A P P E N D I X "A"

ALD-197 May 3, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-1349**

ANTHONY JAMES BRIGHTWELL, JR., Appellant

VS.

SUPERINTENDENT FAYETTE SCI, ET AL.

(E.D. Pa. Civ. No. 2-16-cv-05103)

Present: MCKEE, VANASKIE and SCIRICA, Circuit Judges

Submitted are

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

(2) Appellant's memorandum in support of his request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,
Clerk

ORDER

The request for a certificate of appealability is denied. Essentially for the reasons given by the District Court, in adopting the Magistrate Judge's recommendation, Appellant has not shown that jurists of reason would debate the District Court's ruling that his claims lack merit. See Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003); Strickland v. Washington, 466 U.S. 668, 687 (1984).

By the Court,

s/ Thomas I. Vanaskie
Circuit Judge

Dated: August 3, 2018

A True Copy:

Patricia A. Dodszuweit

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

A P P E N D I X "B"

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

ANTHONY JAMES BRIGHTWELL, JR., **Petitioner,**	:	**CIVIL ACTION**
v.	:	**NO. 16-cv-5103**
ERIC ARMEL, et al.,[1] **Respondents.**	:	

ORDER

AND NOW, this day of , 2017, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for a writ for habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
TIMOTHY J. SAVAGE, J.

[1] I have substituted Eric Armel, who is the current Acting Superintendent of SCI Fayette, as the respondent in this case. *See* Rules Governing Section 2254 Cases, Rule 2 (requiring the current custodian to be named as respondent).

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

ANTHONY JAMES BRIGHTWELL, JR., Petitioner,	:	CIVIL ACTION
v.	:	NO. 16-cv-5103
ERIC ARMEL, et al.,[1] Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

August 28, 2017

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Anthony James Brightwell, Jr. ("Petitioner"), an individual currently incarcerated at the State Correctional Institution – Fayette in LaBelle, Pennsylvania. This matter has been referred to me for a Report and Recommendation. I respectfully recommend that the petition for habeas corpus be **DENIED.**

I. FACTS AND PROCEDURAL HISTORY[2]

The Pennsylvania Superior Court provided the following recitation of the facts:

---

[1] I have substituted Eric Armel, who is the current Acting Superintendent of SCI Fayette, as the respondent in this case. *See* Rules Governing Section 2254 Cases, Rule 2 (requiring the current custodian to be named as respondent).

[2] Respondents have submitted the relevant portions of the state court record ("SCR") in hard-copy format. Documents contained in the SCR are indexed and numbered 1 through 33 and will be cited as "SCR No. ___." The Court has also consulted the Court of Common Pleas criminal docket sheets in *Commonwealth v. Brightwell*, No. CP-15-CR-0000939-2013, (Chester Cnty. Com. Pl.), *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-15-CR-0000939-2013 (last visited August 28, 2017) [hereinafter "Crim. Docket"].

On January 25, 2013, in the early evening hours, [Petitioner] along with his four codefendants, Sergio Droz, Calvin Thompson, Tyrone Palmer, and Nafis Janey, traveled from the City of Chester, in Delaware County, Pennsylvania, to the Borough of West Chester, in Chester County, Pennsylvania, for the purpose of locating a drug dealer to rob. The five men had discussed this plan to rob a drug dealer amongst themselves before arriving in West Chester and had agreed to commit the robbery together. Mr. Janey supplied the transportation to and from West Chester in the form of a white Nissan Maxima. . . .

After arriving in West Chester, the five men proceeded to the Apartments for Modern Living (aka the "Sidetrack Apartments"), located at 201 South Matlack Street, West Chester, Pennsylvania. During a cell phone conversation earlier in the evening, Mr. Droz agreed to meet Jamal Ahmed Scott at the Sidetrack Apartments under the pretense that he wanted to purchase some marijuana from him. Before meeting Mr. Scott, the five men agreed that [Petitioner] and Mr. Droz would rob Mr. Scott. Mr. Janey drove [Petitioner] and Mr. Droz to the Sidetrack Apartments where he dropped them off, then, along with Mr. Palmer and Mr. Thompson, waited for them to commit the robbery and call for a ride. That evening, at approximately 10:49 p.m., [Petitioner] met up with Mr. Scott and entered the front passenger door of the silver Honda Civic that Mr. Scott had driven to the location. Mr. Scott's vehicle then made a left turn onto East Union Street and after traveling a short distance, pulled over and stopped. While in Mr. Scott's vehicle, [Petitioner] pulled the .45 caliber pistol that Mr. Palmer had supplied, on Mr. Scott. As a result of [Petitioner's] displaying the firearm in the Honda, a struggle ensued between Mr. Scott and [Petitioner].

