UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3308

KAREEM GLASS,
Appellant

VS.

SUPERINTENDENT SOMERSET SCI, ET AL.

(E.D. Pa. Civ. No. 2-16-cv-00154)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

APPENDIX D

panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: May 15, 2018

kr/cc: Kareem Glass
John W. Goldsborough, Esq.

DLD-157 **March 23, 2018**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-3308**

KAREEM GLASS, Appellant

VS.

SUPERINTENDENT SOMERSET SCI, ET AL.

(E.D. Pa. Civ. No. 2-16-cv-00154)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,
Clerk

ORDER

To obtain a certificate of appealability, Petitioner must show "that jurists of reason would find it debatable whether [his] 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 dismissing the petition as barred by his waiver of appellate and collateral review rights. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner has not shown that jurists of reason would debate whether the District Court properly concluded that Petitioner's waiver was knowing and voluntary, that it encompassed his claims, and that its enforcement would not work a miscarriage of justice. United States v. Mabry, 536 F.3d 231, 237 (3d Cir. 2008). The foregoing application for a certificate of appealability is, therefore, denied.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: April 4, 2018

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX A

kr/cc: Kareem Glass
John W. Goldsborough, Esq.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KAREEM GLASS	:	CIVIL ACTION
	:	
v.	:	
	:	
JAY LANE et al.	:	NO. 16-0154

ORDER

AND NOW, this day of , 201 , upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED AND ADOPTED;
2. The petition for a writ of habeas corpus is DENIED.
3. Plaintiff's motion for appointment of counsel (Doc. 11) is DENIED.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
GENE E. K. PRATTER, J.

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

KAREEM GLASS,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	
	:	
JAY LANE[1] *et al.*,	:	
Respondents.	:	**No. 16-154**

ORDER

AND NOW, this 21st day of September, 2017, having considered the Petitioner's Petition for Writ of *Habeas Corpus* (Docket No. 1), Respondents' Opposition (Docket No. 17), Petitioner's Brief in Support (Docket No. 18), U.S. Magistrate Judge Elizabeth T. Hey's Report & Recommendations (Docket No. 21), Petitioner's Motions for Extension (Docket Nos. 23, 24), and Petitioner's Objections (Docket No. 25), and the state court record, it is hereby **ORDERED** that:

1. Petitioner's Motions for Extension (Docket Nos. 23, 24) are **deemed MOOT**. Petitioner filed his Objections to the Report and Recommendation shortly after filing two motions to extend the deadline to file objections.

2. The Report & Recommendations are **APPROVED** and **ADOPTED**.

3. Petitioner's Objections are **OVERRULED**.[2]

4. The Petition is **DISMISSED** with prejudice.

5. There is no probable cause to issue a certificate of appealability.[3]

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[1] As Magistrate Judge Hey notes, Trevor Wingard is listed on the docket in this matter as the Respondent, but Mr. Glass is currently housed in State Correctional Institute Fayette, where the current superintendent is Jay Lane.

[2] Petitioner objects to the Report and Recommendations, raising substantially the same arguments that he has raised in his prior filings in this matter. Magistrate Judge Hey thoroughly addressed Petitioner's arguments and correctly concluded that Mr. Glass's appellate waiver was knowing and voluntary and that, in any event, Mr. Glass was not prejudiced by Mr. McMahon's ineffectiveness. Therefore, for the reasons ably outlined by Magistrate Judge Hey in her Report and Recommendations, the Petition must be denied.

APPENDIX B

6. The Clerk of Court shall mark this case **CLOSED** for all purposes, including statistics.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

[3] A certificate of appealability may issue only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). There is no probable cause to issue a certificate in this action.

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

KAREEM GLASS	:	CIVIL ACTION	ENTERED
	:		JUL 31 2017
v.	:		
	:		CLERK OF COURT
JAY LANE, et. al.[1]	:	NO. 16-0154	

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. July 31, 2017

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Kareem Glass ("Glass" or "Petitioner"), who is currently incarcerated at SCI-Fayette. For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

Glass was tried in the Philadelphia Court of Common Pleas for the murder of Tyreke Gayman ("Tyreke") and the attempted murder of Tyreese Allen ("Tyreese"). The facts and procedural history of the case were summarized by the trial court on collateral appeal as follows:

> On September 27, 2004, [Glass] confronted Maurice Gaymon ["Maurice"] on the 1300 block of North 15th Street in Philadelphia about an incident in which [Glass's] coworkers had been robbed. [Glass] asked Maurice whether

[1]The petition named Trevor A. Wingard as the Respondent. Doc. 1. However, Petitioner (under the name Kareen Glass) is currently housed in State Correctional Institute ("SCI") Fayette in LaBelle, Pennsylvania, where the current superintendent is Jay Lane. See http://www.cor/pa.gov/Facilities/StatePrisons/Pages/Fayette (last visited May 5, 2017). Therefore, I have named Mr. Lane as the Respondent. See Rule 2(a) of the Rules Governing Section 2254 Cases (state officer with current custody to be named as respondent).

APPENDIX C

> he had heard about the robbery; when Maurice said that he was unaware, [Glass] told Maurice, "If I can't get at the [people] who did it, I'm going to get at the people they be with [sic]." On September 28, 2004, Maurice, Tyreke, Tyreese and Stanley Battle (Battle) were selling crack cocaine in front of the same house where [Glass] had approached Maurice the day before. Battle left the front steps to get a snack from a local market. Maurice retreated into the house to make a phone call. Shortly thereafter, [Glass] and a friend walked up to the curb, eight or nine feet in front of Tyreke and Tyreese. [Glass] accused Tyreke and Tyreese of knowing who robbed his friend. Both Tyreke and Tyresse denied involvement. [Glass] then pulled a gun from his waist, and opened fire. Tyreese survived five gunshot wounds to his legs and abdomen.
>
> . . . .
>
> On Battle's walk back from the store, as he was four or five houses away from his friends, he saw [Glass] pull a gun from his waist band and begin shooting. As [Glass] lifted his gun and shot Tyreke, Battle froze. "I'm still looking at him. Then he start [sic] looking rapidly, boom, boom. I took off running. I didn't want him to cut his eye on me, start shooting at me. I took off running." After running around the block, Battle returned to the front porch to find Tyreke "dead" with a "big hole in his head," and Tyreese yelling for help in pain.
>
> Tyreke was pronounced dead at the scene of the shooting at 10:25 AM. He suffered a perforating gunshot wound to the left side of his head, passing through his brain before exiting the right backside of his head.

Commonwealth v. Glass, CP-51-CR-0502891-2005, Opinion at 3-4 (Phila C.C.P. Feb. 6, 2014) (Response Exh. C) ("PCRA Ct. Op.") (record citations and footnotes omitted).[2]

On October 21, 2008, following trial before the Honorable M. Teresa Sarmina, the jury convicted Petitioner of first degree murder, attempted murder, aggravated assault,

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[2]No transcripts were provided to this court as part of the state-court record. Certain transcripts or portions thereof are appended to the parties' filings, and the District Attorney's office has provided copies of others.

possessing an instrument of crime, and recklessly endangering another person. N.T. 10/21/08 at 5-6 (partial transcript attached to reply at Doc. 18 Exh C); Commonwealth v. Glass, CP-51-CR-0502891-2005, Docket Sheet at 19 (Phila C.C.P.) ("Docket Sheet"). At the penalty phase hearing held before Judge Sarmina the following day, Petitioner's attorney, Jack McMahon, indicated that the parties had reached an agreement whereby Petitioner agreed to waive his appellate rights -- including his rights to collateral appeal and to file a federal habeas petition -- in return for withdrawal of the death penalty.[3] N.T. 10/22/08 at 5-6, 11-12 (attached to response at Doc. 17-1 Exh. A). After much discussion and an extensive colloquy,[4] Judge Sarmina accepted Petitioner's waiver and sentenced him to life imprisonment without parole for first degree murder and a consecutive term of 20 to 40 years for attempted murder. Id. at 48-49.

