

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

DUANE BROCK THOMAS,) Civil Action No. 2: 15-cv-0447
Petitioner,) United States Magistrate Judge
v.) Cynthia Reed Eddy
NANCY GIROUX, Superintendent,)
District Attorney of Washington County,)
and THE ATTORNEY GENERAL OF)
THE STATE OF PENNSYLVANIA,)
Respondents.)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

Before the Court is the pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”) filed by Petitioner, Duane Brock Thomas (“Petitioner” or “Thomas”). Thomas is currently incarcerated in the state Correctional Institution in Albion, Pennsylvania. For the reasons that follow, it is recommended that the Petition be dismissed and that a certificate of appealability be denied.

II. REPORT

A. Relevant and Procedural Background

Thomas is challenging the judgment of sentence imposed upon him by the Court of Common Pleas of Washington County on January 22, 2010. Following a jury trial presided over by the Honorable Janet Moschetta Bell of the Court of Common Pleas of Washington County, Thomas was convicted of rape, aggravated assault, and related offenses for the January 9, 2009, attack on the victim, his ex-fiancé and the mother of his child. On January 22, 2010, Thomas

was sentenced to an aggregate sentence of fourteen and one-half (14-1/2) years to twenty-nine (29) years imprisonment.

Quoting from the trial court opinion, the Superior Court summarized the facts of the case as follows:

[The victim], twenty-eight (28) years old at the time of trial, and Defendant were involved in a romantic relationship for nearly five (5) years prior to the incident giving rise to this case. They had one son together, [B.G.T.], who was five (5) years old at the time of trial and three (3) years old at the time of Defendant's assault and rape of [the victim]. Defendant, [B.G.T.], and [the victim] had lived together at 58 Beeson Avenue in Marianna, Pennsylvania for two (2) years until approximately December 26, 2008, when [the victim] moved out of the residence after ending her romantic relationship with Defendant.

Subsequent to December 26, 2008, [the victim], who worked during the daytime hours, resided at her father's house in Marianna. [B.G.T.], however, remained at 58 Beeson Avenue due to Defendant's availability to watch the child during the day and to the desire of both parents to keep [B.G.T.'s] life as normal as possible. [The victim] and Defendant arranged between themselves who would stay at 58 Beeson Avenue with [B.G.T.] overnight, and on those nights that [the victim] stayed, Defendant left the residence.

On the evening of January 9, 2009, the night of the rape and assault in this case, [the victim] picked up [B.G.T] from 58 Beeson Avenue in order to take him to her father's house for a planned overnight visit. After approximately two (2) hours at her father's house, however, it became apparent to [the victim] that [B.G.T.] was upset due to his unfamiliarity with that location. Therefore, [the victim] informed Defendant via text message, to which Defendant responded, that she and [B.G.T] were returning to 58 Beeson Avenue. Upon [the victim's] and [B.G.T.'s] return, Defendant was not present, and after taking [B.G.T.] through his nightly routine, [the victim] put him in bed for the night in [the master] bedroom. [The victim] proceeded to go to the basement to smoke a cigarette.

Shortly thereafter, an argument over the disappearance of photographs, from a dresser in the master bedroom, depicting [the victim] posing topless to document her weight loss since the birth of [B.G.T.], ensued in the kitchen. During the argument, Defendant indicated he had removed the pictures in order to "protect himself." Defendant then asked [the victim] if she had anything to tell him regarding his observation of [the victim] traveling in a vehicle with a male friend approximately one week prior to January 9, 2009.

At this point, Defendant became irate and told [the victim] that she did not deserve to be in her son's life and began to call her names, including a "dirty whore" and a "slut." [The victim] testified that Defendant had never spoken to her in that manner before. Defendant became increasingly agitated and continued to call her names, screaming at [the victim] while only a few inches from her face. Both Defendant and [the victim] then retreated from one another, and [the victim] returned to the basement.

Subsequently, Defendant ran down the basement stairs and approached [the victim]. He resumed screaming at her and calling her names, and proceeded to grab [the victim] by the collar and shake her violently. Defendant then punched [the victim] in the face with a closed fist. After the punch, Defendant, who was "cornering" [the victim] up against a wall and blocking her path of retreat, pushed her into a chair. After [the victim] was in the chair, Defendant continued to scream at her and punched her in the mouth, causing her lower lip to bleed. Defendant then repeatedly hit [the victim] in the face and head with closed fists and his elbows, to the point where she "lost count" of the number of times she was struck.

As a result of the repeated blows to the head, [the victim] began feeling "very weak" and "could feel her eyes start to roll into her head." At this point, Defendant kicked her on the side of her face and stated[,] "you're not going to fucking pass out, you're going to be awake through this." [The victim] pleaded with Defendant to stop and asked him "why he was doing this." According to [the victim], Defendant stated that she "was not leaving the room alive tonight" and that "there was no reason that she needed to survive."

Thereafter, Defendant continued to hit [the victim] in the head, and kicked her "multiple times in the side of the face and head." [The victim] testified that during the course of the attack, Defendant would "sit down and seem like he calmed down a little bit and then say something about her being with this guy that would make him mad and he would get up and lunge at her again." At one point during the assault in the basement, Defendant picked up a large, glass ashtray and threw it at the back of [the victim's] head, causing a wound to open near the top of her skull. Defendant also removed two framed pictures from the wall, near the chair where [the victim] was located, and smashed them over her head.

