assistance of counsel during a guilty plea, Mr. Rivera must show he pleaded guilty unintelligently and involuntarily based on his guilty plea counsel's improper advice.<sup>72</sup> "A *habeas* petitioner challenging the voluntary nature of his or her plea faces a heavy burden."<sup>73</sup> To prevail on an ineffectiveness claim under *Strickland*, a petitioner must demonstrate both: 1) their counsel "made errors so serious that counsel was not functioning as counsel guaranteed... by the Sixth Amendment; and 2) counsel's errors resulted in actual prejudice to the

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<sup>69</sup> *Mattis*, 128 F. Supp. at 261.

<sup>70</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>71</sup> ECF Doc. No. 46, p. 9.

<sup>72</sup> *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).

<sup>73</sup> *Zilich v. Reid*, 36 F.3d 317, 320 (3d Cir. 1994).

petitioner.<sup>74</sup> The petitioner must show a reasonable probability but for their counsel's "unprofessional errors," the results of the proceeding would have been different.<sup>75</sup> "Surmounting *Strickland's* high bar is never an easy task."<sup>76</sup>

It becomes even harder for a federal *habeas* petitioner to demonstrate ineffective assistance of counsel. Under the revised *habeas* statute, an ineffectiveness claim can succeed only if the state court's treatment of the ineffectiveness claim is not simply erroneous, but also objectively unreasonable.<sup>77</sup> Where a state court rejects an ineffectiveness claim, a federal court should defer to the state court's decision under 28 U.S.C. § 2254(d)(1).<sup>78</sup> "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult."<sup>79</sup> Both *Strickland* and § 2254 are highly differential to counsel. Federal habeas courts must "guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254 applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard."<sup>80</sup>

Judge Perkin properly analyzed guilty plea counsel's testimony at the PCRA hearing and correctly determined guilty plea counsel acted effectively. Mr. Rivera argued in his first PCRA his guilty plea counsel, Attorney Low, acted ineffectively by inducing Mr. Rivera to plead guilty

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<sup>74</sup> *Id.* at 687.

<sup>75</sup> *Id.* at 694.

<sup>76</sup> *Premo v. Moore*, 562 U.S. 115, 131 S.Ct. 733, 739 (2011).

<sup>77</sup> *Berryman v. Morton*, 100 F.3d 1089, 1103 (3d Cir. 1996).

<sup>78</sup> *Yarborough v. Gentry*, 504 U.S. 1, 4 (2003)(*per curiam*).

<sup>79</sup> *Premo*, 131 S.Ct. at 740 (internal citations and quotations omitted).

<sup>80</sup> *Id.*

by telling him the Commonwealth would withdraw several burglary charges if Mr. Rivera plead.<sup>81</sup> As Judge Perkin noted, Attorney Low never stated she failed to inform Mr. Rivera some of his burglary charges would be dropped if he pleaded guilty.<sup>82</sup> In fact, Ms. Low recalled trying to negotiate for their withdrawal, but the assistant district attorney told her it “was not an option.”<sup>83</sup>

At the guilty plea hearing, Judge Madenspacher told Mr. Rivera the Commonwealth would have to meet its burden at trial for each charge against him.<sup>84</sup> Mr. Rivera responded he understood. Mr. Rivera also said he understood he is entitled to a jury trial instead of pleading guilty.<sup>85</sup> At the guilty plea hearing, Attorney Low argued Mr. Rivera “was leaving behind several of what he believes are triable issues; specifically, about a dozen burglaries that there may be some chance on, in order to take responsibility for the whole.”<sup>86</sup> As Judge Perkin noted, at no time did Mr. Rivera assert his innocence or protest Attorney Low’s representations about his desire to plead guilty. Mr. Rivera never mentioned not understanding the charges against him. Mr. Rivera then pleaded guilty to all the charges.<sup>87</sup>

Mr. Rivera now claims Judge Perkin improperly considered Attorney Low’s testimony at the guilty plea hearing and the later PCRA evidentiary hearing. Judge Perkin properly evaluated Attorney Low’s testimony and concluded she acted properly. Based on a thorough review of the state court record, Judge Perkin concluded Attorney Low acted properly and had not violated

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<sup>81</sup> ECF Doc. No 46, p. 9.