During the struggle, [Petitioner] discharged one round into the ceiling of the Honda. While this was happening, Mr. Droz was waiting outside the Honda, armed with the 9 mm. pistol Mr. Palmer had supplied him. When Mr. Droz observed the struggle between [Petitioner] and Mr. Scott and heard the shot fired within the vehicle, he walked up to the driver's door area of the Honda and at close range shot Mr. Scott in the heart, fatally wounding him. Immediately prior to the shooting, [Petitioner] removed a backpack from Mr. Scott's Honda containing marijuana. [Petitioner] and Mr. Droz fled the scene and were eventually picked up by Mr. Janey, Mr. Palmer and Mr. Thompson, whereupon the five men returned to Mr. Palmer's residence in the City of Chester to divide the marijuana amongst the five of them.

Commonwealth v. Brightwell, No. 2679 EDA 2015, slip op. at 1-2 (Pa. Super. July 26, 2016). On March 31, 2014, Petitioner entered a negotiated guilty plea to third-degree murder, 18 Pa. Cons. Stat. § 2502(c), conspiracy to commit robbery (threaten immediate serious injury), *id.* § 903, and robbery (inflict serious bodily injury), *id.* § 3701(a)(1)(i), and was sentenced to an aggregate term of thirty to sixty years' incarceration. Crim. Docket at 4-6, 9. Petitioner did not file a direct appeal. *See Brightwell*, No. 2679 EDA 2015, at 3.

On March 2, 2015, Petitioner filed a timely *pro se* motion for post-conviction relief, pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA") 42 Pa. Cons Stat. §§ *et seq.* (PCRA Pet., SCR No. 19); Crim. Docket at 10. Counsel was appointed, but shortly thereafter, filed a petition for leave to withdraw and a *Finley* letter stating that Petitioner's PCRA petition lacked merit. Crim. Docket at 11, 12; (Order, SCR No. 20; Pet. to Withdraw as PCRA Counsel, SCR No. 22). On July 28, 2015, the PCRA court dismissed Petitioner's PCRA petition and granted counsel's motion to withdraw. Crim. Docket at 15; (Order, SCR No. 30).

On August 24, 2015, Petitioner filed a timely *pro se* notice of appeal to the Pennsylvania Superior Court.[3] (Notice of Appeal, SCR No. 31); Crim. Docket at 15. Petitioner raised the following issues in his appeal:

---

[3] Pennsylvania and federal courts employ the prisoner mailbox rule. *See Perry v. Diguglielmo*, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. 1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Under this doctrine, a prisoner's *pro se* petition is deemed filed when delivered to prison officials for mailing. *See Burns*, 134 F.3d at 113; *Commonwealth v. Castro*, 766 A.2d 1283, 1287 (Pa. Super. 2001). Nevertheless, it is a prisoner's burden to provide evidence for when the petition was placed within a prison mailbox or delivered to prison officials. *See Commonwealth v. Jones*, 549 Pa. 58, 700 A.2d 423, 426 (Pa. 1997); *Thomas v. Elash*, 781 A.2d 170, 176 (Pa. Super. Ct. 2001). Here, Petitioner certified that he placed the *pro se* petition in the prison mailing system on August 24, 2015, and it will be considered filed on this date. (PCRA Pet. 5, SCR No. 25); *see also Brightwell*, No. 2679 EDA 2015, at 4 n.1. This Court will apply the mailbox rule to all *pro se* filings in this matter.

> The PCRA Court erred when it ruled PCRA counsel fulfilled the requirements outlined in *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988); when PCRA counsel failed to raise guilty plea/sentencing counsels [sic] ineffectiveness; for not raising the issue that Petitioner told the police his family was going to hire an attorney and therefore violating his *Miranda* rights.

(Br. for Appellant 153, 155, ECF No. 8-1 [hereinafter "PCRA App. Br."]). The Superior Court construed Petitioner's statement of the issues as raising four claims:

> (1) Whether PCRA counsel was ineffective for seeking to withdraw from representing Appellant where counsel failed to adequately address whether Appellant's guilty plea was knowing and intelligent?
>
> (2) Whether PCRA counsel was ineffective for failing to adequately address in his Turner/Finley no-merit letter, or file an amended petition on Appellant's behalf, raising the claim that the Commonwealth violated Appellant's negotiated plea agreement, resulting in Appellant's receiving a lengthier sentence than that which he agreed upon?
>
> (3) Whether PCRA counsel was ineffective for not alleging trial counsel's ineffectiveness for failing to file a motion to suppress statements that he made to police?
>
> (4) Whether the PCRA court erred by not appointing Appellant different PCRA counsel, when Attorney Brendza had previously represented Appellant's co-defendant, resulting in a conflict of interest in counsel's representation of Appellant?

