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

WILLIAM PRICE, Petitioner,	)	
vs	)	Civil Action No. 09-783
KENNETH R. CAMERON, et al., Respondents.	)	Magistrate Judge Mitchell

MEMORANDUM OPINION AND ORDER

Petitioner, William Price, an inmate currently incarcerated at the State Correctional Institution (SCI) Retreat, Pennsylvania,[1] brings this habeas corpus action pursuant to 28 U.S.C. § 2254, challenging his convictions on charges of rape, aggravated indecent assault, indecent assault, incest and corruption of minors, and the sentence of 11½ to 30 years of incarceration, imposed by the Court of Common Pleas of Fayette County, Pennsylvania on November 10, 2003 at Criminal Action No. 761 of 2002. For the reasons that follow, the petition will be denied and a certificate of appealability will be denied.

Procedural History

On August 4, 2003, Petitioner proceeded to trial before the Honorable Ralph C. Warman. (Am. Answer Ex. 17.)[2] He was represented by Assistant Public Defender Mary Campbell Spegar and the Commonwealth was represented by Assistant District Attorney Jack R. Heneks, Jr. On August 8, 2003, the jury found Petitioner guilty of charges of rape, aggravated indecent assault,

[1] When Petitioner filed this case in 2009, he was incarcerated at SCI Cresson and the warden was Kenneth Cameron. This facility closed in 2013. When he filed Civ. A. No. 16-117 on January 28, 2016, he was incarcerated at SCI Albion and the warden was Nancy Giroux. His current place of incarceration is SCI Retreat. The Superintendent of SCI Retreat is Vincent Mooney. It is not necessary to amend the caption of the case to reflect this information.
[2] ECF No. 73.

indecent assault, incest and corruption of minors. (Am. Answer Ex. 1.) He was found not guilty of an additional charge of IDSI forcible compulsion and a charge of rape forcible compulsion was either quashed or dismissed. (Am. Answer Ex. 15B at 2.) On November 10, 2003, following a hearing (Am. Answer Ex. 19), he was found not to be a sexually violent predator, but he was sentenced to 11½ to 30 years of incarceration. (Am. Answer Ex. 3.)

Petitioner filed an appeal in the Pennsylvania Superior Court, which was docketed at No. 2191 WDA 2003. He raised the following issues:

> 1. Whether the court erred in denying defense motion to sequester witnesses?
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> 2. Whether the court erred in disallowing defense attorney to call Trooper Robert Newton of Pennsylvania State Police to explain [Petitioner's] whereabouts during the time the alleged assault was occurring?
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> 3. Whether the court erred in not instructing the jury on the victim's failing to make prompt complaint?
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> 4. Whether the evidence presented by the Commonwealth was insufficient to sustain the verdicts?
>
> 5. Whether [Petitioner's] sentence is excessive?

(Am. Answer Ex. 4.)[3]

On April 29, 2004, the trial court issued an opinion pursuant to Pa. R. App. P. 1925 upholding the judgment of sentence. (Am. Answer Ex. 2.) On May 9, 2005, the Superior Court affirmed the judgment of sentence. (Am. Answer Ex. 5.) He did not seek review in the Pennsylvania Supreme Court.

Petitioner filed a timely pro se motion under the Post Conviction Relief Act, 42 Pa. C.S. §§ 9541-46 (PCRA) on February 21, 2006. (Am. Answer Ex. 6.) Although Patrick McDaniel

[3] The Superior Court indicated that, in addition to these five issues raised by counsel before withdrawing, Petitioner raised other issues in his Pro Se Statement of Questions, which the court considered (Am. Answer Ex. 5 at 2 n.7.) These issues will be discussed below.

was appointed as his counsel on May 12, 2006 (Answer Ex. 7),[4] he filed a pro se supplemental petition on July 21, 2006. (Am. Answer Ex. 7.)

A hearing was held on December 11, 2006. (Answer Ex. 9A.) By order dated January 4, 2007, Judge Warman directed that the record remain open for four weeks for a review of the pending forensic DNA issues by Petitioner's experts. (Answer Ex. 9.)

The four-week period elapsed and no decision was rendered. Petitioner filed a pro se application for speedy disposition on July 5, 2007. (Answer Ex. 10.) On October 25, 2007, he filed a pro se Amended Petition, and he filed the identical document again on January 14, 2008. (Answer Exs. 11A, 11B.)

Petitioner filed additional pro se petitions on May 5, 2008, December 30, 2008 and May 11, 2009. (Answer Exs. 12A, 12B, 12C.) On October 26, 2010, he filed a memorandum of law in support of his pending petitions. (Answer Ex. 12D.)

Meanwhile, he filed a petition for writ of habeas corpus in this Court on October 26, 2009, which was docketed at No. 09-783. He raised as his first ground that he had been denied his due process rights by the trial court's 40-month delay in resolving his first PCRA petition. On November 3, 2010, the Court filed a Memorandum and Order which stated that Petitioner had been inundating the trial court with filings and that his conduct was the cause of the delay. The Court refused to waive the exhaustion requirement, denied federal habeas relief, administratively closed the case and directed Petitioner to reinstate the action upon the exhaustion of his state court remedies. (Am. Answer Ex. 8.) Petitioner filed a notice of appeal on November 17, 2010 (ECF No. 69), but on May 10, 2011, the Court of Appeals denied the

[4] The answer filed at Civ. A. No. 16-117 (ECF No. 18) is similar to the Amended Answer. Where it differs, reference will be made to the original answer.

request for a certificate of appealability (ECF No. 71).

Petitioner filed a motion on May 18, 2011 to compel the trial court to issue a decision on his PCRA petition. (Answer Ex. 15.) No response to that motion appears on the docket. (Am. Answer Ex. 15B.) On May 2, 2013, he filed a motion for independent DNA testing, but the court denied it on June 3, 2013 on the ground that he had a pending PCRA petition. (Civ. A. No. 16-117, ECF No. 19 Ex. C).

On August 14, 2013, he filed a second PCRA petition, and he filed an amended petition on December 9, 2013. (Am. Answer Ex. 9A.) On September 15, 2014, Judge Warman held a hearing and permitted Petitioner to represent himself in the PCRA proceeding. On December 4, 2014, the PCRA court issued a notice of intent to dismiss the second petition on the ground that it was untimely (Am. Answer Ex. 10)[5] and on January 21, 2015, the court dismissed the petition (Answer Ex. 18). On March 11, 2015, Petitioner filed a third PCRA petition (Am. Answer Ex. 9B). On March 19, 2015, the PCRA court issued a notice of intent to dismiss this petition as untimely. In the notice, the court stated that there had been a hearing on his first PCRA petition on January 4, 2007, which "apparently" resulted in the denial of his first PCRA petition (Am. Answer Ex. 12 at 1). On April 6, 2015, the PCRA court dismissed the third PCRA petition as untimely. In this order, the court now stated that the first petition was "decided adversely to Petitioner." (Am. Answer Ex. 13 at 1.)

