PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3118

EDWARD MITCHELL,

Appellant

v.

SUPERINTENDENT DALLAS SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY DAUPHIN COUNTY

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 1-09-cv-02548)
Honorable Yvette Kane, District Judge

Submitted Under Third Circuit L.A.R. 34.1(a)
June 11, 2018

BEFORE: CHAGARES, GREENBERG, and FUENTES,
Circuit Judges

(Filed: August 23, 2018)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Edward Mitchell, a prisoner in the custody of the Commonwealth of Pennsylvania, appeals from an order denying his petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. See Mitchell v. Walsh, No. 1:09-cv-02548, 2017 WL 3725503 (M.D. Pa. Aug. 29, 2017). Mitchell currently is serving a sentence of life imprisonment following his convictions at a joint trial with Karim Eley and Lester Eiland in a Pennsylvania state court in 2001 for various offenses arising from a robbery and a murder. Mitchell seeks relief on the grounds that the admission at the trial of testimony of jailhouse informants setting forth his co-defendant Lester Eiland's out-of-court jailhouse statements violated his rights under the Confrontation Clause of the Sixth Amendment. The District Court in the habeas corpus proceedings concluded that Eiland's statements to the informants were nontestimonial as recognized by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), and therefore their inclusion in testimony at the trial did not violate his Confrontation Clause rights even though he could not cross-examine Eiland regarding the statements.

Mitchell has argued and continues to argue that the District Court erred by applying Crawford because the AEDPA requires assessment of whether a state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), and the Supreme Court decided Crawford on March 8, 2004, after his trial and after the Superior Court of Pennsylvania affirmed his

conviction on direct appeal on September 22, 2003, in the last state court proceeding dealing with the Sixth Amendment issue. Consequently, he points out that the Crawford principles were not "clearly established" at the time the state courts were considering the Sixth Amendment issue. Mitchell contends that even if admission of the challenged statements would not create a Confrontation Clause issue in a trial held today, he is entitled to habeas corpus relief because, prior to Crawford, when his case was being tried and was on direct appeal, the Confrontation Clause would have been applied to bar the jailhouse testimony with respect to Eiland's statements.

We have concluded that Mitchell, by focusing narrowly on the "clearly established Federal law" language of 28 U.S.C. 2254(d)(1) and by relying on the law in effect at the time of his trial and appeal, misstates the standard applicable to habeas corpus review of a state court conviction in the federal courts. Congress in section 2254(d) has made it a necessary, but not a sufficient, condition for granting habeas corpus relief to a state prisoner that a state court's decision leading to his custody was contrary to, or unreasonably applied, clearly established federal law at the time that the state court made its decision. But even if a petitioner in state custody makes that showing he has satisfied only one requirement for the granting of his petition because the AEDPA allows relief to be granted "only on the ground that [a prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Accordingly, notwithstanding a state court's misapplication of federal law at trial a prisoner is not necessarily entitled to relief in the light of "the longstanding rule that federal courts will not entertain habeas petitions to correct errors that do not undermine the lawfulness of a petitioner's

detention." Bronshtein v. Horn, 404 F.3d 700, 724 (3d Cir. 2005). For the reasons we set forth below, we conclude that Mitchell is not in custody pursuant to what is now recognized as a violation of the Sixth Amendment attributable to the testimony at the trial of the jailhouse informants which set forth Eiland's statements and therefore we will affirm the order of August 29, 2017, denying Mitchell's petition for a writ of habeas corpus.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 2001, at the joint trial of Mitchell and his two co-defendants, Eley and Eiland, a jury convicted Mitchell of second-degree murder, robbery, and conspiracy to commit robbery in the July 2000 shooting death of Angel DeJesus, a taxi driver, in Harrisburg, Pennsylvania. See Commonwealth v. Mitchell, No. 782-2014, 2015 WL 7726738, at *1-2 (Pa. Super. Ct. Jan. 12, 2015). Prior to the trial, Mitchell and Eley filed unsuccessful motions to have their cases severed from those of the other defendants and thus the trial was of all three defendants.

After extensive but ultimately unsuccessful state court proceedings, Mitchell filed a petition for a writ of habeas corpus in the District Court under 28 U.S.C. § 2254 on December 28, 2009, which he amended on October 19, 2010.[1] Mitchell's amended petition advanced three grounds for relief: (1) the state trial court's charge on reasonable doubt was constitutionally defective; (2) the introduction of the informants' testimony

[1] The federal habeas corpus proceedings were prolonged by orders staying proceedings on Mitchell's petition while his state post-conviction relief applications were pending.

describing non-testifying co-defendant Eiland's out-of-court statements violated Mitchell's rights under the Confrontation Clause; and (3) the trial court deprived Mitchell of due process of law when it denied his claim of actual innocence. At this time, however, Mitchell limits his claim to the Confrontation Clause issue and thus we do not address the other issues he set forth in his petition.

Mitchell argues that the testimony at the trial of two jailhouse informants, Matthew LeVan and Steven Taylor, violated his constitutional rights because they testified as to Eiland's out-of-court statements that implicated Mitchell in the offenses and Mitchell did not have the opportunity to confront Eiland regarding those statements. Though Eiland's statements did not mention Mitchell by name, Mitchell contends that in the context of the joint trial Eiland's statements implicated him in the robbery and murder. Specifically, LeVan testified as follows:

> Q. Now, if you can, describe for the jury the conversation you had with Lester Eiland while you were in the jail cell playing cards.
>
> A. He said about the sawed-off shotgun was used and a .380 pistol, and there was two other guns used and one was hidden in a brick close to where it happened at.
> Q. Did he say what kind of crime it was?
> A. Homicide
> Q. Or began as?
> A. Homicide—no, it was a robbery.
> Q. Did he say what happened?

> A. He said they—they, as in whoever was with him—he didn't say the names of those people—when he went up to them, it was supposed to be a robbery, and he was—he's the one that shot him, but he didn't mean to do it. It was the other two's idea or something like that, in that sense.

App. 225.

> Taylor testified, referring to the substance of Eiland's statements, that "they were there to rob a cab driver, and I guess with different things you did or whatnot during the evening, somewhere, somehow, something went wrong and whatnot. Somebody ended up dead from that." App. 239.

Mitchell claims that these jailhouse witnesses' references to "they" and the murder being "the other two's idea" tied him to the robbery and provided key evidence to establish his culpability for the offenses. Mitchell argues that the failure to exclude or properly redact the references to his involvement in the offenses from the co-defendant's statements to which the informants referred violated his confrontation rights as recognized in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987), and Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998). He unsuccessfully raised this claim on direct appeal in the Superior Court of Pennsylvania where he also unsuccessfully challenged the trial court's order denying his pretrial motion to sever his trial from that of his co-defendants. See Commonwealth v. Mitchell, No. 1658 MDA 2001, slip op.

at 6 (Pa. Super. Ct. Sept. 22, 2003).[2]

Mitchell understandably relies on our decision in Eley v. Erickson, 712 F.3d 837 (3d Cir. 2013), in which we granted habeas corpus relief to his co-defendant, Kariem Eley, whom the jury also convicted at the joint trial. We granted Eley's petition because we believed that there had been a Bruton violation in his case by reason of the admission of testimony describing Eiland's statements at the trial. In Eley, we held that the state court's order denying a motion to sever the trials was contrary to federal law clearly established by Bruton, Richardson, and Gray, Supreme Court's precedent on the Confrontation Clause. 712 F.3d at 859. Focusing in particular on Eiland's statement that it was "the other two" defendants who had the "idea" to rob the victim, in Eley we explained:

> Although we are mindful of the deference that we owe to the Commonwealth's courts, we are constrained to conclude that fairminded jurists could not disagree that the Superior Court's decision is inconsistent with Richardson and Gray. We have no doubt that the jury inferred, on the basis of Eiland's confession alone, that Eley was one of 'the other two' whose 'idea' it was to rob DeJesus. . . . Indeed, a juror who wondered to whom 'the other two' referred . . . 'need[ed] only

[2] The Pennsylvania Supreme Court denied Mitchell's petition for review of the Superior Court decision on June 29, 2014. The Pennsylvania courts subsequently have denied four separate petitions for post-conviction relief that Mitchell has filed. But none of the state post-conviction proceedings addressed the Confrontation Clause issue presented here.

> lift his eyes to [Eley and Mitchell], sitting at counsel table, to find what ... seem[ed] the obvious answer,' Gray, 523 U.S. at 193, 118 S.Ct. 1151.

Id. at 859 (alterations in original).

Mitchell has argued in these habeas corpus proceedings that our holding in Eley that the introduction of testimony making reference to Eiland's statements was unconstitutional applies with the same force here and therefore on that basis he is entitled to habeas corpus relief.

The District Court referred Mitchell's petition to a magistrate judge for a report and recommendation which she issued on December 12, 2016, recommending that the Court deny Mitchell's petition. Mitchell filed objections to the report and recommendation but the Court overruled the objections by adopting the report and recommendation on August 29, 2017, in a memorandum opinion. The Court concluded that, even assuming Mitchell could make the threshold showing under 28 U.S.C. § 2254(d)(1) that the state court's denial of his Confrontation Clause claim was "contrary to, or involved an unreasonable application of, clearly established Federal law" under Bruton, he was not entitled to relief because the Sixth Amendment law had evolved in Crawford after his trial and there had not been a Confrontation Clause violation under the updated standards.[3]

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[3] The Commonwealth initially argued that Mitchell had not exhausted his Confrontation Clause claim in the state courts, as required to proceed under 28 U.S.C. § 2254. However, by the time the magistrate judge had made her report and

The germane development of the law in Crawford was that the Sixth Amendment Confrontation Clause was recognized as guarding against testimonial statements made by an individual in anticipation that the person to whom he makes the statements will be called as a witness as well as formal statements made under oath and statements made to law enforcement officers seeking information about past events. After the District Court denied his petition, Mitchell, to whom that Court granted a certificate of appealability, filed this timely appeal challenging the application of Crawford to his Confrontation Clause claim.

III. STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction over Mitchell's petition for a writ of habeas corpus under 28 U.S.C. §§ 2254 and 2241. We have jurisdiction over this appeal from the denial of an application for a writ of habeas corpus pursuant to 28 U.S.C. §§ 1291 and 2253. Inasmuch as the Court did not hold an evidentiary hearing on Mitchell's petition, our review is plenary. Lewis v. Horn, 581 F.3d 92, 100 (3d Cir. 2009).

The AEDPA imposes a "highly deferential standard" on federal habeas corpus review of state court proceedings. That standard "demands that [such] decisions be given the benefit of

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recommendation, the Commonwealth had conceded that the exhaustion requirement had been satisfied with respect to the Confrontation Clause claim and that the claim was therefore not procedurally defaulted. See App. 961, 979.

the doubt." Renico v. Lett, 559 U.S. 766, 773, 130 S.Ct. 1855, 1862 (2010). A federal court cannot grant habeas relief based on a claim that was "adjudicated on the merits" in a state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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).

IV. DISCUSSION

As was the District Court, we are satisfied that Mitchell established that the Pennsylvania Superior Court, in the last state court decision to address the Sixth Amendment issue, unreasonably applied what was then clearly established federal law when it upheld the trial court's ruling refusing to sever Mitchell's trial from that of the other defendants before admitting the testimony referencing Eiland's out-of-court statements that implicated Mitchell in the offenses. Indeed, in Eley we considered these statements and their effect on Eley, who was in Mitchell's position, and concluded that the admission of the statements violated the Confrontation Clause and that the error "substantially influenced the jury's verdict." Eley, 712 F.3d at 861 (citing Bruton, 391 U.S. at 129, 88 S.Ct. at 1624). Thus the admission of the testimony was not a small matter. But the question that we now must address is different for it is whether the District Court in considering the habeas corpus petition correctly considered case law authority subsequent to that on which we relied in Eley in considering whether Mitchell was "in custody in violation of the

Constitution or laws or treaties of the United States" under 28 U.S.C. § 2254(a). That recent authority is Crawford and our decision in United States v. Berrios, 676 F.3d 118 (3d Cir. 2012), in neither of which we discussed Eley.

There is no doubt but that if a habeas corpus petitioner shows that a state court decision leading to his custody was contrary to, or an unreasonable application of, clearly established federal law under 28 U.S.C. § 2254(d), he often will be entitled to relief, though not "always and automatically." Mosley v. Atchison, 689 F.3d 838, 853 (7th Cir. 2012). While it is necessary for a state prisoner to satisfy § 2254(d) to make a successful habeas corpus claim, he cannot obtain habeas corpus relief unless he also makes a showing under § 2254(a) that he is being held in custody in violation of the Constitution, laws, or treaties of the United States. Id. "[Section] 2254 relief thus is available only to state prisoners who currently are being held in violation of an existing constitutional right, not to inmates who at one point might have been able to show that [under] a since-overruled Supreme Court or lower court precedent [they] would have [been entitled to] relief." Desai v. Booker, 538 F.3d 424, 428 (6th Cir. 2008); see also Dennis v. Sec'y, Pennsylvania Dep't of Corr., 834 F.3d 263, 349 n.6 (3d Cir. 2016) (Jordan, J., concurring) (explaining importance of "understand[ing] the interplay between §§ 2254(a) and 2254(d)").

This case involves the evolution of the law inasmuch as regardless of what happened at his trial or the state of the law at that time, Mitchell is unable to show that he is being held in violation of an existing right by reason of the informants' testimony. In Crawford, the Supreme Court explained that the "primary object" of the Confrontation Clause is to protect defendants from testimonial hearsay, including statements taken

by law enforcement from witnesses against the accused. 541 U.S. at 53, 124 S. Ct. at 1365. We have made clear that the Supreme Court, building on Crawford, has gone on to hold "that the Confrontation Clause protects the defendant only against the introduction of testimonial hearsay statements, and that admissibility of nontestimonial hearsay is governed solely by the rules of evidence." Berrios, 676 F.3d at 126 (emphasis in original) (citing Davis v. Washington, 547 U.S. 813, 823–24, 126 S. Ct. 2266, 2274 (2006), Michigan v. Bryant, 562 U.S. 344, 352-53, 131 S.Ct. 1143, 1152–53 (2011), and Whorton v. Bockting, 549 U.S. 406, 419–20, 127 S.Ct. 1173, 1182-83 (2007)).

In Berrios, we declined to apply the Confrontation Clause to bar introduction of jailhouse testimony not unlike the testimony with respect to Eiland's statements involved in this case because in light of the developing Supreme Court jurisprudence we indicated that "where nontestimonial hearsay is concerned, the Confrontation Clause has no role to play in determining the admissibility of a declarant's statement." 676 F.3d at 126.[4] Though in some circumstances it might not be

[4] Mitchell argues that application of Crawford and its progeny to his petition violates the antiretroactivity principles of Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989). But Teague does not affect our analysis for two reasons: First, Mitchell has not challenged the District Court's observation that Crawford was decided before his conviction became final for purposes of a Teague analysis, and thus it would not be necessary to apply Crawford retroactively to consider its impact on his Confrontation Clause claim. See Mitchell, 2017 WL 3725503, at *5. Second, Teague bars application of new rules of criminal procedure to collaterally attack convictions in state courts, but

clear if a statement is testimonial or nontestimonial for Crawford purposes this is not such a case because Mitchell concedes, correctly, that Eiland's statements were not testimonial.