On July 10, 2009, Petitioner filed a timely pro se petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551, seeking invalidation of the waiver. PCRA Ct. Op. at 2; Docket Sheet at 21.[5] After

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[3]Also present at the penalty phase hearing on behalf of Petitioner were three other attorneys -- Neil Jokelson, Derrick Jokelson, and David Jokelson ("Jokelson Attorneys"). David and Neil Jokelson had represented Petitioner in a civil suit he and his family had previously brought against the City of Philadelphia, alleging that he suffered brain injury as a result of being struck in the head with police batons. Glass v. City of Philadelphia, No. 96-2752 (E.D. Pa.).

[4]The discussion and colloquy will be discussed in greater detail infra Part IIA, as will the later PCRA proceedings concerning the waiver.

[5]Petitioner did not file a direct appeal. Instead, only a few days after his sentencing he sent a letter to the trial court seeking withdrawal of his waiver, which was docketed on October 31, 2008. See Docket Sheet at 21; Doc. 11 at 2 (Petitioner's review of procedural history). No action was taken on that request. The docket entries then

replacing the first counsel appointed to represent Petitioner, Judge Sarmina appointed attorney Janice Smarro. See PCRA Ct. Op. at 2 n.7; Docket Sheet at 22 (entries for 10/5/09 and 4/8/10). Counsel filed an amended PCRA Petition on June 18, 2010, alleging that Judge Sarmina's colloquy was inadequate and that waiver counsel was ineffective in failing to object to the colloquy, thereby rendering the waiver involuntary, unintelligent, and unknowing. Commonwealth v. Glass, 51-CR-0502891-2005, First Amended PCRA Petition (Phila. C.C.P. June 18, 2010). Following additional briefing, Judge Sarmina heard oral argument on October 15, 2010, and announced that the court would send a notice of intent to dismiss without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907 because the waiver colloquy was adequate. N.T. 10/15/10 at 24.

Prior to sending the Rule 907 notice, Judge Sarmina received a letter from Petitioner arguing that Ms. Smarro had not raised all the issues that Petitioner requested, and seeking leave to represent himself. See N.T. 11/16/10 at 6, 9. On November 16, 2010, Judge Sarmina conducted a hearing with Petitioner concerning his self-representation and proposed additional issues, and heard additional testimony regarding the voluntariness of his waiver. Id. at 50-51.

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identify a February 24, 2009 "Amended Petition to Withdraw Negotiated Sentence and Appellate Waiver," and a July 10, 2009 "Post-Conviction Relief Act Petition." See Docket Sheet at 21. It appears that the state court subsequently treated the July 10, 2009 submission as the post-conviction filing. PCRA Ct. Op. at 2.

On June 17, 2011, following further briefing and Petitioner's counseled request for further argument, Judge Sarmina colloquied Petitioner further. Ms. Smarro warned Petitioner that he could be subjected to the death penalty if he succeeded in nullifying his waiver, and explained that since she had decided to stop working on death penalty cases, she would not be able to continue to represent Petitioner and therefore requested permission to withdraw. N.T. 06/17/11 at 6-9. During the hearing, Petitioner stated that he learned "in hindsight" that his trial counsel (Mr. McMahon) was unprepared to go forward with the penalty phase. Id. at 19-21. At the conclusion of the hearing, Judge Sarmina permitted Ms. Smarro to withdraw. Id. at 28.

Attorney David Rudenstein was appointed to represent Petitioner, and filed another amended PCRA petition on October 21, 2011, alleging among other things that trial counsel's lack of preparation for the penalty phase caused him to pressure Petitioner into waiving his appellate rights, rendering the waiver involuntary. Commonwealth v. Glass, 51-CR-0502891-2005, Amended PCRA Petition (Phila. C.C.P. Oct. 21, 2011). According to the District Attorney, the court approved appointed counsel's request for funds to hire an expert to determine whether Petitioner was mentally retarded and thus ineligible for the death penalty. See Doc. 17 at 7.

On July 12, 2012, appointed counsel filed a supplemental amended PCRA petition. Commonwealth v. Glass, 51-CR-0502891-2005, Supplemental Amended PCRA Petition (Phila. C.C.P. Jul. 12, 2012) ("Supp'l Amended PCRA"). Counsel included a preliminary report from Petitioner's expert (Steven E. Samuel, Ph.D.) finding that Petitioner was not mentally retarded, which Petitioner then conceded. Id. ¶ 9. Counsel

also asserted that Petitioner would not have waived his appellate rights if trial counsel had been prepared for the penalty phase hearing. Id. ¶ 8.

Judge Sarmina held a hearing on April 26 and 29, 2013, and heard testimony from trial counsel (Mr. McMahon), the Jokelson Attorneys, and Petitioner and members of his family.[6] On September 11, 2013, Judge Sarmina issued a Rule 907 notice to intent to dismiss, and she dismissed the petition on October 4, 2013. Commonwealth v. Glass, 51-CR-0502891-2005, Order (Phila. C.C.P. Oct. 4, 2013); Docket Sheet at 27 (entries dated 09/11/13 & 10/04/13).

Through new appointed counsel (Todd Mosser), Petitioner appealed to the Superior Court, arguing that trial counsel's lack of preparation for the penalty phase rendered Petitioner's waiver involuntary and invalid, and that PCRA counsel (Mr. Rudenstein) was ineffective for failing to offer evidence that Petitioner had been pressured into accepting the waiver agreement. Commonwealth v. Glass, NO. 3142 EDA 2013, 2015 WL 6394211, Memorandum at 2-3 (Pa. Super. Jan. 30, 2015) (attached to response at Exh. C) ("Super. Ct. Op."); Brief to Super. Ct. (attached to response at Exh. B). Judge Sarmina filed her opinion on February 6, 2014, explaining her conclusion that although waiver counsel was unprepared to proceed, Petitioner offered no evidence to show that counsel's lack of preparation caused Petitioner to enter into the waiver or that he was pressured into doing so, and therefore the waiver was valid. PCRA Ct. Op. at 5-

[6]Dr. Samuel did not testify at the hearing, but the parties stipulated that he would have testified consistent with his report, including that Petitioner was not mentally retarded and that there was no connection between the murder and Petitioner's earlier brain injury. N.T. 4/26/13 at 166.

16. On January 30, 2015, the Superior Court affirmed the denial of PCRA relief, adopting the reasoning set forth in Judge Sarmina's PCRA opinion. Super. Ct. Op. at 5. Petitioner filed a petition for allowance of appeal which the Pennsylvania Supreme Court denied on October 14, 2015. Commonwealth v. Glass, 125 A.3d 1198 (Pa. 2015) (table).

On December 11, 2015, Petitioner filed a pro se second PCRA petition, followed by an amended PCRA petition on May 2, 2016, requesting among other things that the PCRA court excuse any default by initial PCRA counsel, find waiver counsel and initial PCRA counsel ineffective, and reinstate his appellate rights. See Docket Sheet at 31; Commonwealth v. Glass, CP-51-CR-0502891-2005, Amended PCRA Petition (Phila. C.C.P.) (non-numbered signature page). On June 24, 2016, Judge Sarmina issued an Order denying the petition as untimely. See Docket Sheet at 31. Petitioner appealed to the Superior Court, which dismissed the matter on January 10, 2017. See Docket Sheet at 32-33.