<sup>82</sup> ECF Doc. No. 42, p. 22.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 26.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

either prong of *Strickland*. Judge Perkin correctly found Mr. Rivera's guilty plea is valid. Mr. Rivera objects to Judge Perkin's findings because he disagrees with the result, but cannot plausibly argue Judge Perkin is incorrect.<sup>88</sup>

#### **4. Judge Perkin properly rejected Mr. Rivera's alibi claim.**

Mr. Rivera claims Judge Perkin improperly rejected Mr. Rivera's alibi claim. Mr. Rivera argues he is innocent of several burglaries because he claims being in York, Pennsylvania when the burglaries occurred in Lancaster, Pennsylvania.<sup>89</sup> Mr. Rivera argues he sent Facebook messages proving his alibi. Mr. Rivera argues Judge Perkin improperly ignored this obvious evidence of his innocence.<sup>90</sup> Mr. Rivera is incorrect. Judge Perkin thoroughly analyzed the potentially exculpatory evidence adduced at the PCRA hearing. Judge Perkin cited the PCRA court's finding: "[Mr. Rivera's] argument mistakes evidence which may raise a reasonable doubt with evidence that wholly exonerates [him]."<sup>91</sup> Citing the PCRA court, Judge Perkin noted while Mr. Rivera had the right to present evidence of his innocence at trial, Mr. Rivera chose to forego

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<sup>88</sup> Mr. Rivera claims Attorney Low acted ineffectively because she admitted she talked to the Commonwealth about entering a plea on some counts and going to trial on others but never told Mr. Rivera. Mr. Rivera relies upon *Garcia v. United States* to support his position. Mr. Rivera provides the cite for *Garcia v. U.S.*, 2015 U.S. Dist. Lexis 92558 Civil 08-224 CCC (July 14, 2015). A thorough search reveals no such case. Mr. Rivera argues *Garcia* holds counsel acts ineffectively when counsel fails to advise their client of a guilty plea offer from the government. Mr. Rivera would have us follow *Garcia* in his case. However, in *Garcia*, counsel admitted they failed to tell their client about the government's plea offer. Guilty plea counsel in Mr. Rivera's case never admitted she failed to tell Mr. Rivera about a guilty plea offer. When asked "did you tell Mr. Rivera that you had, in fact, either via *nolle pros* or some sort of method, removed some of the counts from the guilty plea proceeding?" Attorney Low responded, "I don't think so." Notes of PCRA evidentiary hearing, July 11, 2014, pp. 6-7. Attorney Low did not admit failing to tell Mr. Rivera about a plea offer. To the contrary, Ms. Low testified she told Mr. Rivera she had been unable to work out a plea offer with the Commonwealth.

<sup>89</sup> ECF Doc. No. 46, p. 11.

<sup>90</sup> *Id.*

<sup>91</sup> ECF Doc. No. 42, p. 21 (citing the PCRA Court's October 31 2014 opinion at 4).

trial and plead guilty. “[T]he task before this court is not to evaluate the veracity of [Mr. Rivera’s] evidence. Rather, the focus of this Court is to determine whether [Mr. Rivera] was fully informed as to the nature and circumstances surrounding the plea when it was tendered.”<sup>92</sup> Mr. Rivera does not show he pleaded guilty without being fully informed. He had the opportunity to go to trial and present his evidence to a jury but chose to plead guilty instead. Mr. Rivera’s argument fails.

**5. Judge Perkin properly relied upon the opinions of the Lancaster County PCRA court and Pennsylvania Superior Court.**

Mr. Rivera claims Judge Perkin erroneously relied upon the reasoning from both the PCRA court and the Pennsylvania Superior Court.<sup>93</sup> Mr. Rivera does not state why Judge Perkin’s reliance on the state court decisions is improper. Instead, Mr. Rivera simply reiterates his arguments<sup>94</sup> concerning his innocence and ineffectiveness claims. Mr. Rivera claims Judge Perkin acted improperly by adopting the state courts’ analysis. However, Judge Perkin’s examination of the state courts’ analysis necessary to determine whether Mr. Rivera’s clearly defined federal constitutional rights were violated. As Mr. Rivera presents no evidence demonstrating why the state court’s analysis is improper, we overrule his objection to Judge Perkin’s findings.