Petitioner filed a notice of appeal, which was docketed at No. 613 WDA 2015. On October 2, 2015, the Superior Court filed an opinion which affirmed the dismissal of the third PCRA petition as untimely, stating that, as to the first PCRA petition, the PCRA court had "held

[5] Judge Warman, who presided at the trial and held a hearing on the first PCRA petition, retired in 2014 and Judge Wagner took over the case.

a PCRA hearing on January 4, 2007 and subsequently denied relief." (Am. Answer Ex. 14 at 2.)

On January 28, 2016, Petitioner submitted a petition to this Court. Unfortunately, the Court failed to note the previous history, assigned the case a new number (Civ. A. No. 16-117) and directed Petitioner to submit either the $5.00 filing fee or a completed motion to proceed in forma pauperis in order to proceed (ECF No. 2). Petitioner filed a motion to proceed IFP on February 23, 2016 (ECF No. 4), the motion was granted (ECF No. 6) and the petition was filed that same day (ECF No. 8).

On April 29, 2016, Respondents filed an answer to the petition (ECF No. 18), in which they argued that it should be dismissed because Petitioner failed to exhaust his state court remedies. On June 8, 2016, Petitioner filed a reply brief in support of his petition (ECF No. 19). On August 23, 2016, Petitioner filed a motion to stay and for abeyance (ECF No. 25), which was granted the next day (ECF No. 26). On October 20, 2016, Petitioner filed a motion to lift the stay (ECF No. 28), in which he explained that he had filed a motion to reopen the PCRA proceedings in state court, but his motion was denied on October 5, 2016. On October 26, 2016, the Court entered an order granting Petitioner's motion, lifting the stay and reopening the case (ECF No. 29).

By order dated January 27, 2017 (No. 16-117, ECF No. 34), the Court held that exhaustion was excused, closed Case No. 16-117, reopened Case No. 09-783 and directed that all further proceedings be filed at this case number. The Court concluded that the filings cited above demonstrated that, since 2015, the state courts have been operating under the false impression that the first PCRA petition had been denied. Thus, there were no further state court remedies available to Petitioner. On March 2, 2017, Respondents filed an Amended Response to the Petition (ECF No. 73), and on April 25, 2017, Petitioner filed a reply brief (ECF No. 76).

Petitioner's Claims

In the petition, Petitioner raises the following claims:

1. [Petitioner] is being deprived of his fundamental right to fair due process by the 40 month delay of state process.

2. Conviction obtained by the constitutional violation of the protection against double jeopardy.

3. There was an error in the application of law: the Commonwealth was barred by the former prosecution, where both informations arose from same criminal conduct, which Commonwealth used to show mod[u]s operandi of single perpetrator.

4. The trial court erred in the application in severing the informations and violating the "coordinate jurisdictional rule" of another judge, that informations would be tried together, without new evidence or facts not presented to prior judge.

5. Petitioner was denied effective assistance of counsel for prior counsel's failure to investigate to discover and raise, via Motion to Suppress evidence and lab report that was without sufficient foundation, where the Commonwealth's evidence could not and did not identify the fetus aborted by Dr. Thompson in 1998, as the same tissue prepared on slides by Histology Department and examined by pathologist, Dr. McPherson the next day, as the same tissue slides that were pulled from storage and new re-cut slides were prepared again by Histology Department in 2002 that were turned over to officer, as the same tissue slide samples placed in property room, as the same tissue sample slides sent to the lab. The Commonwealth failed to meet its burden of proof that the identity and condition of the aborted fetus remained unimpaired and could not, and did not establish a chain of identification or continuous custody from the time fetus was aborted and collected in 1998, until they were sent to lab in 2002.
Trial counsel was ineffective for failing to investigate to discover and object to the introduction of the new re-cut tissue slides and lab report at the time offered at trial. Petitioner was denied his fundamental 5th amendment right to fair due process and the guaranteed right to counsel under the 6th amendment right to the Const.

6. Petitioner was denied effective assistance of counsel for prior counsel's failure to investigate to discover and raise, via Motion to Suppress evidence and lab report that was without sufficient foundation, where the Commonwealth's evidence could not and did not identify the defendant's blood sample that was drawn by Hospital Technician, as the same blood samples turned over to officer, as the same blood sample placed in or removed from property room, as the same tissue blood samples sent to lab. The Commonwealth failed to meet its burden of

proof that the identity and condition of the blood samples remained unimpaired from the time they were seized until samples were sent to lab, and could not and did not establish a chain of identification or continuous custody from time seized, until sent to lab.
Trial counsel was ineffective for failing to investigate to discover and object to the introduction of the blood samples and lab report at the time introduced at trial. Petitioner was denied his fundamental 5th amendment right to fair due process and the guaranteed right to counsel under the 6th amendment right to the Const.

7. Petitioner was denied effective assistance of counsel for prior counsel's failure to investigate to discover and raise, via Motion to Suppress evidence and lab report that was without sufficient foundation, where the Commonwealth's evidence, per se Scientific methodology conducted to test Formalin-fixed, paraffin-embedded (FFPE) tissue has not meet the general acceptance standard, that the laboratory failed to follow proper standards of controls in their testing of DNA samples and that the Scientific methodology conducted failed to meet reliability standards under Frye standard, where the lab had lost their accreditation for failing to follow proper standards and controls and has closed their doors for business.
Trial counsel was ineffective for failing to investigate to discover and object to the introduction of laboratory report and expert testimony at time introduced at trial. Petitioner was denied fundamental 5th amendment right to fair due process and the guaranteed 6th amendment right to counsel under the Const.

8. Petitioner was denied effective assistance of counsel for prior counsel's failure to investigate to discover and raise, via Motion to Suppress evidence and lab report that was without sufficient foundation, where Commonwealth's expert did not possess specialized knowledge in the Scientific methodology of DNA testifying (FFPE) tissue.
Trial counsel was ineffective for failing to investigate to discover and object to the introduction of expert's opinion testimony and lab report at trial. Petitioner was denied his fundamental 5th amendment right to fair due process and the guaranteed 6th amendment right to counsel under the Const.

9. The Court erred in the application of law in failing to hold a Suppression Hearing to determine the admissibility of the evidence and lab report in violation of petitioner's 5th amendment right to due process to the Const.

10. Conviction was obtained by prosecutorial misconduct, where prosecution failed to disclose to [Petitioner], evidence of Magee Hospital's Histology report, litigation package, data recording each step of the process of preparing the new re-cut DNA tissue slides for purpose of litigation in 2002, which was favorable to [Petitioner] to prove that an unqualified person at the hospital altered, and prepared DNA samples to meet lab testing requirements, and that the tissue samples were without sufficient foundation, which violated petitioner's 5th amendment right to due process of the Const.