Meanwhile, on January 10, 2016,[7] Petitioner filed this pro se habeas petition asserting multiple claims of ineffective assistance of counsel ("IAC"), including that ineffectiveness of trial counsel at the penalty phase hearing rendered his waiver involuntary and invalid. Doc. 1 at 5 (GROUND ONE). Petitioner also argues that trial

[7]The pro se petition was docketed on January 13, 2016, but the federal court employs the "mailbox rule," deeming the petition filed when given to prison authorities for mailing. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1998)). The original petition was signed on January 10, 2016, and therefore, I will assume that Petitioner gave the petition to prison authorities for mailing on that date. Doc. 1 at 16 (ECF pagination).

counsel was ineffective in allowing the Jokelson Attorneys to advise Petitioner to enter into the waiver agreement; the Jokelson Attorneys were ineffective in advising Petitioner to waive his appellate rights; the trial court violated Petitioner's due process rights when it "actively participated" during the waiver colloquy; the trial court violated Petitioner's due process rights when it allowed the Jokelson Attorneys to participate in the penalty phase hearing; counsel's layered ineffectiveness violated Petitioner's due process rights; trial counsel was ineffective for failing to assert Petitioner's cognitive damage and incompetence at the penalty phase hearing; and PCRA counsel (identified as Mr. Mosser) was ineffective for failing to raise these claims. Id. at 7-10 (GROUNDS TWO-FOUR), 17-18 (GROUNDS FIVE-EIGHT) (ECF pagination).

On August 25, 2016, Petitioner filed a motion to amend seeking to add a claim of ineffectiveness of PCRA counsel. Doc. 12. The District Attorney filed a response to the petition, arguing that the petition is unreviewable, and in the alternative that the claims are meritless or waived and procedurally defaulted, and that the claim included in the motion to amend is untimely and non-cognizable. Doc. 17. Petitioner filed a reply brief in support of his petition in which he withdrew certain claims. Doc. 18 at 6 (ECF pagination).[8] Petitioner has also filed a motion for appointment of counsel, which I previously stated I would consider after the response was received. Docs. 11 & 13. The

[8]Petitioner is not clear which claims he seeks to withdraw, and I will assume that he is pursuing all claims raised in his petition.

Honorable Gene E. K. Pratter has referred the matter to me for a Report and Recommendation. Doc. 5.[9]

II. DISCUSSION[10]

A. Background of Petitioner's Waiver

Before I consider the claims and defenses, I will begin by detailing Petitioner's waiver at his penalty phase hearing and the state courts' consideration of the validity of his waiver in the PCRA proceedings.

1. Waiver at the Penalty Phase Hearing

As previously noted, at the penalty phase hearing before Judge Sarmina on October 22, 2008, and with Petitioner facing a possible death sentence as a result of the jury's guilty verdict the previous day, defense counsel (Mr. McMahon) stated that the parties had reached an agreement whereby Petitioner agreed to "waive all his appellate

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[9]Petitioner previously moved to stay consideration of his petition in light of the pending second PCRA petition, but withdrew the stay request when those proceedings concluded. Docs. 2, 11, 13.

[10]The District Attorney does not challenge the timeliness of the petition, and the petition is timely. Petitioner's conviction became final on November 21, 2008, 30 days after Judge Sarmina sentenced Petitioner. See Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999) (conviction becomes final when time for seeking next level of appeal expires if appeal is not taken); Pa. R. App. P. 903(a) (notice of appeal shall be filed within thirty days of entry of order appealed from). Petitioner filed his PCRA petition 231 days later, on July 10, 2009, and the habeas limitations period tolled from that date until October 14, 2015, when the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. At that time, Petitioner had 134 days left, or until February 24, 2016, in which to file a timely habeas petition. Therefore, the habeas petition filed on January 10, 2016, is timely.

rights in return for withdrawal of the death penalty." N.T. 10/22/08 at 5-6.[11] Judge Sarmina and Mr. McMahon proceeded to colloquy Petitioner about the agreement, resulting in an extensive discussion in which the Jokelson Attorneys, who represented Petitioner in a prior civil trial, also participated.

Petitioner stated that he was not under the influence of drugs or alcohol, and that he fully understood the purpose of the penalty phase hearing despite being treated in the past for neurological defects. N.T. 10/22/98 at 10. He stated that he had discussed the waiver agreement with his father, other family members, attorney McMahon, and the Jokelson Attorneys. Id. at 11. Petitioner responded that he understood that he was agreeing to give up his state direct appeal and PCRA rights, his right to federal habeas review, and his rights to seek a commutation of sentence or a pardon, in exchange for the Commonwealth not seeking the death penalty. Id. at 11-14.[12] He further stated that,

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[11]It does not appear that the agreement was reduced to writing. The prosecutor gave Mr. McMahon a copy of a colloquy from a different case "to get an understanding of what he needs to waive. It would also include a waiver of asking for commutation or pardon." N.T. 10/22/08 at 6-7.

[12]A portion of the colloquy is quoted here:

> MR. MCMAHON: [Y]ou're agreeing today to waive your right to appeal both direct appeal to the Superior Court and/or the Supreme Court and any Post-Conviction Relief Act action alleging either ineffective assistance of counsel or any other cognizable PCRA hearing. Do you understand that?
> THE DEFENDANT: Yes.
> MR. MCMAHON: Okay. And you're giving up these rights today and to take any action in a Federal courthouse, that is to file a Federal habeas petition saying that the constitutional rights were deprived of you in this case. Do you understand that?
> THE DEFENDANT: Yes.

other than the promise to withdraw the death penalty, nobody had made any promises or threats to him, and that he was waiving his rights of his own free will. Id. at 17. He also acknowledged "being satisfied with [Mr. McMahon's] advice to you so far up until this point in time." Id.

The prosecutor then indicated that Petitioner would be required to admit his guilt as part of the agreement. Petitioner responded "I didn't do it," indicated that he now wished to proceed with the penalty phase, and reiterated his understanding regarding the purpose of the penalty phase hearing, including that he could put in evidence of mitigating circumstances, which "can be anything that you and your attorneys wish to present." N.T. 10/22/98 at 18-20. Judge Sarmina questioned Petitioner at length to

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> THE COURT: You mean that he was deprived of his constitutional rights?
> MR. MCMAHON: Deprived of his . . . Federal constitutional rights. Do you understand that?
> THE DEFENDANT: Yes
> . . . .
> MR. MCMAHON: Okay. And you understand that you are also pursuant to this agreement giving up your right to ask a governor at some point in time to commute your sentence or a parole board to pardon you or the governor to pardon you at a later point in time. Do you understand that?
> THE DEFENDANT: Yes.
> MR. MCMAHON: You've had an opportunity to talk this over with me; correct?
> THE DEFENDANT: Yes.
> MR. MCMAHON: Talk it over with your family; correct?
> THE DEFENDANT: Yes.
> MR. MCMAHON: Okay. And is this your – and you understand that Pennsylvania means life without the possibility of parole? Do you understand that; correct?
> THE DEFENDANT: Yes.

N.T. 10/22/08 at 11-12, 14-15.

ensure that he understood the purpose of a penalty phase, and advised him that if he elected to have the jury decide the question of a life sentence or a death sentence, the Commonwealth would have to prove aggravating circumstances beyond a reasonable doubt, and that a sentence of death required all 12 jurors to agree on the sentence. Id. at 19-22. Petitioner stated that he understood Judge Sarmina's explanation that "[i]f even one [juror] disagrees, then you would not be getting a death sentence. If they're unable to reach a unanimous decision, then they would let me know that and then I would be imposing a sentence of life." Id. at 22.