Brightwell, No. 2679 EDA 2015, at 5-6. The Superior Court affirmed the PCRA court's decision on July 26, 2016. *Brightwell*, No. 2679 EDA 2015, at 13.

On September 15, 2016, Petitioner filed the instant *pro se* petition for writ of habeas corpus. (Hab. Pet. 16, ECF No. 1). He raises four ineffective assistance counsel claims, which, he contends, arise from the following asserted facts (recited verbatim):

(1) Mr. Brightwell's guilty plea was not knowing and intelligently made when the details of the guilty plea were changed and Mr. Brightwell did not fully understand what he was pleading to, or what he was initialing on the guilty plea form.

(2) Mr. Brightwell's counsel was ineffective for not addressing the fact that the Commonwealth violated the negotiated plea agreement, resulting in Mr. Brightwell receiving a lengthier sentence that [sic] that which he agreed upon.

(3) Mr. Brightwell's counsel was ineffective for failing to move to suppress his statements that he made to the police.

(4) Mr. Brightwell was denied his right to conflict free counsel during the PCRA proceedings in this matter.[4]

(Hab. Pet. ¶¶ 12-12(a), ECF No. 1). The matter was assigned to the Honorable Timothy J. Savage, who referred it to me for a Report and Recommendation. (Order, ECF No. 3). Respondents have filed a response, (Answer of the District Attorney of Chester County to Pet. for Writ of Habeas Corpus, ECF No. 8 [hereinafter "Answer"]), and Petitioner has filed a reply (Pet'r's Reply to Answer, ECF No. 11 [hereinafter "Reply"]). The matter has been fully briefed, and is ripe for disposition.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

[4] Petitioner has since withdrawn Ground Four. (Reply 12, ECF No. 11). Accordingly, it will not be addressed further.

shall not be granted unless it appears that—

> (A) the applicant has exhausted the remedies available in the courts of the state; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Levya v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking on complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his

remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 Fed. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)). Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman*, 501 U.S. at 750. To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded

counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.§ 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [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, 412-13 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [The Supreme] Court's decisions but

unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law as objectively reasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 409). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citing *Williams*, 529 U.S. at 410).

III. DISCUSSION

Petitioner raises three claims of ineffective assistance of counsel.[5] (Hab. Pet. ¶ 12, ECF No. 1). For the reasons set forth below, I respectfully recommend denying relief on all claims.

---

[5] Petitioner raised Claims Two and Three as ineffective assistance of trial counsel claims in his PCRA petition, and raised Claims One and Two as layered ineffectiveness claims in his *pro se* response to the PCRA Court's notice of intent to dismiss. (*See* PCRA Pet. 2, SCR No. 19; Resp. to Not. of Intent to Dismiss PCRA 2, SCR No. 29). He presented these claims as layered ineffectiveness claims on appeal to the Superior Court. (*See, e.g.*, Br. for Appellant 155, ECF No. 8-1) ("PCRA counsel failed to raise guilty plea/sentencing counsels [sic] ineffectiveness. . . ."). Thus, Petitioner gave the Superior Court an opportunity to address trial counsel's ineffectiveness, and his current claims are exhausted. *See Collins v. Sec'y of Pennsylvania Dep't of Corr.*, 742 F.3d 528, 541 (3d Cir. 2014), *cert. denied sub nom. Collins v. Wetzel*, 135 S. Ct. 454 (2014) (citation omitted); *id.* at 550 n.10 (emphasis in original) (in conducting exhaustion analysis, "we ask whether a court was given the *opportunity* to address a specific claim, regardless of whether the court actually addressed that claim."); *Rice v. Gavin*, No. 15-291, 2016 WL 3009392, at *2 n.1 (E.D. Pa. Feb. 18, 2016) (finding trial counsel ineffectiveness claims exhausted when petitioner raised layered ineffectiveness claims in PCRA petition because "[t]o address his appellate counsel's effectiveness, the Superior Court was required to address the merits of the underlying trial counsel ineffectiveness claims."). In any event, even if these claims were not fairly presented, the Court may deny unexhausted claims on the merits. *See* 28 U.S.C. § 2254(d)(2).