Petitioner was denied effective assistance of counsel for trial counsel's failure to investigate to discover the Histology report and introduced it at trial, and for failing to raise the prosecutorial misconduct, via Direct appeal, which violated Petitioner's 6th amendment right to counsel guaranteed by the Const.

11. Conviction was obtained by prosecutorial misconduct, where prosecution failed to disclose to [Petitioner], evidence of Orchid Cellmark's Lab testing notes, data recording each step of the DNA testing process use to test Formalin-fixed, paraffin-embedded tissue, which violated petitioner's 5th amendment right of the Const.
Petitioner was denied effective assistance of counsel for trial counsel's failure to investigate to discover request the lab testing notes and introduce them at trial, and for failing to raise the prosecutorial misconduct, via Direct Appeal, which violated Petitioner's 6th amendment right to counsel guaranteed by the Const.

12. Petitioner was denied effective assistance of counsel for prior counsel's misconduct for prosecutor in coercion client's refusal to taking of his blood, then breaching attorney/client confidentiality by sharing information with prosecution, for failing to protect client's interest against the 8th amendment violation by forcing [Petitioner] to submit to the taking of his blood against his will.
Trial counsel was ineffective for failing to object to the introduction of blood samples and lab report that were taken against [Petitioner's] will and to preserve claims for direct appeal. Petitioner was denied his fundamental 5th amendment right to fair[] due process and the guaranteed right to counsel under the 6th amendment to the Const.

13. Petitioner was denied effective assistance of counsel, where trial counsel committed misconduct for prosecution, and the trial court erred in the application of law by continuing Petitioner's second trial, denying petitioner[] his right to have same jury as first trial guaranteed him by another judge, where second trial ran past 180 [days] of incarceration without Petitioner's consent.
Petitioner was denied effective assistance of appeal counsel, where appeal counsel failed to raise the issue for review. Petitioner was denied his fundamental 5th amendment right to fair due process and the guaranteed right to counsel under the 6th amendment to the Const.

14. Conviction was obtained by the trial court's error in failing to sequester jury from witness[e]s, which resulted in taint after improper contact, and where the trial court failed to question the entire jury for taint, which denied Petitioner his fundamental 5th amendment right to fair due process, impartial jury and equal protection clause of the 14th amendment to the Const.
Appeal counsel was ineffective for failing to raise this issue on direct appeal, which denied Petitioner his right to have the claim heard, denying petitioner his guaranteed right to counsel under the 6th amendment to the Const.

15. Petitioner was denied effective assistance of counsel for trial counsel's failure

to Motion in limin[e] for mistrial after "eye witnessing" improper contact between jurors and Commonwealth witness[e]s, which denied Petitioner his 5th amendment right to due process and his 6th amendment right to counsel to the Const.
Appellate counsel was ineffective for failing to raise trial court err[o]r in failing to question entire jury to determine taint, which denied Petitioner his 5th amendment right to fair due process, to have claims heard, under the Const.

16. Petitioner was denied effective assistance of counsel for prior counsel's failure to challenge the admissibility of victim's prior inconsistent statements that were made after victim was improperly influ[e]nced, via Motion to Suppress, to challenge victim's competency to testify and expose taint, which denied Petitioner his 5th amendment right to fair due process and his 6th amendment right to counsel under the Const.

17. Petitioner was denied effective assistance of counsel for trial counsel's failure to file Motion for in camera hearing, to challenge the reliability of victim's prior consistent statements, for failure to introduce evidence of victim's prior inconsistent and contradictory statements to impeach the victim's credibility, which denied Petitioner his 5th amendment right to fair due process and his 6th amendment right to counsel under the Const.

18. The trial court erred in the application of law in failing to hold a "in camera hearing" to assess the reliability of victim's prior consistent statements, for failing to impeach victim on prior contradictory statement but instead lead the victim into adopting statement at trial regarding whether anal sodomy had occurred or was tried, which denied Petitioner his 5th amendment right to fair due process and the equal protection clause of the 14th amendment to the Const.
Appellate counsel was ineffective for failing to raise trial court's error, which denied Petitioner his 5th amendment right to due process, the right to have claims heard and the 6th amendment right to counsel under the Const.

19. Petitioner was denied effective assistance of counsel for trial counsel's failure to investigate and introduce evidence of victim's past sexual conduct, for failing to introduce evidence of victim's internet contacts, or to call witnesses to show others were responsible for the pregnancies, which denied Petitioner his 5th amendment right to fair due process and his 6th amendment right to counsel under the Const.

20. Petitioner was denied effective assistance of counsel for trial counsel's failure to introduce evidence that [petitioner] used corporal punishment "beatings" to discipline victim for wrongful conduct, for failing to introduce evidence of police reports after victim testified to her good character, which denied Petitioner his 5th amendment right to fair due process and his 6th amendment right to counsel under the Const.

21. Commonwealth erred in the application of law in failing to give [petitioner] "notice of intent" to call hearsay witness[e]s, which denied petitioner his 5th amendment right to due process.
Trial counsel was ineffective for failing to object to the introduction of hearsay statements of witnesses at trial, and Appellate counsel was ineffective for failing to raise Commonwealth's error, which denied Petitioner his 5th amendment right to due process, the right to have claims heard and his 6th amendment right to counsel under the Const.

22. Petitioner was denied effective assistance of counsel for trial counsel's failure to introduce evidence of false police report made by Commonwealth's witness, Raymond Price, to show hostility toward [Petitioner] to impeach witness's credibility on [bias] motive, for failing to object to the introduction of witness's hearsay statements that [Petitioner] did not have prior opportunity to cross-examine, for failing to cross-examine witness to introduce inconsistent and contradictory statements, for failing to [introduce] evidence that [Petitioner] used corporal punishment "beatings," and for failing to introduce evidence that witness made false police report against [Petitioner] to impeach witness on [bias] motive, hostility reason to fabricate.

23. Petitioner was denied effective assistance of counsel for trial counsel's failure to object to the introduction of witness's, Candy Collins Amos, hearsay statements that petitioner did not have prior opportunity to cross-examine, for failing to investigate to introduce evidence that witness made false police reports in an effort to have [petitioner] arrested, evidence that [Petitioner] forced witness to leave the home and children for having an affair with [Petitioner's] [cousin], and evidence that witness ran off with a man, named Scott Mcalaster, whom the witness meet on phone sex line, to super 8 motel with children [and] had another [affair], evidence of the emergency application for PFA filed by witness against [Petitioner] and that witness filed a false complaint of PFA violation in Westmoreland County to show hostility toward [Petitioner] and [bias] motive to coerce victim and son to fabricate allegations, which denied Petitioner his 5th amendment right to fair due process and the 6th amendment right to counsel under the Const.
Appellate counsel was ineffective for failing to raise on Direct appeal, that the trial court erred in admitting witness's statements that [petitioner] did not have prior opportunity to cross examine, which denied Petitioner his right to have claims heard and the 5th amendment right to due process and his 6th amendment right to counsel under the Const.