Berrios and the Supreme Court precedent on which it relies foreclose Mitchell's claim for relief. Even if Mitchell shows that the Pennsylvania Superior Court's decision affirming his conviction was contrary to what was clearly established Federal law at the time the court made the decision, that showing alone would not entitle him to habeas corpus relief because he also must show that his confinement violates the Constitution, laws, or treaties of the United States, see 28 U.S.C. § 2254(a), a determination that takes into account all relevant precedent. In this regard, notwithstanding Eley we are obliged to consider Crawford because it is a relevant precedent and the respondent squarely has raised the case even though we did not

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has no relevance where consideration of a new rule leads to rejection of a habeas corpus claim. In such a case, considering the new rule and refusing to upend a conviction based on prior standards serves the very aims of finality and repose that the Teague rule safeguards. See Lockhart v. Fretwell, 506 U.S. 364, 373, 113 S. Ct. 838, 844 (1993); Flamer v. State of Del., 68 F.3d 710, 725 n.14 (3d Cir. 1995) ("Teague only applies to a change in the law that favors criminal defendants.") (emphasis in original). Cf. United States v. Peppers, 2018 WL 382713, at *13 (3d Cir., Aug. 13, 2018) (holding that, for purposes of applying the categorical approach to assess prior convictions, post-sentencing Supreme Court precedent explaining the Armed Career Criminal Act can be considered once an applicant for post-conviction relief has satisfied the gatekeeping requirements of AEDPA codified at 28 U.S.C. § 2255(h)).

discuss Crawford when we granted relief to Eley.[5]

It is appropriate to rely on current constitutional standards in evaluating a habeas corpus petition because, "as a practical matter, correcting violations of extant constitutional standards is all that the statute ever could meaningfully require of a state – at least when it comes to a constitutional challenge to the admission of evidence." Desai, 538 F.3d at 428. It would be anomalous to grant habeas corpus relief to Mitchell because of the introduction of evidence that would be admissible under current constitutional standards at a retrial notwithstanding the previous Confrontation Clause error. After all, if we granted the petition we would do so subject to the condition that the prosecution at its option could retry Mitchell. See Eley, 712 F.3d at 862.[6]

V. CONCLUSION

We sum up by saying that inasmuch as under Crawford, there was not a violation of the Confrontation Clause due to the admission of the informants' testimony with respect to Eiland's statements Mitchell is not being held in custody in violation of

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[5] In similar circumstances, we already have noted that Eley is not dispositive of whether Crawford applies to bar relief because "the parties in Eley did not mention, and the Eley Court did not consider or rule on, the Crawford issue." Waller v. Varano, 562 F. App'x 91, 95 n.5 (3d Cir. 2014).

[6] Sometimes when habeas corpus relief is granted it may not be permissible to retry the petitioner. But we see no reason why if we were reversing on the Confrontation Clause issue the case would come within that category. See Burks v. United States, 437 U.S. 1, 16-18, 98 S.Ct. 2141, 2150-51 (1978).

the Constitution laws, or treaties of the United States and accordingly he is not entitled to a writ of habeas corpus. Therefore, we will affirm the order entered on August 29, 2017, denying Mitchell's petition for habeas corpus.

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

EDWARD MITCHELL,	:	
Petitioner	:	**No. 1:09-cv-02548**
	:	
	:	**(Judge Kane)**
	:	**(Chief Magistrate Judge Schwab)**
JEROME WALSH,	:	
Respondent	:	

MEMORANDUM

Before the Court is the Report and Recommendation of Chief Magistrate Judge Schwab, recommending the denial of Defendant's amended petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. (Doc. No. 94.) Upon review of the amended § 2254 petition, the Report and Recommendation, and Petitioner's objections thereto, the Court will adopt the Report and Recommendation in its entirety.

I. BACKGROUND

On August 10, 2001, a jury convicted Petitioner Edward Mitchell and his co-defendants, Kariem Eley and Lester Eiland, of second-degree murder, robbery, and conspiracy to commit robbery in connection with the July 2000 homicide and robbery of Angel DeJesus in Harrisburg, Pennsylvania. Com. v. Mitchell, No. 782-2014, 2015 WL 7726738, at *1-2 (Pa. Super. Ct. Jan. 12, 2015). Petitioner is serving a term of life imprisonment for second-degree murder at the State Correctional Institution in Dallas, Pennsylvania. (Doc. No. 94 at 16; see Doc. No. 19 at 4.)

Petitioner filed a petition for writ of habeas corpus submitted pursuant to 28 U.S.C. § 2254 on December 28, 2009 (Doc. No. 1), and an amended petition on October 19, 2010 (Doc. No. 19). In his amended § 2254 petition, Petitioner raises three grounds for relief: (1) the trial court's jury charge defining reasonable doubt violated Petitioner's Fourteenth Amendment due process rights and right to a fair trial; (2) the prosecution "improperly introduced a prejudicial

statement of a non-testifying co-defendant" in violation of the Sixth Amendment's Confrontation Clause; and (3) the Petitioner's actual innocence claim was erroneously denied by the Pennsylvania state courts. (Doc. No. 19 at 8-10.)

On December 12, 2016, Chief Magistrate Judge Schwab issued a Report and Recommendation, recommending that the amended petition for writ of habeas corpus be denied. (Doc. No. 94.) Petitioner filed objections to the Report and Recommendation on January 10, 2017. (Doc. No. 99.) Petitioner filed a brief in support of his objections on January 10, 2017 (Doc. No. 100), and a motion to supplement the record on January 31, 2017 (Doc. No. 101).

II. LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the writ of habeas corpus may only be granted on behalf of a petitioner in custody pursuant to the judgment of a state court if that petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal courts may not grant habeas relief with respect to any claim that was adjudicated on the merits at the state court level unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), 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," § 2254(d)(2). Williams v. Taylor, 529 U.S. 362 (2000).[1]

[1] The Magistrate Act, 28 U.S.C. § 636, and Rule 72(b) of the Federal Rules of Civil Procedure, provide that any party may file written objections to a magistrate's proposed findings and recommendations. In deciding whether to accept, reject, or modify the Report and Recommendation, the Court is to make a de novo determination of those portions of the Report and Recommendation to which objection is made. 28 U.S.C. § 636(b)(1).

III. DISCUSSION

Petitioner filed eight objections to the Report and Recommendation. (Doc. No. 99.) Six of the objections concern Petitioner's Confrontation Clause challenge, one objection addresses the trial court's jury charge defining reasonable doubt, and the final objection pertains to Petitioner's actual innocence claim. (Id.) The Court first addresses Petitioner's challenge under the Sixth Amendment's Confrontation Clause.

A. Sixth Amendment confrontation right

Petitioner contends that the trial court violated his Sixth Amendment confrontation right by (1) admitting the testimony of Matthew LeVan, which detailed co-defendant Lester Eiland's confession to murdering Angel DeJesus, and (2) failing to effectively provide a limiting instruction as to those statements. (Doc. No. 100 at 37, 39.) Petitioner's Sixth Amendment challenge focuses on the following testimony offered by Matthew LeVan during Petitioner's joint trial with Kariem Eley and Lester Eiland:

> Q. Now, if you can, describe for the jury the conversation you had with Lester Eiland while you were in the jail cell playing cards.
> A. He said about the sawed-off shotgun was used and a .380 pistol, and there was two other guns used and one was hidden in a brick close to where it happened at.
> Q. Did he say what kind of crime it was?
> A. Homicide
> Q. Or began as?
> A. Homicide – no, it was a robbery.
> Q. Did he say what happened?
> A. He said they – they, as in whoever was with him – he didn't say the names of those people – when he went up to them, it was supposed to be a robbery, and he was – he's the one that shot him, but he didn't mean to do it. It was the other two's idea or something like that, in that sense.

(Id. at 16) (emphasis in original); accord (Doc. No. 28-2 at 59.) Petitioner maintains that the reference to "they" and "the other two's idea . . . ." tied him "to the robbery conspiracy and rendered him an accomplice to the murder." (Id. at 38-39.)

In her Report and Recommendation, Chief Magistrate Judge Schwab determined that Petitioner's Sixth Amendment challenge lacked merit because Lester "Eiland's statements to LeVan and Taylor were not testimonial" and, therefore, the Confrontation Clause is inapplicable to Eiland's statements. (Doc. No. 94 at 55.) In doing so, Magistrate Judge Schwab concluded it was proper to apply "the Crawford line of cases here even though Crawford was not decided at the time the state court ruled." (Doc. No. 94 at 57) (citing Desai v. Booker, 538 F.3d 424, 429 (6th Cir. 2008)). The propriety of the Court's consideration of Crawford v. Washington, 541 U.S. 36 (2004), is a focus of Petitioner's objections and this Memorandum. (See Doc. Nos. 99 ¶¶ 1-4; 100 at 31.)

Specifically, Petitioner objects to Magistrate Judge Schwab's reliance on Crawford and its progeny to recommend the denial of the amended § 2254 petition despite the fact that "a similarly situated co-defendant received habeas corpus relief from the Third Circuit on an identical Confrontation Clause and Due Process claim" in Eley v. Erickson, 712 F.3d 837 (3d Cir. 2013) ("Eley").[2] (See Doc. Nos. 99 ¶ 1; 100 at 31.) In doing so, Petitioner also challenges Chief Magistrate Judge Schwab's interpretation of 28 U.S.C. § 2254(a) as mandating a "current or forward-looking" review of the state-court decision (see Doc. Nos. 99 ¶¶ 4, 5; 100 at 33), and

[2] In Eley v. Erickson, one of Petitioner's co-defendants, Karim Eley, filed a habeas petition and asserted "that his Sixth Amendment confrontation right was violated when his non-testifying co-defendants' confessions were admitted against him at their joint trial." Id. at 841-42, 854. The Third Circuit agreed and held that "the Superior Court's affirmance of the trial judge's denial of Eley's motion to sever was an unreasonable application of Bruton and its progeny." Id. at 859. In reaching its holding, the Eley Court rejected the Superior Court's reliance on: (1) a jury instruction that Lester Eiland's confession was "to be used as evidence against only the individual who made the statement;" and (2) the fact that Lester Eiland's confession was "redacted to omit any reference to [Karim] Eley's name." Id. at 858-59. The Third Circuit determined that Lester Eiland's "statement that '[i]t was the other two's idea' directly implicated both [Karim] Eley and [Petitioner Edward] Mitchell as his co-conspirators and accomplices." The Third Circuit in Eley also determined that the error was not harmless as the "the Bruton error substantially influenced the jury's verdict" and granted Karim Eley habeas relief on his Bruton claim. Id. at 861.

her conclusion that Eley and Bruton have limited "application or precedential value" to the determination of whether to grant Petitioner habeas relief (see Doc. No. 99 ¶¶ 2-3).[3] The Court construes Petitioner's objections as broadly challenging Chief Magistrate Judge Schwab's application and consideration of Crawford despite Eley's silence on Crawford and the fact that Crawford was decided by the Supreme Court after the last relevant state-court decision addressed the merits of Petitioner's Bruton challenge. (See Doc. No. 100 at 31.)

1. The § 2254(d)(1) Analysis

Chief Magistrate Judge Schwab noted in her Report and Recommendation that the Eley Court did not consider "whether Eiland's statements were testimonial" and proceeded to apply Crawford and its progeny to Petitioner's Sixth Amendment challenge. (Doc. No. 94 at 53-54.) Petitioner objects to the application of Crawford, stressing that Crawford was decided after the Superior Court's September 22, 2003 decision, and urges this Court to follow the Third Circuit's decision in Eley. (Doc. No. 100.) Petitioner argues that "the Third Circuit's focus in Eley upon Bruton and its progeny, as opposed to Crawford, was an appropriate application of the relevant review standard, and the Magistrate's basis for limiting the extension of Eley to Mr. Mitchell is in error." (Id. at 31.)

As a general matter, 28 U.S.C. § 2254(d)(1) requires "federal courts to 'focu[s] on what a state court knew and did,' and to measure state-court decisions 'against [the Supreme] Court's precedents as of 'the time the state court renders its decision.'" Greene v. Fisher, 565 U.S. 34, 38 (2011) (emphasis in original) (quoting Cullen v. Pinholster, 563 U.S. 170, 182 (2011)). "[C]learly established [f]ederal law" within the meaning of 28 U.S.C. § 2254(d)(1) encompasses

[3] Magistrate Judge Schwab concluded that, "because the Third Circuit in Eley did not address the Crawford issue, we are not precluded from doing so here." (Doc. No. 94 at 54) (quoting Waller v. Varano, 562 F. App'x 91, 95 n.5 (3d Cir. 2014)).

Supreme Court decisions that "were announced at the time of the last state court merits adjudication." Brian R. Means, Postconviction Remedies § 29:29 (2016).[4]

On September 22, 2003, the Superior Court of Pennsylvania rejected Petitioner's argument on direct appeal that the trial court abused its discretion in refusing to sever Petitioner's trial from that of his two co-defendants.[5] (Doc. No. 29 at 47.) The September 22, 2003 decision was the last state-court decision that addressed the merits of Petitioner's Sixth Amendment confrontation right challenge. (Doc. No. 100 at 31.) As Petitioner emphasizes in his submissions to the Court (see Doc. No. 100 at 31), the universe of Supreme Court opinions in September 2003 did not include Crawford. The Supreme Court decided Crawford on March 8, 2004. Crawford, 541 U.S. at 36.

Here, the Court finds no error in Chief Magistrate Judge Schwab's analysis under 28 U.S.C. § 2254(d)(1) given that the Report and Recommendation appears to concede that Petitioner may have satisfied 28 U.S.C. § 2254(d)(1). (Doc. No. 94 at 59.) This concession is evidenced by Chief Magistrate Judge Schwab's lengthy discussion as to why, "even if the Superior Court unreasonably applied Bruton and its progeny, Mitchell is not entitled to a writ of habeas corpus." (Id.) Chief Magistrate Judge Schwab followed the approach that 28 U.S.C. §

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[4] An exception to this general rule is where a later-decided Supreme Court decision "simply illustrates the appropriate application of a Supreme Court precedent that pre-dates the state-court determination." Frazer v. South Carolina, 430 F.3d 696, 716 (4th Cir. 2005) (Motz, J., concurring) (emphasis added); see also Rompilla v. Horn, 355 F.3d 233, 275, 291 (3d Cir. 2004) (Sloviter, J., dissenting) (recognizing a distinction between a post-dated opinion that illustrates the "proper application" of the law and a post-dated opinion that creates "new law") (citing Wiggins v. Smith, 539 U.S. 510, 522 (2003)). Here, the Court is unpersuaded that Crawford represents a mere clarification or illustration of Bruton, Richardson, and Gray.

