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

JULIUS EDWARDS	:	CIVIL ACTION
	:	
v.	:	
	:	
GERALD L. ROZUM, ET AL.	:	NO. 07-1736

MEMORANDUM

Padova, J. **February 7, 2008**

Petitioner Julius Edwards, a prisoner at the State Correctional Institution in Somerset, Pennsylvania, has filed a counseled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In a Report and Recommendation dated December 11, 2007, Magistrate Judge Timothy R. Rice recommends that Edwards' petition be dismissed but that a certificate of appealability be issued on several questions. Presently before the Court are Edwards' objections to the Report and Recommendation, as well as Respondents' Response. For the following reasons, the objections are overruled and the Report and Recommendation is adopted insofar as it is consistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

On July 16, 1998, a criminal complaint charged Edwards with, among other charges, "Murder - Conspiracy to commit." (Criminal Complaint at 1, Commonwealth v. Edwards, No. 1998-07-1461 (Jul. 16, 1998)). At the preliminary hearing, the conspiracy charge was discussed by the prosecutor and the defense counsel for both Edwards and his alleged co-conspirator, David Carson. (Transcript of Record at 91, 94, 97, Commonwealth v. Edwards, No. 9808-1090 (Phila. Ct. Com. Pl. Aug. 20, 1998) [hereinafter "Transcript of Record"]). The court held Edwards on "all charges." (Id. at 106).

On September 3, 1998, the Bill of Information,[1] however, charged that Edwards "committed the killing or was an accomplice in the killing . . . while in the perpetration of a felony," committed a robbery, and possessed an instrument of crime. (Bill of Information, D.C. No. 9814063799 (Sept. 3, 1998)). It did not include a conspiracy allegation. (See id.) On September 23, 1999, during the colloquy to waive a jury trial, the trial judge read Edwards the charges remaining against him. (Transcript of Record at 11). The charges included first, second, and third degree murder, involuntary and voluntary manslaughter, robbery, and possession of instruments of crime. (Id.) No conspiracy charge was mentioned. (Id.) Edwards waived arraignment, waived his right to a jury trial, and entered a plea of not guilty to charges of murder, manslaughter, robbery, and possession of an instrument of crime. (Id. at 11-17).

During their opening statements, both the prosecutor and the defense counsel mentioned "conspiracy." (Transcript of Record at 33, 36). Although the prosecutor noted the absence of a conspiracy charge in the Bill of Information after his opening statement, he did not move to amend the Bill of Information. (Id. at 34-35). After presenting the Commonwealth's case, however, the prosecution moved to amend the Bill of Information to include such a charge. (Id. at 484). The trial judge granted this motion and amended the Bill of Information to include a charge that Edwards conspired with David Carson to rob and/or kill Romie Webb. (Id. at 537). Edwards did not present witnesses or attempt to recall the Commonwealth's witnesses. (Id. at 547). Edwards was convicted of robbery, possession of an instrument of crime, second degree murder, and criminal conspiracy. (Id. at 607). The robbery sentence merged with the murder sentence, resulting in a sentence of life

[1]States are free to dispense with grand jury indictments and charge by information. Beck v. Washington, 369 U.S. 541, 545 (1962) (citing Hurtado v. California, 110 U.S. 516, 538 (1884)).

imprisonment for murder, and concurrent terms of two-and-a-half to five years imprisonment for possession of an instrument of crime, and five-to-ten years imprisonment for conspiracy. (Transcript of Record at 639-40). The trial court did not specify the basis for the second degree murder conviction. (Id. at 607).

On direct appeal to the Superior Court and the Supreme Court of Pennsylvania, Edwards alleged: (1) it was "untimely, improper, and prejudicial for the trial court to allow the Commonwealth to amend its murder Bill of Information to include a charge of conspiracy after the end of the Commonwealth's case;" (2) the evidence was insufficient to support the murder and conspiracy to commit murder convictions; and (3) the verdict was against the weight of the evidence. (Petition for Allowance of Appeal at 3, Commonwealth v. Edwards, No. 364 EAL 2001). With respect to his first issue on appeal, Edwards discussed Pennsylvania Criminal Rules 224 and 229,[2] which respectively concern withdrawals of charges by the Commonwealth and amendments to bills of information, and Pennsylvania case law. (Petition for Allowance of Appeal at 3, 7-12). Edwards also stated that "to amend an information to fit the Commonwealth's case is a clear due process violation" and cited a state case. (Id. at 11). The Superior Court affirmed the judgment of sentence on June 20, 2001 based exclusively on state law grounds. Commonwealth v. Edwards, 779 A.2d 1216 (Pa. Super. Ct. 2001) (table). On December 19, 2001, the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Edwards, 793 A.2d 904 (Pa. 2001) (table).