Petitioner then told Judge Sarmina that he believed the court committed error by asking the jury, when they initially reported that their deliberations were deadlocked, whether further deliberations might be fruitful. N.T. 10/22/98 at 23. Judge Sarmina explained that the entire trial was on the record, and that Petitioner's claim of trial court error was the sort of claim that Petitioner would waive if he accepted the waiver agreement. Id. at 23-34. Petitioner again stated that he understood the judge's explanation, and her further statement that she could not predict what the jury would decide at the penalty phase hearing. Id. at 24-27. Judge Sarmina then reiterated the penalty phase procedure and emphasized that it was up to Petitioner how he wished to proceed. Id. at 30-31.

Petitioner consulted with his counsel, including Mr. McMahon and the Jokelson Attorneys, while the prosecutor called a supervisor to determine whether it might be possible, in light of the jury's guilty verdict, to waive the admission of guilt requirement. N.T. 10/22/98 at 32-35. When the prosecutor subsequently explained that an admission

of guilt was required to foreclose a future assertion of innocence,[13] Petitioner consulted further with counsel and then indicated that he had changed his mind and again wished to proceed with the waiver as he had originally indicated. Id. at 35-36. Petitioner confirmed that he had an opportunity to consult with his four attorneys (Mr. McMahon and the Jokelson Attorneys), and stated that he understood that he had to admit his guilt, which he then did. Id. at 36-38. Judge Sarmina further explained to Petitioner the appellate rights he was waiving, and Petitioner again stated that he understood. Id. at 38-40. Petitioner asked and was granted permission to speak with his aunt, and then indicated that he was "satisfied" and had no further questions. Id. at 40-41. Petitioner stated that he understood that his answers were under oath and that he was bound by them, that he was waiving his state and federal direct and collateral appellate rights, that no one had pressured or threatened him to change his mind or give certain answers, and that the decision to waive his rights was made by him. Id. at 41-43. Judge Sarmina then found that Petitioner "has knowingly, intelligently, and voluntarily given up those appellate rights both for direct appeal as well as post-conviction relief," and imposed sentence (life imprisonment without parole plus 20 to 40 years). Id. at 42-43, 48-49.

2. State Courts' Enforcement of the Waiver

Judge Sarmina revisited the validity of Petitioner's waiver on PCRA review, most significantly after appointed PCRA counsel (Mr. Rudenstein) filed a supplemental

[13]The prosecutor explained that Petitioner had been offered "this same thing seven or eight different times" and that, in light of the verdict, there was no risk to the Commonwealth in going forward with the penalty phase. N.T. 10/22/08 at 33.

amended PCRA petition on July 12, 2012, arguing that Petitioner would not have waived his appellate rights if trial counsel (Mr. McMahon) had been prepared for the penalty phase hearing. Supp'l Amended PCRA ¶¶ 8-9. On April 26 and 29, 2013, Judge Sarmina heard testimony from Mr. McMahon, the Jokelson Attorneys, Petitioner and members of his family, and then referred to that testimony when explaining her reasons for denying relief.

Judge Sarmina first addressed whether Mr. McMahon was ineffective at the penalty phase:

> This Court found that Mr. McMahon was not prepared to represent [P]etitioner adequately at the penalty phase proceeding. Mr. McMahon was aware that [P]etitioner had suffered significant cognitive damage as the result of a beating by police officers. However, Mr. McMahon did not secure a witness who could have explained, to a reasonable degree of scientific certainty, the cognitive impairments that [P]etitioner suffered. Mr. McMahon stated that he planned to introduce evidence that [P]etitioner's capacity to appreciate the criminality of his conduct was substantially impaired . . . in two ways: (1) through the testimony of Neil Jokelson, Esquire, one of the attorneys who had represented [P]etitioner in his failed civil rights trial against the City of Philadelphia for that beating by the police, and (2) through medical records, which had been introduced at that trial[.]
>
> . . . .
>
> Mr. McMahon's two-pronged approach was flawed. First, Mr. McMahon conceded, and this Court found, that he never actually read the transcripts of the civil trial[.]
>
> . . . .
>
> And second, Neil Jokelson readily admitted that he was not qualified to explain [P]etitioner's cognitive deficiencies to a jury[.]
>
> . . . .
>
> Mr. McMahon was so unprepared as to be unaware that Neil Jokelson could not have illustrated the scientific details necessary to understand the brain injuries that

> [P]etitioner suffered. Therefore, an explanation as to how [P]etitioner lacked the capacity to appreciate the criminality of his conduct could only have come from the records of [P]etitioner's civil case. As Mr. McMahon had not reviewed those records, he was not prepared to represent [P]etitioner at his penalty phase proceeding, which was imminent.
>
> In [P]etitioner's civil case[], multiple New York University doctors were used to establish that [P]etitioner had endured significant brain injuries from the beating that he had suffered. Mr. McMahon failed to secure expert witnesses who could have explained, to *this* jury, the science behind [P]etitioner's cognitive damage. In fact, Mr. McMahon was largely unaware of what those doctors had stated in the civil proceedings. Although a persuasive case of mitigation *could have been* presented, Mr. McMahon failed to take the steps to ensure that it *would have been* presented.

PCRA Ct. Op. at 5 n.12 (emphasis in original) (record citations omitted). Nevertheless, Judge Sarmina concluded that Petitioner failed to show that counsel's lack of preparation caused him to enter into the waiver or that he was pressured into doing so, and that in any event he was not prejudiced by counsel's lack of preparation. Id. at 6-14.

While counsel's ineffectiveness is no longer in dispute, whether that ineffectiveness caused Petitioner to waive his rights is in dispute, and I will examine the testimony on this point more closely. Petitioner testified that Mr. McMahon and the Jokelson Attorneys were "an intellectual influence overtop of me" and had "coached and cajoled" him into waiving his appellate rights. N.T. 04/29/13 at 85-86. He also testified that all four attorneys pressured him to take the waiver, and described their influence over him as a "spell" which he could not "break." Id. at 79, 122-23. On the other hand, Petitioner testified that Mr. McMahon played no role in his decision to waive his appellate rights:

> PETITIONER: Listen, I never really paid Mr. McMahon no mind from day one. I gave him his defense. I gave him his opening statements. I did that. He never did nothing. That's why when I said when he came to see me, he never even discussed a defense.
>
> Anyway, I wasn't – I wasn't listening to his opinion. It was Neil – it was the Jokelsons that coaxed me into taking that waiver. They shrouded with two on one side and the other one on the other side, and Jack [McMahon] was whispering things, but it was them rubbing my back as I said it. "Go through with it," you know, and all that kind of stuff. I – no way in the world I would have did it.

Id. at 82. He testified that Mr. McMahon never discussed the penalty phase with him prior to the hearing, and that he previously rejected a plea in exchange for a life sentence. Id. at 70-73. Petitioner also acknowledged his prior testimony that he was unaware that Mr. McMahon was ill-prepared at the time of the penalty phase hearing. Id. at 108.[14]

The Jokelson Attorneys testified that they tried to convince Petitioner to accept the waiver because it was in his best interest. Neil Jokelson, the father of the other two attorneys, explained his motive as follows:

> My only motivation was to get him the best possible life that he could get, that is, and by life, I mean existence. And if the choice was between living in a solitary confinement and ultimately being exposed to death as opposed to being in general population, I thought that the choice was clear. And I did, or I would have told him that.