24. Petitioner was denied effective assistance of counsel for trial counsel's failure to [introduce] evidence of simple assault charges and trial testimony, and PFA hearing where disclosure of allegations complained of arose to show inconsistent and contradictory statements by victim to impeach victim's credibility, which denied Petitioner his 5th amendment right to fair due process and his 6th amendment right to counsel under the Const.

25. Petitioner was denied effective assistance of counsel for trial counsel's failure to subpoena arresting officer's personnel files to investigate and review to discover acts of bad faith, which led to Officer Steffy's [demotion] from detective to patrol man between the time of Petitioner's arrest and trial, which denied petitioner his 5th amendment right to fair due process and his 6th amendment right to counsel under the Const.

26. Petitioner was denied effective assistance of counsel for trial counsel's failure to object to the introduction of Officer's rebuttal testimony and false statements offered against [Petitioner's] testimony that witness, Raymond Price, had been "brainwashed" by mother and victim to make false statements when the son was taken from [petitioner] by sheriff on or about January 25, 2002.
Appellate counsel was ineffective in failing to rise claim that the court abuse of discretion in admitting officer's false testimony as to rebuttal, which denied Petitioner his 5th amendment right to fair due process to have claims heard and his 6th amendment right to counsel under the Const.

27. Petitioner's constitutional right to direct appeal was obstructed by government officials, where the court clerk failed to furnish the court appointed counsel with a copy of the court order to represent [Petitioner] on direct appeal, in violation of Petitioner's 5th amendment right to fair due process to have claims heard.

28. Petitioner was denied effective assistance of counsel for appellate counsel's failure to amend 1925(b) filed by public defender to raise additional merit issues and failing to file appellate brief, which denied Petitioner his 5th amendment right to due process to have claims heard and his 6th amendment right to counsel under the Const.

29. Court erred in imposing an illegal sentence, where the court sentenced [Petitioner] with [an] incorrect prior record score and consecutive sentences for rape and incest convictions.

(Pet. ¶ 12 & App. F at 1-8.)

Standard of Review

A petitioner is only entitled to federal habeas relief if he meets the requirements of 28 U.S.C. § 2254(d), which 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. § 2254(d). Section 2254(d) "firmly establishes the state court decision as the starting point in habeas review." Hartey v. Vaughn, 186 F.3d 367, 371 (3d Cir. 1999). This provision governs not only pure issues of law, but mixed questions of law and fact such as whether counsel rendered ineffective assistance. Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000).

The Supreme Court has held that, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The Court has also held that:

> the "unreasonable application" prong of § 2254(d)(1) permits a federal habeas court to "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts" of petitioner's case. In other words, a federal court may grant relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced." In order for a federal court to find a state court's application of our precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. The state court's application must have been "objectively unreasonable."

Wiggins v. Smith, 539 U.S. 510, 520 (2003) (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (other citations omitted)). In other words, "the question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007) (citations omitted).

Section 2254(e) provides that:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

As noted above, the Court has excused exhaustion under the circumstances of this case. This means that some claims have not been addressed on the merits by the state courts. The Court must "review *de novo* issues that the state court did not decide on the merits." Bond v. Beard, 539 F.3d 256, 263 (3d Cir. 2008).

Many of Petitioner's claims involve the ineffectiveness of trial counsel. The United States Supreme Court:

> established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that " [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Ibid.

Wiggins, 539 U.S. at 521.

To satisfy the second prong of counsel ineffectiveness, "a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 534 (quoting Strickland, 466 U.S. at 694.) In addition, although a petitioner must satisfy both prongs to succeed on his ineffectiveness claim, the Court noted that " [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Strickland, 466 U.S. at 697.

The question is not whether the defense was free from errors of judgment, but whether defense counsel exercised the customary skill and knowledge that normally prevailed at the time and place. Strickland, 466 U.S. at 689. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 688).

Facts of the Case

The Superior Court summarized the facts of the case as follows:

> At trial, the Commonwealth presented evidence that [Petitioner's] abuse of his daughter (the victim) began in 1991 or 1992, when she was seven years old, and continued until 2002. As a result of the repeated abuse, the victim became pregnant numerous times and underwent abortions at the behest of [Petitioner]. Tissue samples from the victim's first abortion (which occurred when she was thirteen) revealed that [Petitioner] was the biological father of the fetus.

(Am. Answer Ex. 5 at 1-2) (footnote and citations omitted). At trial, the victim ("SP") testified that Petitioner began touching her in her vaginal area when she was seven years old; that he began engaging in sexual intercourse with her when she was approximately twelve; that he also engaged in oral sex with her; that she reported this abuse in July 1998 but recanted her accusation when he held a knife to her mother's throat and threatened to kill her mother, her brother and her if she did not recant; that she became pregnant four times and that each time, her father insisted that she get an abortion (telling a story that she had been raped). (T.T. 20-46.)

Claims II, III and IV: Double Jeopardy Issues

In Claims II, III and IV,[6] Petitioner contends that his right not to be subjected to double

[6] Claim I alleges that Petitioner was denied due process as a result of the unreasonable delay by

jeopardy was violated when he was tried separately regarding Case Nos. 760 of 2002 and 761 of 2002. Respondents explain that Case No. 760 of 2002 was about a specific incident (an assault he allegedly committed on SP on January 4, 2002), while Case No. 761 of 2002 concerned his repeated acts of sexual abuse of SP between 1992 and the date of his arrest (May 28, 2002). As a result, Respondents argue that there is no overlap between these charges and that his acquittal with respect to No. 760 of 2002 has no bearing on the charges of rape, indecent assault and corruption of a minor for which he was convicted at No. 761 of 2002. Petitioner argues that the last rape is alleged to have occurred on the same date as the assault and thus there is an overlap.

Respondents have submitted the preliminary hearing transcripts from both cases. As they describe, the hearing at Case No. 760 of 2002 concerned a charge of simple assault that allegedly occurred on January 4, 2002 (Am. Answer Ex. 16), and the hearing at Case No. 761 of 2002 concerned charges of rape and related charges for his course of conduct between 1992 and May 28, 2002 (Am. Answer Ex. 18).

The Double Jeopardy Clause "protects against multiple punishments for the same offense." Ohio v. Johnson, 467 U.S. 493, 498 (1984) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)). Multiple punishments constitute a double jeopardy violation when the charged offenses are "the same in law and in fact." United States v. Finley, 726 F.3d 483, 495 (3d Cir. 2013). Offenses are the same "in law" where "one is a lesser-included offense of the other under the 'same elements' (or Blockburger) test." United States v. Miller, 527 F.3d 54, 71 (3d Cir. 2008) (citing Blockburger v. United States, 284 U.S. 299 (1932)).