After these acts, Defendant escalated the assault further by brandishing a gun and telling [the victim] that she "was going to die." Defendant pointed the gun at [the victim's] head and told her to stand up from the chair and turn around. [The victim] refused to stand up, and was struck several times in the head with [the] gun. As a result, she was given a choice by Defendant: she could either "stand up and turn around or she could run up the steps and he would shoot her in the back." [The victim] did not move from the chair, at which point Defendant began pointing the gun at her head, stomach, and knee, alternating between each.

Defendant then indicated that he planned to kill [the victim] and then kill himself. Defendant raised the gun towards [the victim's] face again and she, fearful that he was going to pull the trigger, wrapped her hand around the gun. A struggle ensued, Defendant would not relinquish the gun and [the victim] was pulled from the chair. She continued to hold the gun in an attempt to point it away from her head, while Defendant repeatedly "smashed" her head off of the floor and wall.

[The victim] was then thrown back into the chair and ordered to stand up and turn around. Once she turned around, Defendant placed the gun on top of an iguana cage adjacent to the chair, pushed [the victim] over the chair, pulled down her pants, and began vaginally raping her. [The victim] testified that Defendant stated that she "was so dirty he couldn't even fuck her" and then removed his penis from her vagina. Defendant did not ejaculate. Defendant then pushed [the victim] onto her knees and forced [her] to perform oral sex on him by forcing her mouth onto his penis. Defendant, having possession of the gun again, stated that "if she bit him, he would blow her fucking head off."

At some point thereafter, Defendant pushed [the victim] away and she returned to the chair. [The victim] testified that she did not attempt to flee because Defendant still had possession of the gun. Subsequently, Defendant told [the victim] to stand up from the chair and go upstairs. Defendant pushed her to the basement steps and when asked by [the victim] why she was being told to go upstairs, he informed her that she was going to take a shower. [The victim] proceeded to walk backwards up the basement stairs and then up the set of stairs to the third floor of the residence. Defendant remained in possession of the gun during the walk to the third floor.

Once on the third floor, Defendant, while standing before her with the gun, told [the victim] to remove her clothes and take a shower, to which she complied. After the completion of her shower, Defendant forced [the victim] into their son's bedroom on the third floor, pushed her to the ground, and raped her again. [The victim] testified that Defendant stated that "he should come inside of her and get her pregnant so [B.G.T.] could have a sibling and then kill himself." However, Defendant did not ejaculate. Instead, Defendant removed himself from [the victim] and began to cry and tell her that he was sorry. He then sat up and inserted the gun into his mouth. [The victim], fearing that a gunshot would wake their son, pleaded with Defendant not to shoot himself and pulled the gun away from his mouth. At this point, Defendant removed the magazine from the gun and handed both to [the victim], which she subsequently hid before walking into the master bedroom where [B.G.T.] was sleeping. Defendant then laid down next to [B.G.T] and went to sleep. After the Defendant was asleep, [the victim] did not leave the residence, as [B.G.T.] was located immediately next to Defendant and she was afraid that if she attempted to move [B.G.T.], Defendant would wake up. Thereafter, [the victim] testified that she laid down on the bed, held her son, and "passed out from the pain."

The following morning, after [B.G.T.] awoke and began watching cartoons on the edge of the bed, Defendant attempted to “cuddle” with [the victim]. As a result, she jumped out of bed and Defendant said, “I knew you fucking lied, you just wanted to live.” Defendant became increasingly “enraged” and stated “you promised it was going to be all better, you did nothing but lie.” Defendant further stated that he “couldn’t even be a good rapist.” Upon hearing these comments from Defendant, [the victim] left the bedroom and went downstairs where [B.G.T.] was located.^[1] Defendant followed her downstairs, and while she was making breakfast for [B.G.T.], Defendant got on his knees and hugged [the victim’s] legs and apologized for the events of the preceding night, telling her that “he would never hurt her again and he would never do anything like that again.”

¹ It is unclear when the child exited the room.

Later than [sic] morning, after [B.G.T.] had been fed breakfast, and [the victim] felt it was safe to leave the residence, she traveled to her sister’s house. Almost immediately upon her arrival, [the victim’s] sister, Danielle, transported [the victim] to the hospital for treatment of her injuries. After reporting what had occurred the prior night, police were notified and an investigation ensued, culminating in charges being filed against Defendant.

Commonwealth v. Thomas, No. 799 WDA 2010, 32 A.2d 274 (Pa. Super Ct. July 18, 2011) (unpublished opinion) (quoting from Trial Court Opinion, 10/27/10, at 2-8), (Exh. 45 in state court record). *appeal denied*, 34 A.3d 83 (Pa. 2011) (table) (hereinafter referred to as “*Thomas-I*”).

Thomas, through counsel, appealed his conviction to the Pennsylvania Superior Court and raised the following two issues, each challenging the trial court’s evidentiary rulings barring the admission of evidence of the victim’s past and current psychological issues:

- (1) whether the trial court erred in granting the Commonwealth’s motion in limine excluding cross examination of the alleged victim as to her past or current psychiatric treatment, diagnosis, and medication management, past or current which precluded the defense from presenting evidence as to the victim’s ability to observe matters to which she testified at trial; and

(2) whether the trial court erred by granting the Commonwealth's motion in limine excluding Thomas's testimony through direct examination as to the victim's past or current psychiatric treatment, diagnosis, and medication management, past or current which precluded the defense from presenting evidence as to the victim's ability to observe matters to which she testified at trial.

On July 18, 2011, the Superior Court issued a memorandum affirming the trial court. *Thomas-1*, Pa. Super. Ct., 7/18/2011. Thomas filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied by order dated December 23, 2011.