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<sup>92</sup> *Id.*

<sup>93</sup> ECF Doc. No. 46-1, p. 1, 6.

<sup>94</sup> Mr. Rivera reiterates his claims the state court ignored evidence of his innocence including: 1) Facebook messages demonstrating his presence in York during the timeframe of burglaries in Lancaster; 2) his use of gloves for burglaries when police found fingerprints at a burglary scene; 3) repeated arguments concerning Attorney Low’s ineffectiveness during the guilty plea; and 4) deficiencies relating to the guilty plea form itself. Mr. Rivera simply disagrees with the state courts’ rulings but provides no evidence or argument demonstrating their error. Judge Perkin properly relied upon the state court decisions.

**6. Judge Perkin properly rejected Mr. Rivera's allegedly exculpatory newspaper evidence.**

Mr. Rivera contends Judge Perkin improperly rejected his allegedly exculpatory evidence of a newspaper article describing several burglaries in Lancaster city around the time he committed his crimes.<sup>95</sup> Judge Perkin correctly noted Mr. Rivera's claim is procedurally defaulted and not cognizable.<sup>96</sup>

To the extent Mr. Rivera attempts to argue discovery of the newspaper article constitutes newly discovered evidence so as to make his second PCRA timely, both Judge Perkin and the Pennsylvania Superior Court rejected his argument.<sup>97</sup> Mr. Rivera had to file all his PCRA claims by March 2014.<sup>98</sup> Mr. Rivera claims he found the article on August 13, 2015. However, Mr. Rivera did not file his petition until February 1, 2016.<sup>99</sup> Although newly discovered evidence is one of three exceptions to the one-year PCRA statute of limitations, Pennsylvania law requires a PCRA petitioner to file the new PCRA petition disclosing all newly discovered evidence within sixty days of discovery.<sup>100</sup> Failure to file a new PCRA petition disclosing the new evidence within the sixty day window results in a waiver of the tolling period.<sup>101</sup> Mr. Rivera failed to file his second PCRA petition within sixty days of allegedly finding the newspaper article. His second PCRA petition is untimely and remains procedurally defaulted.

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<sup>95</sup> ECF Doc. No. 46-1, p. 7.

<sup>96</sup> ECF Doc. No. 42, p. 36-37.

<sup>97</sup> *Id.*

<sup>98</sup> ECF Doc. No. 42, p. 27, n.9.

<sup>99</sup> *Id.* at 37.

<sup>100</sup> 28 Pa.C.S. § 9545(b)(2); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783 (Pa. 2000).

<sup>101</sup> *Id.*

Even so, Judge Perkin analyzed Mr. Rivera's claim and correctly dismissed it. Mr. Rivera never explains how the newspaper article helps him, although Judge Perkin speculated Mr. Rivera attempted to infer others committed some of the charged crimes. The newspaper article described burglars who were charged for committing daytime burglaries.<sup>102</sup> Mr. Rivera admitted he only committed nighttime burglaries.<sup>103</sup> Judge Perkin properly disregarded the newspaper article.

### *Conclusion*

Judge Perkin properly analyzed the state court proceedings as well as Mr. Rivera's exhausted and non-exhausted *habeas* claims. Mr. Rivera has not shown why any of Judge Perkin's extensive well-reasoned recommendations are incorrect. Following our independent review, we dismiss Mr. Rivera's petition for *habeas corpus* relief and deny a certificate of appealability as there is no probable cause to issue a certificate of appealability as Mr. Rivera has not demonstrated reasonable jurists would debate the correctness of the procedural aspects of this ruling nor has he made a substantial showing of the denial of a constitutional right.<sup>104</sup>

  
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KEARNEY, J.

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<sup>102</sup> ECF Doc. No. 42, p. 37.

<sup>103</sup> *Id.*

<sup>104</sup> See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).