Petitioner has not demonstrated that he was subjected to multiple punishments for the

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the state courts. This Court has determined that the requirement of exhaustion of state court remedies should be excused in this case and therefore this claim need not be discussed further.

same offense. Rather, the record is clear that Case No. 760 of 2002 concerned a single charge of assault arising out of one incident on one day, while Case No. 761 of 2002 arose out of his continuing conduct of rape, aggravated indecent assault, indecent assault, incest and corruption of minors that took place over several years. This claim provides no basis for relief and will be denied.

Petitioner also raises a claim (Claim IV) under Pennsylvania's "coordinate jurisdiction rule" when Case Nos. 760 and 761 were separately prosecuted. This rule provides that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. Commonwealth v. Starr, 664 A.2d 1326 (Pa. 1995). As explained above, these two cases were not the same and this rule does not apply.

Moreover, the Supreme Court has "repeatedly held that 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions'" Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) (quoting Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). Thus, even if Pennsylvania's coordinate jurisdiction rule had been violated, that would not provide a basis for federal habeas corpus relief.

Claims V and VI: Forensic Evidence

In Claims V and VI, Petitioner alleges that his trial counsel was ineffective for failing to object to certain forensic evidence, specifically tissue slides from the aborted fetus and a sample of Petitioner's blood, which were used to establish his paternity of the fetus. Respondents argue that his counsel did question witnesses as to these pieces of evidence and that Petitioner's contention that the evidence was subject to tampering is pure speculation.

In his reply, Petitioner contends that counsel was ineffective for failing to make a specific request for Cellmark's testing data and for failing to conduct a pretrial investigation. He states

that, had counsel requested records that were in the custody of the District Attorney, they could have been used to prepare his independent expert witness for an effective defense against the Commonwealth's expert testimony and show that the lab report and test results were flawed and unreliable. Petitioner further argues that, based upon testimony by the phlebotomist that she drew his blood in gray-topped tubes which she did not seal and the Commonwealth expert's testimony that the blood samples were received at the lab with purple tops on them, he has demonstrated that the Commonwealth failed to establish a chain of custody or support a reasonable inference that the identity and condition of the exhibits had remained unimpaired.

With respect to the fetal tissue, Petitioner argues that the Commonwealth failed to establish a chain of custody and that counsel's failure to object to the admission of the new re-cut slides prejudiced him because the Commonwealth failed to support a reasonable inference that the identity and condition of the tissue had remained unimpaired.

At trial, Petitioner's counsel questioned the Commonwealth's witness, Dr. Trevor McPherson, about the chain of custody regarding the fetal tissue. (T.T. 122-23.) Counsel also questioned the phlebotomist, Claudia Carr, about the manner in which Petitioner's blood had been drawn and kept. (T.T. 181-85.) The jury was free to accept or reject the testimony because of a questionable chain of custody. Moreover, challenges to the chain of custody would address only the weight that the jury should accord to the evidence, not its admissibility. Pa.R.E. 901(a); Commonwealth v. Royster, 372 A.2d 1194 (Pa. 1977).

Petitioner theorizes that the police removed the caps from the blood samples and cross-contaminated the tissue samples with his blood to cause a false positive DNA test result. (Pet'r's

Br. at 15.[7]) As Respondents note, this is pure speculation on his part and provides no basis for relief.

Claims VII and VIII: Forensic Testimony

In Claims VII and VIII, Petitioner alleges that his trial counsel was ineffective for failing to move to suppress certain forensic expert testimony regarding DNA. Respondents argue that his counsel vigorously questioned the Commonwealth's witnesses and that Petitioner's own interpretation of DNA evidence is irrelevant.

Petitioner argues that the DNA evidence was not properly preserved, even according to Cellmark's own procedures. It is not the role of this Court to reevaluate the DNA evidence. Moreover, as described above, counsel questioned the Commonwealth's witnesses and called her own expert witness in an attempt to challenge the conclusion that Petitioner's DNA established his paternity over the aborted fetus. The jury had to evaluate this testimony. Therefore, these claims will be denied.

Claim IX: Suppression Hearing

In Claim IX, Petitioner raises a challenge to the suppression hearing. However, Respondents argue that this claim is unintelligible. In his reply, Petitioner argues that, although counsel filed a motion to suppress on October 22, 2002, the motion failed to state with particularity the evidence sought to be suppressed and the facts and events in support thereof, which resulted in the motion being denied on October 25, 2002.

Generally, Fourth Amendment exclusionary relief is not available in federal habeas corpus proceedings. Stone v. Powell, 428 U.S. 465, 494 (1976). In Marshall v. Hendricks, 307 F.3d 36 (3d Cir. 2002), the Third Circuit stated:

[7] ECF No. 57.

> In Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Supreme Court examined the nature of the exclusionary rule, which it characterized as a "judicially created means of effectuating the rights secured by the Fourth Amendment" and balanced its utility as a deterrent against the risk of excluding trustworthy evidence and thus "deflect[ing] the truthfinding process." Id. at 482, 490, 96 S.Ct. 3037. Finding that, as to collateral review, the costs of the exclusionary rule outweighed the benefits of its application, the Court concluded that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Id. at 494, 96 S.Ct. 3037. While the federal courts are not thus deprived of jurisdiction to hear the claim, they are—for prudential reasons—restricted in their application of the exclusionary rule. Id. at 494 n. 37, 96 S.Ct. 3037.
>
> Seeking to avoid this restriction, Marshall seizes upon the qualifying phrase in Stone, "where the State has provided an opportunity for full and fair litigation," and argues that he has not had an opportunity for full and fair litigation, and thus, that the bar of Stone v. Powell should not apply.
>
> We have recognized that there may be instances in which a full and fair opportunity to litigate was denied to a habeas petitioner, but this is not one of them. This is not a case where a structural defect in the system itself prevented Marshall's claim from being heard. See, e.g., Boyd v. Mintz, 631 F.2d 247, 250-51 (3d Cir. 1980); see also Gilmore v. Marks, 799 F.2d 51, 57 (3d Cir. 1986) (observing that a state's "failure to give at least colorable application of the correct Fourth Amendment constitutional standard" might amount to a denial of the opportunity for full and fair litigation). An erroneous or summary resolution by a state court of a Fourth Amendment claim does not overcome the bar. Id. And, as the District Court correctly assessed, Marshall III, 103 F.Supp.2d at 785-86, Marshall is at most alleging that the Fourth Amendment claims were decided incorrectly or incompletely by the New Jersey courts, allegations which are insufficient to surmount the Stone bar.

307 F.3d at 81-82.

Petitioner presents no evidence that would overcome the Stone bar and therefore this claim cannot form a basis for relief.

Claims X and XI: Brady Violations

In Claims X and XI, Petitioner alleges that the prosecution failed to disclose favorable evidence under Brady v. Maryland, 373 U.S. 83 (1963), and that trial counsel was ineffective for

failing to raise this claim. Respondents argue that he assumes certain records exist, but has no proof to support his suppositions and that there is no basis for finding prejudice.