A. Ineffective Assistance of Counsel Standard

Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel must satisfy a two-prong test:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.

Id. at 687. Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Thus . . . a defendant must overcome the 'presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Strickland "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). To prove prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. To prove this, a

petitioner "must make more than a bare allegation . . . ." *Rice v. Wynder*, 346 F. App'x 890, 893 (3d Cir. 2009) (citation and quotation marks omitted).

It is well settled that *Strickland* is "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to relief if the Pennsylvania court's rejection of his claims was: (1) "contrary to, or involved an unreasonable application of," that clearly established law; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Regarding the "contrary to" clause, the Superior Court addressed Petitioner's ineffective assistance claims using Pennsylvania's three-pronged test for ineffective assistance of counsel. *Brightwell*, No. 2679 EDA 2015, slip op. at 6 (citing *Commonwealth v. Rykard*, 55 A.3d 1177, 1189-90 (Pa. Super. 2012)) (citations omitted). The Third Circuit has found that the Pennsylvania ineffectiveness of counsel test is not contrary to the *Strickland* standard. *See Werts*, 228 F.3d at 204. Because the Superior Court did not apply law contrary to clearly established precedent, Petitioner is entitled to relief only if he can demonstrate that its adjudication involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the fact sin light of the evidence.[6]

B. Ground One: Ineffective Assistance in Relation to Changes to Guilty Plea

In Ground One, Petitioner argues that counsel was ineffective because "Mr. Brightwell's guilty plea was not knowing and intelligently made when the details of the guilty plea were changed and Mr. Brightwell did not fully understand what he was pleading to, or what he was initialing on the guilty plea form." (Hab. Pet. ¶¶ 12-12(a), ECF No. 1). Petitioner explains that

[6] In considering a § 2254 petition, the federal courts examine the "last reasoned decision" of the state courts. *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)).

during his guilty plea hearing, he requested to speak to his attorney, "and there was a brief pause. This is the second brief pause in these proceedings, the first one was when Petitioner had to initial the above changes in the plea deal." (Reply 7-8, ECF No. 11). Looking to Petitioner's state court pleadings for clarification, he appears to be arguing trial counsel was ineffective because "(only a brief pause) was spent going over the plea form prior to [Petitioner] signing it."[7] (Resp. to Not. of Intent to Dismiss PCRA 2, SCR No. 29). The Commonwealth responds, "Petitioner's assertion that his guilty plea was not knowing or intelligent, is not supported by the facts or the law and his claim that PCRA counsel did not review the necessary information with regard to his plea is unfounded."[8] (Answer 34, ECF No. 8). As set forth below, the Court concludes that Petitioner is not entitled to relief on this claim.

The PCRA Court explained, "The law does not permit a defendant to second-guess the oral and written statements that he makes at a plea hearing." *Commonwealth v. Brightwell*, No. CP-15-CR-0000939-2013, slip op. at 5 (Chester Cnty. Com. Pl. Oct. 20, 2015). For a guilty plea to be valid, it must be knowingly, voluntarily, and intelligently entered. *Id.* Pennsylvania law presumes a defendant who pleads guilty was aware of what he was doing; the defendant bears the burden of proving otherwise. *Id.* The PCRA Court found Petitioner's assertion that he was

---

[7] *See McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed . . . ."); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (explaining that *pro se* complaints are held "to less stringent standards than formal pleadings drafted by lawyers").

[8] Although Petitioner's habeas petition does not specify which counsel's ineffectiveness he is raising in this Court, his reply clarifies that each of his claims challenge trial counsel's ineffectiveness. (*See* Reply 2, ECF No. 11) ("Petitioner is not arguing ineffective assistance of PCRA counsel, he is arguing ineffective assistance of guilty plea and sentencing counsel."). To the extent Petitioner is also challenging PCRA counsel's ineffectiveness, such claims are not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(i); *Martel v. Clair*, 565 U.S. 648, 662 n.3 (2012); *Burton v. Glunt*, No. 07-1359, 2013 WL 6500621, at *46 (E.D. Pa. Dec. 11, 2013).

unaware of what he was doing when he entered his plea "is neither supported in fact or law." *Id.*