On March 10, 2003, Edwards sought collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541, et seq., alleging his trial counsel was ineffective for:

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[2]Pennsylvania Rules of Criminal Procedure were renumbered March 1, 2000, effective April 1, 2001. Rule 224 was renumbered as Rule 561, and Rule 229 was renumbered as Rule 564.

(1) "failing to present evidence at trial to establish that someone other than the defendant was involved;" (2) failing to raise on direct appeal trial court error in allowing witness Laura Carson to testify despite a violation of the sequestration order; and (3) failing to impeach witness Naeemah Gorham with prior inconsistent statements. (PCRA Petition for Allowance of Appeal at 2). After an evidentiary hearing, the PCRA court denied Edwards' petition on September 22, 2004, and later issued an opinion explaining its decision. Commonwealth v. Edwards, No. CP-51-CR-0810902-1998, at 1 (Phila. Ct. Com. Pls. Jan. 31, 2006). The Superior Court affirmed the PCRA court's decision on August 25, 2006. Commonwealth v. Edwards, 909 A.2d 869 (Pa. Super. Ct. 2006) (table). On April 24, 2007, the Pennsylvania Supreme Court denied Edwards' allocatur petition. Commonwealth v. Edwards, 921 A.2d 495 (Pa. 2007) (table).

Edwards filed a timely petition for a writ of habeas corpus on April 30, 2007 alleging: (1) trial court error in permitting the amendment of the Bill of Information charging murder to include conspiracy to commit murder at the close of the Commonwealth's case; (2) insufficient evidence to sustain the guilty verdicts; (3) trial counsel ineffectiveness for failing to introduce evidence that someone other than the defendant was involved in the incident; (4) trial counsel ineffectiveness for failing to raise on direct appeal the trial court's error in allowing a witness who violated the sequestration order to testify at trial; and (5) trial counsel ineffectiveness for failing to cross examine Commonwealth witness Gorham regarding her prior inconsistent statements. (Petition at 9-10, Edwards v. Rozum, No. 07-1736 (E.D. Pa. Apr. 30, 2007) [hereinafter "Petition"]). Edwards' discussion of the amendment to the Bill of Information focused exclusively on Pennsylvania Rules of Criminal Procedure 561 and 564, and did not mention federal law. (See Memorandum of Law and Exhibits in Support of Application for Habeas Corpus Under 28 U.S.C. § 2254 at 4-6, Edwards

v. Rozum, No. 07-1736 (E.D. Pa. Apr. 30, 2007) [hereinafter "Memo of Law"]; Petition at 9).

On October 29, 2007, Magistrate Judge Timothy R. Rice, to whom this matter was referred for a Report and Recommendation, directed the parties to file supplemental briefs addressing the following issues: (1) whether Edwards' claim that the trial court erred when it permitted the amendment to the bill of information raises a cognizable federal claim and if not whether Edwards should be granted leave to amend his petition; (2) whether a federal due process claim was "fairly presented" to the state courts and, thus, exhausted; (3) whether there is a material difference between the legal requirements of state law and federal law governing amendments to charging documents; and (4) assuming the claim can be addressed and has merit, what effect, if any, would it have on the murder conviction. Magistrate Judge Rice conducted an oral argument on these issues on November 21, 2007.

On December 11, 2007, Magistrate Judge Rice filed a Report and Recommendation in which he recommends that Edwards' claim of trial error in permitting the amendment of the Bill of Information be dismissed as non-cognizable, or in the alternative procedurally defaulted. However, he also recommends that there is probable cause to issue a certificate of appealability on the following questions: (1) whether the claim of trial court error in allowing the amendment to the bill of information is cognizable on federal habeas; (2) whether the issue was fairly presented to the state courts; and (3) whether Edwards' due process rights were violated. As for the remaining claims, he recommends that they be dismissed as meritless.

On December 18, 2007, Edwards filed counseled Objections to the Report and Recommendation [hereinafter "Objections"]. He objects to the recommendations regarding the claim of trial error in allowing the Commonwealth to amend the Bill of Information. He has not

filed any objections to the recommendations regarding the claims of sufficiency of the evidence, trial counsel ineffectiveness for failing to introduce evidence of an alternate culprit, trial counsel ineffectiveness for failing to raise a violation of the sequestration order, and trial counsel ineffectiveness for failing to impeach a witness.

On January 3, 2008, the Commonwealth filed a Response to Edwards' Objections. The Commonwealth requests that Edwards' objections be overruled, that the Magistrate Judge's Report and Recommendation be adopted (except for the recommendation regarding issuance of a certificate of appealability), that the petition be denied, and that a certificate of appealability be denied.

II. STANDARD

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

III. DISCUSSION

A. Claim relating to Amendment to the Bill of Information

The Magistrate Judge makes several recommendations with respect to this claim. First, he recommends that this claim is not cognizable on federal habeas review because Edwards only asserts violations of state law. He also recommends that Edwards cannot amend his petition to include a federal claim because the Commonwealth did not have notice of such a claim and the statute of limitations for filing a federal habeas corpus petition has expired. Alternatively, the Magistrate Judge recommends that this claim is procedurally defaulted because Edwards failed to present it to

the state courts and state procedural rules now bar state review. He also recommends that Edwards is not able to demonstrate cause and prejudice, or a fundamental miscarriage of justice in order to excuse the procedural default. Edwards objects to each of the recommendations.

1. Cognizability

Federal courts cannot review state court determinations of state law questions. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Rather, habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle, 502 U.S. at 67-68; ; Taylor v. Horn, 504 F.3d 416, 448 (3d Cir. 2007); Smith v. Horn, 120 F.3d 400, 426 (3d Cir. 1997); accord, 28 U.S.C. § 2241(c). In his federal petition, Edwards alleges that the amendment to the Bill of Information violated state law. The only legal basis he cites in support of this claim are the Pennsylvania Rules of Criminal Procedure concerning amendments to bills of information and withdrawals of charges. Edwards concludes the argument section of his Memo of Law on this claim by stating "[t]herefore, to allow the amendment, especially after trial began, was unjust and prejudicial." However, he does not cite any federal law, nor does he make any reference to the Fourteenth Amendment or to federal due process. A claim that an amendment to a bill of information violated state law is not subject to federal habeas review. See Estelle, 502 U.S. at 67-68; Taylor, 504 F.3d at448. Consequently, the Magistrate Judge recommends finding that this is not a cognizable claim.

Edwards first objects that his claim with regard to the bill of information issue is cognizable on federal habeas review. He argues that, in his Memo of Law, he alleged that the state decision was contrary to federal law and cited 28 U.S.C. § 2254. He further asserts that the nature and substance of his claim was "not difficult to decipher," and that "[he] continues to claim that the trial court's

action in allowing the amendment violates [his] right to due process of law in violation of the Fourteenth Amendment . . . ." (Objections at 6). Edwards also asserts that the Commonwealth was aware of his federal claim as evidenced by its Response to the petition and its Supplemental Brief.

Edwards' objections to this portion of the Report and Recommendation are overruled. His assertion that this claim presents a federal issue for review is without merit. Edwards' general reference to federal law appears only in one sentence of the introductory paragraph of his Memo of Law, and makes no reference to any specific federal law. (See Memo of Law at 1). He merely states he is entitled to relief because "the state decision [without reference to any specific state decision] is contrary to federal law." (Id.) This is insufficient to demonstrate that a particular claim discussed later in his Memo of Law is premised on a violation of his federal law, especially when the discussion of the specific claim itself contains absolutely no reference whatsoever to federal law, but rather refers to two state rules of criminal procedure. Additionally, Edwards' argument that his reference to 28 U.S.C. § 2254 is sufficient to show that this claim is based on federal law is meritless. If we were to accept Edwards' contention, then any state-law claim raised in a federal habeas petition brought pursuant to § 2254 would be subject to federal habeas review solely based on the fact that the petition itself was brought pursuant to § 2254.

At oral argument, Edwards moved to amend his petition to allege a federal claim premised on trial court error in allowing the amendment to the Bill of Information. Edwards' one-year statute of limitations for filing a federal habeas petition expired on May 3, 2007.[3] After the AEDPA one-

[3]Edwards' conviction became final on March 19, 2002, when the 90-day period for filing a petition for a writ of certiorari to the United States Supreme Court expired. Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). On March 10, 2003, Edwards filed a petition under the PCRA, tolling the AEDPA statute of limitations with nine days remaining. See Lawrence v. Florida, 127 S.Ct. 1079, 1083 (2007). The PCRA decision became final, and ended the tolling of the AEDPA

year statute of limitations expires, a petition may not be amended unless the asserted claims are tied to a "common core of operative facts." Mayle v. Felix, 545 U.S. 644, 662 (2005) (discussing interaction of AEDPA's statute of limitation with Federal Rule of Civil Procedure 15(c)(2) regarding the relation back of amendments). An amended claim can relate back to an original petition, and satisfy the statute of limitations, when the claim clarifies or amplifies facts, but not if the claim "seek[s] to add an entirely new claim or theory of relief." United States v. Thomas, 221 F.3d 430, 436 (3d Cir. 2000); but cf. United States v. Underwood, No. 05-4104, 2007 U.S. App. LEXIS (3d Cir. Sept. 6, 2007) (noting in dicta that whether trial court correctly denied an amendment was a "difficult question" where amendment sought to assert a claim of both trial and appellate counsel ineffectiveness but the petition alleged only appellate counsel ineffectiveness). To determine whether an amended claim relates back to the original pleading, courts "look to whether the opposing party has had fair notice of the general fact situation and legal theory upon which the amending party proceeds." Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 310 (3d Cir. 2004); Abu-Jamal v. Horn, Civ. A. No. 99-5089, 2001 U.S. Dist. LEXIS 20813 (E.D. Pa. Dec. 18, 2001) (discussing notice under Rule 15(c) in a habeas proceeding). The Magistrate Judge recommends finding that Edwards cannot add a new federal claim to his petition because the Commonwealth did not have notice of the new theory and the statute of limitations has expired.

Edwards objects that his proposed amendment would not have introduced a new claim or new theory, but would have merely clarified or amplified facts already contained in his habeas petition and Memo of Law. Edwards asserts that the Commonwealth clearly had notice of this

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statute of limitations, when Edwards' petition for allowance of appeal was denied on April 24, 2007. Six days later, on April 30, 2007, Edwards filed his federal habeas petition. Three days later, the AEDPA statute of limitations expired.

federal claim as the Commonwealth addressed the federal claim in its Response to the Habeas Petition and in its Supplemental Brief.

Edwards' objections on this issue are overruled. Edwards' proposed federal claim does not merely attempt to clarify or amplify facts already asserted in his petition. Rather, Edwards' proposed federal claim attempts to add a new legal theory of relief. As the statute of limitations has expired, this is impermissible. With respect to the Edwards' argument that the Commonwealth had notice of this federal claim, we find that this argument is without merit. The Commonwealth asserted in its Response to the Petition that this claim is non-cognizable on federal habeas review because it was solely a claim of a violation of state law. In the alternative, the Commonwealth argued that, if the court were to find that this allegation does assert a federal claim, then the federal claim should be found to be procedurally defaulted. The Commonwealth's decision to present this alternative argument does not alter the fact that Edwards' counseled habeas petition did not present a federal theory of relief with respect to the allegations that the trial court erred in allowing the amendment to the Bill of Information. Additionally, the Commonwealth only filed its Supplemental Brief in order to comply with the Magistrate Judge's Order dated October 29, 2007 in which he asked the parties to address, inter alia, whether a federal due process claim was exhausted in state court. Consequently, Edwards' Petition with respect to this claim is dismissed as being non-cognizable on federal habeas review and he is denied permission to amend his Petition to include a federal due process claim.

2. Exhaustion and Procedural Default

Even if Edwards' petition can be construed as raising a federal due process claim, the Magistrate Judge recommends finding that this claim is procedurally defaulted because Edwards

failed to present it to the state courts and state procedural rules now bar state review.

A federal court may not grant habeas relief to a state prisoner unless the prisoner exhausted his available remedies in state court. 28 U.S.C. § 2254(b); O'Sullivan v. Boerckel, 526 U.S. 838, 839 (1999); Picard v. Connor, 404 U.S. 270, 275 (1971); Nara v. Frank, 488 F.3d 187, 197 (3d Cir. 2007); Slutzker v. Johnson, 393 F.3d 373, 379 (3d Cir. 2004). A state prisoner must complete "the State's established appellate review process" to "give the state courts one full opportunity to resolve any constitutional issues." O'Sullivan, 526 U.S. at 845; Nara 488 F.3d at 197; see also Woodford v. Ngo, 126 S.Ct. 2378, 2386-87 (2006). A petitioner "shall not be deemed to have exhausted the remedies available . . . if he has the right under the law of the [s]tate to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

A claim "fairly presented" to the state courts is exhausted. Baldwin v. Reese, 541 U.S. 27, 29 (2004); O'Sullivan, 526 U.S. at 848; Nara, 488 F.3d at 197; Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). In evaluating whether a claim has been presented to the state courts, the substance of the claim controls, not its technical designation. Veal v. Myers, 326 F. Supp. 2d 612, 624 (E.D. Pa. 2004) (Brody, J.) (citing Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992)); Bisaccia v. Attorney Gen. of New Jersey, 623 F.2d 307, 312 (3d Cir. 1980)). A claim is not fairly presented if the state court "must read beyond a petition or brief . . . that does not alert it to the presence of a federal claim." Baldwin, 541 U.S. at 32. Mere similarity of the federal and state issues is insufficient to prove exhaustion. Duncan v. Henry, 513 U.S. 364, 366 (1995). The relevant inquiry is whether the petitioner presented in state courts the legal theory and supporting facts asserted in the federal habeas petition. Nara, 488 F.3d at 198; Keller v. Larkins, 251 F.3d 408, 413 (3d Cir. 2001); see Revels v. Diguglielmo, Civ.

A. No. 03-5412, 2005 WL 1677951 *4 (E.D. Pa. July 18, 2005) (DuBois, J.).

Edwards can satisfy this test in a variety of ways, including: "(a) reliance on pertinent federal cases employing constitutional analysis; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." McCandless v. Vaughn, 172 F.3d 255, 262 (3d Cir. 1999) (quoting Evans, 959 F.2d at 1232); accord Nara, 488 F.3d at 198. Although, the Supreme Court in Baldwin, did not address whether a claim is fairly presented where the state and federal standards are identical, see Baldwin, 541 U.S. at 33-34, the United States Court of Appeals for the Third Circuit has held that a claim is fairly presented where the state and federal standards are identical, the claim was stated in terms so particular as to call to mind a specific constitutional right, and the petitioner consistently presented the factual outline of the federal claim. Nara, 488 F.3d at 198-99.[4]

"[I]f [a] petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for purposes of federal habeas . . . ." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); McCandless, 172 F.3d at 260. This procedural default doctrine prohibits federal courts from reviewing a petitioner's claim defaulted in state courts on an independent and adequate state law ground, i.e. a rule of state law "that is independent of the federal question and adequate to support the judgment." Coleman, 501 U.S. at 729; see Leyva v. Williams, 504 F.3d 357, 365 (3d Cir. 2007); Nara, 488 F.3d at 199; Griggs v.

[4]The Commonwealth filed a petitioner for a writ of certiorari on November 9, 2007, Nara, No. 07-733, raising whether Nara conflicts with Baldwin. See Nara v. Frank, 494 F.3d 1132, 1133 (3d Cir. 2007) (denying Commonwealth's motion to stay the mandate).

DiGugliemlo, Civ. A. No. 06-1512, 2007 WL 2007971, at *5 (E.D. Pa. Jul. 3, 2007) (Yohn, J.). The purpose of the procedural default rule is to prevent habeas petitioners from avoiding the exhaustion doctrine by defaulting their federal claims in state court. Coleman, 501 U.S. at 732. Although the issue of procedural default is best addressed by the state courts, a federal court may dismiss a petition as procedurally barred if state law would unambiguously deem it defaulted. Carter v. Vaughn, 62 F.3d 591, 595 (3d Cir. 1995).

Edwards' brief to the Supreme Court of Pennsylvania included a general assertion that the lower court decision was "probably not in accord with . . . decisions of the Supreme Court of Pennsylvania or the Supreme Court of the United States." (Petition for Allowance of Appeal at 7, Edwards, No. 364 EAL 2001).[5] In both his brief to the Supreme Court of Pennsylvania and his brief to the Superior Court, Edwards made only a passing mention of due process in discussing the amendment to the Bill of Information citing a Pennsylvania case for support, Commonwealth v. Mosley, 585 A.2d 1057 (Pa. Super. Ct. 1991). (Petition for Allowance of Appeal at 7, Edwards, No. 364 EAL 2001; Brief for Appellant at 11-12, Edwards, 3398 EDA 1999). In Mosley, the principal contention on appeal was an alleged violation of Pennsylvania Rule of Criminal Procedure 229. See Mosley, 585 A.2d at 1063. The relevant portion of the cited case discusses Pennsylvania case law, and one of the cases discussed cites a federal constitutional case. Requiring courts to follow a "daisy chain," to divine the federal constitutional claim is insufficient presentation of the federal claim. Howell v. Mississippi, 543 U.S. 440, 443-44 (2005) (holding that, on direct review by the

[5]Edwards' Superior Court brief did not include a similar opening statement, (Brief for Appellant at 7-8, 3398 EDA 1999). The Magistrate Judge noted that, at oral argument, counsel conceded that the Superior Court brief did not mention "due process." However, our review of the Superior Court brief indicates that Edwards did use the term "due process" in this brief. (Brief for Appellant at 11-12, Edwards, 3398 EDA 1999).

Supreme Court, federal claim was not properly presented where case relied on by petitioner cited a case, which cited another case, which cited the relevant case); accord Fields v. Waddington, 401 F.3d 1018, 1023 (9th Cir. 2005) (citing Howell in habeas case); Casey v. Moore, 386 F.3d 896, 912 (9th Cir. 2004) (stating that a claim is not fairly presented where petitioner "cited state cases dealing with his state-law claims, without giving any indication that the cases also dealt with federal law and that he was citing them for that purpose.").

Additionally, Edwards did not rely on federal constitutional cases or state cases that employed federal constitutional analysis, did not assert a claim so particular as to call to mind a specific right protected by the constitution, and did not allege a pattern of facts within the mainstream of constitutional litigation. (See Petition for Allowance of Appeal at 7-12; Memo of Law at 4-6); see Nara, 488 F.3d at 198; Adams v. Robertson, 520 U.S. 83, 89 n.3 (1997) (holding that a passing invocation of due process, without a cite to the federal constitution or federal cases, is insufficient to present a federal claim). The concepts of error, notice and prejudice are not unique to federal law and do not, without more, refer to a federal, as opposed to a state, violation. See Adams, 520 U.S. at 89 n.3. Moreover, the state court treated Edwards' claim as purely a question of state law, which sheds light on how Edwards couched his claim in state court. The trial court addressed whether the amendment violated the state rule and state case law. Edwards, No. 9808-1090, at 3-5. After stating and applying the state law for amendments to Bills of Information, the Superior Court reviewed the trial court determination under an abuse of discretion standard. Edwards, No. 3398 EDA 1999, at 3-4. Although the state courts discussed whether Edwards had notice of the amendment and whether he was prejudiced by it under state law, it never referenced federal due process law, the federal constitution, or federal case law. Edwards, No. 3398 EDA 1999,

at 3-4; Edwards, No. 9808- 1090, at 3-5.

In addition, the federal standard used to determine a violation of due process and the state standard used to determine whether a Bill of Information was properly amended are not substantially equivalent. See Duncan, 513 U.S. at 366 (stating that "mere similarity of claims not sufficient" to exhaust federal claim). Pennsylvania Rule of Criminal Procedure 564 governs amendments to Bills of Information, and allows "an information to be amended when there is a defect . . . provided the information, as amended, does not charge an additional or different offense." Pa. R. Crim. Proc. 564. If an amendment violates the state rule, relief is allowed only if the change prejudices the defendant. Edwards, No. 3398 EDA 1999, at 3 (citing Commonwealth v. Brown, 727 A.2d 541, 543 (Pa. 1999) (holding that prejudice may exist if the new charge renders a defense against the original charge "ineffective with respect to the substituted charges")). Moreover, as the state court noted, a trial judge maintains discretion in resolving this question and will be reviewed on appeal under the deferential abuse of discretion standard. Edwards, No. 3389 EDA 1999, at 4; Commonwealth v. Small, 741 A.2d 666, 681 (Pa. 1999).

On the other hand, a violation of federal due process occurs if an accused is convicted "of a charge on which he was never tried . . . [or] upon a charge that was never made." Cole, 333 U.S. 196, 202 (1948) (citing De Jonge v. Oregon, 299 U.S. 353 (1937)); accord United States ex rel. Collins v. Claudy, 204 F.2d 624, 627 (3d Cir. 1953); see Gautt v. Lewis, 489 F.3d 993, 1014 (9th Cir. 2007) (stating that a constitutional right is violated where defendant was charged under one section of a statute but sentence was enhanced under a different section); Joseph v. Coyle, 469 F.3d 441, 463 (6th Cir. 2006) (finding a due process violation where indictment did not give adequate notice of the capital specification). Although, federal due process does not mandate the procedures

a state court must use, it requires the procedures adopted by state courts, including the notice provided to the defendant, comport with due process. Garland v. Washington, 232 U.S. 642, 645 (1914).

A Bill of Information satisfies federal due process when it contains the elements of the crime so as to permit the accused to plead and prepare an adequate defense, and allows the disposition to be used as a bar in a subsequent prosecution. Russell v. United States, 369 U.S. 749, 763-64 (1962); accord Hamling v. United States, 418 U.S. 87, 117 (1974); see Gautt, 489 F.3d at 1003; Smith v. Vaughn, Civ. A. No. 96-8482, 1997 WL 338851, at *6 (E.D. Pa. June 17, 1997); see also Cole, 333 U.S. at 201. Due process, therefore, requires that an amendment provide a defendant sufficient notice of the charges against him such that he can defend against the charges. Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986) (citing Russell, 369 U.S. at 763-64)); see Cole, 333 U.S. at 202. Relief is permitted only if the constitutional violation "had a substantial and injurious effect or influence" on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 630 (1993). Moreover, a federal court undertakes a de novo review of constitutional claims, not the deferential abuse of discretion standard applicable under Rule 564. See United States ex rel. Wojtycha v. Hopkins, 517 F.2d 420, 425 (3d Cir. 1975) (determining whether the state amendment to the information violated due process).

Thus, whether an amendment violates state law is a separate and distinct inquiry from whether the amendment violates federal due process. See Wojtycha, 517 F.2d at 425 (determining both whether an amendment violated state law and whether the amendment violated due process). Although the inquiries often overlap, the state standard is subsumed within the more searching due process inquiry.

In light of these various considerations, the Magistrate Judge recommends that Edwards failed to fairly present the broader constitutional challenge to the state courts. In his Objections, Edwards maintains that he did fairly present his federal claim to the state courts. He argues that in his Petition for Allowance of Appeal he stated that the trial court's ruling was "probably not in accord . . . with decisions of the Supreme Court of Pennsylvania or the Supreme Court of the United States." (Petition for Allowance of Appeal at 7, Edwards, No. 364 EAL 2001). He also asserts that in his brief to the Supreme Court of Pennsylvania and the Superior Court he stated that "to amend an information to fit the Commonwealth's case is a clear due process violation," and cited Mosley. (See Id.; Brief for Appellant at 11-12, Edwards, 3398 EDA 1999). Edwards asserts that Mosley cites In re Gault, 387 U.S. 1 (1967), which discussed the right to due process under the Fourteenth Amendment. Consequently, he contends that his briefs alerted the state courts to his claim that the trial court violated his federal due process rights. Finally, he contends that the Superior Court in addressing this claim discussed notice, opportunity to defend, and prejudice, which are key components of due process.

These objections are overruled. As detailed above, a mere passing reference to a state case, which relies upon another case which discusses the right to due process under the Fourteenth Amendment, is insufficient to alert state courts that a federal constitutional claim is being asserted. See Howell, 543 U.S. at 443-44. Additionally, as the analysis of whether an amendment to a bill of information violates state law and a due process claim overlap, the fact that the state court examined concepts that are relevant to both claims does not mean that the broader federal due process claim was "fairly presented" to the state courts.

Edwards cannot now raise a due process claim because independent and adequate state law

grounds preclude him. An issue is waived if a petitioner fails to raise it when it could have been raised before trial, at trial, on appeal, in a habeas corpus proceeding, or in a prior proceeding. 42 Pa. Cons. Stat. § 9544(b); see also O'Sullivan, 526 U.S. at 848-49 (finding that the failure to raise an issue in discretionary appeal to state supreme court constituted a procedural default for habeas purposes); Sistrunk v. Vaughn, 96 F.3d 666, 671 n.4 (3d Cir. 1996) ("the rules [of Pennsylvania's appellate procedure] dictate that an issue raised at the trial level but not preserved on appeal will not be considered by any subsequent appellate court"); Commonwealth v. D'Collanfield, 805 A.2d 1244, 1245 (Pa. Super. Ct. 2002) (issue not preserved on appeal waived). Moreover, the PCRA provides collateral actions must be filed within one year of the date on which the conviction became final. 42 Pa. Cons. Stat. § 9545 (b)(1) (petition, even second or subsequent, must be filed within one year of the time conviction becomes final). Pennsylvania's waiver rule and the PCRA statute of limitations are independent and adequate state grounds that bar federal habeas review. Peterson v. Brennan, 196 Fed. Appx. 135, 142 (3d Cir. Sept. 26, 2006). They are rules of general applicability which are "firmly established, readily ascertainable, and regularly followed." See Leyva, 504 F.3d at 366 (quoting Szuchon v. Lehman, 273 F.3d 299, 327 (3d Cir. 2001)). Edwards waived the due process claim when he failed to raise it in state court and, because it is more than one year after his conviction became final, he can no longer raise the claim in state court. Accordingly, the claim is procedurally defaulted.

A procedural default may be excused only where a petitioner can show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750; Smith v. Murray, 477 U.S. 527, 533 (1986); see also Murray v. Carrier, 477 U.S. 478, 485 (1986);

Leyva, 504 F.3d at 362 n.6, 366; Griggs, 2007 WL 2007971, at *5. This requirement is grounded in the need for finality and comity, i.e., ensuring that state courts have an adequate opportunity to review a case on the merits. Smith, 477 U.S. at 533.

To constitute cause to excuse default, Edwards must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753 (quoting Murray, 477 U.S. at 488); Sistrunk, 96 F.3d at 675. According to the Magistrate Judge, Edwards does not identify any evidence to establish cause for the procedural default.[6] (Petition at 10). While Edwards asserts in his Objections that there was cause to excuse his procedural default, (see Objections at 11), he does not offer any legal or factual basis to establish cause for why he failed to raise a federal due process claim in state court. Instead, the discussion in this portion of his Objections solely addresses his assertion that he suffered prejudice. Consequently, the objection to the recommendation that there is no cause to excuse Edwards' procedural default is overruled. As Edwards cannot demonstrate cause to excuse his procedural default, we need not address whether he suffered actual prejudice. See Coleman, 501 U.S. at 750 (requiring both cause and actual prejudice in order to excuse a procedural default).

Lastly, the Magistrate Judge recommends that Edwards cannot establish a miscarriage of

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[6]Although not raised as cause for the procedural default, any alleged ineffectiveness of Appellate or PCRA counsel cannot establish cause for his failure to raise the claim in state court. Ineffective assistance of counsel on direct appeal is an independent constitutional claim and will not establish cause for procedural default of another claim unless the ineffective assistance of counsel claim was first raised in state court. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Line v. Larkins, 208 F.3d 153, 167 (3d Cir. 2000). Additionally, no constitutional right exists to counsel in state collateral proceedings, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Tillett v. Freeman, 868 F.2d 106, 108 (3d Cir. 1989), therefore, a petitioner cannot claim constitutional ineffective assistance of post-conviction counsel to excuse default. Coleman, 501 U.S. at 757; Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992).

justice to excuse his procedural default. To establish the requisite fundamental miscarriage of justice, Edwards must demonstrate "actual innocence," Schlup v. Delo, 513 U.S. 298, 324 (1995); Leyva, 504 F.3d at 366, i.e., "new reliable evidence," such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," id.; Hubbard v. Pinchak, 378 F.3d 333, 339 (3d Cir. 2004) (addressing claim of actual innocence but rejecting it on the merits), that would make it more likely than not that "no juror, acting reasonably, would have voted to find [petitioner] guilty beyond a reasonable doubt." See Schlup, 513 U.S. at 329 (holding that even a "concededly meritorious constitutional violation" is not sufficient to establish a miscarriage of justice to excuse procedural default absent new evidence of innocence); House v. Bell, 126 S.Ct. 2064, 2076-77 (2006). In his Report and Recommendation, the Magistrate Judge states that Edwards does not present any new evidence to support his claim of actual innocence.

Edwards objects to this portion of the Report and Recommendation by asserting that, at trial and during the appellate and collateral review proceedings, he argued that he was innocent of murder as he was neither an accomplice nor a co-conspirator of co-defendant David Carson. Edwards concedes that testimony at trial may have showed that he robbed the victim, but he asserts that he had no part in Carson's plan to commit murder. This objection is overruled. Edwards' claims do not make it more likely than not that no juror, acting reasonably, or in this case, no reasonable jurist, would have found him guilty beyond a reasonable doubt. Consequently, he cannot satisfy the miscarriage of justice exception to excuse his procedural default.

B. Remaining Claims

As noted above, Edwards has not filed any objections to the Magistrate Judge's recommendations concerning his remaining claims. Consequently, we adopt the Magistrate Judge's

Report and Recommendation with respect to these claims and they are dismissed as meritless.

C. Certificate of Appealability

The Magistrate Judge states that jurists of reason could differ on his recommendations regarding Edwards' claim of trial error in allowing the amendment to the bill of information. We agree and find that there is probable cause to issue a certificate of appealability on the following questions: (1) whether Edwards' claim of trial court error in allowing the amendment to the bill of information is cognizable on federal habeas, and (2) whether the issue was fairly presented to the state courts.

An appropriate Order follows.

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

JULIUS EDWARDS	:	CIVIL ACTION
	:	
v.	:	
	:	
GERALD L. ROZUM, ET AL.	:	NO. 07-1736

ORDER

AND NOW, this 7th day of February, 2008, upon consideration of the Petition for Writ of Habeas Corpus Relief (Docket No. 1), all responses thereto, the Report and Recommendation of Magistrate Judge Timothy R. Rice (Docket No. 12), Petitioner's Objections to the Report and Recommendation (Docket No. 13), and Respondents' Response (Docket No. 14), **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**.
2. The Report and Recommendation is **APPROVED AND ADOPTED** insofar as it is consistent with this opinion.
3. The Petition for Writ of Habeas Corpus Relief is **DISMISSED**.
4. A certificate of appealability is **GRANTED** pursuant to 28 U.S.C. § 2253(c)(2) with respect to the following issues: (a) whether Edwards' claim of trial court error in allowing the amendment to the bill of information is cognizable on federal habeas, and (b) whether this claim was fairly presented to the state courts.
5. The Clerk is directed to mark this matter closed.

BY THE COURT:

s/ John R. Padova, J.
John R. Padova, J.