The Court of Appeals has explained that:

> In Brady, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87, 83 S.Ct. 1194. "Impeachment evidence, ... as well as exculpatory evidence, falls within the Brady rule." United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). In fact, the prosecution has an affirmative "duty to disclose such evidence ... even though there has been no request [for the evidence] by the accused." Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (citing United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). Indeed, that responsibility "encompasses evidence 'known only to police investigators and not to the prosecutor.'" Id. at 280-81, 119 S.Ct. 1936 (quoting Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). "In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf ..., including the police.'" Id. at 281, 119 S.Ct. 1936 (quoting Kyles, 514 U.S. at 437, 115 S.Ct. 1555). However, even when the prosecution has failed to disclose favorable evidence to the defense, a constitutional violation is not inevitable. A new trial will be granted only if: (1) the evidence at issue is favorable to the accused; (2) the evidence was suppressed by the state; and (3) the evidence is material. See id. at 281-82, 119 S.Ct. 1936.

Johnson v. Folino, 705 F.3d 117, 128 (3d Cir. 2013).

Respondents argue that Petitioner's Brady claims are based on the following suppositions: 1) that the Commonwealth had some sort of "litigation package" (data recordings or lab notes) for each stage of the DNA testing process; and 2) that the Commonwealth had a duty to disclose all of these hypothetical records, as opposed to the final results of the DNA report, which were disclosed to him. Moreover, his speculation as how the records would be favorable to him is based on a further supposition that they would show some sort of tampering with the evidence.

Petitioner has failed to support his underlying Brady claim and counsel cannot be held ineffective for failing to raise a meritless claim. Real v. Shannon, 600 F.3d 302, 310 (3d Cir.

2010). Therefore, this claim will be denied.

Claim XII: Blood Sample

In Claim XII, Petitioner alleges that he was coerced into providing a blood sample and that counsel shared the results with the Commonwealth. Respondents argue that this claim is unintelligible. This Court agrees: Petitioner's blood sample was drawn to determine if it matched up with the tissue of the aborted fetus and the jury concluded that it did.

Claim XIII: Different Jury

In Claim XIII, Petitioner alleges that his trial counsel was ineffective for failing to ensure that he was tried by the same jury that acquitted him in Case No. 760 of 2002. Respondents argue that, since the cases were not joined and concerned different facts, he had no right to be tried by the same jury.

As outlined above, the two cases were not joined and concerned different facts. Moreover, there is no constitutional right to have the cases tried together or to have the same jury adjudicate both matters, and thus this claim provides no basis for relief.

Claims XIV and XV: Challenge to Tainted Jury

In Claims XIV and XV, Petitioner alleges that he was tried by a jury that was "tainted" by contact with Commonwealth witnesses and that his trial counsel was ineffective for failing to move for a mistrial under the circumstances. Respondents argue that the underlying issue was raised and rejected on direct appeal. Moreover, his counsel did raise the issue of juror contact and the Superior Court explained that Petitioner was not entitled to a mistrial, so counsel cannot be found ineffective in any event.

This issue was raised on direct appeal. The Superior Court stated as follows:

> [Petitioner] states that during a break in testimony, he witnessed members of the jury sitting across the hallway from the victim, and that it appeared the "jurors

> lips were moving" (implying that the jurors were talking to the victim and family members). The record reveals that this matter was raised by counsel during trial, and the members of the jury were questioned regarding any conversations they might have had with the victim or other Commonwealth witnesses. All jurors responded that they had not had any such conversations. Later in the trial, however, another complaint regarding a specific juror was later raised, resulting in the juror's dismissal.
>
> [Petitioner] now argues that he was entitled to a mistrial on the basis that the dismissed juror's comments "tainted" the entire jury. We note initially that at no time during the trial did [Petitioner's] counsel request a mistrial on this basis. It is axiomatic that an issue cannot be raised for the first time in an appellate court. Pa.R.A.P. 302(a).
>
> Even if we were to consider this issue, [Petitioner] would not prevail. There is "no per se rule in this Commonwealth requiring a mistrial anytime there is improper or inadvertent contact between a juror and a witness." Commonwealth v. Tharp, 830 A.2d 519, 532-33 (Pa. 2003) (citation omitted). "A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to have deprived the moving party of a fair and impartial trial," and this "is a matter addressed primarily to the discretion of the trial court." Id. We can find no abuse of discretion in the trial court's actions. When faced with the first complaint regarding juror/witness contact, the trial judge questioned jurors and determined no violation had occurred. When later faced with another complaint regarding the same juror, the trial judge interviewed the juror individually, and later dismissed her. There was no indication of jury tampering, or proof of the "spillover" effect complained of now by [Petitioner]. Therefore, we find the trial judge acted properly, and that [Petitioner's] appeal based on this issue does not succeed.

(Am. Answer Ex. 5 at 7-8) (footnote and record citations omitted).

Since the Superior Court held that Petitioner did not establish that he was entitled to a mistrial under these circumstances, his trial counsel cannot be deemed ineffective for having failed to request a mistrial. Counsel cannot be deemed "ineffective for failing to raise a meritless claim." Real v. Shannon, 600 F.3d 302, 310 (3d Cir. 2010).

Claims XVI, XVII and XVIII: Prior Inconsistent Statements

In Claims XVI, XVII and XVIII, Petitioner alleges that his counsel was ineffective for failing to challenge the victim as incompetent to testify because of her prior inconsistent

statements. Respondents argue that prior inconsistent statements do not make a witness incompetent to testify and that her statements were not inconsistent.

There is no support for the contention that prior inconsistent statements make a witness incompetent to testify. Rather, they are used on cross-examination to challenge the witness's credibility.

Respondents state that Petitioner appears to be addressing two sets of statements: SP's statements in a July 1998 police report, in which she indicated that her aunt told her to make accusations against her father, which she later withdrew; and her alleged inconsistent testimony about her brother's whereabouts during sexual contact between her and her father. With respect to the former, SP testified that she recanted the original allegations she made against her father in 1998 after he threatened her, her brother and mother. (T.T. 29-34.) The jury was permitted to believe or disbelieve her testimony about the reason for her recantation of the original accusation and the fact that Petitioner was convicted indicates that the jury believed her.

As to the latter, during the preliminary hearing, SP testified that when Petitioner subjected her to sexual intercourse, her brother was outside playing or at her grandmother's house (Am. Answer Ex. 18 at 7-8), but at trial she was asked about her brother's whereabouts during incidents in which Petitioner touched her (not acts of intercourse) and she testified that he would be in the same room in front of them watching TV (T.T. 42-43). She was not asked about Raymond's whereabouts during incidents of intercourse. Thus, the statements are not inconsistent with one another and this claim provides no basis for relief.

Claims XIX and XX: Prior Sexual Acts

In Claims XIX and XX, Petitioner alleges that trial counsel was ineffective for failing to introduce the victim's prior sexual acts. Respondents argue that such acts would be inadmissible

under Pennsylvania's Rape Shield Law and that counsel did offer an expert to challenge the DNA analysis that concluded he was the father of the victim's aborted fetus.

As Respondents note, under Pennsylvania law, evidence of the victim's past sexual conduct and reputation evidence about it is not admissible in prosecutions for sexual offenses, except evidence of the victim's past sexual conduct with the defendant where consent is an issue (which obviously would not have helped Petitioner here). 18 Pa. C.S. § 3104(a). At the PCRA hearing, trial counsel testified that Petitioner told him that he thought his daughter was "out running the streets" but that such testimony would have been hearsay and would have been barred by the Rape Shield Law. (PCRA Hr'g at 46.) Therefore, trial counsel could not have introduced evidence regarding SP's prior sexual acts. In addition, this is a state law issue.

Moreover, Petitioner called an expert witness to challenge the Commonwealth's forensic expert's conclusion that Petitioner was the father of the fetus. (T.T. 252-80.) In other words, counsel attempted to introduce evidence that another individual besides Petitioner was the father of the aborted fetus and thus could have been responsible for at least one of SP's pregnancies. The jury was tasked with evaluating the expert testimony and concluded that Petitioner was guilty.

Finally, in Claim XX, Petitioner appears to argue that trial counsel was ineffective for failing to offer evidence of his corporal punishment of SP as well as police reports after SP testified as to her good character. Respondents argue that SP never placed her character at issue and that evidence to show that SP had a "bad character" would have been inadmissible as improper character evidence and it did not qualify as a juvenile adjudication. Pa.R.E. 404(b)(1), 609(d).

In reviewing counsel's actions, the Court presumes that counsel was effective. As the

Supreme Court has declared:

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel's was unreasonable. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689. There is no one correct way to represent a client and counsel must have latitude to make tactical decisions. Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990) ("[W]hether or not some other strategy would have ultimately proved more successful, counsel's advice was reasonable and must therefore be sustained."). Because the Strickland test is one of objective reasonableness, it does not matter if counsel actually considered the course taken or foregone to determine whether the actions or omissions were objectively reasonable. As the Court of Appeals for the Eleventh Circuit has explained:

> To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy. . . . our inquiry is limited to whether this strategy, that is, course A, might have been a reasonable one. See generally Harich v. Dugger, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (en banc) (concluding–without evidentiary hearing on whether counsel's strategy arose from his ignorance of law–that trial counsel's performance was competent because hypothetical competent counsel reasonably could have taken action at trial identical to actual trial counsel); Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995) (holding–where petitioner alleged that trial counsel's mental processes were impaired by drug use–that, because an objective standard is used to evaluate counsel's competence, "once an attorney's conduct is shown to be objectively reasonable, it becomes unnecessary to inquire into the source of the attorney's alleged shortcomings"). . . .
>
> We look at the acts or omissions of counsel that the petitioner alleges are unreasonable and ask whether some reasonable lawyer could have conducted the trial in that manner. Because the standard is an objective one, that trial counsel (at a post-conviction evidentiary hearing) admits that his performance was deficient matters little. See Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir. 1999) (noting that "admissions of deficient performance are not significant"); see also Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) ("[I]neffectiveness is a question

which we must decide, [so] admissions of deficient performance by attorneys are not decisive.").

Chandler v. United States, 218 F.3d 1305, 1316 n.16 (11th Cir. 2000). See also Strickland,466 U.S. at 689 (one claiming ineffectiveness must show that the challenged action "might be considered sound trial strategy.")

In light of the foregoing, the Court of Appeals for the Third Circuit has explained, "[i]t is [] only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997) (citation omitted).

In this case, Petitioner fails to point to any evidence that SP placed her character in evidence. At the PCRA hearing, trial counsel was not asked about this issue. However, if counsel had introduced evidence that Petitioner subjected SP to "corporal punishment" to suggest a motive for her to lie about his sexual abuse of her, it would also have placed before the jury more evidence of his improper conduct. Therefore, he has not demonstrated that his counsel's decision not to introduce this evidence was a poor trial strategy or that he was prejudiced thereby.

Claim XXI: Hearsay

In Claim XXI, Petitioner alleges that trial counsel was ineffective for failing to object to hearsay. Respondents argue that Petitioner cites no instances of hearsay being admitted. Without more detail, this claim cannot be evaluated. Moreover: "Admissibility of evidence is a state law issue." Wilson v. Vaughn, 533 F.3d 208, 213 (3d Cir. 2008) (citing Estelle v. McGuire, 502 U.S. 62, 72 (1991)). Thus, even if hearsay was improperly admitted, it does not provide a basis for federal habeas corpus relief.

Claim XXII: Raymond Price

In Claim XXII, Petitioner alleges that trial counsel was ineffective for failing to object to the testimony of his son, Raymond Price, specifically hearsay statements, contradictions and bias based on corporal punishment. Respondents argue that no hearsay was admitted, that Raymond did not contradict himself, that evidence of Raymond's "bad character" would have been inadmissible and that Petitioner's allegations of a "false" police report are unfounded.

Petitioner has not pointed to any hearsay statements made by Raymond, nor does he specify any inconsistent statements with which he could have been cross-examined. As noted above with respect to SP, introducing evidence of Raymond's "bad character" would not have been permitted. In addition, admission of hearsay is a state law evidentiary issue.

Petitioner argues that counsel failed to introduce a police report made by Raymond that Petitioner had indecently touched him, a report that was ultimately closed with no charges being filed. Respondents argue that this does not make the report "false" (as Petitioner characterizes it), but just unfounded. They further note that counsel may have had good reason not to introduce more evidence that Petitioner engaging in indecent activity with his children.

In this case, it is not difficult to imagine why trial counsel would not have wanted to introduce the fact that Petitioner subjected Raymond to "corporal punishment" or that Raymond made a complaint about him (even if it never resulted in charges being filed): they would have presented the jury with more allegations of improper conduct by a defendant who was already charged with sexually abusing his daughter. Indeed, counsel might well have been ineffective if she had introduced such matters. These claims provide no basis for relief and will be denied.

Claim XXIII: Candy Amos

In Claim XXIII, Petitioner alleges that trial counsel was ineffective for failing to object to the testimony of the victim's mother, Candy Amos. Respondents argue that no hearsay was

admitted, that the PFA was not admitted and that Candy did not implicate him in any sexual acts, and thus there would have been no reason to impeach her credibility.

Amos's testimony in the case was brief and it amounted to her stating that she heard about SP's allegations against Petitioner in 1998, that SP withdrew the charges and that she heard nothing again until 2002 (T.T. 71-88). There was no basis for counsel to challenge her testimony and this claim provides no basis for relief.

Claim XXIV: Evidence from Case No. 760

In Claim XXI, Petitioner alleges that trial counsel was ineffective for failing to introduce evidence from Case No. 760 of 2002 and the victim's testimony from the PFA hearing. Respondents argue that he does not explain how such information would have helped him and indeed, introducing more charges against him would not have benefitted his case.