The PCRA Court found that Petitioner's written colloquy "was not defective on the merits." *Id.* at 6. Additionally, during the guilty plea hearing, "the Court inquired at length" about the agreement's terms. *Id.* Petitioner acknowledged that, by pleading guilty, he was admitting his guilt. *Id.* He stated he was given sufficient time and opportunity to consult with counsel, and that he was satisfied with counsel's representation. *Id.* He informed the Court that he understood what he was doing, and that he was entering his plea voluntarily and of his own free will. *Id.* Moreover, Petitioner was present in open court for all changes made to his proposed sentence; he acknowledged and accepted these changes, and voluntarily initialed the changes made to the written guilty plea colloquy form. *Id.* As an additional safeguard, the court paused the proceedings to ensure Petitioner understood and agreed to the modifications. *Id.* Accordingly, the PCRA Court concluded that Petitioner "had all of the information necessary to make an intelligent and informed decision on how to plead[,]" and that his primary motivation in pleading guilty "was not out of coercion or ignorance of his rights but rather . . . to avoid a potential life sentence without the possibility of parole." *Id.*

On PCRA appeal, the Superior Court rejected Petitioner's argument that the "brief pause" during his plea proceeding "was inadequate to demonstrate that he knowingly, voluntarily, and understandingly initialed the changes made to the plea colloquy and, therefore, [PCRA counsel] should have challenged the validity of the guilty plea, and/or the effectiveness of [trial][9] counsel . . ." *Brightwell*, No. 2679 EDA 2015, slip op. at 7-8. The Superior Court found "the record of the plea proceeding demonstrates that [trial] counsel discussed the changes in the plea colloquy

[9] The Superior Court uses the terms "plea counsel" and "trial counsel" interchangeably. This Court has replaced the term "plea counsel" with "trial counsel" throughout this Report and Recommendation, as both terms refer to the same attorney, Mr. Matthew Vassil, Esq.

with [Petitioner] before the plea hearing, and that the 'brief pause' in the proceedings was only for [Petitioner] to initial the additions to the written colloquy." *Id.* at 8 (citing N.T. 03/31/14 at 3). Additionally, the Superior Court noted the PCRA Court's findings that, *inter alia*, Petitioner stated he entered his plea voluntarily and of his own free will; Petitioner said he was afforded sufficient time and opportunity to consult with counsel and was satisfied with counsel's representation; Petitioner was present in open court for all changes made to his plea agreement; and Petitioner "understood, acknowledged, and voluntarily initialed the changes made to the written guilty plea colloquy." *Id.* at 8-9 (citation and quotations omitted). Accordingly, the Superior Court agreed with the PCRA Court's finding that Petitioner's plea was entered knowingly, intelligently, and voluntarily. *Id.* at 9. Thus, Petitioner did not demonstrate that PCRA counsel acted ineffectively by failing to challenge the validity of the plea "in *any* regard, let alone on the basis that there was only a 'brief pause' when [Petitioner] initialed minor changes made to the written plea colloquy." *Id.* (emphasis in original).

As an initial matter, the Superior Court's determination that PCRA counsel was not ineffective in failing to challenge the validity of Petitioner's plea necessarily involved a determination that trial counsel was not ineffective. As noted above, Petitioner specifically challenged PCRA counsel's failure to raise trial counsel's ineffectiveness. *See supra* n.5. The Superior Court rejected Petitioner's assertion that trial counsel failed to adequately discuss the changes to his plea agreement and that the first "brief pause" in his guilty plea transcript indicated his guilty plea was involuntary. This conclusion was neither an unreasonable application of *Strickland*, nor did it involve an unreasonable determination of the facts. As the Superior Court noted, trial counsel discussed the changes to Petitioner's plea agreement with him prior to the guilty plea hearing, and the first "brief pause" noted in the guilty plea transcript was

to allow Petitioner to initial additions made to his plea agreement. (*See* N.T. 03/31/14 at 2-3).

Additionally, as the Superior Court noted, the transcript indicates that Petitioner understood and voluntarily accepted the changes to his agreement. *Brightwell*, No. 2679 EDA 2015 (citing *Brightwell*, No. CP-15-CR-0000939-2013, slip op. at 5-6 (citing N.T. 03/31/14 at 11-16)). For instance, there was a second "brief pause" in the record to allow Petitioner to further consult with trial counsel regarding his increased sentence, although counsel had already spoken with Petitioner about the increased sentence prior to the hearing. (*Id.* at 13-14). The agreement was then entered into the record, during which time the Commonwealth, trial counsel, and Petitioner stated that the increased sentence was discussed prior to the plea hearing:

> Mr. Yen: Yes, I have the original [agreement] and perhaps we can mark this as C-1 with today's date. I would state for the record, your Honor, that the change appears on page five of the agreement. That I initialed the change, which I made 30 to 60. And that Mr. Vassil and [Petitioner] initialed, and Mr. Vassil put the date of 3/31 of '14.
>
> . . .
>
> Mr. [Vassil]: . . . Today I went over that document again with [Petitioner], read to him the provisions, he initialed the changes, and there's no objection to that.
>
> (Exhibit Commonwealth's-1 marked and admitted.)
>
> The Court: [Petitioner], that document that is marked as Commonwealth exhibit-1, do you agree that Mr. Yen went over that with Mr. Vassil, and Mr. Vassil with you, and as a result of your agreement to the modification of the cooperation agreement, that that is what led to this plea agreement?
>
> [Petitioner]: Yes.

(*Id.* at 14-16). Moreover, Petitioner stated that he was given sufficient time to consult with trial counsel, and he was satisfied with counsel's representation. (N.T. 03/31/14 at 8). Petitioner's statements that he discussed the changes with counsel and was satisfied with counsel's

representation "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Accordingly, the Superior Court's adjudication of this claim did not unreasonably apply *Strickland*. *See Copeland v. Capozza*, No. 15-0481, 2016 WL 6679268, at *3-4 (M.D. Pa. Nov. 14, 2016) (state court reasonably applied *Strickland* when it examined petitioner's written plea colloquy and statements at plea hearing); *Troutman v. Overmyer*, No. 2:14-CV-1592, 2015 WL 1808640, at *16 (E.D. Pa. Apr. 21, 2015) (petitioner's statements that he was satisfied with counsel's representation supported state court's rejection of ineffectiveness claim).[10]

The Court respectfully recommends denying relief on this claim.

C. Ground Two: Ineffective Assistance for Not Addressing Commonwealth's Violation of Plea Agreement

In Ground Two, Petitioner alleges that "counsel was ineffective for not addressing the fact that the Commonwealth violated the negotiated plea agreement, resulting in Mr. Brightwell receiving a lengthier sentence that [sic] that which he agreed upon." (Hab. Pet. ¶¶ 12-12(a), ECF No. 1). Petitioner argues in his Reply that had trial counsel enforced the original agreement, he would have been sentenced to twenty-five to fifty years' incarceration and would not have received the lengthier sentence. (Reply 11, ECF No. 11). The Commonwealth responds that this claim "is not supported by the record and has no basis in fact," and alternatively, lacks merit because "Petitioner failed to timely file a petition to modify his sentence." (Answer 38, ECF No. 8). The Court concludes that this claim lacks merit.

The PCRA Court noted that Petitioner's original offer of twenty-five to fifty years "was conditioned upon his full cooperation in the prosecution of his co-defendants." (Order 5, SCR No. 30). Although Petitioner provided truthful and complete testimony against co-defendant

[10] Because Petitioner's allegation that trial counsel only discussed the changes to his plea agreement with him during one or both of these "brief pause[s]" patently lacks merit, this claim would also fail under *de novo* review.

Sergio Droz, the Commonwealth believed that he failed to do so with respect to co-defendant Tyrone Palmer. (*Id.*). The PCRA Court noted that before pleading guilty, Petitioner was advised that he could reject the increased offer and proceed to trial. (*Id.*). Moreover, both trial counsel and the court advised Petitioner of the potential consequences of accepting or rejecting the increased sentence. (*Id.*). Petitioner indicated that he understood his right to reject the offer, and voluntarily accepted the new negotiated agreement and pled guilty. (*Id.*). Petitioner also stated "that he was able to work with his trial counsel, had sufficient time to discuss the case with counsel, was satisfied with the representation of counsel; and the decision to plead guilty was [Petitioner's] and not that of counsel." (*Id.*). The PCRA Court concluded that "[i]f Petitioner was unhappy with the increased offer, he should have sought enforcement of the terms of the initial agreement or rejected the increased offer and proceeded to trial." (*Id.*). Accordingly, trial counsel was not ineffective for failing to object to the increased sentence, and PCRA counsel was not ineffective for failing to raise this issue. (*Id.*).