[5] The Superior Court of Pennsylvania reasoned that the Sixth Amendment was not violated because none of Eiland's redacted "statements referred to [Petitioner] or directly implicated him in any way." (Id.)

2254(d) is "a necessary, but not a sufficient, condition for habeas relief." Desai v. Booker, 538 F.3d 424, 428 (6th Cir. 2008) (quoting Jackson v. McKee, 525 F.3d 430, 438 (6th Cir.2008)).

Writing separately in the Third Circuit's Dennis v. Secretary, Pennsylvania Department of Corrections decision, Judge Jordan noted that:

> Section 2254(d) thus sets forth a necessary, but not sufficient, prerequisite to habeas relief only for those claims adjudicated on the merits in state court. If that high bar is cleared—i.e., the state court's decision is so unreasonable or contrary to federal law as established by the Supreme Court—we are still restricted to granting habeas relief only if the petitioner has shown he is in custody in violation of federal law under § 2254(a). In that second analysis, we review the petitioner's claim de novo, without deference to the state court's legal conclusions.

834 F.3d 263, 349 n.6 (3d Cir. 2016) (Jordan, J., concurring in part). Decisions from the United States Court of Appeals for the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits also lend authority to the proposition that satisfying § 2254(d)(1) does not automatically entail the granting of habeas relief. See, e.g., Mosley v. Atchison, 689 F.3d 838, 853 (7th Cir. 2012); McGahee v. Alabama Dep't Of Corr., 560 F.3d 1252, 1266 (11th Cir. 2009); Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc); Desai, 538 F.3d at 428; Rose v. Lee, 252 F.3d 676, 691 (4th Cir. 2001). Therefore, the Court agrees with Chief Magistrate Judge Schwab's decision not to end the Report and Recommendation's analysis with § 2254(d)(1) and to proceed to a "de novo" review of Petitioner's amended § 2254 petition. (Doc. No. 94 at 56.)

The question that then remains is whether Chief Magistrate Judge Schwab properly considered Crawford in its "de novo" review of Petitioner's Sixth Amendment challenge. The Court first turns to whether Teague's non-retroactivity rule precludes Chief Magistrate Judge Schwab's application of Crawford.

2. Teague Rule

In Teague v. Lane, the Supreme Court established that, "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be

applicable to those cases which have become final before the new rules are announced."[6] 489 U.S. 288, 310 (1989). Chief Magistrate Judge Schwab concluded that the Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (1989), does not preclude consideration of Crawford or its progeny. (Doc. No. 94 at 58.)

Chief Magistrate Judge Schwab reasoned that, "under Teague, Crawford cannot be applied retroactively to grant a petition for a writ of habeas corpus. But that does not mean that Crawford cannot be applied retroactively to deny a petition for a writ of habeas corpus." (Id.) Petitioner argues that Chief Magistrate Judge Schwab's reasoning conflicts with the Supreme Court's decision in Greene v. Fisher, 565 U.S. 34, 38 (2011), and upends the "interests of repose and finality" addressed in Teague. (See Doc. No. 100 at 34.) Petitioner appears to view Chief Magistrate Judge Schwab's reliance on Teague as a means "to justify the application of a new rule of criminal procedure." (Doc. No. 99 ¶ 6.)

The Court finds Petitioner's arguments unavailing for the following two reasons. First, Crawford was decided after the "last relevant state-court decision," for purposes of 28 U.S.C. § 2254(d)(1), but before Petitioner's conviction became "final" for purposes of Teague. Greene v. Palakovich, 606 F.3d 85, 104 (3d Cir. 2010), aff'd sub nom. Greene v. Fisher, 565 U.S. 34 (2011). Second, the Third Circuit has remarked that "Teague only applies to a change in the law that favors criminal defendants." Flamer v. State of Del., 68 F.3d 710, 725 n.14 (3d Cir. 1995) (emphasis in original); see Delgadillo v. Woodford, 527 F.3d 919, 928 (9th Cir. 2008) ("A habeas petitioner, on the other hand, may not raise Teague to bar the application of a new rule."); Free v. Peters, 12 F.3d 700, 703 (7th Cir. 1993).

[6] "Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from this Court has become time barred or has been disposed of." Greene v. Fisher, 565 U.S. 34, 39 (2011) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n. 6 (1987).

Accordingly, the Court will overrule Petitioner's objection regarding Chief Magistrate Judge Schwab's application of Teague. The Court next turns to Chief Magistrate Judge Schwab's de novo review of Petitioner's Sixth Amendment challenge and her consideration of Crawford therein.

3. De Novo Review

Chief Magistrate Judge Schwab ultimately determined that Petitioner's Sixth Amendment challenge lacked merit because Lester "Eiland's statements to LeVan and Taylor were not testimonial" and, therefore, "Bruton and the Confrontation Clause are inapplicable." (Doc. No. 94 at 55.) In essence, Chief Magistrate Judge Schwab concluded that Petitioner is not in custody "in violation of the Constitution" because Lester Eiland's statements do not fall "within the purview of the Confrontation Clause." (Doc. No. 94 at 57, 59-60.) Petitioner contends that the "de novo standard" does not entail "changing the relevant legal standard 180 degrees from a backward-looking one as discussed in Greene to a current or forward-looking one." (Doc. No. 100 at 33.)

As previously discussed, "[i]f the state court's opinion was unreasonable . . . then § 2254(d) no longer applies. A prisoner still must establish an entitlement to the relief he seeks, and it is § 2254(a), not § 2254(d), that sets the standard . . . ." Aleman v. Sternes, 320 F.3d 687, 690 (7th Cir. 2003). 28 U.S.C. § 2254(a) provides that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). The language of § 2254(a) has been cited as a basis to deny a petitioner habeas relief where the petitioner fails to establish that "he is being

held in violation of current Supreme Court precedent." See Doan v. Carter, 548 F.3d 449, 458 (6th Cir. 2008); see also BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 3:69 (2017).

For example, in Doan v. Carter, the United States Court of Appeals for the Sixth Circuit required a state-prisoner petitioner to demonstrate that the state-court decision was "was contrary to, or a misapplication of," both former and current Supreme Court precedent:

> Notwithstanding the fact that [Petitioner] Doan must establish that the state court's decision was contrary to, or a misapplication of Roberts, Doan must also establish that the state court's decision was contrary to, or a misapplication of, Crawford. This is because AEDPA allows a writ of habeas corpus to issue on behalf "of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). This Court has previously explained that a showing that a state court misapplied Roberts is "a necessary, but not a sufficient, condition for habeas relief," because "[t]he goal of the great writ is not to correct the misapplication of overruled precedents." Desai v. Booker, 538 F.3d 424, 428, 430 (6th Cir.2008) (quotations omitted).

Doan v. Carter, 548 F.3d 449, 457 (6th Cir. 2008). The Sixth Circuit's approach in Doan v. Carter broadly reflects the principle that federal courts sitting in habeas are "restricted to granting habeas relief only if the petitioner has shown he is in custody in violation of federal law under § 2254(a)." See Dennis, 834 F.3d at 349 n.6 (Jordan, J., concurring in part).

As Chief Magistrate Judge Schwab discussed in her Report and Recommendation, the Third Circuit has since interpreted Crawford and its progeny to provide that "where nontestimonial hearsay is concerned, the Confrontation Clause has no role to play in determining the admissibility of a declarant's statement." United States v. Berrios, 676 F.3d 118, 126 (3d Cir. 2012). The Third Circuit determined that "[a]ny protection provided by Bruton is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial." Id. at 128. "'Testimonial' statements under the Confrontation Clause are those made by 'witnesses' who 'bear testimony,' such as by making a 'formal

statement to government officers,' and are not statements made casually to acquaintances." Waller v. Varano, 562 F. App'x 91, 94 (3d Cir. 2014) (citations omitted).

Petitioner does not challenge the characterization of Lester Eiland's statements to Matthew LeVan as "non-testimonial" as defined by Crawford. (Doc. No. 100.) As a general rule, "statements made by one inmate to another . . . are not testimonial." United States v. Pelletier, 666 F.3d 1, 9 (1st Cir. 2011) (collecting cases). Here, Eiland made the challenged, out-of-court statement to LeVan, a fellow inmate, while they were playing cards in the jail cell.[7] (See id. at 16.) LeVan testified that he struck up a conversation about playing cards "on the second tier" while the two of them "were at the phones." (Doc. No. 28-2 at 58; Tr. at 422: 2-11.) According to LeVan's testimony at trial, while Eiland and LeVan were playing cards in the jail cell and talking about their cases, Eiland discussed the "cabbie situation" and made the challenged, out-of-court statement to LeVan. (Id. at 58, 60, 63; Tr. at 422: 25; 423: 1-6, 22-25; 430: 4-9; 442: 20-24.) Even accepting Petitioner's earlier characterization of LeVan as "a jail-house informant" (Doc. No. 20 at 18), Eiland's casual statements to LeVan while playing cards do not qualify as "testimonial" for purposes of the Confrontation Clause.

Given that the Third Circuit has narrowed Bruton and its progeny to testimonial statements, and that co-defendant Lester Eiland's challenged confession does not qualify as a testimonial statement, see Berrios, 676 F.3d at 128, the Court agrees with Chief Magistrate Judge Schwab that Petitioner "is not entitled to a writ of habeas corpus on his Confrontation Clause claim because the statements that underlie that claim . . . are not within the purview of the Confrontation Clause." (Doc. No. 94 at 59-60.) Thus, as to his Sixth Amendment challenge,

[7] LeVan also testified that, while LeVan and Lester Eiland were incarcerated at Dauphin County Prison, LeVan witnessed Eiland "jumping up and down" in reaction to a local 6 o'clock newscast and saying: "That was me; that was me; and it was about the cabdriver being shot and . . ." (Doc. No. 28-2 at 57.)

Petitioner is not entitled to habeas relief because Petitioner is not "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a).

B. Actual Innocence Claim and Jury-Instruction Claim

Petitioner also filed objections arguing that: (1) the record does "satisfy the standard for demonstrating a freestanding claim of actual innocence;" and (2) "trial court's charge on reasonable doubt lowered the Commonwealth's burden of proof by directing the jury to discount defense evidence and argument." (See Doc. No. 99 at ¶¶ 7, 8.) The Court finds that Magistrate Judge Schwab correctly and comprehensively addressed the substance of Plaintiff's objections on these matters in the Report and Recommendation, and the Court will not write separately to address them.

C. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller–El v. Cockrell, 537 U.S. 322, (2003).

Here, the Court is persuaded that reasonable jurists could disagree with Chief Magistrate Judge Schwab and this Court's application of Crawford and its progeny in its de novo review of Petitioner's Sixth Amendment Confrontation Clause challenge. When granting habeas relief to Petitioner's co-defendant, Kariem Eley, based on an identical Bruton claim, the Third Circuit in

Eley did not mention Crawford in its discussion of Bruton, Richardson, and Gray, discuss the testimonial or non-testimonial nature of Lester Eiland's challenged confession, or proceed to conduct a "de novo" review under 28 U.S.C. § 2254(a).[8] See Eley v. Erickson, 712 F.3d 837, 855-62 (3d Cir. 2013). Therefore, the Court will issue a certificate of appealability in this case.

IV. CONCLUSION

For the foregoing reasons, the Court will adopt the Report and Recommendation. An order consistent with this memorandum follows.

[8] However, the Court is cognizant that, in a footnote in Waller v. Varano, the Third Circuit remarked that "the parties in Eley did not mention, and the Eley Court did not consider or rule on, the Crawford issue." 562 F. App'x 91, 95 n.5 (3d Cir. 2014).

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EDWARD MITCHELL, Petitioner	: :	CIVIL NO: 1:09-CV-02548
	:	(Judge Kane)
v.	:	
	:	(Magistrate Judge Schwab)
JEROME WALSH, Respondent	: :	

REPORT AND RECOMMENDATION

I. Introduction.

In this habeas corpus case, the petitioner, Edward Mitchell, is challenging his 2001 conviction and sentence from the Court of Common Pleas of Dauphin County, Pennsylvania. Mitchell claims that the trial court gave a defective jury instruction on reasonable doubt, that his Sixth Amendment right to confrontation was violated by the admission of a co-defendant's confession, and that he is actually innocent. Because Mitchell's claims are without merit, we recommend that his petition be denied.

II. Background and Procedural History.

A. The Trial and Verdict.

1. Overview.

Mitchell was convicted in the Court of Common Pleas of Dauphin County, Pennsylvania of second-degree murder, robbery, and conspiracy to commit robbery.[1] *Commonwealth v. Mitchell*, No. 1658 MDA 2001, slip op. at 3 (Pa. Super. Ct. Sept. 22, 2003). There were three trials; the first two resulted in mistrials and the third resulted in Mitchell's conviction. *Id.* at 3. The Superior Court of Pennsylvania aptly summarized the basic facts underlying Mitchell's conviction:

> Angel DeJesus (Mr. DeJesus) was killed in the early morning of July 5, 2000, in his taxicab at the intersection of Kittatinny and Hummel Streets in Harrisburg. Jennifer McDonald (Ms. McDonald) went to a store around 4:30 a.m., shortly before the murder. She observed [Mitchell] and his co-defendants, Kariem Eley (Eley) and Lester Eiland (Eiland), standing at the intersection of Kittatinny and Hummel Streets. As Ms. McDonald was walking home about a minute and a half later, she saw Mr. DeJesus's cab pass her traveling toward the intersection. When she heard a loud noise, she looked back and saw Mr. DeJesus's cab stopped at the intersection with its brake lights on. Five or ten minutes after arriving home, Ms. McDonald heard police sirens.
>
> Guadalupe Fonseca (Mr. Fonseca) was standing in front of his house on the morning of the murder and saw three African-American men standing near Mr. DeJesus's cab. He

[1] Mitchell was tried with two co-defendants—Kariem Eley and Lester Eiland—who were also convicted.

> saw one of the men enter that cab and heard two gunshots. After the shots, the man got out of the cab and joined the other two men at the right side of the cab. Mr. Fonseca heard a third shot and saw the men departing to the north on Hummel Street. Rufus Hudson saw [Mitchell] and his co-defendants at the intersection before the shooting and witnessed them running across Hummel Street toward an abandoned house after Mr. DeJesus was shot.
>
> Another taxicab driver in the area, Francisco Ramirez-Torres (Ramirez-Torres), was informed of the incident by a passenger named Elijio Contreras (Elijio). Ramirez-Torres went to the scene and called the police. Police officers found Mr. DeJesus alive but bleeding from the head. Two shell casings were found on the floor of the cab. A police officer found a third casing inside an air vent in the car. Mr. DeJesus died at the hospital following surgery. The evidence indicated that he had been shot three times in the head and neck with a .25-caliber handgun, at least once from a distance of less than a foot. Although Mr. DeJesus was known to carry a pouch to hold his money while he was working, it was not found on his person or in the cab, nor was any money found.
>
> [Mitchell] and his co-defendants were arrested and held for trial. [Mitchell] made a statement to police admitting that he had been firing guns before the murder with two other men near the location where Mr. DeJesus was shot. He stated that the group left the weapons in an abandoned house. Although police officer discovered several guns in the house, the .25-caliber handgun used to kill the victim was not found there.

Id. at 1-3.

2. The Prosecution's Case.

The prosecution relied on the testimony of Guadalupe Fonseca ("Fonseca"), Franciso Ramirez-Torres ("Ramirez-Torres"), Jennifer McDonald ("McDonald"),

and Rufus Hudson ("Hudson"), all of whom were around the scene of the murder during the morning of July 5, 2000. The prosecution also offered testimony from William Vernouski, James Hawkins, Cindy Baldwin, David Lau, LeRoy Lucas, Leslie Brown, and Kevin Duffin, all of whom were with the Harrisburg Police Department and were involved with the investigation of the murder The prosecution also presented testimony from Wayne K. Ross, a forensic pathologist; Vivian Martinez, the victim's fiancé; John Fabriele, an attorney with the Dauphin County Public Defender's Office; Frankie Armstrong, a restaurant owner; and Matthew LeVan ("LeVan") and Steven Taylor ("Taylor"), inmates at the Dauphin County Prison.

The prosecution offered Officer Vernouski, who testified that on July 5, 2000, he responded to a call of a man with a gun near a cab at Kittatinny and Cresent Streets. *Doc. 28-1* (Trial Transcript at 60). After Officer Vernouski did not see anything in that area, he proceeded to Kittatinny and Hummel Streets, where a white male, who was walking up the street, told him that there was someone in the taxicab. *Id.* at 61. Vernouski then attended to the cab driver, Mr. DeJesus. *Id.* Harrisburg Police Officer James Hawkins arrived on the scene at the time Officer Vernouski was walking toward the cab. *Id.* at 89. Officer Vernouski told Officer Hawkins to stop and retrieve information from the male that was walking across Hummel Street.

Id. Hawkins stopped that individual, Miguel Guerrero ("Guerrero"), and took down his name and address. *Id.* at 95-96.

Fonseca testified that when he witnessed the three black men at the taxi, he was waiting for his ride to work, which came at 5:15 a.m., by which time the shooting had already occurred but the police were not at the scene yet. *Id.* at 229. Although Fonseca identified the men he saw as black, he was unable to provide a description to the police or to identify anyone from photographs. *Id.* at 221-223. At trial, when counsel for co-defendant Eiland asked Eiland to stand and asked Fonseca if he was one of the men he saw, Fonseca testified that he did not remember. *Id.* at 222. When asked if he was "absolutely certain that it was three men and not two men and a woman," Fonseca further responded "no." *Id.* at 224. Later, when asked if he could identify either of the other two defendants, Fonseca said he just saw three men. *Id.* at 236.

Fonseca also testified that when the police arrived he saw a Hispanic male—Elias Contreras—talking to the police. *Id.* at 231. But later he testified that it was when he gave his statement at the police station that he saw Contreras talking to the police and that he had not seen another Hispanic male talk to the police when

the police arrived on the scene of the murder. *Id.* at 231-232.[2] Fonseca, who is in the country illegally, travelled to New York and California sometime after the crime, and upon his return to the area, the Commonwealth had him detained as a material witness. *Id.* at 211-213. Fonseca testified that the District Attorney's Office promised to try to help him get a green card, and while he was being held as a material witness, the District Attorney's Office put $140 in his prison account so that he could buy toiletries and snacks. *Id.* at 213.

McDonald testified that when she saw Mitchell, Eley, and Eiland while returning from the all night store, she did not see any guns on them. *Id.* at 282 & 312-313. McDonald also testified that she saw a group of Hispanic males across the street and down the street a little from the corner. *Id.* at 283 & 309-310. According to McDonald, after she heard the loud noise and looked back, she did not see anyone by the cab. *Id.* at 287. She testified that on July 4th, people in the area shoot firearms in celebration, and when asked if she recalled that morning if she was "hearing sounds, other sounds, like guns being discharged," she answered: "They

[2] One of the themes of the defense was to try to arouse suspicion that Fonseca, Ramirez-Torres, Elijio Contreras, Elias Contreras-Hernandez, and/or Guerrero may have been involved with the murder. In that regard, the defense tried to show that the testimony of Ramirez-Torres and Elias Contreras-Hernandez was inconsistent, and in doing so, they argued that the passenger in Ramirez-Torres's vehicle, who Ramirez-Torres identified as Elijio Contreras, is the one and same Elias Contreras-Hernandez. *See Doc. 28-4* (Closing Arguments).

could have been. Could have been anything." *Id.* at 298. She immediately reiterated, however, her earlier testimony that the sound she heard could have been a car driving over a metal plate that was in the road. *Id.* McDonald testified that there is an abandoned house near the intersection of Kittatinny and Hummel Streets, where people, including Mitchell, Eley, and Eiland, hung out. *Id.* at 319-320.

Hudson testified that on July 5, 2000, he was driving around the Allison Hill area with Amanda Weikel and smoking marijuana. *Id.* at 332 & 349. According to Hudson, Mr. DeJesus was a good friend of his. *Id.* at 332. Hudson and Weikel encountered DeJesus near a store on 13th and Kittatinny Streets at about 4:00 a.m., and Weikel spoke with DeJesus for a few minutes. *Id.* at 332-334. Hudson testified that he saw Mitchell, Eley, and Eiland on the corner of Kittatinny and Hummel Streets throughout the time he was driving around that morning. *Id.* at 334-337. At approximately 5:00 a.m. or 5:30 a.m., he saw them running real fast across Hummel Street away from where the cab was and toward the abandoned building. *Id.* at 337-339.

Ramirez-Torres is a driver for a company called "Able Bodies," and he picks people up who work in hotels, etc., takes them to work, and then takes them home. *Id.* at 243-244 & 252. He testified that he drove close to the taxicab and Elijio Contreras, who was in the passenger seat of the vehicle, looked in the taxi and said

that the person in the taxicab was bleeding and in bad shape. *Id.* at 246 & 256. Ramirez-Torres testified that when he called the police he said he did not see anything, "but his friend who was in the van said he heard shots." *Id.* at 249. When asked if Guerrero was somebody he picked up for work on occasion from Kittatinny Street, Ramirez-Torres testified: "I don't think so. I just know by seeing them, but I don't know their names." *Id.* at 267. Ramirez-Torres testified the Elijio Contreras also goes by the name Elijio Contreras-Hernandez. *Id.* at 268. When asked if Mr. Contreras-Hernandez got into the van with his son Angel, Ramirez-Torres testified that Contreras-Hernandez does not have any sons. *Id.* at 270. Although Ramirez-Torres had identified the person in his van as Elijio Contreras, he answered "yes" to the question: "You testified you drove up to the cab and Mr. Elias Contreras learns [sic] looked in the cab?" *Id.* at 274.

Vivian Martinez, DeJesus's finance, testified that on July 4, 2000, she, her daughter, and DeJesus went to the Kipona festival, where DeJesus spent part of their rent money, that he went to work to make up that money, and that after the Kipona he still had $245. *Id.*

There was also testimony that the police found some latent fingerprints on the cab and ran those prints through the AFIS system, but no match was identified. *Id.* at 192-193. A manual comparison of the latent prints to the prints of Mitchell, Eiland,

Eley, and Hudson did not find a match. *Id.* at 499-500. No prints were lifted from the shell casings. *Id.* at 195. Dr. Wayne Ross, a forensic pathologist, opined that based on wounds on DeJesus and the blood stains in cab, DeJesus was shot from the backseat of the cab and though the passenger door of the cab. *Id.* at 116.

LeVan, a prisoner at the Dauphin County Prison, testified that one day in July of 2000, he heard a commotion; an inmate was jumping up and down saying "that was me; that was me" in response to a television news broadcast about a cab driver being shot. *Id.* at 420. LeVan identified Eiland as that inmate. *Id.* LeVan further testified that the next day, he was playing cards with Eiland, when Eiland said that he was the triggerman. *Id.* at 423. LeVan testified that Eiland was bragging to everyone on the block. *Id.* According to LeVan, Eiland said a sawed-off shotgun was used and a .380 pistol as well as two other guns, and Eiland said that one of the guns was hidden in a brick close to where it happened. *Id.* at 425. LeVan further testified that Eiland said "it was supposed to be a robbery, and he was – he's the one that shot him, but he didn't mean to do it. It was the other two's idea or something like that, in that sense." *Id.*

LeVan further testified that on another occasion, on September 10, 2000, while he was in the pill line at the prison, he overheard a conversation about the death of DeJesus. *Id.* at 448-449. According to LeVan, the inmate in front of him in

line was talking to an inmate in D Block, which is across the aisle from the pill line. *Id.* at 449 & 462. LeVan testified that the inmate in D Block was not any of the three defendants. *Id.* at 449-450. Although LeVan had testified in a previous proceeding that the person in front of him in the pill line was Eiland, he now testified that he had made a mistake and the person in front of him was not Eiland, Eley, or Mitchell. *Id.* at 450-456. LeVan testified that the person in front of him was speaking fluent Spanish. *Id.* at 456. He later testified, however, that he does not understand Spanish and that the conversation that he heard was not in Spanish. *Id.* at 475. Because LeVan could not remember the details of the conversation, he was allowed to read into the record a letter he had written about it to the District Attorney on September 11, 2000. *Id.* at 464-465. According to that letter, the inmate in front of LeVan said to the inmate on D Block: "Hey, I seen you on T.V. a few days ago." *Id.* at 465. To which, according to LeVan, the inmate in D Block responded: "Yeah. You mean about the cabdriver?" *Id.* The inmate on D Block then purportedly said that he was there, "but the young boy shot him in the head." *Id.* The inmate in D Block also purportedly said that the D.A. was trying to charge him with conspiracy to commit homicide and robbery; that he was involved, but that he did not shoot the driver; that they don't have any fingerprints; and that no one saw him. *Id.* According to LeVan, the inmate on D Block was bald, 5'8" to 6'0" tall,

150 pounds, and with a mustache and goatee. *Id.* at 466. Although LeVan did not specify the race of the inmate on D Block in his letter or in his statement to the police, he testified that that inmate was black. *Id.* at 473. LeVan wrote numerous letters to the District Attorney's Office offering assistance in this case and asking for assistance with his case. *Id.* at 432-439.

The parties stipulated that Eiland was incarcerated at the Dauphin County Prison in cell B-16 from July 13, 2000 to July 17, 2000; that in September of 2000, Eiland was not in B Block, but LeVan was; and that between September 1, 2000 to September 12, 2000, Mitchell was in D Block. *Id.* at 566-568. Detective Duffin testified that of the three people arrested for this crime, only one—Mitchell—was bald. *Id.* at 534-535.

Another inmate at the Dauphin County Prison—Steven Taylor—also testified about statements Eiland, who was his cellmate for a short time, purportedly made. *Id.* at 480-481. According to Taylor, Eiland told him that "they" were trying to pin a homicide on him, that he was trying to rob a cabdriver, and that something went wrong and somebody ended up dead. *Id.* at 481-482. Taylor testified that Eiland told him that they recovered the guns from an abandoned house. *Id.* at 483. Taylor admitted that he was hoping for some consideration from the Commonwealth with regard to pending charges against him as result of his testimony. *Id.* at 489-490.

Detective Duffin testified about the circumstances under which various individuals including Fonseca, McDonald, LeVan, Hudson, and Amanda Weikel,[3] gave statements to the police. *Id.* at 509-553. Detective Duffin also testified that Mitchell told him that between 12 and 1:30 a.m. on the morning of July 5th, he was with two other people at the corner of Kittatinny and Elm Streets and he was firing weapons in the air. *Id.* at 518-519. Duffin further testified that Mitchell told him that they had "a .380, a .38, 9 millimeter, and two shotguns," and they hid the guns in a house on Hummel Street. *Id.* at 519. According to Duffin, Mitchell was concerned that his fingerprints would be found on the .38. *Id.* at 526.

Detective Duffin further testified that when Eiland was arrested he said that he was at various locations during the early morning hours of July 5th including at a restaurant called Calabashes, but the owner of Calabashes testified the he closed the restaurant at approximately 2:30 a.m. that morning because it was a holiday and business was slow. *Id.* at 513 & 574. Investigator Lau, with the Harrisburg Police Department, testified that Eley stated during an interview on July 14, 2000, that he had not been in the area of Kittatinny and Hummel streets for the past two weeks,

[3] Amanda Weikel did not testify at trial; Detective Duffin testified that the Commonwealth could not locate her. *Id.* at 529-530.

that on July 5, 2000, between 4:00 a.m. and 5:00 a.m., he was at Calabashes restaurant, and that around 5:00 or 6:00 a.m., he heard a shot. *Id.* at 395-398 & 412.

Duffin also testified that the police received information from Elias Contreras-Hernandez that Fonseca had information about the shooting. *Id.* at 509. More specifically, he testified that he thought the conversation with Contreras-Hernandez was with Detective Kohr. *Id.* at 557.

John Fabriele ("Fabriele"), an attorney with the Dauphin County Public Defender's Office, testified that one his clients—Jermaine Velez—pleaded guilty to a robbery and kidnapping that occurred on July 4, 2000, between 8:00 p.m. and 9:30 p.m. at the intersection of Kittatinny and Hummel Streets. *Id.* at 568-572. Although there were no allegations that Eley was involved with that crime, Fabriele spoke to Eley, who said that he was at the location at the time and that a Bernard Connor or Conway committed the robbery. *Id.* at 570-572.

3. The Defense Case.

Mitchell's mother testified for the defense. She testified that Mitchell does not speak Spanish and that he never wore a goatee. *Id.* at 578. On cross-examination, when shown a photograph of her son with facial hair, she admitted that in that photo he had a mustache, but she denied that the facial hair was

a beard or a goatee; she described it as "sideburns coming around here." *Id.* at 579-580.

Defense counsel presented Elias Contreras-Hernandez as a witness. He, like several of the other witnesses, testified through an interpreter. When asked to spell his first name, he said that he cannot write or spell his name, but he presented a card with the name Elias Contreras-Hernandez on it. *Id.* at 583. Contreras-Hernandez testified that on July 5, 2000, he was living on Kittatinny Street, that he left his house at about 6:40 a.m.[4] and was waiting for a ride to work, that he saw a white taxi across the street, that he went to work, and that when he returned home, he found out that the driver was dead. *Id.* at 584-586. He testified that there were no police officers present when he left his house in the morning. *Id.* at 590.

When asked if he talked to the police on the day of the incident, Contreras-Hernandez testified that "[a]t no point did I talk to the police about it." *Id.* at 586. Later, however, he testified that he spoke to Detective Santos Martinez at the police station. *Id.* at 589.

Contreras-Hernandez testified that he knows Francisco Ramirez, but that he was not in the van with Ramirez when Ramirez called the police, that he did not call

[4] Later he was asked: "It was 5:40, 5:45, right?" and he answered "Okay." *Id.* at 587.

the police, and that he was not in the van with Ramirez looking at DeJesus's body in the cab. *Id.* at 588. He also testified that he did not tell the police to speak to Fonseca about the shooting. *Id.* at 589. Contreras-Hernandez testified that he has a son named Angel. *Id.* at 586.

4. The Rebuttal Case.

On rebuttal, the Commonwealth presented Jose Martinez, who is employed with the Harrisburg Police Bureau and who is fluent in Spanish. *Id.* at 597. Martinez testified that, on July 5, 2000, he assisted with an interview of Elias Contreras at the police station. *Id.* at 598. Martinez testified that the man he took that statement from was the same man that had just testified in Court. *Id.* at 599. Martinez testified that on his way into the courtroom, he saw "Mr. Elias" getting on the elevator. *Id.* According to Martinez, during his interview with Contreras, Contreras stated that he was in a van with Francisco. *Id.* at 598. But after reading Contreras's statement, Martinez conceded that the statement does not say that Contreras got into a van with Francisco. *Id.* at 600. Martinez also testified that Contreras told him that the car he got into to go to work was a gray sedan owned by a "Eugenio." *Id.* 600. He also testified that Contreras said that he had a son named

Angel and that he lived at 1248 Kittatinny Street. *Id.* at 602-603. Martinez testified that Elijio and Elias are two different names. *Id.* at 600-601.

The Commonwealth also presented Mercedes Vega, an employee of the Dauphin County Victim-Witness Assistance Program, who was present for a statement Ramirez-Torres gave. *Id.* at 615. According to Vega, when the interviewer asked Ramirez-Torres who the person in the van with him was, Ramirez-Torres responded "Elijio Contreras," and he did not use the name Elias at any point. *Id.* at 615-616. Vega testified that an interpreter had to help Ramirez-Torres spell Contreras's name. *Id.* at 617.

5. The Conviction and Sentence.

Mitchell was convicted of second-degree murder, robbery, and conspiracy to commit robbery; he was acquitted of conspiracy to commit murder. *Commonwealth v. Mitchell*, No. 1658 MDA 2001, slip op. at 3 (Pa. Super. Ct. Sept. 22, 2003). He was sentenced to life imprisonment without the possibility of parole for the second-degree murder conviction, a 7-20 year consecutive term for the robbery conviction, and a 4-12 year consecutive term for the conspiracy conviction. *Id.*

B. Direct Appeal and Motion for a New Trial.

Mitchell filed an appeal to the Superior Court. While that appeal was pending, the Commonwealth informed Mitchell "than an individual named Rasheen Davis had been arrested in possession of a firearm and that tests on the weapon indicated that it was the gun used to kill Mr. DeJesus." *Commonwealth v. Mitchell*, No. 1656 MDA 2002, slip op. at 3 (Pa. Super. Ct. July 30, 2003). In response, Mitchell filed a motion for a new trial on the basis of after-discovered evidence, and he moved to stay his direct appeal so that the trial court could hold an evidentiary hearing regarding his motion for a new trial. *Id.* at 1 & 3. The Superior Court granted a stay, and remanded the case to the trial court for a hearing. *Id.* at 3.

On remand, the trial court held a hearing:

> Rasheen Davis testified that he purchased the gun from his brother Rashawn Davis in the middle of September 2000. However, Rasheen Davis had told the police officer at the time of his arrest on March 9, 2001, that he had obtained the gun only a few weeks earlier. When it was discovered that the gun had been used to kill Mr. DeJesus, Rasheen Davis claimed he had received the gun from an individual named Benny in December 2000. Rasheen Davis explained the discrepancy at the evidentiary hearing by stating that he was concerned about getting his brother in trouble.
>
> At a second evidentiary hearing, Rashawn Davis was called to testify. Upon being informed that he might be arrested on the basis of his testimony, he declined to testify without the benefit of counsel. Rashawn Davis had given a written statement to police indicating that he gave the gun to his brother

> in 2000 or 2001. At a final evidentiary hearing, Rashawn Davis was represented by counsel and refused to testify. [Mitchell] sought to have Rashawn Davis's written statement introduced, but the trial court denied that request. The trial court determined that [Mitchell] was not entitled to a new trial on the basis of after-discovered evidence.

Id. at 3. On appeal, the Superior Court affirmed the denial of Mitchell's motion for a new trial based on after-discovered evidence. *Id.* at 1. That court observed that there was no evidence connecting either Rasheen Davis or Rashawn Davis to the murder and no evidence that Rasheen came into possession of the gun any time before September of 2000. *Id.* at 5. Reasoning that the location of the gun several months after the murder "was not relevant to the issues at trial" and that "Rasheen Davis obtained the gun after the murder could well indicate that [Mitchell] and his co-defendants had taken steps to dispose of it," the Superior Court concluded that "[t]he evidence was not of such nature and character that a different verdict will likely result if a new trial is granted." *Id.* The Superior Court also concluded that the trial court had not erred in ruling that the statement that Rashawn Davis gave to police was inadmissible. *Id.* at 5-7.

Thereafter, the Pennsylvania Superior Court addressed Mitchell's direct appeal, where Mitchell raised three claims: (1) whether the trial court erred in denying [Mitchell]'s motion to sever his trial from that of his co-defendants, thereby

allowing the introduction of prejudicial statements made by co-defendant Eiland; (2) whether the trial court erred in giving a closing charge that prejudiced [Mitchell]'s closing argument; and (3) whether there was insufficient evidence to convict. *Commonwealth v. Mitchell*, No. 1658 MDA 2001, slip op. at 4 (Pa. Super. Ct. Sept. 22, 2003). The Superior Court affirmed Mitchell's convictions, but concluding that the convictions for second-degree murder and robbery merged for sentencing purposes, it *sua sponte* remanded the case to the trial court for resentencing. *Id.* at 14-15. On June 29, 2004, the Pennsylvania Supreme Court denied Mitchell's petition for allowance of appeal. *Commonwealth v. Mitchell*, No. 777 MAL 2003 (Pa. June 29, 2004). "[O]n August 5, 2004, [Mitchell] was re-sentenced to life imprisonment for murder and one consecutive term of imprisonment of four to twelve years for conspiracy." *Commonwealth v. Mitchell*, No. 1776 MDA 2007, slip op. at 4 (Pa. Super. Ct. Oct. 20, 2008).

C. PCRA Proceedings.

1. The First PCRA Petition.

"On November 26, 2004, [Mitchell] filed a post-conviction petition seeking a new trial on the basis of after-discovered evidence consisting of a September 1, 2001 statement that Laura Weikel had given to the police." *Commonwealth v. Mitchell*,

No. 739 MDA 2007, slip op. at 4 (Pa. Super. Ct. Aug. 19, 2008). "Weikel implicated James Blackwell in the murder by claiming that Blackwell had confessed to killing the cab driver to her." *Id.* "The trial court ultimately precluded Weikel's testimony on hearsay grounds and denied the post-sentence motion." *Commonwealth v. Mitchell*, No. 1321 MDA 2005, slip op. at 2 (Pa. Super. Ct. Oct. 23, 2006).

2. The Second PCRA Petition.

On February 28, 2005, Mitchell filed a second Post Conviction Relief Act (PCRA) petition, "claiming that his prior counsel was ineffective for failing to subpoena Blackwell as a witness at the after-discovered evidence hearing." *Id.* After allowing Mitchell's counsel leave to withdraw, the PCRA court dismissed Mitchell's petition without a hearing. *Id.* at 2-3. On appeal, the Superior Court determined that the PCRA court erred by granting counsel's petition to withdraw and by dismissing the petition without a hearing. *Id.* at 4. It remanded the case to the PCRA court to "hold an evidentiary hearing to consider Mitchell's claim that PCRA counsel failed to review the record and raise other potentially meritorious issues and, if necessary, address the merit of those issues." *Id.* at 5.

On remand, new counsel was appointed to represent Mitchell and the PCRA court held a hearing. *Commonwealth v. Mitchell*, No. 739 MDA 2007, slip op. at 6 (Pa. Super. Ct. Aug. 19, 2008). The PCRA court concluded that counsel had been properly permitted to withdraw, and it again denied relief. *Id.* at 8.

On appeal, the Superior Court now agreed that the PCRA court had properly permitted counsel to withdraw. *Id.* at 9. It found that the only issue that Mitchell had told counsel to raise was the question of prior counsel's ineffectiveness for failing to subpoena Blackwell. *Id.* at 9-10. Counsel explained in his no-merit letter "that he reviewed two statements given to police, the September 1, 2004 one from Laura Weikel, and a September 16, 2004 one given by Blackwell," both of which were attached to his petition to withdraw. *Id.* at 4-5. In Weikel's statement, she "indicated that Blackwell bragged about committing the murder but stated that while she believed it when he made the statement, she no longer actually thought that he did it." *Id.* at 5. In Blackwell's statement, he "denied telling Weikel that he was involved in the robbery and murder of Mr. DeJesus, denied any involvement in that crime, and stated that Weikel was probably accusing him of making that statement because she was "mad" at him for agreeing to testify against her in a Federal drug case." *Id.* The Superior Court concluded "that Weikel's hearsay statement that Blackwell confessed to committing the crime would not likely have compelled a

different result at trial." *Id.* at 15. It noted that two eyewitnesses placed Mitchell at the scene of the crime and that "Weikel would be subject to effective impeachment regarding the veracity of Blackwell's hearsay admission due to her bias against him." *Id.* at 15. The Superior Court also considered and rejected two other issues that Mitchell wanted to raise in his PCRA petition, i.e. that trial counsel was ineffective for failing to call his former girlfriend as an alibi witness and that trial counsel was ineffective for failing to present evidence that Angel DeJesus had cocaine in his system. *Id.* at 12-14.

On June 22, 2009, the Pennsylvania Supreme Court denied Mitchell's petition for leave to file a petition for allowance of appeal nunc pro tunc. *Commonwealth v. Mitchell*, No. 187 MM 2008 (Pa. June 22, 2009).

3. The Third PCRA Petition.

In the meantime, one of Mitchell's co-defendants, Eley, "secured the services of a private investigator, Diane Cowan." *Commonwealth v. Mitchell*, No. 1776 MDA 2007, slip op. at 6 (Pa. Super. Ct. Oct. 20, 2008). "On September 15, 2005, Ms. Cowan interviewed Eugene Whitaker in state prison and obtained Mr. Whitaker's signature on a written statement, which indicated" that he "was at the murder scene with two other black males, Germaine Velez and James Blackwell"

and that he "witnessed Blackwell shoot Mr. DeJesus." *Id.* Mitchell joined in the PCRA petition filed by Eley based on Whitaker's written statement. *Id.* Counsel was appointed to represent Mitchell, and the PCRA court conducted hearings at which "Whitaker acknowledged that he signed the statement, but said that he could not read it because his reading comprehension is at the first grade level." *Id.* at 6. Whitaker also testified that Cowan did not read the statement to him, and he testified that he never told her what she wrote in the statement. *Id.* Whitaker "denied being present at the scene of the murder and denied telling Ms. Cowan otherwise." *Id.* at 6-7. He also denied knowing Blackwell. *Id.* at 7. He also denied telling Cowan that he saw two black males known as Bliz and Jermaine Velez, and he denied that Bliz was Blackwell. *Doc. 30-1* at 59. Whitaker's mother, however, testified that Bliz used to come to the house with her son. *Id.* at 94. She picked a photo of Bliz out of a photo array. *Id.* at 94-95.

At the hearing, Jermaine Velez also testified that he was in "the emergency room at Harrisburg Hospital from 1:00 a.m. to 6:00 a.m. on July 5, 2000, and thus was not physically located at the murder scene at 5:00 a.m." *Commonwealth v. Mitchell*, No. 1776 MDA 2007, slip op. at 7 (Pa. Super. Ct. Oct. 20, 2008). The Commonwealth presented hospital records in the name of Jermaine Jones to support his story. *Doc. 30-1* at 19-20. Velez testified that Jermaine Jones is his brother, but

later he testified that his brother is Lamar Jones. *Id.* at 23-24. He also testified that Jermaine Jones is an alias of his. *Id.* at 31.

The PCRA court denied the PCRA petition based on Whitaker's statement. On appeal, the Superior Court affirmed the PCRA court's finding that Whitaker's statement would not likely compel a different result at trial:

> In this case, the PCRA court, the Honorable Joseph H. Kleinfelter, concluded that Whitaker's statement would not likely compel a different verdict. It based this conclusion on the compelling evidence presented at [Mitchell]'s trial as well as the doubtful authenticity of Whitaker's statement. It observed that Whitaker vehemently denied giving the statement to Ms. Cowan, Blackwell denied committing the crime, and there was incontrovertible evidence refuting the veracity of the portion of the statement indicating that Velez was one of the three men present at the murder scene.
>
> In this case, President Judge Kleinfelter presided over both [Mitchell]'s jury trial and the PCRA hearings conducted regarding Whitaker's statement. President Judge Kleinfelter was in a position to assess whether the statement would likely effectuate an acquittal. The trial judge observed the witnesses as well as Whitaker and Cowan and was qualified to assess their credibility. He also considered the fact that hospital records refuted Whitaker's statement.
>
> [Mitchell] attacks President Judge Kleinfelter's conclusion in part by asserting that there was a "paucity of proof" against him. We cannot agree with this characterization of the trial evidence. As outlined above, [Mitchell] was placed at the scene of the crime by two eyewitnesses who actually knew him. As further noted above, we specifically rejected on direct appeal [Mitchell]'s claim that there was insufficient evidence to convict him.

> [Mitchell] also asserts that the learned trial judge failed to acknowledge that Whitaker's statement would be admissible at any future trial. We disagree. That jurist expressly analyzed whether the written statement would likely produce a different verdict; thus, he was well aware that the statement was admissible and treated it as such.

Commonwealth v. Mitchell, No. 1776 MDA 2007, slip op. at 11-12 (Pa. Super. Ct. Oct. 20, 2008) (citations omitted). The Superior Court also reiterated its earlier conclusion that the fact that Rasheen Davis was later found with the gun does not support an inference that Mitchell was not guilty. *Id.* at 12-13. On July 7, 2010, the Pennsylvania Supreme Court denied Mitchell's petition for allowance of appeal. *Commonwealth v. Mitchell*, No. 757 MAL 2008 (Pa. July 7, 2010).