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[14]As previously noted, Judge Sarmina conducted a colloquy on June 17, 2011, in connection with Ms. Smarro's motion to withdraw as PCRA counsel, to ensure that Petitioner was aware that he risked a death sentence if he prevailed on PCRA. In answer to the prosecutor's questions, Petitioner testified that he knew in "hindsight" that Mr. McMahon had done no penalty-phase investigation, but that he did not know that at the time of the waiver. N.T. 6/17/11 at 20-21.

N.T. 4/26/13 at 213.[15] He acknowledged being "as persuasive as I could be to get [Petitioner] to accept the deal." Id. at 212. David Jokelson testified that he shared with Petitioner his "opinion as to what I thought would be in his best interest when I was asked," and he agreed that it was accepting life in prison over the possible alternative. Id. at 273. Derrick Jokelson testified that he "thought it was absolutely in his best interest to avoid the death penalty" and that, after a lengthy conversation during which both he and Petitioner grew emotional, Petitioner "made an affirmative decision" to accept the waiver. Id. at 231, 242. All three Jokelson Attorneys relied on Mr. McMahon's opinion that there were no meritorious appellate issues arising from the trial. Id. at 192, 195, 197, 233, 271.

In addition to Mr. McMahon and the Jokelson Attorneys, Petitioner's family members advised him to accept the waiver. Petitioner's father, Reuben Glass, advised his son to waive his appellate rights in exchange for a guaranteed life sentence. N.T. 4/29/13 at 24. He also recalled that the Jokelson Attorneys "kept talking to" Petitioner to convince him "to take the deal," and did not recall any discussion with Mr. McMahon about the penalty phase. Id. at 24-25, 26. Similarly, Reuben Glass's long-time partner, Jane Malloy, told Petitioner to "take the waiver." Id. at 101 (Petitioner's testimony).

Petitioner testified at the PCRA hearing that he understood the Court's explanation of what was at stake when he was colloquied about his waiver:

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[15]Neil Jokelson testified that although he had experience as a defense attorney in capital cases, he did not take the required training to qualify in such cases, and for that reason declined representing Petitioner. N.T. 4/26/13 at 173.

> [PROSECUTOR]: . . . do you recall [Judge Sarmina] saying: "You have to make that decision, just like you decided you did not wish to plead guilty and wanted to go to trial, just like you decided that you did not wish to testify [at trial] and wished me to tell the jury that you had no burden of providing any evidence. So now it's time for you to decide in this case whether you wish to be able to take an appeal or not. The only way you're going to preclude us going to a penalty-phase hearing is by agreeing not to take an appeal or pursue post-conviction collateral rights." Do you recall that?
> PETITIONER: Yes, I do.
> [PROSECUTOR]: And did you understand that at the time?
> PETITIONER: I understood as she was telling me at the time, yes, I did.

N.T. 4/29/13 at 94-95. He also understood that he was giving up his appellate rights in order to avoid the possibility of receiving a death sentence. Id. at 95-96.

Judge Sarmina concluded as follows from the evidence presented at the PCRA hearing:

> [A]s [P]etitioner swore under oath that he had not been pressured into entering into the appellate waiver, he is bound by that testimony and may not now assert grounds for withdrawing his waiver which contradict those statements. Although Mr. McMahon had inadequately prepared to present mitigation evidence at a penalty phase hearing, . . . his failure to do so did not negate [P]etitioner's understanding of the "nature and consequences" of entering into that waiver. Not only did [P]etitioner testify during the waiver colloquy that he was aware of the consequences of the waiver, but he also conceded at the [evidentiary] hearing that he understood this Court's explanation of the results which flowed from entering into the appellate waiver.

PCRA Ct. Op. at 12 (state law citation omitted). Accordingly, Judge Sarmina concluded that "Petitioner failed to demonstrate that Mr. McMahon's deficient preparation vitiated his knowing, intelligent and voluntary waiver." Id.

Judge Sarmina further found that, even if Petitioner's alleged ineffectiveness claim had arguable merit, it would have failed because Petitioner did not demonstrate prejudice. PCRA Ct. Op. at 12. Specifically, because Petitioner testified that he was unaware at the time of the penalty phase that Mr. McMahon was ill-prepared, and because Petitioner generally ignored Mr. McMahon's input, "it is clear that [P]etitioner's motivation to accept a guaranteed life sentence was not based on Mr. McMahon's deficient performance." Id. at 13. As previously noted, on January 30, 2015, the Superior Court affirmed the denial of PCRA relief, adopting the reasoning set forth in Judge Sarmina's PCRA opinion. Super. Ct. Op. at 5.

B. Claim One - Enforceability of the Waiver

Petitioner's first claim is that Mr. McMahon was ineffective in failing to prepare for the penalty phase, and thereby caused Petitioner to involuntarily waive his appellate and collateral review rights. Doc. 1 at 5 (ECF pagination); Doc. 18 at 3-26. The District Attorney argues that Petitioner's waiver of his rights renders the present habeas petition unreviewable. Doc. 17 at 10-12. A determination that the waiver is enforceable is dispositive of not just this claim but all of Petitioner's claims.

1. Enforcement of Appellate/Collateral Review Waivers

The Third Circuit has held that waivers of appellate rights that are contained in a guilty plea agreement are generally permissible if entered into knowingly and voluntarily, unless they work a miscarriage of justice. United States v. Khattak, 273 F.3d 557, 562-63 (3d Cir. 2001); see also United States v. Mabry, 536 F.3d 231, 236 (3d Cir. 2008) ("Criminal defendants may waive both constitutional and statutory rights, provided they

do so voluntarily and with knowledge of the nature and consequences of the waiver.") The language of such waivers is to be strictly construed, and if the waiver applies by its terms, "it is the [petitioner's] burden to show the waiver should not be enforced." United States v. Morrison, 282 F. App'x 169, 171 (3d Cir. 2008). "A waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues – indeed, it includes a waiver of the right to appeal blatant error." Khattak, 273 F.3d at 561.

As the Third Circuit has observed, such waivers "preserve the finality of judgments and sentences imposed." Khattak, 273 F.3d at 561 (quoting United States v. Rutan, 956 F.2d 827, 829 (8th Cir. 1992)). "Allowing defendants to retract waivers would prolong litigation, affording defendants the benefits of their agreements while shielding them from their self-imposed burdens." Id. Elsewhere, the Third Circuit has stated:

> [I]f a defendant who has participated in a waiver proceeding is then allowed, without exception, to change his mind whenever he chooses, the doctrine of waiver will be rendered purposeless. Moreover, such an indulgence would be bad judicial policy resulting in frequent hearings and the expenditure of untold judicial resources.

Fahy v. Horn, 516 F.3d 169, 187 (3d Cir. 2008).

The above principles apply to both waivers of appellate rights and to waivers of rights to seek collateral review, including federal habeas review. See generally Mabry, 536 F.3d 231 (enforcing waiver of collateral review). "[W]e look to the underlying facts to determine whether a miscarriage of justice would be worked by enforcing the waiver." Id. at 243.

2. Knowing and Voluntary

Courts in this jurisdiction have upheld waivers similar to the one presented in this case, where it is determined that the waiver was knowing and voluntary. See, e.g., United States v. Wilson, 429 F.3d 455, 459-61 (3d Cir. 2005) (waiver enforced where knowing and voluntary); United States v. Melendez, No. 14-0266-04, 2017 WL 131700, at *5 (M.D. Pa. Jan. 13, 2017) (Caldwell, J.) (same); Swinson v. Pennsylvania, No. 07-3934, 2008 WL 4790608 (E.D. Pa. Oct. 31, 2008) (Padova, J.) (approving Report and Recommendation of Restrepo, M.J.) (habeas merits review foreclosed by knowing and voluntarily waiver of appellate rights in guilty plea agreement); Watts v. Wilson, No. 07-2820, 2008 WL 5094251 (E.D. Pa. June 27, 2008) (Restrepo, M.J.), approved and adopted, 2008 WL 5000277 (J. Padova) (habeas merits review foreclosed by knowing and voluntarily waiver of appellate rights in penalty phase waiver agreement).

In Mabry, the petitioner pled guilty after the jury was selected, and following a detailed colloquy waived his right to appeal his conviction and sentence "on any and all grounds," and also waived his right to "challenge any conviction or sentence or the manner in which the sentence was determined in any collateral proceeding." 536 F.3d at 233-34. Petitioner was convicted and later filed a section 2255 habeas petition, claiming his counsel was ineffective for failing to file an appeal to raise sentencing error and counsel's failure to present any reasons to waive his appellate rights. Id. at 234-45.

The Third Circuit affirmed the denial of the petition, concluding that the collateral review waiver was enforceable. On the question whether the waiver was knowing and voluntary, the court rejected the argument that the court's failure to define the term

"miscarriage of justice" as an exception to enforcing the waiver rendered the waiver unknowing.

> The written plea agreement here clearly provides that the waiver is very broad, admits of no exceptions, and applies to both direct appeal and collateral challenge rights. . . . Having scrutinized the colloquy . . . we are satisfied that the district court 'informed the defendant of, and determined that the defendant understood the terms of any plea-agreement provision waiving the right to appeal or collaterally attack the sentence' . . . .

Id. at 238-39. "That the Court did not explain further or elaborate is not error." Id. at 239. The court noted that petitioner did not allege that he was misled or coerced, and therefore found no reason to remand for any factual finding. Id. at 238 n.7, 239. The court thus concluded that Mabry's collateral review waiver was knowing and voluntary.[16]

Mabry strongly supports a finding of a knowing and intelligent waiver in Petitioner's case. As there, Petitioner here was colloquied extensively on the waiver. He was specifically asked whether he understood that he was giving up the right to raise his counsel's ineffectiveness in a collateral proceeding, including in a federal habeas corpus petition. The fact that particular instances of ineffectiveness were not explained or disclosed does not, under the reasoning in Mabry, negate the knowing and voluntary nature of the waiver.

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[16]The court also rejected Mabry's argument that a special rule applied to allow his claim that he asked his attorney to file an appeal and the attorney failed to do so. 536 F.3d at 239-42. "We will consider the validity of the collateral waiver as a threshold issue and employ an analysis consistent with other waiver cases." Id. at 242.

It must also be noted that in Petitioner's case, the state courts made a finding that the waiver was knowing and intelligent, raising the question of the deference the federal courts owe to that finding. In Swinson, the court considered whether a state court determination that a waiver was knowing and voluntary is a "claim that was adjudicated on the merits" under section 2254(d), and thus deserving of deference unless that adjudicated was contrary to, or an unreasonable application of, the law or facts under that provision. 2008 WL 4790608, at *5.[17] The court observed that the Third Circuit in Fahy did not apply such deference, but also noted that the waiver issue in Fahy was raised in a procedurally different context and thus that case likely did not control. Id. at *6 (citing Fahy, 516 F.3d at 180).[18] In any event, "even assuming that the state court's ultimate findings on the validity of petitioner's waiver . . . are not entitled to deference under

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[17]Under the federal habeas statute, review is limited in nature and may only be granted if (1) the state court's "adjudication of the claim . . . resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, rebuttable only by clear and convincing evidence. Werts v. Vaughn, 228 F.3d 178, 196 (citing 28 U.S.C. § 2254(e)(1)). In cases where the deferential standard of review does not apply, federal habeas courts apply de novo standard of review. See Jacobs v. Horn, 395 F.3d 92, 100 (3d Cir. 2005).

[18]In Fahy, the petitioner waived his right to collateral review during the pendency of his PCRA proceeding, and the Third Circuit later held that the state court finding on the validity of the waiver was not entitled to section 2254(d) deference because the issue did not amount to an adjudication on the merits of any of the claims. 516 F.3d at 180 (defining a "claim" for purposes of section 2254(d) as a claim which, if granted, would entitle petitioner to relief on the merits). In Swinson, as well as in Petitioner's case, the validity of the waiver would determine entitlement to relief.

§ 2254(d), . . . the underlying explicit and implicit factual findings upon which the state court based its conclusions must be afforded a presumption of correctness" where the petitioner has failed to rebut the presumption with "clear and convincing evidence." Id. at *7 (citing 28 U.S.C. § 2254(e)(1)). In Swinson, the record contained a written and oral guilty plea colloquy sufficient to demonstrate that the petitioner made a knowing and voluntary waiver and plea. Id.; see also Watts, 2008 WL 5094251 at *6 ("In light of the state court's factual findings, it cannot be said that Watts' waiver was not entered into knowingly and voluntarily.") (citing Khattak, 273 F.3d at 563). Here, Judge Sarmina engaged in a lengthy waiver colloquy during the penalty phase hearing, and conducted a two-day evidentiary hearing on PCRA appeal before concluding that trial counsel's performance at the penalty phase hearing was deficient in terms of preparation, but that counsel's deficient preparation did not affect Petitioner's decision to enter into the appellate waiver, and did not cause prejudice. These findings are entitled to deference in the habeas context, and Petitioner has not rebutted them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Werts, 228 F.3d 178, 196.

This case is also similar to Watts, where the petitioner entered into a waiver agreement at the penalty phase when the only possible sentences were life imprisonment or the death penalty. In both cases, the trial courts engaged in extensive colloquies during which the defendants acknowledged that they had discussed all of their rights with their respective attorneys, and that they understood those rights; that they were giving up the right to file any direct or collateral appeals; and that they have not been forced or threatened to accept the terms of the waiver agreement, but rather made the decisions

themselves. N.T. 10/22/98 at 11-14, 38-43; Watts, 2008 WL 5094251, at *3. Moreover, in both cases the defendants filed appeals in the state courts notwithstanding their waiver agreements, and in both cases the state courts determined that the waivers were entered into knowingly and voluntarily. PCRA Ct. Op. at 14, 15; Super. Ct.-PCRA at 5; Watts, 2008 WL 5094251, at *5. In light of the similarities I find the opinion in Watts highly persuasive and conclude that Petitioner knowingly and voluntarily waived his right to appellate and collateral review.

3. Miscarriage of Justice

In evaluating whether a miscarriage of justice would result from enforcement of a waiver, courts should consider "the clarity of the error, its gravity, its character (e.g., whether is concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." Mabry, 536 F.3d at 242-43 (quoting United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001)).

The court in Mabry concluded that the waiver would not work a miscarriage of justice, in particular noting that "it is undisputed that the waiver . . . was broad and offered no express exceptions." 536 F.3d at 243. The court made reference to two scenarios where courts have declined to enforce a collateral review waiver on miscarriage of justice grounds, only one of which is potentially applicable here.[19] The court observed

[19]In United States v. Shedrick, 493 F.3d 292 (3d Cir. 2007), the Third Circuit applied the miscarriage of justice exception on grounds that do not apply here. In Shedrick, the appellate waiver specifically retained the defendant's ability to appeal an upward departure, and the plea agreement also contained a collateral review waiver.

that the case before it did not "rais[e] allegations that counsel was ineffective or coercive in negotiating the very plea agreement that contained the waiver." Id. at 243 (citing United States v. Wilson, 429 F.3d 455 (3d Cir. 2005)). This statement implies that such allegations could rise to a miscarriage of justice to preclude enforcement of the waiver, a scenario potentially implicated here where Glass alleges that his trial counsel was ineffective in failing to inform him that he was unprepared to defend him in the penalty phase and thereby caused an unknowing waiver.

Unfortunately, Wilson does not provide guidance in separating the waivers that are enforceable from those that are unenforceable on this ground. In Wilson, the defendant pled guilty with a broad appellate waiver, and then appealed after the trial court denied his motion to withdraw his plea. 429 F.3d at 457. On appellate review, the Third Circuit accepted that a miscarriage of justice would result if the defendant should have been allowed to withdraw his plea, but then concluded that the trial court had not abused its discretion in denying that request. Id. at 458-60. Principally, the court focused on whether the plea was coerced, which in that case turned on the validity of a "package deal" plea in which the government would only accept one defendant's plea if the other's pled guilty as well. The court upheld the validity of the arrangement, and in the absence

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There was no direct appeal, and the defendant sought habeas review to reinstate his appellate rights to challenge an upward departure. As noted by the court in Mabry, the court did not enforce the waiver "because defense counsel's constitutionally deficient conduct in failing to file an appeal as instructed deprived the defendant of 'the opportunity properly to raise the issue he had . . . explicitly preserved in his plea agreement.'" 536 F.3d at 243 (citing Shedrick, 493 F.3d at 303). The scenario presented in Shedrick is not implicated in Glass's case, where the waiver broadly covered all appeals and collateral review.

of any facts showing coercion rejected defendant's argument and dismissed his appeal. Id. at 459-60. Despite recognizing in principle that a waiver should not be enforced where counsel was ineffective in advising a defendant to accept a waiver, Wilson does not assist in application of such a rule.

Petitioner relies on a Tenth Circuit case to support his argument that the waiver should not be enforced. Doc. 18 at 9-10, 19-25 (citing Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001)). Like Petitioner's case, Battenfield involved a penalty phase proceeding following the jury's guilty verdict on a murder charge, but unlike Petititioner's case, ended in a death sentence. Battenfield is distinguishable and does not provide support for Petitioner's argument.

In Battenfield, the defendant informed his attorney and the court that he did not want to present any mitigating evidence. 236 F.3d at 1226.[20] The prosecution presented

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[20]In Battenfield, the court's colloquy consisted of the following:

> THE DEFENDANT: I'm going against my attorney's advice and not taking the stand.
>
> THE COURT: All right. Are you being abused, mistreated, or forced to make you go against his advice?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: It was my understanding . . . that you don't even want to put on any evidence as to mitigation; is that correct:
>
> THE DEFENDANT: You mean my parents and stuff?
>
> THE COURT: Yes.
>
> THE DEFENDANT: No sir, they have been through enough.
>
> THE COURT: You're not going to present any testimony as to mitigation?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You understand you have the right?
>
> THE DEFENDANT: Yes, sir.

evidence of aggravating factors, the defense did not present any mitigation evidence, and the jury returned a death sentence. Id. at 1219. In his state post-conviction proceeding, Battenfield argued that his counsel was ineffective in failing to prepare and present mitigating evidence, and that he did not understand the meaning of mitigation beyond testimony from his family. Id. at 1226. The state courts held an evidentiary hearing but denied relief, concluding that the defendant voluntarily waived his right to present mitigating evidence, and that even if he did not thoroughly understand mitigation, "[w]e will not hold counsel responsible for his client's obstinate behavior." Id. at 1226-27.

A divided panel of the Tenth Circuit granted habeas relief, concluding that the state courts had unreasonably determined that the waiver was valid. The court observed that counsel's only mitigation strategy was to invoke the jury's sympathy, and that there was no indication that counsel interviewed Battenfield about his background or spoke to anyone other than his parents about potential mitigation. 236 F.3d at 1228. The result of this constitutionally inadequate investigation, the court concluded, was that counsel was wholly unprepared to present a mitigation case or defend the prosecution's case, hampering his ability to make strategic decisions about the penalty phase and to competently advise Battenfield. Id. at 1229. Counsel's "deficient performance culminated in Battenfield waiving the right to present mitigating evidence." Id. at 1230. Viewing the court's colloquy in light of counsel's inadequate performance, "Battenfield did not have a proper understanding of the general nature of mitigation evidence or the

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236 F.3d at 1230-31.

specific types of mitigating evidence that might be available for presentation. He only knew that [counsel] intended to put his parents on the witness stand and have them beg for the jury's mercy." Id. at 1231. Finally, the court found prejudice under a de novo standard, concluding that a variety of mitigating evidence could have been presented. Id. at 1234-35.

Battenfield is inapplicable to the circumstances of Petitioner's case. Although both Petitioner and Battenfield faced possible death sentences at their respective penalty phase hearings, Battenfield received a death penalty as a result of his waiver of his right to present mitigating evidence, whereas Petitioner received a life sentence as a result of his waiver of his right to appeal or seek collateral review. Also, whereas Battenfield was not colloquied in any detail about the rights he was giving up, Petitioner was colloquied extensively about his waivers. Accordingly, enforcement of Petitioner's waiver is not inconsistent with Battenfield.[21]

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[21]The continued vitality of Battenfield is in question. The Eleventh Circuit rejected a similar claim in Allen v. Secretary, Florida Dep't of Corr., 611 F.3d 740, 762 & 764 n.14 (11th Cir. 2010), in light of Schriro v. Landrigan, 550 U.S. 465 (2007). In Schriro, the defendant instructed his family members and lawyer not to present mitigating evidence, and advised the sentencing court that there were no mitigating circumstances "as far as I'm concerned." Id. at 469. Defendant also interrupted and refuted his attorney's attempts to mitigate his conduct. The court imposed a death sentence. In collateral state court proceedings, the defendant offered mitigating evidence that his counsel never investigated, but his claim was rejected without a hearing. The Supreme Court reversed the Ninth Circuit's grant of habeas relief, concluding that if the defendant "issued . . . an instruction [not to offer any mitigating evidence], counsel's failure to investigate further could not have been prejudicial under Strickland." Id. at 475.

Additionally, Judge Sarmina's analysis and conclusions are consistent with Strickland v. Washington, 466 U.S. 668 (1984), which governs federal review of IAC claims.[22] Strickland sets forth two requirements. First, the defendant must show that counsel's performance was deficient, meaning counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense, which turns on whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see also Smith v. Robbins, 528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed").

As previously noted, the state courts found on PCRA appeal that trial counsel performed deficiently insofar as he was not adequately prepared for Petitioner's penalty phase hearing, but that Petitioner failed to demonstrate that counsel's deficient preparation invalidated Petitioner's knowing, intelligent and voluntary waiver, or that it prejudiced Petitioner at the penalty phase. PCRA Ct. Op. at 12. Petitioner testified that he did not learn of counsel's ill-preparedness until later and did not generally listen to counsel's advice anyway, and therefore counsel's lack of preparation did not contribute to Petitioner's decision to enter into the waiver agreement. In addition, Petitioner repeatedly testified under oath that he understood the proceedings and the nature of the

[22]Whether the merits of the underlying IAC claim is reviewed under deferential or de novo standard of review, the state court's reasoning conclusion regarding the validity of Petitioner's waiver is well-reasoned and supported by the record.

waiver, and that the decision to enter into the waiver agreement was made by him, without threats or coercion. As a result, the record cannot fairly be read to show that counsel's performance caused Petitioner to accept the waiver agreement, but rather shows that Petitioner independently acquiesced in the result. Moreover, given the penalties Petitioner faced at the time of his penalty phase, he cannot show prejudice.[23]

For the aforementioned reasons, Petitioner's substantive ineffectiveness claim does not give rise to a "miscarriage of justice" that would invalidate his waiver of appellate rights. Therefore, I find that Petitioner's waiver of his appellate rights, explicitly including his right to federal habeas review, renders the present habeas petition unreviewable. However, in an abundance of caution, I will proceed to address Petitioner's remaining claims.