Unsuccessful on direct appeal, Thomas filed a *pro se* petition pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 - 9546. Counsel was appointed and filed an Amended Petition raising six (6) claims of ineffective assistance of counsel. On May 28, 2013, the PCRA court denied each of Thomas's six claims of ineffective assistance of counsel.¹ *Commonwealth v. Thomas*, 490 WDA 2013, slip opinion (May 28, 2013) (Exh. 64 in state court record) (hereinafter referred to as "*PCRA Court Opinion*"). Thomas, through counsel, filed a timely appeal from the PCRA order to the Superior Court.² By Memorandum of February 27, 2014, the Superior Court affirmed the PCRA court's denial and dismissal of the PCRA petition. *Commonwealth v. Thomas*, No. 490 WDA 2013, slip opinion (Pa. Super. Ct. Feb. 27, 2014)(unpublished opinion) (Doc. No. 65 in state court records) (hereinafter referred to

¹ Judge Janet Moschetta Bell presided over the trial, sentencing proceedings, and post-sentence motions; upon her retirement, the PCRA proceedings were transferred to Judge Katherine B. Emery (the "PCRA court").

² In its Memorandum affirming the order denying PCRA relief, the Superior Court noted that there were actually eight (8) issues raised in the appellant brief. "However, his fifth issue is simply a reiteration of his first, challenging a comment by Police Detective David Leonard on Thomas's post silence arrest. Hence, we need not address it. Moreover, his last two issues challenge the trial court's preclusion of all testimony concerning the victim's mental health. We will consider these issues together." *Commonwealth v. Thomas*, No. 490 WDA 2013 (Pa. Super. Ct. February 27, 2014, n. 3)(unpublished opinion) (Doc. No. 65 in state court records).

as “*Thomas-2*”). The Supreme Court of Pennsylvania denied allowance of appeal on September 10, 2014.

Having been denied relief in state court, Thomas filed *pro se* the instant habeas petition raising the following six ineffectiveness claims, which are similar to the claims he raised on collateral review:

GROUND ONE: ineffective assistance of counsel / constitutional violation of failure to object / request a cautionary instruction or mistrial with regard to improper statements or mistrial with regard to improper statements made by the prosecution in closing argument.

GROUND TWO: ineffective assistance of counsel / constitutional violation failure to object to inadmissible and prejudicial statements by prosecutor and failure to request a mistrial and/or cautionary instruction.

GROUND THREE: ineffective assistance of counsel for failure to preserve issues and object to inadmissible and prejudicial expert testimony.

GROUND FOUR: ineffective assistance of counsel for failure to object to the prosecutor’s reference to appellant’s post-arrest silence.

GROUND FIVE: ineffective assistance of counsel / constitutional violation for failing to subpoena / obtain alleged victim’s medical records and/or utilize reports, etc. to establish defenses, including justification and to impeach the victim through cross examination;

GROUND SIX: ineffective assistance of counsel / constitutional violation for failing to compel alleged victim to undergo psychological / psychiatric evaluation and subpoena alleged victim’s medical records and failure to utilize the services of a medical / mental health expert.

Habeas Pet. (ECF No. 1). Respondents filed a timely Answer (ECF No. 13) and the relevant state court records, to which Thomas filed a Brief (ECF No. 14) and Traverse reply brief (ECF No. 20). The Court has reviewed the filings of the parties, as well as the state court record, including the transcripts from Thomas’s trial, and the appellate briefs filed with the Pennsylvania Superior Court. (ECF Nos. 22 and 23). The matter is fully briefed and ripe for disposition.

B. Standard of Review

This case is governed by the federal habeas statute applicable to state prisoners. 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214, enacted on April 24, 1996 (“AEDPA”), “which imposes significant procedural and substantive limitations on the scope” of the Court’s review.³ *Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221, 227 (3d Cir. 2017), *cert. denied*, -- U.S.--, 2018 WL 49031 (Feb. 26, 2018). Under AEDPA, a petitioner must “‘ha[ve] exhausted the remedies available in the courts of the State,’ 28 U.S.C. § 2254(b)(1)(A), before seeking federal habeas relief, and a claim will be deemed unexhausted if the petitioner ‘has the right under the law of the State to raise, by any available procedure, the question presented,’ but has failed to do so, *id.* § 2254(c).” *Id.* The exhaustion requirement does not require a habeas petitioner “to cite the federal Constitution ‘book and verse,’ but rather to have ‘fairly presented’ his federal claim to the state courts.” *Id.* (quoting *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999)(quoting *Picard v. Connor*, 404 U.S. 270, 277-78 (1971)). If a habeas petitioner has not “fairly presented” a federal claim and “further state-court review is no longer available under state law, the claim is ‘procedurally defaulted . . . and may be entertained in a federal habeas petition only if there is a basis for excusing the procedural default.’” *Id.* at 228 (quoting *Wenger v. Frank*, 266 F.3d 218, 223-24 (3d Cir. 2001)).

Additionally, “where a state court has rejected a petitioner’s claim on the merits, AEDPA limits the scope of [the court’s] substantive review to whether the state court’s decision ‘was contrary to, or involved an unreasonable application of, clearly established Federal law, as

³ The first consideration in reviewing a federal habeas petition is whether the petition was timely filed under AEDPA’s one-year limitations period. 28 U.S.C. § 2244(d). Respondents do not dispute that Thomas’s petition was timely filed.

determined by the Supreme Court of the United States.” *Id.* (quoting 28 U.S.C. § 2254(d)(1). “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 a decision of [the Supreme] Court and nevertheless arrives at a [different] result.’” *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). Few state court decisions will be “contrary to” Supreme Court precedent. “Clearly established Federal law” should be determined as of the date of the relevant state-court decision. *Greene v. Palakovich*, 606 F.3d 85, 95 (3d Cir. 2010), *aff’d*, *Greene v. Fisher*, 565 U.S. 34 (2011).