4. The Fourth PCRA Petition.

On March 27, 2012, Mitchell filed a fourth PCRA petition "in which he raised yet another allegation of after-discovered evidence." *Commonwealth v. Mitchell*, No. 782 MDA 2014, 2015 WL 7726738, at *2 (Pa. Super. Ct. Jan. 12, 2015). The after-discovered evidence this time was an unsworn statement from Hudson in which Hudson "claimed that he fabricated his testimony and that he 'did not see Kari[e]m "Mo" [Eley] or Lester "Risha" Eiland with guns and did not see them running from the scene of the shooting.'" *Id.* at *3. The PCRA court denied that petition, and on appeal, the Pennsylvania Superior Court affirmed concluding that

Mitchell could not show that the after-discovered evidence would likely compel a different verdict. *Id.* at *4. That court reasoned:

> Initially, we note that a careful reading of Hudson's unsworn affidavit reveals that Hudson recants his trial testimony only insofar as it concerns his observation of co-defendants Eley and Eiland at the scene of the crime. Hudson states in the affidavit that he "did not see Kari[e]m 'Mo' [Eley] or Lester 'Risha' Eiland with guns and did not see them running from the scene of the shooting." Notably, Hudson does not recant his trial testimony that he observed Mitchell running from the scene of the crime. Thus, the unsworn affidavit arguably does not even constitute recantation evidence pertaining to Mitchell's involvement in the crime.
>
> Additionally, Hudson's testimony at the PCRA hearing still places Mitchell and his two co-defendants *at the scene of the crime.* Although Hudson recanted his testimony that he observed Mitchell fire a gun and run from the scene of the crime, he unequivocally stated that he observed Mitchell and his co-defendants "in the vicinity of the cab" during the evening of the shooting, which Hudson clarified to mean "about 30" feet away from the cab. We are not convinced that this testimony, together with the unequivocal testimony of other trial witnesses placing Mitchell and his co-defendants at the cab directly prior to the shooting, would have compelled a different verdict at trial. We further note that the PCRA court explicitly found Hudson's recantation testimony, in general, to be incredible. Consequently, we agree with the PCRA court that Hudson's recantation testimony does not entitle Mitchell to a new trial.

Commonwealth v. Mitchell, No. 782 MDA 2014, 2015 WL 7726738, at *4 (Pa. Super. Ct. Jan. 12, 2015) (footnote and citations omitted; italics in original). On

August 3, 2015, the Pennsylvania Supreme Court denied Mitchell's petition for allowance of appeal. *Commonwealth v. Mitchell*, 119 A.3d 350 (Pa. 2015).

D. The Habeas Petition and Proceedings.

On December 28, 2009, Mitchell, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court. Because at the time, Mitchell's appeal of the denial of his PCRA petition was pending, in February of 2010, Judge Kane stayed the case. After the Pennsylvania Supreme Court denied Mitchell's petition for allowance of appeal and Mitchell filed a motion to lift the stay in this Court, Judge Kane lifted the stay on September 22, 2010.

In October of 2010, Mitchell filed an amended habeas petition. The amended petition contains three claims: (1) a due process claim that the trial court gave a defective charge on reasonable doubt; (2) a Sixth Amendment Confrontation-Clause claim based on the introduction of a statement of Mitchell's non-testifying codefendant; and (3) a due process claim based on the trial court's denial of Mitchell's claim of actual innocence. The respondent argued that Mitchell procedurally defaulted his claims and that the claims fail on the merits. After Mitchell filed a reply, he filed a motion to stay this case again pending the outcome of a second petition for post-collateral relief, and in March of 2012, Judge

Kane stayed the case. In March of 2015, Judge Kane lifted the stay and denied Mitchell's motion for the appointment of counsel. This case was referred to the undersigned magistrate judge on May 13, 2015.

Because state court proceedings had taken place since the respondent filed his answer to the amended petition and because the United States Court of Appeals for the Third Circuit had issued an opinion in Eley's case finding a Sixth Amendment Confrontation-Clause violation, *see Eley v. Erickson,* 712 F.3d 837 (3d Cir. 2013), we ordered the respondent to file a supplemental answer to Mitchell's amended habeas petition in accordance with Rule 5 of the Rules Governing § 2254 Cases in the United States Courts. *See* R. Governing § 2254 Cases R. 5(b)-(d)(explaining required contents of answer and supporting materials). In addition to containing the information required by Rule 5, we ordered that the supplemental answer also address the effect of the Third Circuit's decision in *Eley* on Mitchell's Sixth Amendment claim as well as Mitchell's argument in this reply that he did, in fact, exhaust state remedies.

The respondent filed a supplemental brief. Although the respondent now conceded that Mitchell exhausted his Confrontation-Clause claim and the respondent addressed the effect of the Third Circuit's decision in *Eley* on that claim, the respondent did not address whether Mitchell exhausted his other claims.

Further, it appeared that the respondent did not file all relevant state court documents that had not already been filed in this case as ordered and as required by Rule 5. After Mitchell filed a supplemental reply, he filed a motion for the appointment of counsel. Concluding that the interests of justice required the appointment of counsel given the difficult issues in this case and the respondent's failure to fully comply with our prior order regarding a supplemental answer to the petition, we granted the motion for the appointment of counsel and appointed the Federal Public Defender's Office to represent Mitchell. We also ordered supplemental briefing. That briefing concluded in February of 2016.

III. Discussion.

A. Jury-Instruction Claim.

Mitchell presents a due process claim that the trial court gave a defective charge on reasonable doubt. The respondent contends that Mitchell procedurally defaulted this claim by not presenting it as a federal constitutional claim in state court. In the alternative, the respondent contends that this claim fails on the merits.

1. Procedural Default.

"Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan,* 132 S.Ct. 1309, 1316 (2012). One of these rules is that a state prisoner must exhaust available state remedies before filing a petition for habeas corpus in federal court. 28 U.S.C. § 2254(b) and (c). The exhaustion requirement serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."). "The exhaustion rule also serves the secondary purpose of facilitating the creation of a complete factual record to aid the federal courts in their review." *Walker v. Vaughn*, 53 F.3d 609, 614 (3d Cir. 1995). A habeas corpus petitioner bears the burden of demonstrating that he has exhausted state remedies. *O'Halloran v Ryan*, 835 F.2d 506, 508 (3d Cir. 1987). The petitioner "must give 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,* 526 U.S. at 845.[5]

In order to exhaust state remedies for federal habeas corpus purposes, a petitioner must show that he fairly presented his federal claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The fair-presentation requirement provides the State the opportunity to consider and correct an alleged violation of a prisoner's federal rights. *Duncan v. Henry,* 513 U.S. 364, 365 (1995). "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id.* at 365-66. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citations omitted). Rather, for a claim to have been fairly presented to the state courts, both the legal theory and the facts supporting the claim must have been presented to the state courts. *O'Halloran*, 835 F.2d at 508.

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[5] In Pennsylvania, pursuant to Order 218 of the Pennsylvania Supreme Court, review of criminal convictions and post-conviction relief matters from the Pennsylvania Supreme Court is discretionary and "unavailable" for purposes of exhausting state court remedies under § 2254. *Lambert v. Blackwell,* 387 F.3d 210, 233 (3d Cir. 2004). Thus, to exhaust state remedies, a Pennsylvania prisoner need appeal only to the Pennsylvania Superior Court.

"[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese,* 541 U.S. 27, 32 (2004). "A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Id.* Although to meet the fair-presentation requirement, a petitioner need not cite "'book and verse'" of the federal constitution, "the substance of a federal habeas corpus claim must first be presented to the state courts." *Picard,* 404 U.S. at 278. "A petitioner can 'fairly present' his claim through: (a) reliance on pertinent federal cases; (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." *Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007).

If a claim has not been fairly presented to the state courts but state law clearly forecloses review, exhaustion is excused. *Carpenter v. Vaughn*, 296 F.3d 138, 146

(3d Cir. 2002); *see also McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999) ("When a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'"). Such a claim is procedurally defaulted, rather than unexhausted. A procedural default occurs when a prisoner's claim is barred from consideration in the state courts by an "independent and adequate" state procedural rule. *Martinez,* 132 S.Ct. at 1316. A procedural default generally bars a federal court from reviewing the merits of a habeas claim that the prisoner procedurally defaulted in state court. *Id.; Munchinski v. Wilson,* 694 F.3d 308, 332 (3d Cir. 2012). "Grounded in principles of comity and federalism, the procedural default doctrine prevents a federal court sitting in habeas from reviewing a state court decision that rests on a state law ground 'that is sufficient to support the judgment,' when that state law ground 'is independent of the federal question and adequate to support the judgment.'" *Munchinski,* 694 F.3d at 332-33 (quoting *Coleman v. Thompson,* 501 U.S. 722, 729 (1991)). "In such situations, 'resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.'" *Id.* at 333.

There are, however, exceptions to the bar on consideration of procedurally defaulted claims. *Martinez,* 132 S.Ct. at 1316. A federal court may consider the merits of a procedurally defaulted habeas claim in two situations: (1) the petitioner establishes cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) the petitioner demonstrates that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. "To show cause and prejudice, 'a petitioner must demonstrate some objective factor external to the defense that prevented compliance with the state's procedural requirements.'" *Cristin v. Brennan*, 281 F.3d 404, 412 (3d Cir. 2002) (quoting *Coleman*, 501 U.S. at 753). "To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime by presenting new evidence of innocence." *Keller v. Larkins,* 251 F.3d 408, 415–16 (3d Cir. 2001) (citation omitted).

Although the discussion in Mitchell's Superior Court brief regarding his jury-instruction claim was muddled, it did mention reasonable doubt. *See Doc. 29* at 25-26. As such, we conclude that Mitchell alleged facts that are well within the mainstream of constitutional litigation. Moreover, the Superior Court recognized that Mitchell was complaining about the jury instructions in reference to reasonable doubt. *See Commonwealth v. Mitchell*, No. 1658 MDA 2001, slip op. at 7-8 (Pa.

Super. Ct. Sept. 22, 2003) ("Appellant claims that the trial court essentially told the jury to disregard information that may have given rise to a reasonable doubt about his guilt by showing the Ramirez-Torres was untruthful.") Accordingly, Mitchell fairly presented his federal claim to the state court, and, thus, the claim is not procedurally defaulted.[6]

2. The Merits.

a. The Standard for Addressing Habeas Claims on the Merits.

In addition to overcoming procedural hurdles, a state prisoner must meet exacting substantive standards in order to obtain habeas corpus relief. As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 limits the power of a federal court to grant a state prisoner's petition for a writ of habeas corpus. *Cullen v. Pinholster,* 563 U.S. 170, 181 (2011). A federal court

[6] Even if Mitchell procedurally defaulted this claim, the Court may deny the claim on the merits. 28 U.S.C. § 2254(b)(2) provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State," and the United States Court of Appeals for the Third Circuit has applied this section to claims that have been procedurally defaulted. *See Bronshtein v. Horn,* 404 F.3d 700, 728 (3d Cir. 2005). Because, as discussed below, Mitchell's claim fails on the merits, it can also be denied on that basis without regard to whether it has been procedurally defaulted.

may not grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The standard under Section 2254(d) is highly deferential and difficult to meet. *Cullen,* 563 U.S. at 181. It "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter,* 562 U.S. 86, 102-103 (2011) (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). State courts are presumed to know and follow the law, *Woods v. Donald,* 135 S.Ct. 1372, 1376 (2015), and Section 2254(d) "'demands that state-court decisions be given the benefit of the doubt.'" *Cullen,* 563 U.S. at 181 (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002)).

Under Section 2254(d)(1), only the holdings, not the dicta, of the Supreme Court constitute "clearly established Federal law." *Howes v. Fields,* 132 S.Ct. 1181, 1187 (2012). "[R]eview under § 2254(d)(1) is limited to the record that was before

the state court that adjudicated the claim on the merits." *Cullen,* 563 U.S. at 181. Under the "contrary to" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Under the "unreasonable application" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413. But federal habeas relief may be granted only if the state court's application of clearly established federal law was objectively unreasonable. *Keller v. Larkins*, 251 F.3d 408, 418 (3d Cir. 2001). "[A]n incorrect application of federal law alone does not warrant relief." *Id.* "[I]f the state-court decision was reasonable, it cannot be disturbed." *Hardy v. Cross,* 132 S.Ct. 490, 495 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter,* 562 U.S. at 101 (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). "When assessing whether a state court's application of federal law is unreasonable, 'the range of reasonable

judgment can depend in part on the nature of the relevant rule' that the state court must apply." *Renico v. Lett*, 559 U.S. 766, 776 (2010) (quoting *Yarborough,* 541 U.S. at 664). "Because AEDPA authorizes federal courts to grant relief only when state courts act *unreasonably,* it follows that '[t]he more general the rule' at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—'the more leeway [state] courts have in reaching outcomes in case-by-case determinations.'" *Id.* (emphasis in original).

Under the "unreasonable determination of the facts" provision of § 2254(d)(2), the test "is whether the petitioner has demonstrated by 'clear and convincing evidence,' § 2254(e)(1), that the state court's determination of the facts was unreasonable in light of the record." *Roundtree v. Balicki,* 640 F.3d 530, 537-38 (3d Cir. 2011). "[T]he evidence against which a federal court measures the reasonableness of the state court's factual findings is the record evidence at the time of the state court's adjudication." *Id.* at 538.

"In considering a § 2254 petition, we review the 'last reasoned decision' of the state courts on the petitioner's claims." *Simmons v. Beard,* 590 F.3d 223, 231–32 (3d Cir. 2009) (citing *Bond v. Beard,* 539 F.3d 256, 289–90 (3d Cir.2008)). Thus, "[w]e review the appellate court decision, not the trial court decision, as long as the appellate court 'issued a judgment, with explanation, binding on the parties before

it.'" *Burnside v. Wenerowicz*, 525 F. App'x 135, 138 (3d Cir. 2013). But when the highest state court that considered the claim does not issue a reasoned opinion, we look through that decision to the last reasoned opinion of the state courts. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

The highly deferential standard of § 2254(d) applies only to claims that have been "adjudicated on the merits" in the state court. *Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012). "[I]f the state court did not reach the merits of the federal claims, then they are reviewed *de novo*." *Id.* But we must still presume that the state court's factual determinations are correct, and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Further, even as to a claim adjudicated by the state court on the merits, if a habeas petitioner overcomes the § 2254(d) hurdle, the habeas court then considers the claim *de novo*. *See Panetti v. Quarterman,* 551 U.S. 930, 953 (2007) (When § 2254(d) is satisfied, "[a] federal court must then resolve the claim without the deference AEDPA otherwise requires.").

b. Mitchell's Argument and the Jury Instructions.

In the following summary, the Superior Court captured the essence of Mitchell's claim regarding the jury instructions:

> At trial Ramirez-Torres testified that Elijio Contreras was a passenger in his cab and told him about the shooting. He then drove to the scene and called the police. On cross-examination, he indicated that Elijio Contreras was also known as Elijio Contreras-Hernandez and that he had no sons. The defense called a man named Elias Contreras-Hernandez who had a son named Angel. Elias Contreras-Hernandez testified that he left for work on the day of the murder around 6:40 a.m. and did not know about the murder until later, although he previously told a police officer that he left his house at 5:10 a.m. He denied being with Ramirez-Torres when the police were called and said he did not see his vehicle on the morning of the murder. In closing arguments, the defense argued the Elijio and Elias were the same person and that Ramirez-Torres was, therefore, lying about being told of the crime by Elijio Contreras-Hernandez. [Mitchell] claims that the trial court essentially told the jury to disregard information that may have given rise to a reasonable doubt about his guilt by showing that Ramirez-Torres was untruthful.

Commonwealth v. Mitchell, No. 1658 MDA 2001, slip op. at 7-8 (Pa. Super. Ct. Sept. 22, 2003).

The trial court instructed the jury on the presumption of innocence and on reasonable doubt, but it is the following instructions that Mitchell claims were improper:

> . . . They have certain elements that have to be proven, and it's with regard to those elements that we use the term beyond a reasonable doubt.
>
> I emphasize this because sometimes it's difficult to see the forest for the trees. You've all heard that expression, and during the trial of virtually any case I hear, there are always a host of facts, some of which have direct bearing on the issues before the

jury; some are more collateral: but with regard to many of those facts, often the jury is not given all of the answers.

Let me give you an example in this case. The order that the shots were fired; the angles of the shots that were discussed by Dr. Ross, the pathologist; whether the shooter was in the front seat or the back seat; when the shooter fired the third shot, well, was he inside the cab? Was he outside the cab? Details like that. Where is the third bullet, I think, was a question that was asked. This fellow, Contreras, is there one Contreras or are there two Contrerases?

There are a lot of details in this case to which you may never have an answer and about which you may have a reasonable doubt. Well, those are the trees in the forest. The term—and you can reach a verdict and have reasonable doubts about some of the trees in the forest.

When we say reasonable doubt, we are talking about these elements of the crime that I'm going to get to. The real questions are, was there a murder? Was there a robbery? Was there a criminal conspiracy to commit robbery? A criminal conspiracy to commit murder? Did those things happen?

And then specifically, were these three Defendants involved in any way, and if so, to what degree? Those are the real elements of the crime about which you can have no reasonable doubt when you're returning a verdict.

Doc. 28-3 at 637-639. The defense objected to these instructions, and in response the trial court provided the following additional instructions:

When I gave you the definition of reasonable doubt, members of the jury, I emphasized that the whole concept of reasonable doubt goes to whether or not the Commonwealth has proven the elements of the crime, and now, of course, having

heard my entire instructions, you know what the elements of these crimes are.

I said, as well, that during the course of any trial, you hear all kinds of facts about all kinds of things, some of which have more bearing on the ultimate issues at trial; that is, a greater degree of relevance to others.

Actually, in the course of a trial, there's a lot of things you hear that perhaps have no relevance. They come in and there's no objection, but they have no relevance.

A lot of evidence in this case and the cross-examination of witnesses directly went to the witnesses' believability or credibility. Evidence that's offered to test credibility is very important for that purpose. But that's the purpose of it.

You know, is this a witness that you should believe? During the course of the trial, it wouldn't be surprising that you may disbelieve some witnesses, believe others, or believe some witnesses in part but not in their entirety because of all of the circumstances that have been brought out.

When I, therefore, gave you my examples as to some evidence, a doubt about which you might have even a reasonable doubt and still be able to have no reasonable doubt about the proof of the elements, it was to give you that trees and forest comparison.

I discussed the order in which the shots were fired or the angle at which they were fired; whether the shooter was in the front seat or the back seat; where the third bullet is.

Those questions may bear on the credibility of any particular witness or witnesses in this case, and that evidence should be considered by you for that purpose, and I don't mean to belittle or diminish any of those issues.

For example, is there one person by the name of Contreras or are there two people with the name of Contreras? If that helps you, the way that developed in the course of that trial, that may or may not help you in determining who you're going to believe.

For example, Francisco Ramirez had told you certain things about this Contreras person, and we had a Contreras person come in here and say he wasn't with Francisco Ramirez that day.

Well, is it the same Contreras? Was Francisco Ramirez telling the truth? Was Contreras telling the truth? These are all things for you to consider. But if you're able to take those issues and put them over here on the shelf and still from all the other evidence find that the Commonwealth has proven the Defendant or any one of them guilty beyond a reasonable doubt of any one of these charges on the totality of the evidence, you don't let a reasonable doubt about one of these side issues prevent you from reaching a verdict in this case.

You consider the evidence in determining the credibility of witnesses and, of course, the credibility of all the witnesses will ultimately lead to whatever your verdict is going to be on the elements.

Too often I have been made aware of the fact that jurors have said a certain fact wasn't proven beyond a reasonable doubt. Well, if the fact is one of the elements, is Angel DeJesus dead? Was it a homicide? Did one of these three people or the three of them acting in concert cause Angel DeJesus's death?

If there's no reasonable doubt looking at all of the evidence, then you convict. If you have a reasonable doubt as to any one of those elements, either as to robbery, homicide, or as to conspiracy, then of course you acquit. But you don't acquit because you may have a reasonable doubt about some collateral fact along the way. That may or may not affect your ultimate

> conclusion as to whether or not the elements may have been presented.
>
> That's the point that I want to make, but I don't want you to that just because I've used that example, that you should disregard the testimony that was offered; disregard it as though it had no purpose. I was very important testimony within the context of believing or disbelieving certain witnesses.

Id. at 670-673.

c. The Superior Court Opinion.

The Superior Court concluded that the jury instructions "accurately instructed the jury concerning the need to find [Mitchell] guilty beyond a reasonable doubt of the elements of the crimes with which he was charged in order to convict him." *Commonwealth v. Mitchell*, No. 1658 MDA 2001, slip op. at 10 (Pa. Super. Ct. Sept. 22, 2003). It concluded that "[t]he trial court also correctly instructed the jury that doubt about collateral issues could have a bearing on its determination of the credibility of witnesses, including Ramirez-Torres." *Id.*

But Justice Todd issued a dissenting opinion concluding that the jury instructions "were confusing and prejudicial." *Id.* at 1 of dissenting opinion. She "believe[d] that the jury instructions, when considered as a whole, suggested to the jury that certain issues, such as the credibility of the witnesses who claimed to be at the scene of the crime, were irrelevant and need not be resolved in order to convict

[Mitchell]." *Id.* at 2. Justice Todd concluded that the "instructions clearly prejudiced [Mitchell], by precluding the jury from considering whether someone other than [Mitchell] may have committed the crimes." *Id.* at 2-3.

d. The Superior Court Decision Was Not Contrary to or an Unreasonable Application of Clearly Established Supreme Court Precedent.

"[A] jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt." *Tyler v. Cain*, 533 U.S. 656, 658–59 (2001) (footnote omitted). But "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). And "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). "The question is whether [the] instructions, when read in the context of the jury charge as a whole, violate the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt." *Francis v. Franklin*, 471 U.S. 307, 309 (1985). "[T]he proper inquiry in such a case is whether there is a reasonable likelihood that the jury

has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

Here, when the instructions are read as whole including the later clarifying instructions, under the deferential standard that applies to a claim evaluated under 28 U.S.C. § 2254(d)(1), the Superior Court's conclusion that the instructions did not relieve the Commonwealth of its burden of proving all elements of the crime beyond a reasonable doubt was not contrary to or an unreasonable application of clearly established law. Accordingly, Mitchell is not entitled to habeas relief on this claim.

B. Sixth Amendment Confrontation Clause Claim.

Mitchell presents a Sixth Amendment Confrontation-Clause claim based on the introduction of statements from one of his co-defendants—Eiland—to LeVan and Taylor. Although the respondent initially argued that Mitchell procedurally defaulted this claim, the respondent now concedes that Mitchell presented this claim to the state courts and that the claim is not procedurally defaulted. And so we proceed to the merits of the claim.

1. The Confrontation Clause and *Bruton*.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. "The right of confrontation includes the right to cross-examine witnesses." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Generally, "[t]herefore, where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." *Id.*

"Ordinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz v. New York*, 481 U.S. 186, 190 (1987). "Therefore, a witness whose testimony is introduced in a joint trial with the limiting instruction that it be used only to assess the guilt of one of the defendants will not be considered to be a witness 'against' the other defendants." *Id.* "This accords with the almost invariable assumption of the law that jurors follow their instructions." *Richardson*, 481 U.S. at 206.

But in *Bruton v. United States,* the Supreme Court acknowledged that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that

the practical and human limitations of the jury system cannot be ignored." 391 U.S. 123, 135 (1968). And it concluded that "[s]uch a context [was] presented [t]here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." *Id.* at 135–36 (1968). *Bruton* thus "recognized a narrow exception" to the principle that juries can be counted on to follow a court's instructions to disregard evidence, and it "held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *Richardson*, 481 U.S. at 207.

Two of the important and oft-cited Supreme Court cases applying *Bruton* are *Richardson*, 481 U.S. at 211 (holding "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence"), and *Gray v. Maryland*, 523 U.S. 185, 192 (1998) (holding that a "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still falls within *Bruton*'s protective rule").

2. The Superior Court Decision.

Here, the Superior Court denied Mitchell's *Bruton* claim on the basis that "[n]one of Eiland's statements referred to [Mitchell] or directly implicated him in any way" and that the trial court had properly instructed the jury to consider Eiland's statements as evidence against only Eiland. *Commonwealth v. Mitchell*, No. 1658 MDA 2001, slip op. at 6 (Pa. Super. Ct. Sept. 22, 2003).

3. The Third Circuit Decision in *Eley*.

The United States Court of Appeals for the Third Circuit, however, granted habeas relief to one of Mitchell's codefendants—Eley—based on a *Bruton* claim like the one presented here by Mitchell. *See Eley v. Erickson*, 712 F.3d 837, 854 (3d Cir. 2013). In doing so, the Third Circuit identified *Bruton*, *Richardson*, and *Gray* as the controlling precedents for purposes of 28 U.S.C. § 2254(d)(1). *Id.* at 856. Although the Third Circuit concluded that the Pennsylvania Superior Court's decision on Eley's *Bruton* claim was not contrary to *Bruton*, *Richardson*, or *Gray*, it concluded that the Superior's Court decision with respect to Eiland's statement to LeVan that he was the one that shot DeJesus but "[i]t was the other two's idea" was an unreasonable application of those cases. *Id.* at 857-858 (quoting LeVan's testimony). The Superior Court in Eley's case had based its decision on the same

considerations as those it addressed in Mitchell's case: it concluded that Eiland's statement did not "refer to [Eley] or directly implicated him in any way" and that "[t]he trial court properly instructed the jury that such statement[] [was] to be used as evidence against only the individual who made the statement." *Id.* at 858 (quoting Superior Court opinion). The Third Circuit though held that such was "an unreasonable application of *Bruton* and its progeny":

> The Superior Court's reliance on the trial judge's jury instructions reveals that it believed that *Richardson* governed Eley's case. But *Richardson* does not support the Superior Court's conclusion that Eiland's confession did not refer to Eley. *Richardson*'s holding is explicitly limited to a confession that is redacted to eliminate "not only the defendant's name, *but any reference to his . . . existence.*" 481 U.S. at 211, 107 S.Ct. 1702 (emphasis added). Here, Eiland's confession was redacted to omit any reference to Eley's name. However, Eiland's statement that "he's the one that shot him," but that "[i]t was the other two's idea" expressly referred to the existence of exactly three people: himself and two others. App. at 138. Eiland's express reference to the existence of Eley and Mitchell as "the other two," *id.,* could not have been lost on the jury because, as the Commonwealth emphasized shortly before introducing the confession into evidence, there were exactly "three Defendants" sitting at the defense table "in the courtroom," *id.* at 136.
>
> *Gray,* moreover, contradicts the Superior Court's conclusion that Eiland's confession did not directly implicate Eley. *Gray*'s holding explicitly extends to a confession that is redacted to "replace a proper name with . . . a symbol," 523 U.S. at 195, 118 S.Ct. 1151, which "facially incriminat[es]" a defendant, *id.* at 196, 118 S.Ct. 1151 (quotation and emphasis omitted). Here, the Commonwealth merely replaced Eley and

> Mitchell's names in Eiland's confession with a type of symbol—the number two. Further, all three defendants were charged together and jointly tried under conspiracy, accomplice, and principal theories of liability. For this reason, Eiland's confession that "he's the one that shot him" directly implicated himself as a principal, and his statement that "[i]t was the other two's idea" directly implicated both Eley and Mitchell as his co-conspirators and accomplices. App. at 138.
>
> Although we are mindful of the deference that we owe to the Commonwealth's courts, we are constrained to conclude that fairminded jurists could not disagree that the Superior Court's decision is inconsistent with *Richardson* and *Gray.* We have no doubt that the jury inferred, on the basis of Eiland's confession alone, that Eley was one of "the other two" whose "idea" it was to rob DeJesus. App. at 138. As in *Gray,* "[t]he inferences at issue here involve[d] statements that, despite redaction, obviously refer[red] directly to someone . . . and which involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." 523 U.S. at 196, 118 S.Ct. 1151. Indeed, a juror who wondered to whom "the other two" referred, App. at 138, "need[ed] only lift his eyes to [Eley and Mitchell], sitting at counsel table, to find what . . . seem[ed] the obvious answer," *Gray,* 523 U.S. at 193, 118 S.Ct. 1151. Therefore, we hold that the Superior Court's affirmance of the trial judge's denial of Eley's motion to sever was an unreasonable application of *Bruton* and its progeny.

Id. at 858–859. The Third Circuit also concluded that the *Bruton* error was not harmless. *Id.* at 861.

4. Mitchell's Confrontation-Clause Claim Fails Because Eiland's Statements Were Not Testimonial.

The respondent contends that we should reach a result different from that of the Third Circuit because Eiland's statements to LeVan and Taylor were not testimonial, and, thus the Confrontation Clause does not apply to those statements.

In *Ohio v. Roberts,* 448 U.S. 56 (1980), the Supreme Court held that where a witness is shown to be unavailable at trial, the admission at trial of his or her prior out-of-court statements does not violate the Confrontation Clause if the statements bear adequate "indicia of reliability." But in *Crawford v. Washington,* 541 U.S. 36 (2004), the Supreme Court changed the focus of the Confrontation-Clause analysis from whether hearsay is reliable to whether hearsay is testimonial and whether the declarant was subject to cross-examination. "Abrogating *Roberts*, the *Crawford* Court adopted a per se rule that where *testimonial* hearsay is concerned and the declarant is absent from trial, the Confrontation Clause requires that the witness be unavailable and that the defendant have had a prior opportunity for cross-examination." *United States v. Berrios*, 676 F.3d 118, 125 (3d Cir. 2012) (italics in original). "In subsequent decisions, the Court overruled *Roberts* in its entirety, holding without qualification that the Confrontation Clause protects the defendant *only* against the introduction of testimonial hearsay statements, and that

admissibility of nontestimonial hearsay is governed solely by the rules of evidence." *Id.* at 126 (italics in original); *see also Davis v. Washington*, 547 U.S. 813, 823 (2006) (concluding that the Confrontation Clause applies only to testimonial hearsay).

In *Berrios*, the Third Circuit addressed the interplay of the *Crawford* line of cases and of the *Bruton* line of cases. It held that "where nontestimonial hearsay is concerned, the Confrontation Clause has no role to play in determining the admissibility of a declarant's statement." *Id.* at 126 (footnote omitted). And "because *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements." *Id.* at 128. Thus, "[a]ny protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial." *Id.* If a "statement is nontestimonial, then admissibility is governed *solely* by the rules of evidence." *Id.* at 127.

In *Eley*, the Third Circuit did not mention *Berrios* and did not consider whether Eiland's statements were testimonial. Although the parties argue about whether the Third Circuit in *Eley* erred in not applying *Crawford*, it is not this Court's prerogative to determine whether the Third Circuit erred. Rather, we must determine whether Mitchell is entitled to a writ of habeas corpus. In making that

determination, we conclude that because the Third Circuit in *Eley* did not address the *Crawford* issue, we are not precluded from doing so here. *See Waller v. Varano*, 562 F. App'x 91, 95 n.5 (3d Cir. 2014) ("*Eley* does not control the outcome here, as the parties in *Eley* did not mention, and the *Eley* Court did not consider or rule on, the *Crawford* issue.").

The respondent contends that because Eiland's statements to LeVan and Taylor were not testimonial, *Bruton* and the Confrontation Clause are inapplicable and, thus, Mitchell's Confrontation Clause claim is without merit. "Testimonial statements for Confrontation Clause purposes include statements a declarant made with an intent to incriminate, statements made with the anticipation that the person to whom the declarant made the statement would be called to testify, formal statements under oath, and statements made in response to law enforcement interrogation seeking information about a past event." *Waller*, 562 F. App'x at 92 n.2. Mitchell does not dispute that Eiland's statements to LeVan and Taylor were not testimonial, and with good reason as statements to fellow prisoners and acquaintances have been held not to be testimonial. *See Id.* at 92 & 94-95 (concluding that a non-testifying co-defendant's statements to his cousin that were redacted "to refer to, but not name, the other people who were present" was "plainly nontestimonial under *Crawford*" and thus "the Confrontation Clause and *Bruton*

[were] not violated by their admission at trial"); *Berrios*, 676 F.3d at 124 & 127 (holding that a conversation that authorities intercepted "between Berrios and Moore in a recreational yard at the detention facility during which they discussed, in detail, the Wendy's shooting and getaway, and their respective roles in it" and "identified Rodriguez (by nickname) as the getaway driver, and blamed him for blowing out a tire and crashing the getaway car" "was not testimonial, and thus not subject to Confrontation Clause scrutiny"); and *United States v. Hendricks*, 395 F.3d 173, 181 (3d Cir. 2005) (holding that conversations between the defendants and other third parties surreptitiously intercepted by law enforcement through Title III wiretaps were not testimonial).

Because Eiland's statements to LeVan and Taylor were not testimonial, *Bruton* and the Confrontation Clause are inapplicable. Thus, Mitchell's Sixth Amendment claim is without merit. Mitchell contends, however, that we should not apply the *Crawford* line of cases and should not consider whether the statements at issue were testimonial because *Crawford* was decided after the state court adjudicated his *Bruton* claim.

Although "§ 2254(d)(1) requires federal courts to 'focu[s] on what a state court knew and did,' and to measure state-court decisions 'against th[e] [Supreme] Court's precedents *as of "the time the state court renders its decision*." '" *Greene v.*

Fisher, 132 S. Ct. 38, 44 (2011) (emphasis in original) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)), even if the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law, that does not mean that the habeas petitioner is entitled to a writ of habeas corpus. Rather, when a claim has been adjudicated on the merits in state court, 2254(d) sets "forth a precondition to the grant of habeas relief . . . not an entitlement to it." *Fry v. Pliler*, 551 U.S. 112, 119–20 (2007), In other words, if a petition is able to pass through the Section 2254(d) gateway, then the habeas court must consider the claim de novo. *See Panetti v. Quarterman,* 551 U.S. 930, 953 (2007) (When § 2254(d) is satisfied, "[a] federal court must then resolve the claim without the deference AEDPA otherwise requires."); *Branch v. Sweeney*, 758 F.3d 226, 233 (3d Cir. 2014) (concluding that "if the state courts unreasonably applied federal law in rejecting Branch's petition, the District Court should have reviewed Branch's ineffective assistance of counsel claim de novo"); *Breakiron v. Horn*, 642 F.3d 126, 138 (3d Cir. 2011) (stating that "[i]f we determine that the Pennsylvania Supreme Court's ruling was contrary to or an unreasonable application of *Strickland,* then we still must review the claim de novo to determine whether Breakiron is entitled to relief."); *Real v. Shannon*, 600 F.3d 302, 308 (3d Cir. 2010) (holding that where a state prisoner overcomes

2254(d)'s bar to relief by showing that the state court's decision was contrary to federal law, the habeas court must review the claim de novo under the correct federal standard).

"A state prisoner's federal habeas petition may be granted 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Bronshtein v. Horn*, 404 F.3d 700, 724 (3d Cir. 2005) (quoting 28 U.S.C. § 2254(a)) "Thus, if a petitioner's custody does not in fact violate federal law—i.e., if the petitioner's claims fail even de novo review—the petitioner is not entitled to habeas relief regardless of the correctness of the state court's analysis of those claims." *Id.* "This conclusion follows naturally from the longstanding rule that federal courts will not entertain habeas petitions to correct errors that do not undermine the lawfulness of a petitioner's detention." *Id.* Thus, it is proper for us to apply the *Crawford* line of cases here even though *Crawford* was not decided at the time the state court ruled. *See Desai v. Booker,* 538 F.3d 424, 429 (6th Cir. 2008) (applying the *Crawford* line of cases to deny a writ of habeas corpus even thought that line of cases was not decided before the conviction became final and stating: "Even if it were true, as Desai argues, that the state courts unreasonably applied the old *Roberts* test, that would mean only that his habeas application cleared that hurdle for obtaining relief, not that he otherwise qualified for relief. Section 2254(a) still

requires the applicant to show that he is currently being held in custody in violation of an extant constitutional right.").

Nor does *Teague v. Lane,* 489 U.S. 288 (1989), preclude the Court from considering the *Crawford* line of cases. In *Teague*, "the Supreme Court held that [generally] a federal court cannot grant habeas relief to a petitioner based on a rule announced after his conviction and sentence became final." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3d Cir. 1999). The Supreme Court has held "that *Crawford* announced a 'new rule' of criminal procedure and that this rule does not fall within the *Teague* exception for watershed rules."). *Whorton v. Bockting*, 549 U.S. 406, 421 (2007). Thus, under *Teague*, *Crawford* cannot be applied retroactively to grant a petition for a writ of habeas corpus. But that does not mean that *Crawford* cannot be applied retroactively to deny a petition for a writ of habeas corpus.

The rule in *Teague* "was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on 'the constitutional standards that prevailed at the time the original proceedings took place.'" *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (quoting *Teague,* 489 U.S. at 306). But "[a] federal habeas petitioner has no interest in the finality of the state-court judgment under which he is incarcerated:

Indeed, the very purpose of his habeas petition is to overturn that judgment." *Id.* at 373. Thus, *Teague* operates to the benefit of the state but not the habeas petitioner. *Id.* ("The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it."). *Id.* at 372-373.[7]

In sum, even if the Superior Court unreasonably applied *Bruton* and its progeny, Mitchell is not entitled to a writ of habeas corpus on his

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[7] Even if *Teague* was otherwise applicable, it would not bar us from considering *Crawford* because *Teague* is only concerned with retroactively applying a rule announced after a petitioner's conviction and sentence became final, and *Crawford* was decided before Mitchell's conviction and sentence was final. *Crawford* was decided on March 8, 2004. But Mitchell's conviction and sentence did not become final until on or about September 29, 2004, (90 days—the time allowed to filed a petition for certiorari with the United States Supreme Court—after the Pennsylvania Supreme Court denied Mitchell's petition for allowance of appeal.). *See Beard v. Banks*, 542 U.S. 406, 411 (2004) ("State convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'") (quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994)). Because *Crawford* was decided before Mitchell's conviction and sentence became final, *Crawford* is applicable in this case. *See Young v. Grace*, No. 3:CV-07-016, 2010 WL 3489046, at *6 n.5 (M.D. Pa. Sept. 2, 2010) ("The 'new rule' created in *Crawford* is applicable in this collateral review, as Young's claims were still on direct review when *Crawford* was decided.").

Confrontation-Clause claim because the statements that underlie that claim are not testimonial and, thus, are not within the purview of the Confrontation Clause.

C. Actual Innocence.

Mitchell claims that his due process rights were violated when the trial court denied his claim of actual innocence. Mitchell's counsel makes clear that Mitchell is asserting a freestanding claim of actual innocence.[8]

Generally, actual innocence is a way to overcome a procedural bar—such as procedural default or the statute of limitations—to having a habeas petition heard on the merits. *See Murray v. Carrier,* 477 U.S. 478, 496 (1986); *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1933 (2013). Thus, "actual innocence, if proved, serves as a gateway through which a petitioner may pass" despite the procedural bar. *McQuiggin*, 133 S.Ct. at 1928. The standard for establishing actual innocence as a gateway, however, is demanding. *Id.* at 1936. It requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness

[8] The respondent asserts that Mitchell procedurally defaulted his actual innocence claim by failing to present it to the state courts as a federal claim rather than a state-law claim. Any procedural default, however, would be excused if Mitchell could show actual innocence. *Wright v. Superintendent Somerset SCI*, 601 F. App'x 115, 119 n.15 (3d Cir. 2015). Further, since the state courts decided Mitchell's claims regarding after discovered evidence under state law, rather than federal law, we address the claim de novo instead of under 28 U.S.C. § 2254(d). *Id.* at 119.

accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The standard is not met unless the petitioner "'persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin,* 133 S.Ct. at 1928 (quoting *Schulp*, 513 U.S. at 329). "Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schulp*, 513 U.S. at 324; *see also Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("We have often emphasized "the narrow scope" of the exception."); *Sistrunk v. Rozum*, 674 F.3d 181, 192 (3d Cir. 2012) ("*Schlup* sets a supremely high bar.")

Here, however, Mitchell is not claiming actual innocence as a way to overcome a procedural bar. Rather, he is asserting a freestanding claim of actual innocence. The Supreme Court has not yet, however, "resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin*, 133 S. Ct. at 1931. Although the Supreme Court has not resolved whether a freestanding claim of actual innocence is a viable habeas corpus claim, it has assumed hypothetically that it is.

In *Herrera v. Collins*, the Supreme Court explained the reasons why it has never recognized actual innocence as a freestanding basis for habeas relief:

> [I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant. Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

506 U.S. 390, 416-417 (1993). Nevertheless, in *Herrera*, the Supreme Court assumed for the sake of argument "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417. "But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* The Court concluded that Herrera's evidence fell "far short of any such threshold." *Id.*

In *House v. Bell*, 547 U.S. 518, 554–555 (2006), the Supreme Court again refused "to answer the question left open in *Herrera*" about whether a freestanding

claim of actual innocence is a cognizable habeas corpus claim. The Court concluded that House failed to meet the "extraordinarily high" standard for any such claim, which standard is necessarily higher than the standard for a gateway assertion of actual innocence:

> We conclude here, much as in *Herrera,* that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure, House has cast considerable doubt on his guilt—doubt sufficient to satisfy *Schlup's* gateway standard for obtaining federal review despite a state procedural default. In *Herrera,* however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high." 506 U.S., at 417, 113 S.Ct. 853. The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

Id. at 555.

Following *Herrera* but before *House*, the Third Circuit stated that "[i]t has long been recognized that '[c]laims of actual innocence based on newly discovered evidence' are never grounds for 'federal habeas relief absent an independent constitutional violation.'" *Fielder v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004) (quoting *Herrera,* 506 U.S.at 400). But following *House*, the Third Circuit has assumed without deciding that actual innocence may be a cognizable habeas claim,

but that the petitioners in those cases did not meet the extraordinarily high bar. *See e.g. Albrecht v. Horn,* 485 F.3d 103, 126 (3d Cir. 2007) (capital case); *Wright v. Superintendent Somerset SCI*, 601 F. App'x 115, 117 (3d Cir. 2015) (noncapital case).

Here, assuming for the sake of argument that Mitchell can assert a freestanding claim of actual innocence, he has not overcome the exceedingly high bar for such a claim. First, Mitchell points to the fact that Rasheen Davis was found with the murder weapon after the crime and the fact that he received it from his brother as evidence of his actual innocence. But evidence of who possessed the gun months after the crime is of limited probative value given that there was testimony at trial that would support an inference that the culprits hid the gun after the crime and the gun could have been found by someone in the area. Second, Mitchell points to Weikel's statement that Blackwell confessed to the murder. This evidence also does not satisfy the extremely high bar necessary to show actual innocence given that there was evidence that Mitchell was identified as at the scene of the crime shortly before the murder, that Blackwell denied confessing to Weikel, and that Weikel had a motive to lie given that Blackwell agreed to testify against her in a

federal drug case. Third, and finally,[9] Mitchell points to evidence that Eugene Whitaker signed a statement indicating that he was at the murder scene with Velez and Blackwell and that Blackwell shot DeJesus. But Whitaker denied telling the private investigator that he was at the murder scene with Velez and Blackwell or that he witnessed Blackwell shoot DeJesus. Further, Velez testified that he was in the emergency room at the time of the crime and hospital records were presented that purportedly support that assertion. While this is the strongest evidence to which Mitchell points, we cannot say that based on this evidence, alone or combined with the other evidence, no juror, acting reasonably, would have voted to find Mitchell guilty beyond a reasonable doubt. As such, Mitchell does not satisfy the *Schulp* standard for a gateway claim of actual innocence, and it therefore follows that he cannot met the even more stringent standard for establishing actual innocence as a freestanding claim.

[9] Mitchell does not point to the purported recantation of Hudson as evidence of his actual innocence here.

IV. Recommendation.

Based on the foregoing, it is recommended that the petition for a writ of habeas corpus be denied.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this12th day of December, 2016.

S/Susan E. Schwab
Susan E. Schwab
United States Magistrate Judge