C. The Remaining Claims

In his petition, in addition to the ineffectiveness claim discussed above, Petitioner argues that trial counsel (Mr. McMahon) was ineffective in allowing the Jokelson

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[23]Petitioner has not demonstrated any issues of potential merit had he taken a direct appeal unburdened by his appellate waiver. Having received a life sentence and absent any grounds for direct appeal, Petitioner is unable to show prejudice resulting from his waiver. To the extent Petitioner argues that his loss of the right to file a direct appeal constitutes prejudice, he is incorrect. As noted above, where the waiver is entered into knowingly and voluntarily, and where the colloquy is not marred by error, the loss of appellate rights does not in and of itself constitute prejudice. See Mabry, 536 F.3d at 240-41 (in considering IAC claims where defendant waived appellate rights, "there is no reason to presume prejudice amounting to a miscarriage of justice in such a situation where the attorney's filing of an appeal would constitute a violation of the plea agreement"); Melendez, 2017 WL 131700, at *5 (where waiver of appellate rights is otherwise enforceable, counsel's failure to file an appeal at defendant's request does not constitute ineffective assistance).

Attorneys to advise Petitioner to enter into the waiver agreement; the Jokelson Attorneys were ineffective in advising Petitioner to waive his appellate rights; the trial court violated Petitioner's due process rights when it "actively participated" during the waiver colloquy; the trial court violated Petitioner's due process rights when it allowed the Jokelson Attorneys to participate in the penalty phase hearing; layered ineffectiveness violated Petitioner's due process rights; trial counsel was ineffective for failing to assert Petitioner's cognitive damage and incompetence; and PCRA appellate counsel (Mr. Mosser) was ineffective for failing to raise these claims. Doc. 1 at 7-10 (GROUNDS TWO-FOUR), 17-18 (GROUNDS FIVE-EIGHT) (ECF pagination).[24] Respondent argues that, in addition to the enforceability of Petitioner's waiver of his right to seek habeas review, the claims are also procedurally defaulted. Doc. 17 at 14-16.

Before the federal court can consider the merits of a habeas claim, Petitioner must comply with the exhaustion requirement of section 2254(b), by giving "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Also, failure to comply with the state's procedural rules in presenting one's claims results in a procedural default. Coleman v. Thompson, 501 U.S. 722, 750 (1991). The federal courts may address a defaulted claim only if the petitioner establishes cause for the default and prejudice resulting therefrom, or that a failure to

[24]Petitioner raised some of these arguments in his 1925(b) statement of matters complained of on appeal, see PCRA Ct. Op. at 4, 14, but he did not do so in his subsequent appellate brief. See Super. Ct. Op. at 2-3.

consider the claim will result in a fundamental miscarriage of justice. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). To meet the "cause" requirement to excuse a procedural default, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). To establish prejudice, a petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Id. at 193. In order for a petitioner to satisfy the fundamental miscarriage of justice exception to the rule of procedural default, the Supreme Court requires that the petitioner show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Carrier, 477 U.S. at 496). This requires that the petitioner supplement his claim with "a colorable showing of factual innocence." McCleskey v. Zant, 499 U.S. 467, 495 (1991) (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)). In other words, a petitioner must present new, reliable evidence of factual innocence. Schlup, 513 U.S. at 324.

Here, none of the claims asserted in Grounds Two through Eight were timely presented to the Superior Court. Therefore, the claims are unexhausted. Moreover, because the time for raising the claims in state court has now expired, the claims are defaulted.

The insurmountable difficulty for Petitioner with regard to cause and prejudice is that all of his claims concern the actions of attorneys and the court in connection with his

penalty phase hearing, when the only possible sentences Petitioner could receive were life imprisonment or a death sentence. Because the waiver agreement ensured a sentence of life imprisonment, it is impossible for Petitioner to show that the actions of the attorneys or the court at the penalty phase prejudiced him.[25] Thus, even if Petitioner could establish cause, he has not established prejudice.[26]

Similarly, Petitioner cannot demonstrate that the failure to consider these claims will result in a fundamental miscarriage of justice. As previously noted, this exception requires new, reliable evidence of factual innocence. See Schlup, 513 U.S. at 324. Here, all of Petitioner's claims relate to the performance of attorneys or the court during the penalty phase of trial, and therefore do not implicate his factual innocence. Additionally, Petitioner's alleged cognitive deficiency and competency was known at the time of trial, and in any event Petitioner's own expert obtained on PCRA appeal determined that Petitioner was not mentally retarded, as Petitioner conceded. See Supp. Amended PCRA ¶ 9. As a result, these claims are defaulted and cannot be reviewed.

Finally, the claim of ineffectiveness of PCRA appellate counsel which Petitioner raised in his motion to amend, see Doc. 12, is both untimely and non-cognizable. Petitioner filed the motion to amend on August 25, 2016, which was outside the one-year

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[25]As previously noted, the waiver of appellate rights alone does not constitute prejudice, and Petitioner has not identified issues he would have pursued on direct appeal.

[26]I therefore need not address Petitioner's argument that his PCRA counsel's failures provide cause pursuant to Martinez v. Ryan, 566 U.S. 1 (2012). Doc. 18 at 55 (ECF pagination).

habeas statute of limitations. In any event, there is no federal constitutional right to effective post-conviction counsel, and the claim is therefore not cognizable on habeas review. See 28 U.S.C. § 2254(i); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."). Therefore, no relief can be granted on this claim.

III. MOTION

Petitioner has moved the court for appointment of counsel, which I previously stated I would consider after the response was received. Docs. 11 & 13. There is no right to counsel to pursue a habeas petition. See Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991). The court does have discretion to appoint counsel when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2). In making this determination the court should consider the complexity of the factual and legal issues in the case and the petitioner's ability to investigate facts and present his claims. Reese, 946 F.2d at 264. Counsel need not be appointed when the issues are "'straightforward and capable of resolution on the record' . . . or the petitioner had 'a good understanding of the issues and the ability to present forcefully and coherently his contentions.'" Id. (quoting Ferguson v. Jones, 905 F. 2d 211, 214 (8th Cir. 1990); LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987)). Here, the issues raised do not warrant appointment of counsel. Therefore, the motion should be denied.

IV. CONCLUSION

The petition is timely, but Petitioner's knowing, intelligent, and voluntary waiver of his right to file a habeas petition forecloses review. The state courts correctly

concluded that Mr. McMahon's ineffective assistance did not render his waiver unenforceable, and Petitioner is not prejudiced by enforcement of the waiver. Therefore, his claim that his counsel's ineffectiveness rendered his waiver unknowing and involuntary has no merit. The remaining seven claims asserted in his petition are unexhausted and procedurally defaulted, and the ineffectiveness of PCRA appellate counsel claim raised in his motion to amend is untimely and non-cognizable. Finally, the issues raised do not warrant the appointment of counsel.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 31st day of July 2017, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED, and that Plaintiff's motion for appointment of counsel (Doc. 11) be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

ELIZABETH T. HEY, U.S.M.J.

Additional material from this filing is available in the Clerk's Office.