In this case, it is not difficult to imagine why trial counsel would not have wanted to introduce the PFA filed against Petitioner: such evidence would have presented the jury with more allegations of improper conduct by a defendant who was already charged with sexually abusing his daughter. Indeed, counsel might well have been ineffective if she had introduced such matters. This claim provides no basis for relief and will be denied.

Claims XXV and XXVI: Trooper Steffy

In Claims XXV and XXVI, Petitioner alleges that trial counsel was ineffective for failing to introduce evidence that Trooper Steffy was demoted. Respondents argue that the idea of him being demoted is pure speculation (he changed positions) and that he proffers no evidence of prejudice.

At trial, Trooper Steffy testified that he was a member of the patrol unit, but that at the time of the investigation into Petitioner's charges, he was in the criminal investigations unit.

(T.T. 160.) As Respondents note, there is no evidence to support Petitioner's claim that Trooper Steffy was "demoted," only that he was working in a different unit.

Petitioner also objects to Trooper Steffy's testimony, which Respondents contend was submitted in rebuttal of Petitioner's claim that Raymond had been "brainwashed" into testifying against him, because Trooper Steffy testified that Raymond made the same allegations as he did at trial months before.[8] Petitioner asserts that Trooper Steffy's testimony was "false," but "[b]ald assertions and conclusory allegations do not afford a sufficient ground to provide habeas relief." Daniels v. Wilson, 2010 WL 4788046, at *28 (W.D. Pa. Oct. 5, 2010), report and recommendation adopted, 2010 WL 4789106 (W.D. Pa. Nov. 17, 2010), aff'd mem., 507 F. App'x 158 (3d Cir. 2012). The credibility of Trooper Steffy's testimony was a matter for the jury to determine.

Claim XXVII: Obstruction of Appeal

In Claim XXVII, Petitioner alleges that government officials obstructed his appeal. Respondents argue that he offers no specifics regarding this claim and he managed to raise many issues, so there is no evidence of prejudice.

Petitioner argues that the Clerk of Court failed to provide court-appointed appellate counsel with the order to represent him on appeal, which led to him being unable to have claims heard on appeal. However the record reveals the following: 1) after trial counsel withdrew, the trial court appointed two attorneys to represent Petitioner on appeal (the second one after the first withdrew); and 2) despite having counsel on appeal, Petitioner filed his own pro se statement raising 42 issues, and added another eight issues in a pro se brief. Thus, Petitioner had many

[8] In point of fact, Trooper Steffy testified that he interviewed Raymond, but he did not discuss the substance of Raymond's testimony (T.T. 162).

issues raised on appeal and his claim of being precluded from raising issues is unsupported.

Claim XXVIII: Appellate Counsel

In Claim XXVIII, Petitioner alleges that appellate counsel was ineffective for failing to raise issues on appeal. Respondents argue that counsel did raise issues and Petitioner filed his own brief on appeal. As noted above, Petitioner raised numerous issues on appeal and he provides no specifics about claims counsel did not raise or why they would have been meritorious.

Claim XXIX: Illegal Sentence

In Claim XXIX, Petitioner alleges that he was subjected to an illegal sentence. Respondents argue that he fails to explain this claim, that sentencing is a state law issue and that the decision to run his sentences consecutively rather than concurrently is a discretionary one for the trial judge.

> Generally, sentencing is a matter of state criminal procedure and does not fall within the purview of federal habeas corpus. Wooten v. Bomar, 361 U.S. 888, 80 S.Ct. 161, 4 L.Ed.2d 122 (1959). As such, a federal court normally will not review a state sentencing determination that falls within the statutory limit, Williams v. Duckworth, 738 F.2d 828, 831 (7th Cir. 1984), as the severity of a sentence alone does not provide a basis for habeas relief. Smith v. Wainwright, 664 F.2d 1194 (11th Cir. 1981) (holding that a sentence imposed within the statutory limits can not be attacked in habeas proceeding). Accord Gleason v. Welborn, 42 F.3d 1107, 1112 (7th Cir.1994) (internal citation omitted), cert. denied, 514 U.S. 1109, 115 S.Ct. 1961, 131 L.Ed.2d 852 (1995); Walker v. Endell, 850 F.2d 470, 476 (9th Cir. 1987), cert. denied, 488 U.S. 926, 109 S.Ct. 309, 102 L.Ed.2d 328 (1988); Mira v. Marshall, 806 F.2d 636, 639 (6th Cir. 1986); United States v. Myers, 374 F.2d 707 (3d Cir. 1967). Thus, unless an issue of constitutional dimension is implicated in a sentencing argument, this Court is without power to grant habeas relief. United States v. Addonizio, 442 U.S. 178, 186, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979) (noting that a criminal sentence was not subject to collateral attack unless the sentencing court lacked jurisdiction to impose it or committed a constitutional error that made the sentence or underlying conviction fundamentally unfair). Accord Colon v. Folino, 2008 WL 144212, at *9 (M.D. Pa. Jan.11, 2008).

Fuller v. Dist. Attorney of Fayette Cty., 2008 WL 3539905, at *9 (W.D. Pa. Aug. 13, 2008).

Petitioner has provided no basis for reviewing a state law determination of his sentence. Moreover, the trial court had the discretion to determine whether to run the sentences consecutively or concurrently. 42 Pa. C.S. § 9721. Therefore, the sentence cannot be deemed "illegal" under Pennsylvania law and even if it had been, that is a state law issue not cognizable in federal habeas corpus.

Certificate of Appealability

Additionally, a certificate of appealability should be denied. The decision whether to grant or deny a certificate of appealability is "[t]he primary means of separating meritorious from frivolous appeals." Barefoot v. Estelle, 463 U.S. 880, 893 (1983). If a certificate of appealability is granted, the Court of Appeals must consider the merits of the appeal. However, when the district court denies a certificate of appealability, the Court of Appeals can still grant one if it deems it appropriate. 28 U.S.C. § 2253.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons addressed above, this petition does not present a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should be denied.

For these reasons, the petition for writ of habeas corpus filed by Petitioner (ECF No. 3) will be denied and a certificate of appealability will be denied. An appropriate order follows.

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

WILLIAM PRICE, Petitioner,	)	
vs	)	Civil Action No. 09-783
KENNETH R. CAMERON, et al., Respondents.	)	Magistrate Judge Mitchell

ORDER

AND NOW, this 25th day of July, 2017,

IT IS HEREBY ORDERED that the petition for writ of habeas corpus filed by petitioner William Price (ECF No. 3) is denied and a certificate of appealability is denied.

IT IS FURTHER ORDERED that, pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, if the petitioner desires to appeal from this Order, he must do so within thirty (30) days by filing a notice of appeal as provided in Rule 3, Fed. R. App. P.

s/Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate Judge

cc: William Price
FP-2118
SCI Retreat
660 State Route 11
Hunlock Creek, PA 18621-3136