On PCRA appeal, the Superior Court considered whether PCRA counsel was ineffective for "fail[ing] to adequately address, or file an [a]mended PCRA petition . . . when [Petitioner] . . . did not receive the negotiated plea deal . . . ." *Brightwell*, No. 2679 EDA 2015, slip op. at 9-10. The Superior Court rejected Petitioner's argument that PCRA counsel's no-merit letter failed to address Petitioner's claim his plea was invalid because he did not receive his agreed-upon sentence. *Id.* at 10 (citing No-Merit Letter 4-7). Moreover, the Superior Court found that PCRA counsel could not have filed an amended petition challenging the validity of Petitioner's plea; it was waived because it could have been raised on direct appeal, but was not.[11] *Id.* (citing 42 Pa.

[11] The Superior Court noted, "[Petitioner] does not argue that [trial]/appellate counsel was ineffective for failing to file a direct appeal presenting this issue." *Brightwell*, No. 2679 EDA 2015, slip op. at 10 n.5.

Cons. Stat. §§ 9543(a)(3), 9544(b)). In any event, the Superior Court found that "the record does not support [Petitioner's] claim that the Commonwealth violated the plea bargain by recommending a lengthier sentence." *Id.* Petitioner "acknowledged and accepted that [his] original plea offer of 25-50 years was revoked and changed to 30-60 years because of [Petitioner's] failure to fully co-operate in testifying at the Tyrone Palmer trial." *Id.* at 10-11 (citation and quotations omitted). Petitioner entered his plea voluntarily, knowingly, and intelligently, aware of the sentence he faced. *Id.* at 11. Thus, Petitioner failed to demonstrate that PCRA counsel was ineffective by not raising "this waived and/or meritless claim." *Id.*

Normally, the Superior Court's finding that a claim is waived under 42 Pa. Cons. Stat. § 9544(b) would preclude review of that claim, as this waiver rule is an independent and adequate state procedural rule. *See, e.g.*, *Williams v. Sauers*, No. 12-102, 2015 WL 787275, at *13-14 (E.D. Pa. Feb. 25, 2015); *Thomas v. Commonwealth of PA*, No. 04-343, 2006 WL 2273812, at *3 (W.D. Pa. Aug. 8, 2006). However, in these circumstances, the Superior Court only found that the challenge to the validity of the plea due to the modification of Petitioner's sentence was waived on direct appeal, whereas Petitioner is challenging trial counsel's ineffectiveness for failure to "address[ ] the fact that the Commonwealth violated the negotiated plea agreement." (Hab. Pet. ¶ 12(a), ECF No. 1; Reply 11, ECF No. 11). Because the Superior Court did not address this claim that was presented to it, the Court will review this claim *de novo*. *Breakiron v. Horn*, 642 F.3d 126, 131 (3d Cir. 2011) (citations omitted); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). State court factual findings are still entitled to a presumption of correctness, unless rebutted by clear and convincing evidence. *Breakiron*, 642 F.3d at 131.

The Court concludes that this claim lacks merit upon *de novo* review. Petitioner has not rebutted the Superior Court's factual finding that the Commonwealth did not violate the plea

bargain by recommending a lengthier sentence. The transcript from Petitioner's guilty plea hearing also directly refutes Petitioner's claim, as it shows that the Commonwealth did not violate the agreement; rather, that the change occurred due to Petitioner's testimony at the Palmer trial:

> Mr. Yen: . . . With regard to [Petitioner's] testimony in the Droz matter, we considered that to be cooperation.
>
> With respect to [Petitioner's] testimony in the Palmer case, I would say that [Petitioner] changed things up a bit, and so that actually was not the level of cooperation that would be expected. And as a consequence, I can state that the original agreement, your Honor, under the cooperation agreement, was an aggregate of 25 to 50 years.
>
> Because of [Petitioner's] performance in the Palmer case where he came up with a new story, which was hard to justify, that the agreement has been changed so that it is 30 to 60 years as an aggregate.

(N.T. 03/31/14 at 11-12). Moreover, as the PCRA Court noted, Petitioner was advised that he could reject the increased offer, and he voluntarily accepted the new agreement. (*See id.* at 14-16) (noting the changes to the original agreement and asking Petitioner whether he understood that he has the right to reject the guilty plea and instead proceed to trial, to which Petitioner responded, "Yes"). Accordingly, trial counsel was not ineffective for failing to raise this meritless argument. *Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998); *Sanchez v. Overmyer*, No. 15-5305, 2016 WL 6836960, at *4 (E.D. Pa. Oct. 31, 2016), *report and recommendation adopted*, No. 15-5303, 2016 WL 6821898 (E.D. Pa. Nov. 18, 2016) ("[C]ounsel will not be considered ineffective for failing to pursue a meritless argument.").