However, “[w]here the state court fails to adjudicate or address the merits of a petitioner’s claims, unless procedurally defaulted, the federal habeas court must conduct a *de novo* review over pure legal questions and mixed questions of law and fact. *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

Our Court of Appeals has made clear that “the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner’s conviction; what occurred in the petitioner’s collateral proceeding does not enter into the habeas calculation.” *Hassine v. Zimmerman*, 160 F.3d 941, 954 (3d Cir. 1998). Put simply, “habeas proceedings are not the appropriate forum for [a prisoner] to pursue claims of error at the PCRA proceeding It is the original trial that is the ‘main event’ for habeas purposes.” *Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004).

Petitioner’s claims will be reviewed with these standards in mind.

C. Discussion⁴

Each of Thomas's six claims raises an allegation of ineffective assistance of counsel.

The Supreme Court of the United States:

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 v. Smith, 539 U.S. 510, 521 (2003). 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 Supreme 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 United States Court of Appeals for the Third Circuit has held that Pennsylvania's test for assessing ineffective assistance of counsel claims is not contrary to *Strickland*. *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000); *see also Commonwealth v. Pierce*, 527 A.2d 973,

⁴ The first consideration in reviewing a federal habeas corpus petition is whether the petition was timely filed under AEDPA's one-year limitations period. 28 U.S.C. § 2244(d). Respondents do not dispute that Thomas's petition was timely filed.

976 (Pa. 1987) (expressly stating that Pennsylvania follows the *Strickland* standard of review). Thus, the relevant question is whether the decisions of the Pennsylvania courts involve an unreasonable application of *Strickland*. *Jacobs v. Horn*, 395 F3d 92, 106 n.9 (3d Cir. 2005). That is, a petitioner must show that the state courts “applied *Strickland* to the facts of his case in an objectively unreasonable manner.” *Bell v. Cone*, 535 U.S. 685, 699 (2002).

When resolving an ineffectiveness of counsel issue, 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 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 699).

Respondents argue that Claims One and Six are procedurally defaulted and should not be reviewed by this Court on the merits. Respondents agree that Claims Two, Three, Four, and Five have been exhausted and are not procedurally defaulted. However, they argue that these claims are meritless. Petitioner’s claims will be addressed seriatim.

Claim One

In his first claim, Thomas alleges that trial counsel was ineffective for failing to object to the prosecutor’s improper closing argument. Specifically, “Thomas argues that the prosecutor referenced evidence outside the record during her closing argument which is impermissible and violates due process.” Pet. at 5. Respondents argue that although Thomas raised this claim in collateral proceedings, the Superior Court did not adjudicate the claim on the merits. Therefore,

Respondents argue that the claim is procedurally defaulted and should not be reviewed by this Court.

The procedural default doctrine is based upon the “independent and adequate state law grounds” doctrine, which dictates that federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law that is “independent” of the federal question and “adequate” to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Rolan v. Coleman*, 680 F.3d 311, 317 (3d Cir. 2012).

A petitioner whose constitutional claims have not been addressed on the merits due to procedural default can overcome the default, thereby allowing federal court review, if he or she can demonstrate either (i) “cause” for the default, i.e., that some objective factor “external to the defense” impeded efforts to comply with the state’s procedural rule, and “actual prejudice” or (ii) that failure to consider the claims would result in a “fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750; *Martinez v. Ryan*, 566 U.S. 1 (2012).

The second exception to the procedural default rule arises when a petitioner demonstrates that failing to allow his claims to proceed would result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320-22 (1995). To show a fundamental miscarriage of justice, a petitioner must demonstrate that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Id.* at 321 (quoting *Murray*, 477 U.S. at 496). Under this standard, a petitioner must “support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial.” *Schlup*, 513 U.S. at 324. Once such evidence is presented, a petitioner must then show that “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* at 327.

There is no question that the instant case is not the type of extraordinary case in which Thomas can overcome the default of his claim by way of the miscarriage of justice exception.

If a petitioner has committed a procedural default and has not shown either cause and prejudice or a miscarriage of justice, the proper disposition is to dismiss the procedurally defaulted claim with prejudice. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977).

Turning to Claim One of the instant petition, on PCRA appeal, Thomas argued, that his trial counsel was ineffective for failing to object to “improper remarks” made by the prosecutor during closing argument. The Superior Court, on appeal of the denial of his PCRA petition, did not adjudicate the claim on the merits but rather addressed the claim as follows:

[I]n the 14 pages of argument on this issue, Thomas fails to explain why the cited comments were improper, or specify which comment(s) implied to the jury that the prosecutor had outside knowledge of his guilt.

We have previously cautioned that a brief which includes citations to pages in the notes of testimony, but no specific arguments concerning reasons why each challenged comment deprived an appellant of his right to a fair trial, constitutes the type of cursory legal discussion which is wholly inadequate to preserve an issue for appellate view.

Commonwealth v. Johnson, 985 A.2d 915, 925 (Pa. 2009). See also **Commonwealth v. LaCava**, 666 A.2d 221, 235 ([Pa.] 1995) (“[A]bsent even a meager attempt to show how [alleged prejudicial (sic) statements by the prosecutor] deprived [defendant] of a fair trial or worked to form in the jury’s minds a fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict, no relief is due.”). The courts of this Commonwealth have consistently refused to make arguments for a defendant. **LaCava**, 666 A.2d at 235. Thus, no relief is due on this claim.

Thomas-2, Pa. Super. Ct., 2/27/14, at 13-14.⁵

⁵ This Court has also reviewed Thomas’s appellate brief and agrees with the Superior Court that while the appellate brief cited to pages in the trial transcript containing the prosecutor’s closing argument, it failed to provide any reasoned development whatsoever of why

The Superior Court did not base its decision on federal law, but clearly and expressly denied the claim based on Pennsylvania common law rules. The rule was “independent” of the federal question raised by Thomas’s claim. The procedural rule upon which the Superior Court based its decision was also “adequate.” The terms of this common law rule are firmly established by state law and have been regularly and consistently applied by Pennsylvania courts. *See Commonwealth v. Johnson*, 985 A.2d 915, 925 (Pa. 2009), *cert. denied*, -- U.S. --, 131 S.Ct. 250 (2010); *Commonwealth v. LaCava*, 666 A.2d 221, 235 (Pa. 1995); *Commonwealth v. Faith*, No 920 WDA 2016, 2017 WL 1326510 (Pa. Super. Ct. Apr. 11, 2017); *Commonwealth v. Luster*, No. 528 WDA 2011, 71 A.3d 1029, 1052 (Pa. Super. Ct. 2011).

For these reasons, the Court finds that Claim One was waived under an independent and adequate procedural rule, and therefore, is procedurally defaulted.

In an attempt to save the claim from procedural default, Thomas in his brief in support of his petition (ECF No. 14) and in his traverse reply brief (ECF No. 20), cites to the prosecutor’s closing arguments and argues why the statement(s) was improper. *See* ECF No. 20 at 6-10. However, because these explanations were never presented to the state courts, the claim remains procedurally defaulted.

Notwithstanding the procedural default of this claim, the Court finds the claim is without merit and habeas relief is unavailable on that basis as well. To determine whether counsel was ineffective for failing to object during the prosecutor’s closing argument, the Court must determine whether prosecutorial misconduct occurred. “A claim of prosecutorial misconduct must be viewed in light of the entire context in which the alleged misconduct arose.”

the challenged statements were improper, or which statements implied to the jury that the prosecutor had outside knowledge of his guilt. *See* ECF No. 22 at 32 - 45.

Commonwealth v. LaCava, 666 A.2d 221, 235 (Pa 1995). “Generally, a prosecutor is permitted to vigorously argue his case so long as his comments are supported by evidence and contain inferences which are reasonably derived from that evidence.” *Id.* at 231.

The question now before this Court, however, is not the propriety of the prosecutor’s comments *per se*, but the response of trial counsel. The Court has reviewed the transcript of the closing arguments, N.T., 9/24/09, Doc Nos. 36 and 36A in state court record, and finds that it was not objectively unreasonable for trial counsel to refrain from objecting during the prosecutor’s closing argument. “[B]ecause many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements by the prosecutor, the failure to object during closing argument and opening statement is within the ‘wide range’ of permissible professional legal conduct, and thus does not constitute ineffective assistance of counsel.”

United States v. Lively, 817 F Supp. 453, 466 (D. Del), *aff’d*, 14 F.3d 50 (3d Cir. 1993) (citations omitted). The Court does not find that the prosecutor made “egregious misstatements.” Moreover, trial counsel could reasonably trust in the jury’s ability to follow the court’s general charge emphasizing that the arguments of counsel were not evidence. *See* N.T., 9/24/09 at 86 (“Anything that counsel may have said in the opening statements or closing arguments, any personal opinion that they may have expressed, if they misstated any facts or evidence or added any alleged facts not in evidence, you should disregard that because it is your recollection individually and collectively that counts and nothing else.”)

However, even if Thomas was able to demonstrate that trial counsel had no reasonable strategic basis for not raising any objections during the prosecutor’s closing argument, Thomas fails to establish the prejudice prong of his *Strickland* claim by showing that but for counsel’s

failure to raise an objection to the challenged statements, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 696.

Thus, to the extent that this claim was not waived, the Court recommends that this claim be denied as it is without merit.

Claim Two

In his second claim, Thomas alleges that trial counsel was ineffective for failing to object, move for a mistrial, and/or request a cautionary instruction when the prosecutor referred to Thomas's post-arrest silence. This issue was raised by Thomas in his PCRA Petition and was rejected on the merits by the Superior Court. Thus, this Court's review is governed by AEDPA's standard of review.

The challenged exchange occurred during the cross examination of Thomas and is repeated verbatim from the trial transcript as follows:

[Prosecutor]: So this all seems to be a relatively easy explanation. Why is it that you didn't say, I can't believe I'm accused of this, this is really what happened?

[Defense Counsel:] Objection, your Honor. I don't believe that's appropriate to ask why the Defendant did not give the statement to the police or whoever she is asking about.

THE COURT: Restate your question. I'm not sustaining it. I just didn't hear your question.

[Prosecutor:] Your Honor, I will withdraw that and reserve that for argument at this point.

THE COURT: Move on.

N.T., 9/23/09, at 646-47. The Superior Court held, for a number of reasons, that relief was not warranted on this claim. First, the Superior Court noted that Thomas's contention that trial counsel failed to object was belied by the record. Next, the appellate court found that trial

counsel had no basis to request a mistrial because (i) during the opening charge, the court had instructed the jury that questions posed by the attorneys are not evidence, but rather it is the answers of the witnesses that provide the evidence; and (ii) the prosecutor withdrew the question when asked to repeat it. The Superior Court also noted that “any negative inference drawn by the jury when the prosecutor asked Thomas why he did not tell the police his side of the story was effectively cured when Thomas later explained that he was counseled not to talk to the police.” *Thomas-2*, Pa. Super. Ct., 2/27/14, at 9-10.

The decision of the Superior Court easily withstands review under AEDPA. It is clear that the Superior Court applied the correct standard and Thomas has not demonstrated that the Superior Court’s decision was an unreasonable application of *Strickland*. Therefore, it is recommended that Thomas be denied habeas relief on this claim.

Claim Three

In his third claim, Thomas argues that his counsel was ineffective for failing to challenge the admission of expert testimony by Commonwealth witness, Nurse Laura Yang. This issue was raised by Thomas in his PCRA Petition and was rejected on the merits by the Superior Court. Accordingly, as with Claim Two, this Court’s review is governed by AEDPA’s standard of review.

Nurse Yang testified as a Sexual Assault Nurse Examiner (“SANE”). Thomas argues that trial counsel was ineffective for failing to object or request a mistrial on the grounds that Nurse Yang’s testimony was beyond the scope of diagnosis to which nurses may testify in Pennsylvania. Both the PCRA court and the Superior Court found that Thomas was not entitled to relief on this issue.

The record reflects that before the trial court accepted Nurse Yang as an expert, she testified as to her competency regarding her qualifications as a SANE nurse. She testified that she had done over 100 sexual assault investigations and had completed over 100 sexual assault kits. N.T., 9/22/09, 360-366. After that testimony, Thomas's trial counsel requested a discussion at side bar at which he asked for a proffer as to her expertise. Both parties agreed that Nurse Yang would "testify to the collection of evidence, but she is not the expert in determining whether or not a sexual assault occurred." N.T., 9/22/09, 366: 16-21. The prosecutor explained that she understood that the nurse could not testify as to her ultimate opinion but that the nurse could "state what the examination was, what took place during the examination." *Id.* at 366: 22-25.

Nurse Yang testified that SANE nurses use a sexual assault kit to proceed with a particular protocol for gathering evidence from patients who have indicated that they have been sexually assaulted. She testified about the injuries she saw on the victim in this case and the lack of injury to the victim's vaginal area. She testified that she had performed a sexual assault kit on the victim consistent with her SANE training and also testified as to the information the victim had provided to her regarding the attack in order to assist in her treatment. *Id.* at 360-397.

Both the PCRA court and the Superior Court found that Nurse Yang's testimony was proper and that trial counsel had no valid reason for objecting, requesting limiting instructions to the jury, or moving for a mistrial. The Superior Court commented that Nurse Yang's testimony was not an impermissible medical diagnosis; rather, her testimony described the sexual assault examination she performed on the victim, the injuries she witnessed on the victim during that exam, the victim's account of the attack, and her assessment of the victim's demeanor and state

of mind. Nurse Yang did not testify that the victim's injuries were caused by a sexual assault. *Thomas-2*, Pa. Super. Ct., 2/27/14, at 11.

It is clear that the Superior Court applied the correct standard and Thomas has not demonstrated that the Superior Court's decision was an unreasonable application of *Strickland*.

Thomas also argues, as he did during the PCRA proceeding, that if not impermissible, trial counsel was ineffective for not objecting to Nurse Yang's testimony which was prejudicial and inflammatory, as reflected by the following exchange:

[Prosecutor]: Based on your background and experience and training and prior examinations, can you explain why there would be no physical injury [in the victim's vaginal area]?

[Nurse Yang]: In a lot of cases it's because the girls are so fearful and scared they will so go along with the assailant to do anything so they won't injure them further.

In [the victim's case], she had been beaten with a gun. She was threatened with a gun. She was told she wasn't going to leave alive. You know, she just went along with whatever was the easiest so she wouldn't get injured further. That happens in a lot of sexual assault cases.

...

[Prosecutor]: Anything else you're looking at beyond the vaginal area? What else are you evaluating when you're looking at this?

[Nurse Yang]: . . . We look for, you know, any evidence to corroborate the story she is telling. She had - her ear was ripped and her earring was ripped out.

N.T. at 376-77. The Superior Court rejected the argument that this testimony was prejudicial and inflammatory, finding that

As a SANE expert witness, Nurse Yang properly opined why some sexual assault victims do not present with visible injuries. Her comments regarding the particular victim in this case were based upon the victim's recollection of the alleged attack. Further, Nurse Yang properly testified that during a sexual assault examination, she looks for any physical evidence that corroborates the "story" provided by the victim. Here, Nurse Yang testified that the victim's earring had

been ripped out, which was consistent with the victim's version of the events. Therefore, trial counsel would have had no basis to object to this testimony.

Thomas-2, Pa. Super. Ct., 2/27/14, at 12-13. Again, Thomas has not demonstrated that the Superior Court's decision was an unreasonable application of *Strickland*. Therefore, it is recommended that Thomas be denied habeas relief on this claim.

Claim Four

In his fourth claim, Thomas challenges the failure of trial counsel to object to a comment made by Trooper David Leonard during his direct examination about Thomas's post-arrest silence. Thomas claims that his trial counsel should have filed a motion to suppress; and/or filed a motion in limine seeking to preclude that testimony; and/or moved for a mistrial; and/or requested a cautionary instruction. This issue was raised by Thomas in his PCRA Petition and was rejected on the merits by the Superior Court. Accordingly, this Court's review is governed by AEDPA's standard of review.

The Superior Court explained the context of Thomas's claim and rejected it as follows:

[PROSECUTOR]: What steps did you take after you left the hospital with [the victim]?

[DETECTIVE LEONARD:] After I left the hospital, I made sure that the barracks had responded to Mr. Thomas' residence. And thereafter, I proceeded back to the barracks and I encountered Mr. Thomas, at which point I asked if he would like to discuss this case at all.

[PROSECUTOR]: You understand that he did have the absolute right to not talk to you at all?

[DETECTIVE LEONARD:] That's correct. And that is exactly what he chose to do. I did ask him, however, if he would like to make any complaint as far as injuries or anything. He stated that he would rather talk to an attorney.

[PROSECUTOR:] Which he has the right to do?

[DETECTIVE LEONARD:] That's correct.

Thomas-2, Pa. Super. Ct., 2/27/14, at 6 (quoting N.T. , 9/22/2009, at 464 - 65).

The Superior Court found that while the testimony was objectionable, Thomas had not established ineffective assistance of counsel because (i) the testimony was spontaneously made by the detective and, therefore, not subject to a motion in limine or pretrial suppression; (ii) that a motion for mistrial would have been fruitless, as the comment was brief, not solicited by the Commonwealth, and not exploited by the Commonwealth in closing argument; and (iii) that there was no prejudice as a result of trial counsel's failure to request a cautionary instruction as the prosecutor made clear during the objectionable testimony that Thomas had the absolute right to remain silent and a concomitant right to consult with an attorney. *Thomas-2*, Pa. Super. Ct., 2/27/14, at 7-8.

Both the United States Constitution and the Pennsylvania Constitution protect every person against being compelled to be a witness against himself or herself. U.S. Const. amend. V; Pa. Const. article 1, § 9. Pennsylvania courts have “interpreted the constitutional right against self-incrimination generally to prohibit prosecutors from referencing a defendant’s silence as substantive evidence of guilt.” *Commonwealth v. Adams*, 104 A.3d 511, 517 (Pa. 2014).

The Court finds that the decision of the Superior Court withstands review under AEDPA. Not every revelation of silence establishes prejudice. *See Commonwealth v. Whitney*, 708 A.3d 471, 478 (Pa. 1998) (“Even an explicit reference to silence is not reversible error where it occurs in a contact not likely to suggest to the jury that silence is the equivalent of a tacit admission of guilt”). Taken at face value, Trooper Leonard’s statement was limited to its context. The Trooper revealed the exchange with Thomas and the decision to engage in discussion with the trooper was declined. Trooper Leonard agreed with the prosecutor’s statement that Thomas had

the absolute right not to talk to him. N.T., 9/22/2009, at 465. The Court agrees with the Superior Court that the reference to silence was not used in any fashion that was likely to burden Thomas's Fifth Amendment right or to create an inference of an admission of guilt. Because there was no violation of Thomas's Fifth Amendment privilege, counsel cannot be found ineffective for failing to raise meritless claims.

Claims Five and Six

Because Thomas's fifth and sixth claims overlap, the Court will consolidate them for analysis. Thomas argues that trial counsel was ineffective for failing to present evidence of the victim's mental health issues. Specifically, he contends that counsel was ineffective for failing to (i) subpoena the victim's medical records (Claim Five), (ii) compel the victim to undergo a psychological examination (Claim Six), and (iii) utilize the services of a mental health expert to "establish defenses including justification and to impeach / challenge victim recollection through cross examination of victim and testimony of defendant." (Claim Five and Six). Pet. at 16 (ECF No. 1). As both claims were presented to the Pennsylvania courts on PCRA review, the claims are subject to AEDPA review.⁶

During trial counsel's opening statement, counsel indicated that he would introduce evidence to demonstrate that the victim was mentally unstable, the defense theory being that the victim was emotionally unstable, threatened Thomas with the gun, and sustained her injuries as a result of his wrestling the gun away from her. N.T., 9/21/2016, at 33: 3-11. After completing

⁶ Respondents argue that Claim Six (failure to compel psychological examination) is procedurally defaulted as it was not presented to the PCRA courts. However, this Court finds that the issue was presented to both the PCRA court and Superior Court on collateral review. The PCRA court specifically addressed the issue in its 1925(a) opinion (state court record No. 64 at 18 - 21), and the Superior Court specifically stated that Thomas "contends counsel was ineffective for failing to compel the victim to undergo a psychological exam . . ." *Thomas-2*, Pa. Super. Ct., 2/27/14, at 14 (state court record No. 65).

the direct testimony of the victim, the Commonwealth presented an oral motion in limine seeking to exclude defense counsel from questioning the victim regarding or prior psychiatric treatment or offering Thomas's own testimony regarding victim's mental health. *Id.* at 113: 11-18. The Commonwealth argued that the victim had not undergone any psychiatric or mental health treatment at any time in close proximity to the events of the case. *Id.* at 113:22 - 114:3. According to the Commonwealth, the only psychiatric treatment undertaken by the victim was in 2005 for depression after the death of a close friend and that there was no evidence that the victim was currently being treated for a mental health issue.

During argument, defense counsel indicated that he was going to ask the victim if she had been prescribed medication, specifically, Depakote and Wellbutrin. *Id.* at 115: 14-17. He also indicated that Thomas was prepared to testify that he was taking the victim to mental health appointments within the last year, *id.* at 123: 11-13. The Commonwealth agreed that defense counsel had the right to cross-examine the victim as to whether she was under the influence of alcohol, illegal controlled substances, or prescriptive medications on the night of the attack, but argued that it was not relevant to ask the victim about her past mental health history, especially during time periods that preceded the alleged crime by four or five years. The trial court granted the motion in limine over defense counsel's objection.

Thomas testified on his own behalf. N.T. 544 - 667, 9/23/2009. He testified that he acted in self-defense pertaining to the charges of aggravated assault and simple assault. Specifically, he testified that the victim was the aggressor, that he used the amount of force necessary to protect himself from her attacks on him and to take possession of the gun which she allegedly held in her hand and pointed at him. He denied all allegations regarding the remaining charges

against him. The trial court instructed the jury on the self-defense / justification defense as to the charges of aggravated assault and simple assault. N.T. 844 - 846, 9/24/2009.

On direct appeal, Thomas challenged the trial court's evidentiary rulings barring the admission of evidence of the victim's past and current psychological issues. The Superior Court found that "[s]imply put, there is no indication that the victim's ability to recall or observe the events that transpired on the date in question was impaired." *Thomas-2*, Pa. Super. Ct., 2/27/2014, at 12. (state court record 45). Rather, the defense's reason for questioning the victim about her mental health was not to attack her ability to recall the events, but to demonstrate that it was more likely that she held the gun on Thomas and he feared for his life. *Id.*

In his PCRA petition, Thomas argued that his trial counsel was ineffective because the evidence that established that the victim suffered from or received services or medication as a result of mental instability or impairment at the time of the event, could have been used for impeachment purposes. In its 1925(a) Opinion, the PCRA court explained that "[d]ue to the large gap in time between the victim's mental health treatment due to the loss of a close friend and the defendant's attack on the victim, the trial court had no reason to find that prior mental history was relevant to the facts of the case or her ability to testify." *PCRA Court Opinion*, 5/28/13, at 20. Further, the PCRA court held as follows:

Even if trial counsel had compelled the victim to undergo a mental health evaluation and obtained her records, and hired an expert, the testimony would not have been permitted at trial. Trial counsel's failure to do so may have been a trial tactic, knowing that the time and money used to pursue this plan would have been wasted. The defendant has not proven that trial counsel had no reasonable strategic basis for his inaction.

Further, the defense of justification was used; the defendant testified that the victim actually attacked him. It was not necessary to obtain psychiatric and mental health records or use an expert witness for this defense; and as already stated, an expert would not have been permitted to testify about such information.

The defense nonetheless failed as the defendant testified that over the course of their relationship, they had never had a physical altercation (T.T. 581:6) and that he was not afraid of physical harm from her (T.T. 630:18). Any evidence that the defendant argues trial counsel should have presented to establish the victim's mental illness caused her to attack him would have been contradicted by the defendant's testimony about his state of mind. Based on the defendant's own testimony, the two were in a relationship for almost five (5) years without any incident like this. [The claim] fail[s] the test for ineffective assistance of counsel.

Id. at 21.

On appeal, the Superior Court affirmed the order denying PCRA relief agreeing that Thomas failed to demonstrate that his trial counsel rendered ineffective assistance of counsel. Specifically, the appellate court held that Thomas had failed to proffer any evidence that the victim's purported mental illness hampered her ability to recall the incident and that his assertions that she was prescribed certain medications and she stopped taking them and that he was taking her to psychiatric appointments within the last year were bald assertions. Moreover, the Superior Court found that counsel was not ineffective because any evidence proffered to establish "that the victim's mental illness caused her to attack him would have been contradicted by [Thomas's] testimony about his state of mind." *Thomas-2*, Pa. Super. Ct., 2/27/2014, at 17-18 (quoting *PCRA Court Opinion*, 5/28/2013, at 21).

After a review of the record, the Court finds that the Superior Court applied the correct standard and Thomas has not demonstrated that the Superior Court's decision was an unreasonable application of *Strickland*.⁷

⁷ In his traverse reply brief, Thomas appears to be contending for the first time that he is entitled to habeas relief based upon the "cumulative" prejudicial effect of all of his trial counsel's errors in this case. (ECF No. 20 at 28). This is improper as Thomas cannot amend or supplement his petition by raising a new claim in a traverse. However, even if the claim had been properly raised, given that the Court has found no constitutional errors entitling Thomas to habeas relief, there are "no errors to bundle," *Pursell v. Horn*, 187 F. Supp.2d 260, 363 (W.D.Pa. 2002), and it would have been recommended that the claim be denied.

D. Certificate of Appealability

Section 102 of AEDPA, which is codified at 28 U.S.C. § 2253, governs the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. It provides that “[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court has rejected a constitutional claim on its merits, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* Applying those standards here, the Court concludes that jurists of reason would not find it debatable whether each of Thomas’s claims should be dismissed. Accordingly, a certificate of appealability should be denied.

E. Conclusion

For all of the above reasons, it is respectfully recommended that the petition for a writ of habeas corpus be dismissed. It is further recommended that there is no basis upon which to grant a certificate of appealability.

Any party is permitted to file Objections to this Report and Recommendation to the assigned United States District Judge. In accordance with 28 U.S.C. § 636(b), Fed.R.Civ.P. 6(d) and 72(b)(2), and LCvR 72.D.2, Petitioner, because he is a non-electronically registered party,

may file objections to this Report and Recommendation by **May 11, 2018**, and Respondents, because they are electronically registered parties, may file objections by **May 8, 2018**. The parties are cautioned that failure to file Objections within this timeframe “will waive the right to appeal.” *Brightwell v. Lehman*, 637 F.3d 187, 193 n. 7 (3d Cir. 2011).

Dated: April 23, 2018

s/ Cynthia Reed Eddy
Cynthia Reed Eddy
United States Magistrate Judge

cc: DUANE BROCK THOMAS
JJ-8233
SCI Albion
Unit/Side C A
10745 Route 18
Albion, PA 16475-0002
(via United States First Class Mail)

Jerome A. Moschetta
Washington County District Attorney's Office
(via ECF electronic notification)