The Court respectfully recommends denying relief on this claim.

D. Ground Three: Ineffective Assistance for Failing to Move to Suppress Statements

In Ground Three, Petitioner alleges counsel was ineffective "for failing to move to suppress his statements that he made to the police." (Hab. Pet. ¶¶ 12-12(a), ECF No. 1). The Commonwealth responds that Petitioner has not argued or established that he is entitled to relief under 28 U.S.C. § 2254(d). (Answer 41-42, ECF No. 8). As set forth below, I find that Petitioner is not entitled to relief on this claim.[12]

The PCRA Court explained that Petitioner's ineffective assistance claim based on "[t]he Court's failure to throw out Defendant's statement to the arresting officers . . . ." was waived because Petitioner pled guilty. (Not. of Intent to Dismiss PCRA Pet. Pursuant to Pa. R. Crim. P 907(1) 4, 8, SCR No. 24). Thus, the PCRA Court found the issue was not cognizable. (*Id.*).

On PCRA appeal, Petitioner brought this as a layered ineffectiveness claim, asserting that PCRA counsel should have alleged trial counsel's ineffectiveness for failing to move to suppress statements his statements. *Brightwell*, No. 2679 EDA 2015, slip op. at 11-12. The Superior Court explained:

> [W]here the defendant asserts a layered ineffectiveness claim he must properly argue each prong of the three-prong ineffectiveness test for each separate attorney.
>
> Layered claims of ineffectiveness are not wholly distinct from the underlying claims[,] because proof of the underlying claim is an essential element of the derivative ineffectiveness claim[.] In determining a layered claim of ineffectiveness, the critical inquiry is whether the first attorney the defendant asserts was ineffective did, in fact, render ineffective assistance of counsel. If that attorney was effective, then subsequent counsel

[12] Petitioner asserts that because he does not have access to the police reports, "and counsel has refused to provide him with the documents, [he] is unable to prove this claim." (Reply 12, ECF No. 11). Because it is unclear whether this *pro se* Petitioner intends to drop this claim, the Court will briefly analyze its merits out of an abundance of caution. *See McNeil*, 508 U.S. at 113; *Haines*, 404 U.S. at 520-21 (1972).

> cannot be deemed ineffective for failing to raise the underlying issue.

Id. at 12 (citing *Rykard*, 55 A.2d at 1190). The Superior Court found that Petitioner's argument as to both counsels' ineffectiveness was underdeveloped, and that his discussion of the underlying substantive suppression issue was inadequate. *Id.* The Superior Court noted there were no statements by Petitioner to police in the certified record, and nothing in the record otherwise indicated that Petitioner provided a statement to police. *Id.* at 12-13. Moreover, the Superior Court found that Petitioner "does not even offer any details about the alleged statements, such as when he provided them, the context in which they were given, or the content of what he said that inculpated him in the robbery and murder of Jamal Scott." *Id.* at 13. Accordingly, the Superior Court concluded that Petitioner's argument was "inadequate to prove that [trial] counsel was ineffective for failing to file a motion to suppress, and that [PCRA counsel] was ineffective for not raising this issue in an amended petition." *Id.*

The Superior Court's adjudication of Petitioner's claim did not involve an unreasonable application of *Strickland*, nor was it based on an unreasonable determination of the facts. A habeas petitioner cannot demonstrate counsel's ineffectiveness based on bald assertions and conclusory allegations; "he must set forth facts to support his contention." *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991). Petitioner has not set forth sufficient facts to support his claim, either in the Superior Court or here. Petitioner's Superior Court brief alleged, "At the police station when appellant was arrested, he specifically told the police his family will hire him an attorney. The police ignored appellant and continued to question him and appellant gave the police statements." (Br. of Appellant 164, ECF No. 8-1). His habeas petition simply asserts that he provided statements to police, without describing the content or context of said statements. (*See* Hab. Pet. 9, ECF No. 1). Accordingly, Petitioner has not provided sufficient

facts to support his claim, and the Superior Court's rejection of this claim was reasonable.[13]

The Court respectfully recommends denying relief on this claim.

IV. CONCLUSION

As fully explained herein, I respectfully recommend that Petitioner's petition for writ of habeas corpus be denied.

Therefore, I respectfully make the following:

[13] Because Petitioner has failed to provide sufficient factual support for this claim, the claim would likewise fail under *de novo* review.

RECOMMENDATION

AND NOW this 28th day of August, 2017, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without the issuance of a certificate of appealability.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

Lynne A. Sitarski

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE