OZZIE DAVIS, Appellant vs. SUPERINTENDENT COAL TOWNSHIP SCI, ET AL.
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
2019 U.S. App. LEXIS 6561
C.A. No. 18-2934
January 30, 2019, Decided

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}(E.D. PA. CIV. NO. 2-16-cv-03807).

Counsel **OZZIE DAVIS** (#GL-1424), Plaintiff - Appellant, Pro se, Coal Township, PA.

For SUPERINTENDENT COAL TOWNSHIP SCI, ATTORNEY GENERAL PENNSYLVANIA, Defendants - Appellees: Max C. Kaufman, Esq., Philadelphia County Office of District Attorney, Philadelphia, PA.

Judges: Present: JORDAN, GREENAWAY, JR. and NYGAARD, Circuit Judges.

Opinion

Opinion by: Kent A. Jordan

Opinion

ORDER

The foregoing request for a certificate of appealability is denied. For substantially the reasons given by the District Court and the Magistrate Judge, appellant has not made a substantial showing of the denial of a constitutional right nor shown that reasonable jurists would find the correctness of the procedural aspects of the Court's determination debatable. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Appellant's motion for appointment of counsel on appeal is denied.

By the Court,

/s/ Kent A. Jordan

Circuit Judge

Dated: January 30, 2019

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2934

OZZIE DAVIS,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI;
ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

(E.D. Pa. No. 2-16-cv-03807)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* Judge Nygaard's vote is limited to panel rehearing only.

Appendix E

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: March 26, 2019
Lmr/cc: Ozzie Davis
Max C. Kaufman

OZZIE DAVIS, Petitioner, v. THOMAS MCGINLEY et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 125013
CIVIL ACTION No. 16-3807
July 24, 2018, Decided
July 25, 2018, Filed

Editorial Information: Prior History

Davis v. McGinley, 2018 U.S. Dist. LEXIS 28698 (E.D. Pa., Feb. 21, 2018)

Counsel {2018 U.S. Dist. LEXIS 1}OZZIE DAVIS, Petitioner, Pro se, COAL TOWNSHIP, PA.

For THOMAS MCGINLEY, SUPERINTENDENT, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: MAX COOPER KAUFMAN, PHILADELPHIA DISTRICT ATTY'S OFFICE, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: GENE E.K. PRATTER

Opinion

ORDER

AND NOW, this 24th day of July, 2018, upon consideration of Petitioner Ozzie Davis's Petition for Writ of *Habeas Corpus* (Doc. No. 1), and the Respondents' response thereto (Doc. No. 21), Petitioner's Reply (Doc. No. 22), U.S. Magistrate Judge Lynne A. Sitarski's Report & Recommendation (Doc. No. 24), Petitioner's Objections (Doc. No. 27), and the state court record, it is **ORDERED** that:

1. The Report & Recommendation (Doc. No. 24) is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections are **OVERRULED**.1
3. The Petition is **DISMISSED** with prejudice.
4. There is no probable cause to issue a certificate of appealability.2
5. The Clerk of Court shall mark this case **CLOSED** for all purposes, including statistics.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

Footnotes

Appendix B

1

Petitioner objects to the Report and Recommendation, raising substantially the same arguments that he has raised in his prior filings in this matter. Magistrate Judge Sitarski thoroughly addressed Petitioner's arguments and correctly concluded that none of them had merit. Mr. Davis particularly objects to Magistrate Judge Sitarski's conclusions regarding (1) the sufficiency of the evidence against him and (2) his *Bruton* claim.

First, the Court agrees with Magistrate Judge Sitarski's conclusion that there was sufficient evidence to support both of Mr. Davis's convictions. Second, "[g]iven this strong evidence that Petitioner conspired with Chaco to murder Lewis, this Court does not have 'grave doubt' about whether the *Bruton* violation had a substantial and injurious effect or influence in determining the jury's verdict." Report & Recommendation, at 30 (Doc. No. 24). Therefore, for the reasons ably outlined by Magistrate Judge Sitarski in her Report and Recommendation, the Petition must be denied.

2

A certificate of appealability may issue only upon "a substantial showing of the denial of a constitutional**{2018 U.S. Dist. LEXIS 2}** right." 28 U.S.C. § 2253(c)(2). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). There is no probable cause to issue a certificate in this action.

OZZIE DAVIS, Petitioner, v. THOMAS MCGINLEY, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 28698
CIVIL ACTION NO. 16-cv-3807
February 21, 2018, Decided
February 21, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Objection overruled by, Writ of habeas corpus dismissed, Certificate of appealability denied Davis v. McGinley, 2018 U.S. Dist. LEXIS 125013 (E.D. Pa., July 24, 2018)

Editorial Information: Prior History

Commonwealth v. Davis, 932 A.2d 251, 2007 Pa. Super. LEXIS 3139 (Pa. Super. Ct., July 10, 2007)

Counsel **{2018 U.S. Dist. LEXIS 1}**OZZIE DAVIS, Petitioner, Pro se, COAL TOWNSHIP, PA.

For THOMAS MCGINLEY, SUPERINTENDENT, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: MAX COOPER KAUFMAN, PHILADELPHIA DISTRICT ATTY'S OFFICE, PHILADELPHIA, PA.

Judges: LYNNE A. SITARSKI, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: LYNNE A. SITARSKI

Opinion

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI

UNITED STATES MAGISTRATE JUDGE

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Ozzie Davis ("Petitioner"), an individual currently incarcerated at the State Correctional Institution located in Coal Township, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED.

I. BACKGROUND1

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

> [Petitioner's] jury conviction of third degree murder and criminal conspiracy arose out of the fatal shooting of Melvin Lewis, in Philadelphia, on August 11, 1999. The shooting grew out of an argument that occurred about 6:45**{2018 U.S. Dist. LEXIS 2}** P.M. that day between Aisha Lane, [Petitioner's] girlfriend, and Latina Sasportas, who claimed [Petitioner] was the father of her two month old son. Ms. Lane became angry at Mr. Lewis, Ms. Sasportas' then-current boyfriend, for

APPENDIX K

remarks he made to her as a result of that argument, which she considered insulting.

Later that evening, at about 9:00 P.M., [Petitioner] and Ms. Lane picked up [Petitioner's] friend, Eric Cacho, a convicted murderer, and the three drove to the home of Ms. Sasportas. While [Petitioner] argued with Mr. Lewis, Cacho came up behind Lewis and shot him in the back, fatally. Cacho and [Petitioner] fled together. [Petitioner] was the getaway driver. A bystander who witnessed these events later testified at trial.

The police later arrested [Petitioner] and Cacho. Cacho gave the police a statement implicating Lane and [Petitioner]. He admitted shooting Lewis, but claimed he did it at [Petitioner's] request, in return for a future favor. His redacted statement was read at trial.

Ms. Lane, a reluctant Commonwealth witness, testified and was cross-examined at a preliminary hearing, but did not appear for trial, and the prosecutor reported to the trial judge that the Commonwealth**{2018 U.S. Dist. LEXIS 3}** could not locate her. [Petitioner's] trial counsel stipulated to Ms. Lane's unavailability. At trial an attorney read Ms. Lane's testimony at the preliminary hearing.*Commonwealth v. Davis*, 133 A.3d 72, 2015 Pa. Super. Unpub. LEXIS 3407 slip op. at 1-3 (Pa. Super. 2015). Petitioner was found guilty of third degree murder, 18 Pa. Cons. Stat. § 2502, and criminal conspiracy, *id.* § 903. Crim. Docket at 4-5. On June 26, 2002, he was sentenced to twenty to forty years' incarceration for the murder charge and ten to twenty years' incarceration for the conspiracy charge, to run concurrently. Crim. Docket at 4-5; (N.T. 06/26/02 at 29:16-20).

After having his appellate rights reinstated *nunc pro tunc*, Petitioner filed a notice of appeal to the Superior Court. *Davis*, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 3; Crim. Docket at 8. His judgment of sentence was affirmed on July 10, 2007. *Commonwealth v. Davis*, 932 A.2d 251, slip op. at 1 (Pa. Super. July 10, 2007). Petitioner filed a timely petition for allowance of appeal, which was denied March 14, 2008. Crim. Docket at 14.

On September 29, 2008, Petitioner filed a *pro se* petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"). Crim. Docket at 14; (Mot. for Post Conviction Collateral Relief, SCR No. D24). Counsel was appointed and filed numerous amended petitions. Crim. Docket at 14, 19, 23, 24. Petitioner's PCRA petition was dismissed on May 5, 2014. Crim. Docket at 14-25; (Order, No. D49). Petitioner filed a counseled notice**{2018 U.S. Dist. LEXIS 4}** of appeal to the Superior Court, which affirmed the PCRA Court's decision on September 16, 2015. Crim. Docket at 25-26; (Not. of Appeal, SCR No. D50); *Davis*, 2015 Pa. Super. Unpub. LEXIS 3407, slip op. at 1. Petitioner filed an application for reargument, which was denied; he then filed a petition for allowance of appeal in the Pennsylvania Supreme Court. Appellate Docket at 3. That petition was denied on March 16, 2016. Crim. Docket at 26.

On July 7, 2016,2 Petitioner filed a *pro se* petition for writ of habeas corpus, raising the following claims for relief (recited verbatim):

(1) The Pennsylvania Superior Court's denial on direct review of the challenge to the sufficiency of the evidence in support of Davis' conviction for third degree murder and criminal conspiracy resulted in a decision that is based on an unreasonable application of clearly established Supreme Court precedent.

(2) The Pennsylvania Superior Court's denial of the claim that the trial court erred when it refused to give a proper jury instruction of the issue of mere presence resulted in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

(3) The Pennsylvania Superior Court's denial of the claim that the trial court erred**{2018 U.S. Dist. LEXIS 5}** when it admitted a redacted and directly incriminating statement of a non-testifying co-defendant resulted in a decision that is based on an unreasonable application of clearly established Supreme Court precedent.

(4) Davis was convicted of third-degree murder on a theory of conspiracy as a result of cumulative prejudice from trial counsel's deficient performance in failing to challenge improper comments made by the prosecutor during opening and closing summation which effectively undid the court-ordered redactions in Cacho's confession. It is also alleged that Davis was prejudiced by PCRA appellate counsel's failure to include this claim of cumulative prejudice, which encompasses the underlying issue of prosecutorial misconduct referred to above, in her statement of questions involved a required by Pa.R.A.P. 2116, thus waiving this claim which must now be considered *de novo* under federal habeas review.

(5) Davis was convicted of third-degree murder on a theory of conspiracy as a result of prejudice from the deficient performance of counsel during the critical pretrial and trial stages by failing to investigate and interview Aisha Lane and subsequently depriving Davis of his right to conflict-free**{2018 U.S. Dist. LEXIS 6}** representation by stipulating with his former college's unverified proffer concerning Ms. Lane's purported unavailability based on trial counsel's previous experience as a member of the District Attorney's office.

(6) Davis was convicted of third-degree murder on a theory of conspiracy as a result of cumulative prejudice from the deficient performance of counsel during the guilty phase in failing to challenge the improper actions of the prosecutor in making deletions to the preliminary hearing testimony of Aisha Lane as read into the record by an attorney for the Commonwealth.

(7) Davis was convicted of third-degree murder on a theory of conspiracy as a result of prejudice from trial counsel's deficient performance in failing to challenge the material "and" false statement: "they know Aisha was killed" which, when taken together with the prosecutor's unverified proffer concerning Ms. Lane's purported unavailability, exposes concealment of prejudicial misconduct in not producing Ms. Lane so that material deletions to her preliminary hearing testimony could be used instead of her live testimony at trial, thus undermining Davis's Sixth Amendment right to cross-examine this witness for the prosecution.**{2018 U.S. Dist. LEXIS 7}**(Hab. Pet., Ex. A., ECF No. 1-9 [hereinafter "Statement of Claims"]). The petition was assigned to the Honorable Gene E.K. Pratter, who referred it to the undersigned for a Report and Recommendation. (Order, ECF No. 4). The Commonwealth filed a response, and Petitioner filed a reply. (Resp. to Pet. for Writ of Habeas Corpus, ECF No. 21 [hereinafter "Resp. to Pet."]; Pet'r's Reply to Respondent's Resp. to Pet. for Writ of Habeas Corpus, ECF No. 22 [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 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{**2018 U.S. Dist. LEXIS 8**} 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, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Leyva 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) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (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. Warden, State Corr. Inst. Waymart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas{**2018 U.S. Dist. LEXIS 9**} 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. Larkins*, 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 163. 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 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557-59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739-40. A state rule is "adequate" if it is "firmly established and regularly followed." *Johnson v. Lee*, __ U.S. __, 136 S. Ct. 1802, 1804, 195 L. Ed. 2d 92 (2016) (*per curiam*) (citation{**2018 U.S. Dist. LEXIS 10**} omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Bronshtein v. Horn*, 404 F.3d 700, 707, 708 (3d Cir. 2005).

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, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (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**{2018 U.S. Dist. LEXIS 11}** 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, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (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, 115 S. Ct. 851, 130 L. Ed. 2d 808 (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. Visicotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002); *Werts*, 228 F.3d at 196. 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 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**{2018 U.S. Dist. LEXIS 12}** 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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (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 was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citation omitted). "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."**{2018 U.S. Dist. LEXIS 13}** *Werts*, 228 F.3d at 196 (citation omitted).

III. DISCUSSION

A. Claim One: Sufficiency of the Evidence

In Claim One, Petitioner challenges the sufficiency of the evidence underlying his conspiracy and third degree murder convictions. (Statement of Claims 1, ECF No. 1-9). The Commonwealth responds this

claim must fail because the Superior Court reasonably rejected it. (Resp. to Pet. 13, ECF No. 21). The Court agrees with the Commonwealth and finds sufficient evidence supports both convictions. Because the existence of a conspiracy was established, Petitioner was also criminally liable for the murder committed in furtherance thereof.

On direct appeal, Petitioner challenged the sufficiency of the evidence for both convictions, arguing the Commonwealth failed to prove that he "entered into an agreement to commit murder or any other unlawful act or that he was an active participant in the crime[.]" *Davis*, No. 152 EDA 2005, slip op. at 3. The Superior Court explained:

> A person is guilty of criminal conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
>
> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes**{2018 U.S. Dist. LEXIS 14}** such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.*Id.* at 5 (quoting 18 Pa. Cons. Stat. § 903(a)). To be convicted for conspiracy, the defendant or his co-conspirator must commit an overt act. *Id.* (citing 18 Pa. Cons. Stat. § 903(e)). Relevant factors to consider in assessing the sufficiency of evidence regarding conspiracy are:
>
> (1) [A]n association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy.*Id.* at 6 (citation omitted).

The Superior Court found the evidence sufficient to sustain Petitioner's conspiracy conviction. *Id.* at 7. It found the evidence established that Petitioner called Cacho, urged Cacho to shoot Lewis, drove Cacho to the crime scene, distracted Lewis and looked away as Cacho snuck behind Lewis and shot him, and drove Cacho away from the scene. *Id.* at 7, 8. The Superior Court also noted that Petitioner and Lewis knew each other, and had a prior confrontation that appeared to provide the motive for the shooting. *Id.* at 8. It explained this evidence was sufficient to sustain**{2018 U.S. Dist. LEXIS 15}** an inference that Petitioner entered into an illicit agreement with Cacho to harm Lewis, and it was reasonable to infer that Petitioner's actions "facilitated the shooting of Lewis." *Id.* at 6-7 (citing *Commonwealth v. Lambert*, 2002 PA Super 82, 795 A.2d 1010, 1019-20 (Pa. Super. 2002)). This evidence sufficiently established Petitioner's prior knowledge of the crime, shared intent with Cacho to shoot Lewis, and participation in the crime. *Id.* at 7. The Superior Court further noted that once a conspiracy is established, "the law imposes upon a conspirator full responsibility for the natural and probable consequences of acts committed by his fellow conspirator or conspirators if such acts are done in pursuance of the common design or purpose of the conspiracy." *Id.* at 8-9 (citation and quotations omitted). Because the evidence was sufficient to sustain the inference that Petitioner and Cacho had an agreement to harm Lewis, Petitioner was "liable for the shooting that was done in furtherance of their agreement." *Id.* at 9.

The established federal law governing Petitioner's claim was determined in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). When a habeas petitioner challenges the sufficiency of evidence underlying a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational**{2018 U.S. Dist. LEXIS 16}** trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). The habeas court must examine the evidence "with reference to 'the substantive elements of the criminal offense as defined by state law.'" *Eley v. Erickson*, 712 F.3d

837, 848 (3d Cir. 2013) (quoting *Jackson*, 443 U.S. at 324). However, "the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 651, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012). A reviewing court may not substitute its judgment for that of the jury. *Jackson*, 443 U.S. at 318-19. The court must defer to the jury's findings regarding witness credibility, resolving conflicts of evidence, and drawing reasonable inferences from the evidence. *Id.* at 319. If, upon review of the evidence, the court finds that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," then habeas relief is appropriate. *Id.* at 324.

The Superior Court applied the Pennsylvania standard, under which the court "determine[s] whether the evidence and all reasonable inferences arising therefrom, viewed in the light most favorable to the verdict-winner (the Commonwealth), is sufficient to establish all the elements of the offense beyond a reasonable doubt." *Davis*, No. 152 EDA 2005, slip op. at 4. This standard is consistent with *Jackson*. *See**{2018 U.S. Dist. LEXIS 17}** *Evans v. Court of Common Pleas, Delaware County*, 959 F.2d 1227, 1233 (3d Cir. 1992). Thus, the Superior Court did not apply a standard "contrary to" clearly established federal law, and Petitioner is entitled to relief only if he can demonstrate that the Superior Court's adjudication involved an unreasonable application of *Jackson*, or was based on an unreasonable determination of the facts in light of the evidence. Petitioner has not met his burden.

Under Pennsylvania law, the elements of conspiracy are: "(1) an intent to commit or aid in an unlawful act, (2) an agreement with a co-conspirator, and (3) an overt act in furtherance of the conspiracy." *Commonwealth v. Spotz*, 552 Pa. 499, 716 A.2d 580, 592 (Pa. 1998). An agreement can be proven through circumstantial evidence. *Id.* When a conspiracy is established, a conspirator is responsible "for the natural and probable consequences of acts" committed by his coconspirator(s) "if such acts are done in pursuance of the common design or purpose of the conspiracy. Such responsibility . . . extends even to homicide which is a contingency of the natural and probable execution of the conspiracy, even though such homicide is not specifically contemplated by the parties." *Commonwealth v. Roux*, 465 Pa. 482, 350 A.2d 867, 871 (Pa. Super. 1976); *see also Commonwealth v. Fisher*, 622 Pa. 366, 80 A.3d 1186, 1195-96 (Pa. 2013).

Viewing the evidence in the light most favorable to the Commonwealth and drawing all reasonable inferences**{2018 U.S. Dist. LEXIS 18}** therefrom, a rational factfinder could find the elements of conspiracy satisfied beyond a reasonable doubt. Aisha Lane's testimony was read into the record, and established that on the day of the murder, Latina Sasportas confronted her about Petitioner fathering Sasportas' child; Lane then confronted Petitioner about the same. (N.T. 03/07/01 at 171-73). After Lane and Petitioner discussed this matter, Petitioner picked up Cacho. Petitioner, Cacho, and Lane drove together to Nicholas Street, where Melvin Lewis was killed. (*Id.* at 173-74). Cacho got out of the car on 24th Street, and Petitioner and Lane later got out of the car at a different location. (*Id.* at 174-75). Lane and Sasportas testified that Petitioner spoke with Sasportas and Lewis regarding the paternity of Sasportas' son; Sasportas testified that Petitioner accused Lewis of confronting Lane, Petitioner's girlfriend, earlier that day. (*Id.* at 45-46, 51-54, 177-78). Sasportas described Petitioner as "moving too much," and said that he "looked past [Lewis and Sasportas] like somebody was right there, and then [she] heard a shot go off." (*Id.* at 49-50, 51:8-10). Both women testified that during this discussion, Cacho came up behind Lewis and shot him. (*Id.* at 51-52, 54-55, 135, 178-79). Bystander Pamela Wood testified that she**{2018 U.S. Dist. LEXIS 19}** saw Lewis talking to a man, and "as they was talking to each other somebody - another guy came up from behind, and then [she] just heard shots and then [she saw] both of the guys running." (N.T. 03/09/01 at 12). Wood testified that both men ran in the same direction and got into the same vehicle, which "pulled off real fast." (*Id.* at 13-14).

This evidence was sufficient to establish the elements of conspiracy. *See Lambert v. Warden Greene SCI*, 861 F.3d 459, 468 (3d Cir. 2017) (sufficient evidence supported conspiracy conviction when

petitioner drove the shooter to the crime scene, waited in his car while the shooter forced his way into the victim's home, and drove the shooter from the crime scene); *McNair v. Coleman*, No. 09-0134, 2010 U.S. Dist. LEXIS 85161, 2010 WL 3283010, at *14-15 (E.D. Pa. July 30, 2010), *report and recommendation adopted*, No. 09-0134, 2010 U.S. Dist. LEXIS 85139, 2010 WL 3283002 (E.D. Pa. Aug. 19, 2010) (sufficient evidence supported conspiracy conviction when petitioner arrived at the scene with the shooter, drove the getaway car, and was identified by several witnesses as being involved in the shooting); *Spotz*, 716 A.2d at 592 (agreement can be established through circumstantial evidence). Because the evidence established the existence of a conspiracy, sufficient evidence supports Petitioner's third degree murder conviction; this murder was a "natural and probable execution of the conspiracy."3 *Roux*, 350 A.2d at 871; *see also McNair*, , 2010 WL 3283010, at *15 (sufficient evidence supported**{2018 U.S. Dist. LEXIS 20}** conspiracy and third degree murder convictions when there was sufficient evidence of an agreement to shoot the victim, and petitioner's co-conspirator shot the victim with malice); *Commonwealth v. Baskerville*, 452 Pa. Super. 82, 681 A.2d 195, 200 (Pa. Super. 1996); *Commonwealth v. La*, 433 Pa. Super. 432, 640 A.2d 1336, 1350-51 (Pa. Super. 1994). Petitioner has not shown that the Superior Court unreasonably applied *Jackson*.

Nor did the Superior Court's decision involve an unreasonable determination of facts. Petitioner argues the Superior Court's decision was based on an unreasonable determination of fact because its findings that Davis called Cacho, ordered Cacho to shoot Lewis, looked away as Cacho snuck behind Lewis and shot him, drove Cacho from the crime scene, and distracted Lewis before the shooting, are based on inadmissible evidence or are otherwise unsupported by the record.4 (Statement of Claims 1, ECF No. 1-9; Mem. of Law 9-11, ECF No. 1-2). He also argues that the Superior Court's decision was based on an unreasonable determination of fact because it made an "inaccurate finding" that there was a prior confrontation between Petitioner and Lewis that provided the motive for the shooting. (Mem. of Law 10-11, ECF No. 1-2). These arguments fail.

As to Petitioner's first argument, the record establishes these facts. Lane testified that Petitioner**{2018 U.S. Dist. LEXIS 21}** picked up Cacho and drove him to Nicholas Street (N.T. 03/07/01 at 173-74, 187); Sasportas testified to Petitioner's odd behavior just prior to the shooting, and that Petitioner looked away as Cacho snuck behind Lewis and shot him (N.T. 03/07/01 at 49-51); Wood testified that the two men involved in the shooting got into the same vehicle (N.T. 03/09/01 at 13-14).5 Additionally, the Superior Court's finding that Petitioner called Cacho and ordered him to shoot Lewis was based on a reasonable inference drawn from the facts established at trial. Sasportas testified that Petitioner believed that Lewis and Petitioner's girlfriend had a confrontation earlier that day. (*See* N.T. 03/07/01 at 45-47, 82:12-16). Lane testified that after Petitioner picked up Cacho, no conversation occurred in the vehicle. (*Id.* at 183-84, 187-88, 201-02). She also indicated that she did not know why Petitioner picked Cacho up, or why Cacho got out of the vehicle. (*Id.* at 188-89, 199-201). From this, it was reasonable to infer that Petitioner had a motive to harm Lewis, and Petitioner and Cacho had formed a plan to shoot Lewis, before Petitioner picked up Cacho.6

Petitioner's argument that the Superior Court's decision was based on an unreasonable determination**{2018 U.S. Dist. LEXIS 22}** of fact because it made an "inaccurate finding" that that there was prior confrontation between Petitioner and Lewis also lacks merit. Although there appears to be no evidence of a prior confrontation between Petitioner and Lewis, the record reflects that Petitioner *thought* there was an earlier confrontation between Lewis and Lane. (*See, e.g.*, N.T. 03/07/07 at 45-47, 82:12-16). Thus, the record contained evidence of Petitioner's motive for the crime. Despite this discrepancy, the Superior Court's ultimate conclusion that Petitioner's verdict was supported by sufficient evidence was reasonable, and its decision was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

The Court respectfully recommends denying relief on this claim.

B. Claim Two: Trial Court Error and Direct Appeal Counsel Ineffectiveness Regarding Jury Instructions

Within Claim Two, Petitioner raises two claims concerning jury instructions: (1) trial court error in refusing to issue a proper "mere presence" instruction; and (2) ineffective assistance of direct appeal counsel for failing to raise trial court error in failing to give a curative instruction. (Statement of Claims 2, ECF No. 1-9).

1. Trial Court Error{2018 U.S. Dist. LEXIS 23} in Mere Presence Instruction

Petitioner alleges a due process violation, citing the trial court's refusal "to give a proper jury instruction on the issue of mere presence." (Statement of Claims 2, ECF No. 1-9; Mem. of Law 12, 15-17, ECF No. 1-2). He avers that the trial court failed to instruct the jury that he could not be found guilty of conspiracy based on mere presence and flight alone, and thus, there is a reasonable probability that he was found guilty on this basis.7 (Mem. of Law 13, 15 ECF No. 1-2). He also argues the instruction's language regarding presence and knowledge suggested "that [Petitioner] was guilty of the crime to some extent." (*Id.* at 15). The Commonwealth responds this claim is not cognizable, procedurally defaulted, and meritless.8 (Resp. to Pet. 19, 20 n.3, ECF No. 21). The Court finds Petitioner's claim lacks merit.

On direct appeal, the Superior Court explained that in evaluating a claim of trial court error in the jury instructions, it "must consider the entire instruction and decide whether it was fair and complete." *Davis*, No. 152 EDA 2005, slip op. at 12. An instruction is prejudicial if it does not adequately convey and explain the relevant legal**{2018 U.S. Dist. LEXIS 24}** principles to apply to the evidence. *Id.* A defendant has no right to specify the exact language used, and the instruction need not contain specific "magic words." *Id.* The Superior Court found the trial court's instruction was not prejudicial because the jury was instructed that "'[Petitioner] is not guilty unless he and Eric Cacho had an agreement or a common understanding and shared the intention to commit the murder.'" *Id.* at 13 (citing N.T. 03/21/01 at 44-45). The trial judge gave a mere presence instruction, telling the jury that it if it found Cacho committed the murder, and Petitioner was present at the scene and knew they were committing that crime, it could not "'infer from these facts alone that [Petitioner] was guilty of conspiracy.'" *Id.* (citing N.T. 03/21/01 at 44-45). The Superior Court determined the instructions as a whole sufficiently conveyed that Petitioner's mere presence is not enough to establish criminal conspiracy or accomplice liability. *Id.*

A federal habeas court may review state trial jury instructions to determine whether they violate specific constitutional standards imposed on the states through the Due Process Clause. *Hallowell v. Keve*, 555 F.2d 103, 106 (3d Cir. 1977); *Harris v. Kerestes*, No. 11-3093, 2014 U.S. Dist. LEXIS 173984, 2014 WL 7232358, at *16 (E.D. Pa. Dec. 17, 2014). In reviewing an allegedly ambiguous instruction, the proper**{2018 U.S. Dist. LEXIS 25}** inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)); *see also Williams v. Beard*, 637 F.3d 195, 223 (3d Cir. 2011). The jury instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instruction as a whole and the trial record." *Estelle*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)); *see also Williams*, 637 F.3d at 223 (due process analysis of a jury charge "requires careful consideration of each trial's unique facts, the narratives presented by the parties, the arguments counsel delivered to the jurors before they retired to deliberate, and the charge as a whole").

Upon *de novo* review, this Court concludes this claim fails.9 Defense counsel discussed the issues of mere presence and flight during closing argument:

> But I think [Judge Hughes] may tell say something like mere presence means that you cannot convict someone because they were there. Huh. You can't convict someone if you believe they knew a crime was going to be committed. Huh. You can't convict someone if after a shot is fired they run. Huh. You have to find that they participated in the criminal activity. Huh.
>
> If we could find people guilty in this Commonwealth on mere presence, I probably would**{2018 U.S. Dist. LEXIS 26}** be doing life because the reality of the situation is that where we live dictates a lot of times what we see. It dictates a lot of times who you know, but because you see and you know doesn't mean you're involved. Huh.(N.T. 03/09/01 at 86). He further argued that Petitioner's flight did not indicate guilt, noting that "gunfire sometimes make[s] people run." (*Id.* at 97:9-15).

The trial court instructed the jury that a person charged with a crime is presumed innocent until proven guilty, and that the Commonwealth must prove its case beyond a reasonable doubt. (N.T. 03/12/01 at 13-17). The trial court also gave an extensive conspiracy instruction, which, in relevant part, informed the jury:

> Eric Cacho and [Petitioner] are charged with conspiracy to commit murder. In general terms a conspiracy is an agreement between two or more persons to commit a crime. Their agreement constitutes the conspiracy. The form of the conspirator's agreement is not important. It may be an express, verbal agreement or it may be a largely unspoken, common understanding. If the conspirators know how one another thinks, they may be able to communicate their agreement by their behavior**{2018 U.S. Dist. LEXIS 27}** without a lot of words. Their agreement does not have to cover the details of how the crime will be committed, nor does it have to call for all of them to participate in actually committing the crime. They can agree that one of them will do the job. What is necessary is that the parties do agree. In other words, do come to a firm, common understanding that a crime will be committed.
>
> Although the agreement itself is the essence of conspiracy, a defendant cannot be convicted of conspiracy unless he or a fellow conspirator doing [sic] something more, does an overt act in furtherance of the conspiracy. The overt act is an act by any conspirator which shows that the parties have a firm agreement and are not just thinking or talking about committing a crime. The overt act shows that the conspiracy has reached the action stage. If a conspirator actually commits or attempts to commit the agreed upon crime, that obviously would be an overt act in furtherance of the conspiracy. But a small act or step that is much more preliminary and a lot less significant can satisfy the overt act requirement.
>
> The Bills of Information allege that Eric Cacho conspired with [Petitioner] and that [Petitioner] conspired**{2018 U.S. Dist. LEXIS 28}** with Eric Cacho. The information alleges that the crime of murder was the object of the conspiracy. The Bills of Information allege that the following actions, the shooting of Melvin Lewis, were the overt acts.
>
> In order to render a verdict of conspiracy to commit murder you must be satisfied that the following elements have been proven beyond a reasonable doubt; first, that an agreement existed between Eric Cacho and [Petitioner] that one of them would engage in the conduct which constitutes the crime of murder; second, that there was an intent to promote or facilitate the committing of the murder. In other words, [Petitioner] and Eric Cacho shared the intention to bring about that crime or to make it easier to commit that crime; and third, the acts that are alleged to have been the overt acts were done by one defendant or the other and they were done in furtherance of the conspiracy.

. . .

You may if you think it proper infer that there was a conspiracy from the relationship, the conduct, and the acts of the defendants and the circumstances surrounding their activities. You cannot render a verdict of conspiracy if the evidence merely leads you to suspect or feel or have a hunch that**{2018 U.S. Dist. LEXIS 29}** there was a conspiracy. You must be convinced beyond a reasonable doubt. . . .

A defendant may by reason of being a member of a conspiracy become liable for a crime he did not personally commit. You may find [Petitioner] guilty of the crimes charged as a conspirator if you are satisfied beyond a reasonable doubt; first, that [Petitioner] agreed with Eric Cacho that one of them would commit the crime of shooting Melvin Lewis; second, that [Petitioner] so agreed with the intent of promoting or facilitating the commission of that crime; third, that while the agreement remained in effect the crime of shooting Melvin Lewis was committed by Eric Cacho; and fourth, that the crime of murder while it may differ from the agreed upon crime was committed by Eric Cacho in furtherance of his and [Petitioner's] common design.

. . .

If you believe that Eric Cacho committed murder and that [Petitioner] was in his company, present at the scene and knew that they were committing that crime, you cannot infer from these facts alone that [Petitioner] was guilty of conspiracy. [Petitioner] is not guilty unless he and Eric Cacho had an agreement or common understanding and shared the intention to commit the**{2018 U.S. Dist. LEXIS 30}** murder. Consider all the evidence including the evidence of the defendant's presence and knowledge and the words and behavior of the defendant and the others when you are deciding whether the required elements of agreement and shared intent have been proven beyond a reasonable doubt. Put simply, if you convict [Petitioner] of the conspiracy charge, it must be because he was a party to the conspiracy and not just a knowing spectator to the crime committed by his companion.(*Id.* at 38-46).

Considering the trial record and the instruction as a whole, it is not reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. Counsel argued that flight does not show guilt, and was not sufficient to convict. The trial court gave a comprehensive conspiracy instruction that specifically informed the jury that Petitioner could not be found guilty based on mere presence. Moreover, the charge instructed that the jury was required to find an overt act and that the Commonwealth contended the overt act was the shooting. Accordingly, the jury was required to find something more, beyond mere presence and flight, in concluding Petitioner was guilty. Considering the trial**{2018 U.S. Dist. LEXIS 31}** record and instruction as a whole, there is not a reasonable probability that the jury found Petitioner guilty based on mere presence and flight alone.

Petitioner further argues that the charge suggested Petitioner was guilty, but this argument fails. The trial court advised the jury that Petitioner was presumed innocent, and the Commonwealth must prove its case beyond a reasonable doubt. The charge informed the jury it could *not* find Petitioner guilty of conspiracy based solely on his presence and knowledge. This was an accurate recitation of Pennsylvania law. *See* Pa. SSJI (Crim.) 12.903A ("A defendant cannot be convicted because he or she was present with others, or even because he or she knew what the other or others planned or were doing . . . .").

The Court respectfully recommends denying relief on this claim.

2. Direct Appeal Counsel's Ineffectiveness in Failing to Raise Trial Court Error Regarding a Curative Instructive

Petitioner also contends that direct appeal counsel was ineffective for not raising the claim "that the trial court erred when it denied trial counsel's request to give [a] curative instruction," and that Petitioner suffered prejudice from PCRA counsel's failure**{2018 U.S. Dist. LEXIS 32}** to assert appellate counsel's ineffectiveness.10 (Statement of Claims 2, ECF No. 1-9; Mem. of Law 17, 23-25, ECF No. 1-2). The Commonwealth argues that this ineffective assistance of direct appeal counsel claim is defaulted. (Resp. to Pet. 27, ECF No. 21). The Court agrees that this claim is procedurally defaulted.

Petitioner's ineffective assistance of appellate counsel claim is unexhausted because it was not raised before the Superior Court. *See generally Commonwealth v. Davis*, Br. for Appellant, 2015 WL 5084808 (Pa. Super.) [hereinafter "PCRA App. Br."]. It is now procedurally defaulted pursuant to the PCRA's one year statute of limitations.11 *See* 42 Pa. Cons. Stat. § 9545(b)(1); *Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001) (if a petitioner is barred from seeking further relief in state court for an unexhausted claim due to a state procedural rule, the claim is procedurally defaulted).

Petitioner asserts that his ineffective assistance of appellate counsel claim is procedurally defaulted due to PCRA counsel's ineffectiveness, and argues that default should be excused under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). (Mem. of Law 24-25, ECF No. 1-2; Reply 13, ECF No. 22). *Martinez* recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding, "[i]nadequate assistance**{2018 U.S. Dist. LEXIS 33}** of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. To successfully invoke the *Martinez* exception, a petitioner must satisfy two factors: that the underlying, otherwise defaulted, claim of ineffective assistance of trial counsel is "substantial," meaning that it has "some merit," *id.* at 14; and that petitioner had "no counsel" or "ineffective" counsel during the initial phase of the state collateral review proceeding. *Id.* at 17; *see also Glenn v. Wynder*, 743 F.3d 402, 410 (3d Cir. 2014). Both prongs of *Martinez* implicate the controlling standard for ineffectiveness claims first stated in *Strickland v. Washington*: (1) that counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

This defaulted claim does not fit within *Martinez*' narrow exception. Petitioner cites PCRA counsel's ineffectiveness to overcome the default of his appellate counsel ineffectiveness claim, but the doctrine articulated in *Martinez* does not apply to procedurally defaulted claims of ineffective assistance of appellate counsel. *Davila v. Davis*, __ U.S. __, 137 S. Ct. 2058, 2065, 198 L. Ed. 2d 603 (2017) (declining to extend *Martinez* to defaulted claims of ineffective assistance of appellate counsel).

The Court**{2018 U.S. Dist. LEXIS 34}** respectfully recommends that this claim be dismissed as procedurally defaulted.12

C. Claim Three: *Bruton* Violation, Ineffective Assistance of Trial and Appellate Counsel, and Trial Court Error

Petitioner's allegations in Claim Three arise from the fact that Petitioner was jointly tried with his co-conspirator, Eric Cacho, and that Cacho's redacted statement was read to the jury at trial. *See* Crim. Docket at 1; (N.T. 03/08/01 at 88-93). Petitioner alleges that: (1) Cacho's statement violated *Bruton* and its progeny because it was "redacted and directly incriminating;" (2) appellate counsel was ineffective for failing to specifically point out which portions of Cacho's statement were not properly redacted; and (3) "trial counsel was ineffective in failing to file a motion for severance" and "the State court fundamentally erred by refusing to sever the joint trial." (Statement of Claims 2, ECF No. 1-9; Mem. of Law 4-7, 10, ECF No. 1-3). The Commonwealth responds that the Superior Court reasonably

rejected Petitioner's *Bruton* claim. (Resp. to Pet. 16-18, ECF No. 21). It does not address Petitioner's other contentions. (*See id.*). The Court finds Petitioner's *Bruton* claim has merit, but the violation was**{2018 U.S. Dist. LEXIS 35}** harmless; Petitioner's ineffective assistance of appellate counsel claim lacks merit; and Petitioner's severance claims are procedurally defaulted.

1. *Bruton* Claim

"[A] defendant's Sixth Amendment right to challenge evidence against him is violated during a joint trial when a co-defendant's un-redacted statement is introduced as evidence against the co-defendant but not against the defendant." *Davis*, No. 152 EDA 2005, slip op. at 10 (citing *Bruton v. United States*, 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)). Petitioner raised a *Bruton* claim on direct appeal, arguing that the trial court erred in admitting portions of Cacho's statement that implicated Petitioner in the conspiracy because Cacho was a non-testifying co-defendant, and his statement was improperly redacted. *Id.* at 9.

At the joint trial, Cacho's statement was redacted to use the passive voice and remove some references to Petitioner altogether. (*Compare* N.T. 02/26/01 at 10-33 and 03/05/01 at 133-44 *with* N.T. 03/08/01 at 88-92). In relevant part, Cacho's redacted statement was read into the record as follows:

> Answer: "I was called on the phone and told about a problem with this guy. I did not want to speak on the phone. I was picked up. I was picked up on Monmouth Street and instructed to shoot this guy. I was told to shoot him**{2018 U.S. Dist. LEXIS 36}** three times in the back. I was driven to around 24th and Cecil B. Moore when I got out of the car. As the guy was talking I walked up to the guy and shot him in the back. I shot him once and then the gun jammed. I kept pulling the trigger but it just wouldn't shoot. I ran to the car and jumped in the car. I went back to Monmouth Street. About a week later I was called and told that the guy died and that the cops was looking. That's the last time I talked."
>
> . . .
>
> Question: "Was anyone else with you when you were picked up on Monmouth Street before the shooting?"
>
> Answer: "Yes, Aisha."
>
> . . .
>
> Question: "Did she know that you planned to shoot the guy?"
>
> Answer: "Yes. On the way over I talked about it."
>
> Question: "Did you get paid to shoot the guy?"
>
> Answer: "No. I was told you do me the favor and I will do you one later."
>
> Question: "How did you know who to shoot?"
>
> Answer: "Aisha told me what the guy would be wearing. I don't remember his clothes right now."
>
> Question: "Did Melvin Lewis the guy you shot and killed have a gun?"
>
> Answer: "No. I didn't see no gun on the guy."
>
> Question: "What is Aisha's full name and address?"
>
> Answer: "I don't know. She was staying at my house in the northeast but I don't know**{2018 U.S. Dist. LEXIS 37}** where she's staying now."

. . .

Question: "What kind of car were you picked up in?"

Answer: "A red Nissan."(*See* N.T. 03/08/01 at 88-92).

On direct appeal, Petitioner argued generally that the statement was not sufficiently redacted. Petitioner did not identify any improper redactions of Cacho's statement; rather, he pointed to a question from the jury asking who drove Cacho to the crime scene. *Davis*, No. 152 EDA 2005, slip op. at 11. The Superior Court began its analysis by incorrectly stating that "the version of Cacho's statement that was introduced against [Petitioner] at trial substituted any mention or reference of [Petitioner] with the term 'the other man.'" *Id.* at 9. The Superior Court then explained, "The test for whether a defendant's confrontation right is violat[ed] is not whether the jury raised or asked any question concerning the statement. Rather it is whether 'the co-defendant's statement is redacted to remove any specific reference to the defendant and [whether] a proper limiting instruction [was] given' to the jury." *Id.* at 11 (quoting *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)). It concluded Cacho's redacted statement, which it described as "us[ing] the neutral term of 'the other man' in place of Petitioner's name," was properly redacted because**{2018 U.S. Dist. LEXIS 38}** "it made no specific mention of [Petitioner]" and strictly adhered to the holding of *Commonwealth v. Travers*, 564 Pa. 362, 768 A.2d 845, 851 (Pa. 2001).13 *Id.* at 11-12.

Together, *Bruton, Richardson*, and *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998) constitute the clearly established federal law governing this claim. In *Bruton*, the Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's confession that incriminates the other co-defendant violates that co-defendant's right to confrontation. 391 U.S. at 135-36. The Supreme Court refined *Bruton*'s application in *Richardson* and *Gray*. In *Richardson*, the Supreme Court held that a co-defendant's confession redacted to eliminate all references to the defendant's existence does not violate the Confrontation Clause when a proper limiting instruction is given. 481 U.S. at 211. In *Gray*, the Supreme Court held that "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" violates the Confrontation Clause. 523 U.S. at 192.

The Court finds that the Superior Court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2). The Superior Court twice incorrectly stated that Cacho's statement was redacted to replace references to Petitioner with the term "the**{2018 U.S. Dist. LEXIS 39}** other man," and thus concluded that Cacho's statement was properly redacted. However, upon review of the transcript, the Court agrees with Petitioner, that Cacho's redacted statement read into the record at trial never uses the term "the other man." (*See* N.T. 03/08/01 at 88-93; Mem. of Law 9, ECF No. 1-3). Accordingly, the Court will review this claim *de novo*. *See Currin v. Cameron*, No. 14-1523, 2017 U.S. Dist. LEXIS 50169, 2017 WL 1211616, at *10 (W.D. Pa. Apr. 3, 2017) (reviewing claim *de novo* when state court's decision was based on an unreasonable determination of the facts); *Cook v. Nogan*, No. 05-3916, 2016 U.S. Dist. LEXIS 162338, 2016 WL 6892080, at *19 (D.N.J. Nov. 22, 2016) (same); *Sileo v. Rozum*, No. 12-3803, 2015 U.S. Dist. LEXIS 158463, 2015 WL 7444820, at *15-16 (E.D. Pa. Nov. 24, 2015), *aff'd sub nom. Sileo v. Superintendent Somerset SCI*, 702 Fed. Appx. 95, 2017 WL 3168962 (3d Cir. 2017).

As a whole, Cacho's redacted statement implicates Cacho, Lane, and a third person - the driver - who instructed Cacho to shoot the victim three times in the back.14 In the redacted statement, Cacho said he was ordered to shoot the victim in exchange for a future favor, but was never asked to name who ordered him to do this. In contrast, he explicitly named "Aisha," and was asked to provide her full

name and address. That the police officer taking the statement did not ask Cacho to name the more culpable individual, but asked for the full name and address of Aisha, a less culpable party, was likely to raise confusion or suspicion in the jurors' minds; surely the officer would have also wanted**{2018 U.S. Dist. LEXIS 40}** the name and address of the person who instructed Cacho to shoot Lewis. *Cf. Washington v. Sec'y Pa. Dep't of Corr.*, 801 F.3d 160, 167 (3d Cir. 2015) (citing *Gray*, 523 U.S. at 192-94); *David v. J.A. Eckard*, No. 14-7123, 2017 U.S. Dist. LEXIS 8950, 2017 WL 3396437, at *9-10 (E.D. Pa. Jan. 19, 2017), *report and recommendation adopted sub. nom. David v. Eckard*, No. 14-7123, 2017 U.S. Dist. LEXIS 123795, 2017 WL 3388921 (E.D. Pa. Aug. 7, 2017) (in redacted statement, co-defendant was not asked to name the shooter, but was asked to provide the full name of a third person; "[t]his approach was sure to raise confusion or suspicion in the jurors' minds"). This is an obvious indication of alteration, and this "obvious deletion may well call the jurors' attention specially to the removed name." *Gray*, 523 U.S. at 193.

Moreover, although the statement does not directly incriminate Petitioner, it did not omit all reference to his existence as in *Richardson*, and it could implicate him when linked with other evidence presented at trial, that Petitioner drove a red Nissan, and picked up Cacho. (*See* N.T. 03/07/01 at 60, 173-74, 187); *contra Richardson*, 481 U.S. at 203 (statement redacted to eliminate all reference to defendant's existence). Because the jury could use this evidence to infer that Petitioner was the third person implicated in the statement, this statement was powerful incriminating evidence against Petitioner. *See Gray*, 523 U.S. at 195-96.

The Court finds that despite the redactions and the court's limiting instructions, there was a risk that the jury considered**{2018 U.S. Dist. LEXIS 41}** Cacho's redacted statement against Petitioner, in violation of *Bruton* and its progeny. *Cf. Colon v. Rozum*, 649 F. App'x 259, 263 (3d. Cir. 2016) (not precedential) (*Bruton* violation where it was easy for the jury to infer that petitioner was the "other person" referred to in the statement and statement "gave the jury new, incriminating information" that was critical to the prosecution's conspiracy case); *Hawkins v. Superintendent of SCI-Huntingdon*, No. 13-42, 2016 U.S. Dist. LEXIS 87554, 2016 WL 4197200, at *6 (W.D. Pa. June 30, 2016), *report and recommendation adopted*, No. 13-42, 2016 U.S. Dist. LEXIS 103871, 2016 WL 4179445 (W.D. Pa. Aug. 8, 2016) (*Bruton* violation where statement identified petitioner's car and residence, which were directly linked to petitioner through other witnesses' testimony).15

Nonetheless, Petitioner is not entitled to relief, because this error is harmless. Habeas petitioners are not entitled to relief unless they can establish that trial error "resulted in 'actual prejudice.'" *Davis v. Ayala*, _ U.S. _, 135 S. Ct. 2187, 2197, 192 L. Ed. 2d 323 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). Relief is appropriate only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 2197-98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)) (emphasis added). This requires more than a "reasonable possibility" that the error was harmful. *Id.* at 2198 (citing *Brecht*, 507 U.S. at 637).

I find that the evidence against Petitioner, other than the insufficiently redacted Cacho statement, was strong enough that**{2018 U.S. Dist. LEXIS 42}** the erroneous admission of the Cacho statement did not cause actual prejudice. As discussed above, testimony from Lane, Sasportas, and Wood established that Petitioner: had motive; drove the shooter to the scene of the crime; confronted the victim about speaking to his girlfriend earlier that day; distracted the victim just before the shooting; was present when the victim was shot; ran in the same direction as the shooter after the shooting; and drove the getaway car. *See supra* Part III.A. Given this strong evidence that Petitioner conspired with Cacho to murder Lewis, this Court does not have "grave doubt" about whether the *Bruton* violation had a substantial and injurious effect or influence in determining the jury's verdict. *Cf. Johnson v. Lamas*, 850 F.3d 119, 137 (3d Cir. 2017) (*Bruton* error harmless when two eyewitnesses identified

defendant); *Bond v. Beard*, 539 F.3d 256, 276 (3d Cir. 2008) (*Bruton* error harmless where two eyewitness identified defendant as the shooter and defendant confessed but argued confession was coerced). The Court respectfully recommends that the *Bruton* claim be denied.

2. Ineffective Assistance of Appellate Counsel

In PCRA proceedings, Petitioner alleged that "[a]ppellate counsel was ineffective for [failing] to preserve and argue the *Bruton* claim on**{2018 U.S. Dist. LEXIS 43}** direct appeal," and appellate counsel's failure to specify what portions of Mr. Cacho's statement were improperly redacted prevented the Superior Court from considering his meritorious *Bruton* claim. (Supp. to Pet'r's Second Am. Pet. Under Post Conviction Relief Act ¶¶ 5, 8, SCR No. D44). The PCRA Court found Petitioner's *Bruton* argument was previously litigated. *Commonwealth v. Davis*, No. CP-51-CR-1103861-1999, slip op. at 13 (Phila. Cnty. Com. Pl. Dec. 19, 2014) [hereinafter "PCRA 1925(a) Op."]. It also found Petitioner's reliance on a Third Circuit case, *Vazquez v. Wilson*, 550 F.3d 270 (3d Cir. 2008), was misplaced because *Vasquez* is not binding on the PCRA Court, *Vasquez* was decided a year after Petitioner's direct appeal concluded, and counsel cannot be ineffective "for failing to predict future developments or changes in the law." *Id.*

On PCRA appeal, the Superior Court found this claim failed because "among other reasons," it already found the underlying *Bruton* claim lacked arguable merit. *Davis*, 2015 Pa. Super. Unpub. LEXIS 3407 at *18. Thus, the Superior Court concluded that Petitioner failed to prove ineffectiveness.16 *Id.* at 15.

A claim for ineffective assistance of counsel is governed by *Strickland v. Washington*. In *Strickland*, the United States Supreme Court established the following**{2018 U.S. Dist. LEXIS 44}** two-pronged test to obtain habeas relief on the basis of ineffectiveness:

> First, the defendant 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 defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.466 U.S. 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, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (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**{2018 U.S. Dist. LEXIS 45}** 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. This standard applies to claims of appellate counsel ineffectiveness. *See Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000) (petitioner must show appellate counsel's conduct was objectively unreasonable and that, but for appellate counsel's unreasonable conduct, petitioner would have prevailed on his appeal).

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 ineffectiveness test. *See,e.g., Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 14 (citing *Commonwealth v. Collins*, 585 Pa. 45, 888 A.2d 564, 573 (Pa. 2005); *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001)). This test requires the petitioner to establish: (1) the underlying claim has arguable merit; (2) counsel lacked a reasonable basis for his**{2018 U.S. Dist. LEXIS 46}** or her conduct; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. *Collins*, 888 A.2d at 573. The Third Circuit has found Pennsylvania's ineffectiveness 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 facts in light of the evidence.

This Court concludes the Superior Court's adjudication of this claim was based on an unreasonable determination of the facts. As discussed above, the Superior Court's incorrect finding that Cacho's statement was redacted to use the term "the other man," undergirded its conclusion that Petitioner's *Bruton* claim lacked merit. *See supra* Part III.C.1. This, in turn, resulted in the Superior Court's determination that appellate counsel was not ineffective. Thus, the Court will review this claim *de novo*. *Currin*, 2017 U.S. Dist. LEXIS 50169, 2017 WL 1211616, at *10; *Cook*, 2016 U.S. Dist. LEXIS 162338, 2016 WL 6892080, at *19; *Sileo*, 2015 U.S. Dist. LEXIS 158463, 2015 WL 7444820, at *15-16.

Petitioner alleges that if direct appeal counsel specified what portions of Cacho's statement were improperly redacted,**{2018 U.S. Dist. LEXIS 47}** he "would have prevailed on direct appeal." (Mem. of Law 10, ECF No. 1-3). Had appellate counsel done this, it is more likely that the Superior Court would have considered the correct redacted statement, rather than assessing a statement that was not presented at trial. Even so, Petitioner has not established a reasonable probability that he would have prevailed on direct appeal. On direct appeal, the trial court had the correct redacted statement before it, and still concluded the *Bruton* claim lacked merit. *See Commonwealth v. Davis*, No. 9911-0386, slip op. at 8-9 (Phila. Cnty. Com. Pl. Aug. 10, 2005). Petitioner presents no argument that the Superior Court would have disagreed with the trial court's analysis if appellate counsel indicated what portions of the statement were improperly redacted. Petitioner has not established that, but for appellate counsel's ineffectiveness, he would have prevailed on direct appeal.17

The Court respectfully recommends denying relief on this claim.

3. Ineffective Assistance of Counsel for Failing to File a Motion to Sever and Trial Court Error in Refusing to Sever the Joint Trial

Petitioner argues that trial counsel was ineffective for failing to file a motion for severance. (Statement**{2018 U.S. Dist. LEXIS 48}** of Claims 2, ECF No. 1-9). This claim is unexhausted and procedurally defaulted because it was not fairly presented to the Superior Court. *See supra* n.11. This Court cannot review the merits of Petitioner's claim unless he establishes cause and prejudice or a fundamental miscarriage of justice.18 Petitioner has not met this burden.

Petitioner alleges cause and prejudice, arguing that PCRA counsel neglected to raise trial counsel's ineffectiveness. (Statement of Claims 2, ECF No. 1-9). However, Petitioner has not articulated sufficient facts to support his underlying ineffectiveness claim. *See Mayle v. Felix*, 545 U.S. 644, 655, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) (habeas petition must "state the facts supporting each ground") (citation and quotation marks omitted); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991), *cert denied*, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991); *United States v. Minerd*,

No. 06-212, 2012 U.S. Dist. LEXIS 43631, 2012 WL 1069946, at *3 (W.D. Pa. Mar. 29, 2012) (ineffectiveness claim "must identify the specific error(s) counsel has made"). In his pleadings, Petitioner gives conflicting accounts of what happened at trial: he asserts that counsel failed to file a severance motion altogether, that counsel filed a severance motion that was denied, and that counsel filed a severance motion that was voluntarily withdrawn. (Statement of Claims 2, ECF No. 1-9; Statement of Facts 9, ECF No. 1-9; Mem. of Law 3-4, ECF No. 1-3). Petitioner**{2018 U.S. Dist. LEXIS 49}** cites the Notes of Testimony from February 26, 2001 to support his contradictory assertions, but the Notes of Testimony provide no clarification. In the absence of a properly-developed claim, supported with facts, Petitioner has not established that this defaulted ineffectiveness claim has merit. *See Torres-Rivera v. Bickell*, No. 13-3292, 2014 U.S. Dist. LEXIS 159669, 2014 WL 5843616, at *6 (E.D. Pa. Nov. 10, 2014) ("[V]ague allegations have no potential merit, [so] petitioner has not met the threshold showing *Martinez* required[.]"). Thus, Petitioner is not entitled to relief under *Martinez*' narrow exception.

The Court respectfully recommends that Petitioner's severance claims be dismissed as procedurally defaulted.

D. Claim Four: Cumulative Prejudice from Counsel's Failure to Object to Improper Comments

In Claim Four, Petitioner alleges "cumulative prejudice" from trial and appellate counsel's failure to challenge the prosecutor's "improper comments" which "effectively undid" the redactions in Cacho's statement. (Statement of Claims 3, ECF No. 1-9; Mem. of Law 16, ECF No. 1-3). The Commonwealth responds that this claim is defaulted and meritless. (Resp. to Pet. 28, ECF No. 21). The Court agrees this claim is procedurally defaulted.19

On PCRA appeal,**{2018 U.S. Dist. LEXIS 50}** and citing Rule 2116, the Superior Court found Petitioner's cumulative prejudice claim was waived because "[Petitioner] failed to include this claim in his statement of questions involved." *Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 15-16 n.10 (citing Pa. R.A.P. 2116). Additionally, the Superior Court opined that the cumulative prejudice claim lacked merit because "[n]one of [Petitioner's] underlying claims have merit." *Id.*

The Superior Court's reliance on Rule 2116 precludes review of this claim because Rule 2116 is an independent and adequate state procedural rule. The Rule states:

> The statements of the questions involved must state concisely the issues to be resolved, expressed in terms and circumstances of the case but without unnecessary detail. The statement will be deemed to include every subsidiary question fairly comprised therein. No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby. . . .Pa. R.A.P. 2116(a). Courts in this circuit have found Rule 2116 to be an independent and adequate state court ground precluding federal review.20 *See, e.g., Vega v. State Corr. Inst. at Forrest*, No. 14-2880, 2016 U.S. Dist. LEXIS 93212, 2016 WL 4467924, at *4 (E.D. Pa. July 14, 2016), *report and recommendation adopted*, No. 14-2880, 2016 U.S. Dist. LEXIS 111266, 2016 WL 4430791 (E.D. Pa. Aug. 22, 2016); *Tyson v. Beard*, No. 06-290, 2013 U.S. Dist. LEXIS 122368, 2013 WL 4547780, at *17-18 (E.D. Pa. Aug. 27, 2013); *Norton v. Coleman*, No. 09-1751, 2009 U.S. Dist. LEXIS 123983, 2009 WL 5652570, at *5 (E.D. Pa. Nov. 25, 2009), *report and recommendation adopted*, No. 09-1751, 2010 U.S. Dist. LEXIS 5210, 2010 WL 290517 (E.D. Pa. Jan. 2010). This Court also finds the Superior Court's denial of this claim on procedural grounds**{2018 U.S. Dist. LEXIS 51}** was based on an independent and adequate state rule that existed at the time of Petitioner's default.

The Court may not review the merits of this defaulted claim unless Petitioner has established cause

and prejudice, or a fundamental miscarriage of justice. Petitioner raises cause and prejudice. He argues that PCRA counsel failed to "adequately develop[ ] . . . [this claim] during the initial-review PCRA proceeding" and that PCRA appellate counsel waived this claim by failing to include it in the Statement of Questions Involved of his appellate brief filed in the Superior Court. (Statement of Claims 3, ECF No. 1-9; Mem. of Law 22-23, ECF No. 1-3). These arguments lack merit.

Petitioner has not established cause to excuse the default of Claim Four. As discussed above, Petitioner's claim was defaulted on PCRA appeal because it was not included in the Statement of Questions Involved of his appellate brief. Petitioner does not explain how PCRA counsel's alleged failure to develop Claim Four during initial review PCRA proceedings caused the default of this claim on PCRA appeal.21 *See Keys v. Attorney Gen.*, No. 12-2618, 2013 U.S. Dist. LEXIS 186979, 2013 WL 8207554, at *17 (E.D. Pa. Feb. 15, 2013), *report and recommendation adopted sub nom. Keys v. Attorney Gen. of Pennsylvania*, No. 12-2618, 2014 U.S. Dist. LEXIS 48133, 2014 WL 1383313 (E.D. Pa. Apr. 7, 2014) (habeas petitioner failed**{2018 U.S. Dist. LEXIS 52}** to establish cause under *Martinez* when he provided no discussion or analysis concerning PCRA counsel's ineffectiveness). Moreover, PCRA appellate counsel's failure to include this claim in the Statement of Questions Involved cannot establish cause; *Martinez* does not apply to ineffective assistance of counsel in PCRA appellate proceedings. *See Norris v. Brooks*, 794 F.3d 401, 405 (3d Cir. 2015), *cert. denied*, __ U.S. , 136 S. Ct. 1227, 194 L. Ed. 2d 225 (2016) (*Martinez* only applies "to attorney error causing procedural default during initial-review collateral proceedings, not collateral appeals."). Thus, Petitioner's allegation of PCRA appellate counsel's ineffectiveness cannot overcome the default of this claim.

The Court respectfully recommends this claim be dismissed as procedurally defaulted.22

E. Claims Five and Six: Ineffective Assistance for Failure to Investigate and Interview a Witness and Failure to Challenge Deletions in Testimony

In Claim Five, Petitioner alleges counsel was ineffective for "failing to investigate and interview Aisha Lane."23 (Statement of Claims 3, ECF No. 1-9; *see also* Mem. of Law 24, ECF No. 1-3). In Claim Six, Petitioner alleges counsel was ineffective for failing to challenge that the prosecutor deleted portions of Lane's preliminary hearing**{2018 U.S. Dist. LEXIS 53}** testimony read into the record at trial.24 (Statement of Claims 4, ECF No. 1-9). The Commonwealth responds that these claims are procedurally defaulted. (Resp. to Pet. 20, 24-25, ECF No. 21). The Court finds these claims are procedurally defaulted pursuant to the independent and adequate state grounds doctrine.

The PCRA Court explained that, to establish counsel's ineffectiveness for failing to investigate or interview a witness, a petitioner must prove: (1) the witness existed; (2) the witness was available to testify; (3) counsel knew, or should have known, of the witness' existence; (4) the witness was willing to testify; and (5) the absence of the testimony was so prejudicial as to have denied the defendant a fair trial. PCRA 1925(a) Op. at 6. A court will not find counsel ineffective for failing to call a witness if the defendant fails to provide an affidavit from the purported witness indicating availability and willingness to cooperate. *Id.* Here, the PCRA Court found counsel was not ineffective for failing to investigate Lane's availability because defense counsel's mere failure to locate a Commonwealth witness, who could not be found by the Commonwealth,**{2018 U.S. Dist. LEXIS 54}** was not unreasonable. *Id.* at 10. Additionally, the PCRA Court found counsel was not ineffective for failing to call Lane as a witness because Petitioner did not provide an affidavit from Lane, and the sworn statement from the private investigator who interviewed Lane did not indicate that Lane was available and willing to cooperate with the defense. *Id.* at 6-7. Moreover, Petitioner did not establish that he was harmed by counsel's alleged failures; Petitioner had a full and fair opportunity to cross examine Lane at the preliminary hearing. *Id.* at 7, 10.

On PCRA appeal, Petitioner argued counsel was ineffective for failing to investigate Lane's availability, and that he suffered prejudice because he was unable confront Lane as a result. *Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 5. The Superior Court found this claim waived because Petitioner failed to provide evidence of record to support his "mere bald assertions." 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 7. For instance, Petitioner argued the prosecutor deleted portions of Lane's preliminary hearing testimony so the portions read to the jury did not accurately reflect her testimony, but he did not include the preliminary hearing transcript, or the statements at issue, in the certified record. 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 7, 7 n.6. The Superior Court explained:**{2018 U.S. Dist. LEXIS 55}**

> This Court cannot meaningfully review claims raised on appeal unless we are provided with a full and complete certified record. This requirement is not a mere "technicality" nor is this a question of whether we are empowered to complain *sua sponte* of *lacunae* in the record. In the absence of an adequate certified record, there is no support for an appellant's arguments and, thus, there is no basis on which relief could be granted.2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 7-8 (quoting *Commonwealth v. Preston*, 2006 PA Super 170, 904 A.2d 1, 7 (Pa. Super. 2006), *appeal denied*, 916 A.2d 632, 591 Pa. 663 (Pa. 2007)). Likewise, Petitioner "provide[d] no reference in the record for his claim that he timely informed his trial counsel of the whereabouts of Ms. Lane." 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 8. The Superior Court explained it is not its role "to develop an argument for a litigant, or to scour the record to find evidence to support an argument." *Id.* (citing *J.J. DeLuca Co., Inc. v. Toll Naval Associates*, 2012 PA Super 222, 56 A.3d 402, 411 (Pa. Super. 2012)). Thus, it found Petitioner's claim waived.25 *Id.*

The Superior Court's finding of waiver was based on two independent and adequate state procedural rules. The first requires a Pennsylvania appellant to produce transcripts and necessary documents in the certified record. *See Preston*, 904 A.2d at 7 (citing Pa. R.A.P. 1921). The second requires an appellant to cite competent record evidence to support his claim. *See J.J. Deluca Co.*, 56 A.3d at 411 (citing Pa. R.A.P. 2119(c)). Courts in this district have**{2018 U.S. Dist. LEXIS 56}** found these rules to be independent and adequate. *See, e.g., Pugh v. Overmyer*, No. 13-364, 2017 U.S. Dist. LEXIS 137634 2017 WL 3701824, at *10 (M.D. Pa. Aug. 28, 2017) (Rule 2119 is independent and adequate); *Alston v. Gilmore*, No. 14-6439, 2016 U.S. Dist. LEXIS 110170, 2016 WL 7493979, at *11 (E.D. Pa. Aug. 16, 2016), *report and recommendation adopted*, No. 14-6439, 2016 U.S. Dist. LEXIS 180193, 2016 WL 7491731 (E.D. Pa. Dec. 30, 2016) (same); *Gordon v. Sommers*, No. 14-7071, 2015 U.S. Dist. LEXIS 163073, 2015 WL 11110588, at *9 (E.D. Pa. Dec. 3, 2015), *report and recommendation adopted*, No. 14-7071, 2016 U.S. Dist. LEXIS 85043 , 2016 WL 3551479 (E.D. Pa. June 30, 2016) (rule that petitioner provide necessary documents in certified record is independent and adequate); *Tuten v. Tennis*, No. 06-1872, 2007 U.S. Dist. LEXIS 56162, 2007 WL 2221419, at *3 (E.D. Pa. July 31, 2007), *report and recommendation adopted*, No. 06-1872, 2008 U.S. Dist. LEXIS 62386, 2008 WL 3832520 (E.D. Pa. Aug. 14, 2008) (rule that petitioner provide necessary transcripts and transmit a complete record to Superior Court, pursuant to Pennsylvania Rules of Appellate Procedure 1911(a) and 1921, is independent and adequate); *Bowen v. Blaine*, 243 F. Supp. 2d 296, 318-19 (E.D. Pa. 2003). This Court similarly finds these rules to be independent and adequate; thus, these claims are procedurally defaulted.

Because Petitioner's claims are procedurally defaulted, this Court may not review their merits unless Petitioner establishes cause and prejudice, or a fundamental miscarriage of justice. He alleges cause and prejudice, asserting PCRA counsel was ineffective for failing to: (1) file objections to the PCRA Court's Notice of Intent to Dismiss; and (2) argue Claim Five involved a conflict of interest.26 (Mem. of Law 24-25, ECF No. 1-4; Reply 21, ECF No. 22). He also challenges the Superior Court's waiver finding, asserting the decision was based on an "unreasonable**{2018 U.S. Dist. LEXIS 57}**

determination of the facts."27 (Statement of Claims 4, ECF No. 1-6). As discussed in more detail below, Petitioner cannot establish cause to excuse his default because his allegations lack merit. Moreover, his challenge to the state court's waiver finding lacks merit.

First, Petitioner's bare allegation that PCRA counsel was ineffective in failing to file objections to the PCRA Court's Notice of Intent to Dismiss is too insufficiently developed to demonstrate cause.28 Petitioner does not specify what PCRA counsel should have asserted in said objections, or how PCRA counsel was ineffective for failing to file objections. *See Zettlemoyer*, 923 F.2d at 298; *Keys*, 2013 U.S. Dist. LEXIS 186979, 2013 WL 8207554, at *17 (E.D. Pa. Feb. 15, 2013).

Second, Petitioner's allegation that PCRA counsel was ineffective for failing to assert trial counsel's conflict of interest cannot establish cause, because Petitioner's underlying trial counsel ineffectiveness claim is not substantial. To prevail on a conflict of interest claim, a petitioner must show an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 138 (3d Cir. 1984). To demonstrate an actual conflict of interest, a petitioner must show: (1) some viable, alternative defense strategy might have**{2018 U.S. Dist. LEXIS 58}** been pursued; and (2) the alternative tactic was not employed due to the attorney's conflicting loyalties. *Tillery v. Horn*, 142 F. App'x 66, 70 (3d Cir. 2005); *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988).

Petitioner asserts that trial counsel operated under a conflict of interest because trial counsel used to work in the District Attorney's Office. He argues this conflict caused trial counsel to accept the Commonwealth's representations that Lane was unavailable, instead of informing the trial court that Petitioner "gave him credible information concerning [Lane's] current whereabouts." (Mem. of Law 3, 9, ECF No. 1-4) (citing N.T. 03/05/01 at 132). Petitioner's argument fails. First, he has not shown that some viable, alternative defense strategy might have been pursued. The record undermines Petitioner's claim that he actually informed counsel of Lane's whereabouts; Petitioner stated on the record at trial that there was nothing further he wanted counsel to do in his defense.29 (N.T. 03/09/01 at 30-31). Second, Petitioner has not established that counsel had "conflicting loyalties" simply because he used to work in the District Attorney's Office. *See, e.g., United States v. Villarreal*, 324 F.3d 319, 327-28 (5th Cir. 2003) (attorney's prior employment in the district attorney's office at the time of petitioner's prior conviction did not demonstrate**{2018 U.S. Dist. LEXIS 59}** a conflict of interest); *Schmanke v. United States*, 25 F.3d 1053 (7th Cir. 1994) (counsel's prior employment as an Assistant United States Attorney during the investigation into petitioner's criminal conduct "does not suggest the existence of a conflict of interest"). Thus, Petitioner has not demonstrated that an actual conflict of interest adversely affected trial counsel's performance. Because Petitioner's underlying ineffectiveness claim is not substantial, Petitioner may not avail himself of *Martinez*' narrow exception. *Glenn v. Wynder*, 743 F.3d 402, 411 (3d Cir. 2014) (default not excused under *Martinez* because underlying ineffectiveness claims lacked merit).

Finally, citing 28 U.S.C. § 2254(d)(2), Petitioner argues the Superior Court's waiver finding was based on an unreasonable determination of the facts because certain documents were included in the certified record transmitted to the Superior Court. (Statement of Claims 4, ECF No. 1-9; Mem. of Law 27-28, ECF No. 1-4). By its own terms, Section 2254(d)(2) applies only if the state court adjudicated a claim on the merits. *See* 28 U.S.C. § 2254(d)(2). Thus, Petitioner's argument that the Superior Court's waiver finding involved an unreasonable determination of facts fails.

In light of the foregoing, Petitioner may not avail himself of *Martinez*' narrow exception, and Petitioner's**{2018 U.S. Dist. LEXIS 60}** procedural default cannot be excused. The Court respectfully recommends that Claims Five and Six be dismissed as procedurally defaulted.

F. Claim Seven: *Brady* Violation, Ineffective Assistance of Counsel for Failure to Challenge

Prosecutor's False Statement, and a Confrontation Violation

In Claim Seven, Petitioner alleges that counsel was ineffective for failing to challenge the prosecutor's statement that the jury "know[s] Aisha was killed," suggests the prosecutor concealed information regarding an "unverified proffer" and Lane's availability, and asserts his right to confront Lane was violated. (Statement of Claims 4, ECF No. 1-9). The Commonwealth responds that the state court reasonably found Petitioner did not suffer prejudice from counsel's failure to object to the prosecutor's comment. (Resp. to Pet. 24, ECF No. 21). The Court finds Petitioner is not entitled to relief on these claims.

1. *Brady* Violation and Ineffective Assistance of Counsel

Petitioner argues the prosecutor's "material and false" statement that Lane was killed revealed "concealment of prejudicial misconduct in not producing Ms. Lane [at trial]," and that this "concealment of prejudicial misconduct" violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and**{2018 U.S. Dist. LEXIS 61}** its progeny. (Statement of Claims 4, ECF No. 1-9; Mem. of Law 16-18, ECF No. 1-4). He also argues counsel was ineffective for failing to object to the prosecutor's statement that "Aisha was killed." (Mem. of Law 16-18, ECF No. 1-4). These claims lack merit.30

A petitioner alleging a *Brady* violation must establish that: (1) evidence was suppressed by the prosecution, either willfully or inadvertently; (2) the evidence was favorable to the defense, because it was either exculpatory or impeaching; and (3) the evidence was material, *i.e.*, the omission was prejudicial. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Brady*, 373 U.S. at 87. Petitioner argues the prosecutor's statement reveals misconduct in failing to produce Lane for trial, and the concealment of this supposed misconduct constitutes a *Brady* violation. Though Petitioner cites to *Brady*, we disagree that this potentially constitutes a *Brady* violation. For the prosecutor to have violated *Brady*, Petitioner would have to establish that: (1) the prosecutor affirmatively misrepresented that Lane could not be located in order to suppress evidence that would be introduced through her live testimony; (2) the prosecutor did, in fact, suppress such evidence; (3) this evidence was**{2018 U.S. Dist. LEXIS 62}** favorable to the defense; and (4) the evidence was material. However, Petitioner focuses his claim on the prosecutor's "false" statement that Lane was killed, arguing this statement somehow reveals misconduct in failing to produce Lane for trial. Rather than arguing the prosecutor suppressed evidence, Petitioner argues the *Brady* violation occurred when the prosecutor suppressed this alleged misconduct. Notwithstanding this dubious argument and questionable connection to *Brady*, the Court will review Petitioner's *Brady* claim because it was examined by, and exhausted in, state court.

In PCRA Court, Petitioner argued the prosecutor presented "material and false information" that Lane was unavailable because she was deceased, thus causing the trial court to allow Lane's preliminary hearing testimony to be read to the jury, and prejudicing Petitioner pursuant to *Brady*. PCRA 1925(a) Op. at 11, 12. The PCRA Court noted that despite Petitioner's assertion to the contrary, "The only mention of Ms. Lane being deceased occurred while the jury was deliberating[.]" *Id.* at 12. The PCRA Court found "no indication whatsoever" of suppression - a requirement under *Brady* - and rejected the claim. *Id.* at 11, 12.

On collateral**{2018 U.S. Dist. LEXIS 63}** appeal, Petitioner argued that trial counsel was ineffective for failing to challenge the prosecutor's statement that Lane was unavailable "as prejudicial under *Brady*." *Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407 [slip op.] at 9. The Superior Court found no evidence that the Commonwealth suppressed evidence, and rejected Petitioner's ineffectiveness claim. 2015 Pa. Super. Unpub. LEXIS 3407 [slip op.] at 11, 12. The prosecutor's remark that "[t]hey [the jury] know Aisha was killed" may have been incorrect in hindsight, but this

statement "occurred in an informal sidebar discussion, during deliberations, about a jury inquiry." 2015 Pa. Super. Unpub. LEXIS 3407 [slip op.] at 11. The jury never heard the statement, and Petitioner failed to establish how he suffered prejudice from a statement the jury never heard. 2015 Pa. Super. Unpub. LEXIS 3407 [slip op.] at 11-12. Thus, counsel was not ineffective for failing to challenge the statement. 2015 Pa. Super. Unpub. LEXIS 3407 [slip op.] at 12. The Superior Court concluded that Petitioner failed to show a *Brady* violation, and failed to prove ineffectiveness. 2015 Pa. Super. Unpub. LEXIS 3407 [slip op.] at 12-13.

The Superior Court's analysis of Petitioner's *Brady* claim was neither contrary to, nor an unreasonable application of, *Brady* and its progeny, nor did it involve an unreasonable determination of the facts. Without evidence of suppression, there can be no *Brady* violation. *See Strickler*, 527 U.S. at 281-82 (a *Brady* violation has three components: (1)**{2018 U.S. Dist. LEXIS 64}** the evidence was favorable to the defense; (2) the evidence was suppressed by the State; and (3) prejudice ensued); *Slutzker v. Johnson*, 393 F.3d 373, 386 (3d Cir. 2004) (a *Brady* claim requires, *inter alia*, that the government actually suppressed evidence); *Strube v. United States*, 206 F. Supp. 2d 677, 688 (E.D. Pa. 2002) ("[T]he government did not violate the dictates of *Brady* by failing to turn over something that did not exist.").31

The Superior Court also reasonably rejected Petitioner's ineffective assistance claim. The Superior Court's finding that the jury never heard the prosecutor's statement is presumed correct. *See* 28 U.S.C. § 2254(e)(1). Thus, its conclusion that Petitioner did not establish prejudice was reasonable. The prosecutor's statement that "Aisha was killed" was made outside of the jury's presence, so Petitioner has not established a reasonable probability that, but for counsel's failure to challenge this statement, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. Petitioner did not establish prejudice, and the Superior Court reasonably rejected his claim. *See id.* at 693, 697.

The Court respectfully recommends these claims be denied as meritless.

2. Confrontation Claim

Petitioner also alleges that he was deprived of his right to cross examine Lane. (*See* Mem. of Law 12-16, ECF No. 1-4). The Court**{2018 U.S. Dist. LEXIS 65}** need not determine whether this claim was exhausted because it lacks merit. *See* 28 U.S.C. § 2254(b)(2); *Roman v. DiGuglielmo*, 675 F.3d 204, 209 (3d Cir. 2012).

The Confrontation Clause prevents the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). As discussed, Lane was unavailable to testify. *See supra* Part III.E. Petitioner had a prior opportunity for cross examination at the preliminary hearing. (*See* N.T. 10/27/99 at 36-52). "[T]he Supreme Court in *Crawford* accepted the notion that prior testimony subjected to cross-examination at a preliminary hearing 'provides substantial compliance with the purposes behind the confrontation requirement[.]'" *Kelly v. Wenerowicz*, No. 13-4317, 2015 U.S. Dist. LEXIS 170259, 2015 WL 11618244, at *11 (E.D. Pa. Dec. 18, 2015), *report and recommendation adopted*, No. 13-4317, 2016 U.S. Dist. LEXIS 108162, 2016 WL 4386083 (E.D. Pa. Aug. 15, 2016) (citations omitted); *see also Saget v. Bickell*, No. 12-2047, 2014 U.S. Dist. LEXIS 142348, 2014 WL 4992572, at *18 (E.D. Pa. Oct. 6, 2014).32 Petitioner's right to confrontation was not violated by the admission of this testimony.

The Court respectfully recommends denying relief on this claim.

IV. CONCLUSION

I respectfully recommend that Petitioner's petition for writ of habeas corpus be denied without an evidentiary hearing and with no certificate of appealability issued.

Therefore, I make the following:

RECOMMENDATION

AND NOW this 21st day of February, 2018, it**{2018 U.S. Dist. LEXIS 66}** is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without an evidentiary hearing and with no certificate of appealability issued.

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:

/s/ Lynne A. Sitarski

LYNNE A. SITARSKI

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

Respondents submitted the relevant transcripts and portions of the state court record ("SCR") in hard-copy format. Documents contained in the SCR will be cited to as "SCR No. __." This Court has also consulted the criminal docket sheet for *Commonwealth v. Davis*, No. CP-51-CR-1103861-1999 (Phila. Cnty. Com. Pl.), *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-1103861-1999 (last visited February 21, 2018) [hereinafter "Crim. Docket"], and the appellate docket sheet for *Commonwealth v. Davis*, No. 2050 EDA 2014 (Pa. Super.), *available at* https://ujsportal.pacourts.us/DocketSheets/AppellateCourtReport.ashx?docketNumber=2050+EDA+2014 (last visited February 21, 2018) [hereinafter "Appellate Docket"].

2

Pennsylvania and federal courts employ the prisoner mailbox rule, pursuant to which the *pro se* petition is deemed filed when it is given to prison officials for mailing. *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); *Commonwealth v. Castro*, 2001 PA Super 17, 766 A.2d 1283, 1287 (Pa. Super. 2001). In this case, Petitioner certified that he gave his habeas petition to prison officials on July 10, 2016, and it will be deemed filed on that date. (Hab. Pet. 16, ECF No. 1).

3

Third degree murder is defined as "[a]ll other kinds of murder" that are not murder in the first or second degree. 18 Pa. Cons. Stat. § 2502(c). Malice - defined as "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty" or "consciously disregard[ing] an unjustified and extremely high risk that [one's] actions might cause death or serious bodily harm" - is an element of third degree murder. *Commonwealth v. Scales*, 437 Pa. Super. 14, 648 A.2d 1205, 1206-07 (Pa. 1994) (citing 18 Pa. Cons. Stat. §§ 2501, 2502(c)); *Commonwealth v. Devine*, 2011 PA Super 163, 26 A.3d 1139, 1146 (Pa. Super. 2011).

4

More specifically, Petitioner argues the first four findings were based on: (1) Cacho's redacted statement, which could not be used against Petitioner and does not indicate who drove Cacho to or from the scene, and (2) Pamela Wood's testimony, which did not identify who drove the getaway car. (Mem. of Law 9-10, ECF No. 1-2).
5

The Superior Court's statement that Petitioner drove Cacho from the crime scene was based on a reasonable inference drawn from the facts established at trial. *See United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989). Sasportas' and Lane's testimony established that Petitioner and Cacho were the two men that Wood saw run into the getaway car, and Lane testified that Petitioner drove Cacho to the scene. It was reasonable to infer from this that Petitioner also drove Cacho from the scene.
6

In any event, the remainder of the evidence was sufficient to support Petitioner's conviction. *See Rodriguez v. Rozum*, 535 F. App'x 125, 130-31 (3d Cir. 2013) (not precedential) ("[W]e focus on whether the state court's ultimate decision-affirmation of the conviction-was supported by sufficient record evidence.").
7

Petitioner also avers the trial court's instruction that flight tends to show consciousness of guilt was improper. (Mem. of Law 15, ECF No. 1-2). He never argued this before the state courts. *See Commonwealth v. Davis*, Br. for Appellant, 2006 WL 4757206, at *26-27 (Pa. Super) [hereinafter "Dir. App. Br."]. This aspect of the claim is unexhausted and procedurally defaulted. *See Landano v. Rafferty*, 897 F.2d 661, 669-70 (3d Cir. 1990); *see infra* n.11.
8

The Commonwealth argues that Petitioner's claim is defaulted because he "never presented a due process issue to the state courts." (Resp. to Pet. 19, ECF No. 21). This Court disagrees. Petitioner fairly presented this federal due process claim in state court. He asserted that the trial court's refusal to give a proper "mere presence" charge violated due process, citing the Fourteenth Amendment and *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), and cited the correct federal standard for evaluating ambiguous jury instructions. *See* Dir. App. Br. at *13, 26-28. *See Allison v. Superintendent Waymart SCI*, No. 15-3240, 703 Fed. Appx. 91, 2017 WL 3411855, at *3 (3d Cir. Aug. 9, 2017); *Nara v. Frank*, 488 F.3d 187, 199 (3d Cir. 2007) ("The Pennsylvania courts were not required to search beyond the pleadings and briefs for a federal issue."); *contra Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001). In any event, "[a]n application for a writ of habeas corpus may be denied on the merits," notwithstanding a petitioner's failure to exhaust his remedies. 28 U.S.C. § 2254(b)(2).
9

It is unnecessary to determine whether this claim was "adjudicated on the merits" for purposes of determining whether Section 2254's standard of review applies. Even if Section 2254(d) deference does not apply, Petitioner cannot show he is entitled to relief under "the more favorable" *de novo* review. *Berghuis v. Thompkins*, 560 U.S. 370, 390, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); *see also id.* ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review[.]") (citing 28 U.S.C. § 2254(a)); *Waller v. Varano*, 562 F. App'x 91, 93 (3d Cir. 2014) (not precedential).
10

Petitioner similarly asserts that he suffered prejudice from PCRA counsel's ineffectiveness within

Claims Three, Four, Five, Six, and Seven. (*See, e.g.*, Statement of Claims 2-4, ECF No. 1-9; Mem. of Law 24-26, ECF No. 1-4). To the extent Petitioner attempts to raise substantive ineffective assistance of PCRA counsel claims, 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, 132 S. Ct. 1276, 182 L. Ed. 2d 135 (2012).
11

Pursuant to the PCRA, collateral actions must be filed within one year of the date the conviction at issue becomes final. 42 Pa. Cons. Stat. § 9545(b)(1). Petitioner's conviction became final on June 12, 2008, when the time expired for seeking a writ of certiorari to the United States Supreme Court. 42 Pa. Cons. Stat. § 9545(b)(3). Because Petitioner's conviction became final nearly ten years ago, the PCRA statute of limitations would preclude Petitioner from now presenting this claim in a PCRA petition. 42 Pa. Const. Stat. § 9545(b)(1).
12

To the extent that Petitioner is raising a claim of trial court error, that claim is also unexhausted and procedurally defaulted. His allegation of direct appeal counsel's ineffectiveness cannot establish cause because, as discussed above, that claim is itself procedurally defaulted. *See Edwards v. Carpenter*, 529 U.S. 446, 451-54, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000); *Sandler v. Wynder*, No. 07-3876, 2008 U.S. Dist. LEXIS 45775, 2008 WL 2433094, at *21 n.4 (E.D. Pa. June 21, 2008); *Grasty v. Wolfe*, No. 01-7312, 2003 U.S. Dist. LEXIS 28985, 2003 WL 22247613, at *1 n.1 (E.D. Pa. Aug. 28, 2003).
13

Commonwealth v. Travers held that "such a neutral term as 'the other man' in place of the defendant's name is sufficient to protect the defendant's Sixth Amendment confrontation right." *Davis*, No. 152 EDA 2005, slip op. at 11 (citing 768 A.2d at 851).
14

Cacho stated that Lane was with him when he was picked up, implying that a third person - the driver - was also in the vehicle. (N.T. 03/08/01 at 90:4-7). Although Lane testified that no conversation occurred in the vehicle, Cacho stated that he was instructed to shoot the victim after he was picked up, and that Lane knew about his plan to shoot Lewis because Cacho "talked about it" in the car. (*Id.* at 89:11-12, 90:12-15). If Lane knew about Cacho's plan to shoot Lewis only because Cacho revealed it to her, then Lane could not have issued the instruction to shoot Lewis. Thus, Cacho's statement - which states only three people were in the car and suggests neither Lane nor Cacho issued the instruction - implicates the driver as the person who instructed Cacho to shoot Lewis.
15

The jury considered Cacho's statement during deliberations, as it asked to have Cacho's statement read back. When that request was denied, the jury asked to have a portion of the statement regarding "how [Cacho] was transported to the crime scene, specifically who picked him up and dropped him off" read back. (N.T. 03/13/01 at 8-9). Rather than reading that portion of the statement to the jury, the court crier read them a response: "Mr. Cacho's statement does not indicate who picked him up or dropped him off. It only states 'I was picked up.'" (*Id.* at 10-11).
16

In PCRA proceedings, Petitioner also argued direct appeal counsel waived a *Bruton* claim regarding Lane's testimony. The Superior Court found this claim waived. *See Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 13. Here, Petitioner mistakenly believes his claim regarding Cacho's confession was waived, parroting the Superior Court's language regarding Lane's testimony. (*See* Statement of Claims 3, ECF No. 1-9). Because Petitioner is patently wrong, his argument on this point will not be addressed.

17

Petitioner spends a great deal of time discussing the applicability of *Martinez* to this ineffective assistance of appellate counsel claim. (*See* Mem. of Law 10-15, ECF No. 1-3). This claim is not procedurally defaulted. Regardless, *Martinez* does not apply to procedurally defaulted claims of ineffective assistance of appellate counsel. *Davila*, 137 S. Ct. at 2065.
18

Petitioner also alleges that the trial court erred "by refusing to sever the joint trial." (Mem. of Law 7, ECF No. 1-3). This claim is also unexhausted and procedurally defaulted. *See supra* n.11. Petitioner does not acknowledge its default, nor allege cause and prejudice or a fundamental miscarriage of justice.
19

To the extent this claim is not one of cumulative prejudice, but raises ineffective assistance of trial or appellate counsel or prosecutorial misconduct, those claims are unexhausted and procedurally defaulted. *See supra* n.11. Petitioner's appellate brief did not argue that trial or appellate counsel were ineffective for failing to challenge the prosecutor's comments. (*See* PCRA App. Br. at 40-58); *see also Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 15 ("[Petitioner's] 'sixty-page brief . . . has little to do with either trial or appellate counsel's performance.'"). Additionally, his appellate brief discussed the prosecutor's comments in *Bruton* terms, not as a prosecutorial misconduct claim. (*See* PCRA App. Br. at *49); *Brown v. Superintendent Greene SCI*, 834 F.3d 506, 517 n.7 (3d Cir. 2016), *cert. denied sub nom. Gilmore v. Brown*, 137 S. Ct. 1581, 197 L. Ed. 2d 736 (2017).
20

A prior version of Rule 2116 was found to be inadequate because a page limitation imposed by that earlier version was not regularly followed. *See Nolan*, 363 F. App'x at 871. Neither the page limitation nor the earlier version of Rule 2116 is at issue here. *Cf. Hennis v. Mazurkiewicz*, No. 12-1280, 2012 U.S. Dist. LEXIS 187814, 2012 WL 7679201, at *6 n.13 (E.D. Pa. Nov. 8, 2012), *report and recommendation adopted*, No. 12-1280, 2013 U.S. Dist. LEXIS 32841, 2013 WL 878892 (E.D. Pa. Mar. 11, 2013).
21

Furthermore, on PCRA appeal, the Superior Court specifically explained that it would "give [Petitioner] the benefit of the doubt, and treat all issues raised in this appeal as timely, not waived because of failure to include them in any prior PCRA petition, and not previously litigated." *Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 4 n.3. Thus, PCRA counsel's alleged failure to develop Claim Four during initial review PCRA proceedings did not cause this claim to be defaulted on PCRA appeal.
22

Petitioner argues his claim is not defaulted because the Superior Court considered the merits of this claim in the alternative. (Reply 18, ECF No. 22). Petitioner is incorrect; the Superior Court's alternative holding that the claim lacked merit does not change this Court's conclusion that the claim is defaulted. *See, e.g., Johnson v. Pinchak*, 392 F.3d 551, 558 (3d Cir. 2004) (the fact that the state courts "made reference to the merits of the case as an alternative holding does not prevent [the court] from finding procedural default").
23

He also argues counsel was ineffective for "depriving [Petitioner] of his right to conflict-free representation" by stipulating with the District Attorney's Office that Lane was unavailable. (Statement

of Claims 3, ECF No. 1-9). This claim is unexhausted and procedurally defaulted. *See generally* PCRA App. Br.; *supra* n.11.
24

The Superior Court addressed these issues together, and this Court does the same. To the extent Petitioner intended to assert Claim Six as a "cumulative prejudice" claim, it is defaulted under Rule 2116, an independent and adequate state rule. *See supra* Part III.D.
25

The Superior Court alternatively found the claim lacked merit. Even assuming appellate counsel's investigator found Lane in 2012, "that discovery does not satisfy any of the elements required to prove that Ms. Lane was available, and willing to testify, for [Petitioner] (even though she was a Commonwealth witness) at trial in 2001." *Davis*, No. 2050 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3407, [slip op.] at 9. Moreover, Petitioner did not "adequate[ly] assert[ ]" that Lane's testimony would have made a difference in his case, so Petitioner did not prove prejudice. *Id.*
26

Petitioner also argues that PCRA counsel was ineffective in a variety of ways on PCRA appeal. (*See* Statement of Claims 3-4, ECF No. 1-9; Mem. of Law 22, 24-26, ECF No. 1-4; Reply 25, ECF No. 22). Because these allegations concern PCRA counsel's actions during collateral appeal, *Martinez* does not apply, and Petitioner cannot establish cause through PCRA counsel's alleged ineffectiveness. *See Norris*, 794 F.3d at 405; *see also Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012).
27

Petitioner additionally argues in his Reply brief that, as to Claim Six, the Superior Court's application of Rule 1921 was exorbitant. (Reply 27-28, ECF No. 22) (citing *Lee v. Kemna*, 534 U.S. 362, 376, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002)). Petitioner did not raise this argument in his opening brief, so it has been waived. *Hill v. Wetzel*, No. 12-2185, 2015 U.S. Dist. LEXIS 184734, 2015 WL 12745810, at *12 n.17 (E.D. Pa. Apr. 22, 2015), *report and recommendation adopted*, No. 12-2185, 279 F. Supp. 3d 550, 2016 U.S. Dist. LEXIS 156044, 2016 WL 6657389 (E.D. Pa. Nov. 10, 2016); *United States v. Martin*, 454 F. Supp. 2d 278, 281 n.3 (E.D. Pa. 2006). In any event, the Superior Court's application of the relevant procedural rule was not exorbitant. The *Lee* Court found significant that: (1) the trial court did not invoke the procedural requirement at trial, and the defendant's perfect compliance with the rule would not have altered the outcome; (2) there was no case law that directed flawless compliance with the rules in the unique circumstances of his case; and (3) the defendant had complied with the essential requirements of the rules, which were intended to provide information to the trial court and opposing party. *Lee*, 534 U.S. at 381-85. The first two considerations weigh against Petitioner. The Superior Court explicitly invoked the procedural rule in finding waiver, and Pennsylvania law "is well settled that matters which are not of record cannot be considered on appeal." *Preston*, 904 A.2d at 6 (collecting cases).
28

Petitioner argues that PCRA counsel's ineffectiveness in failing to file objections establishes cause to overcome the default of Claim Seven as well. This argument also fails.
29

Petitioner provides only a self-serving affidavit to support his allegation that he informed trial counsel of Lane's whereabouts. (Davis Affidavit 14, ECF No. 1-10). This is not sufficient to support his assertions. *Cf. Thompson v. Warren*, No. 11-7164, 2014 U.S. Dist. LEXIS 104567, 2014 WL 3778738, at *5 (D.N.J. July 31, 2014) (rejecting *Strickland* claim supported only by self-serving speculations); *United States v. Barber*, 808 F. Supp. 361, 382 (D.N.J. 1992), *aff'd*, 998 F.2d 1005 (3d Cir. 1993).
30

Petitioner also raises a *Brady* violation, asserting the prosecutor failed to disclose an agreement between Lane and the Commonwealth concerning Lane's "expectation of leniency" in exchange for Lane's testimony at the preliminary hearing. (Mem. of Law 14-15, ECF No. 1-4). This *Brady* claim is unexhausted and procedurally defaulted. *See supra* n.11. Only one of Petitioner's cause and prejudice arguments relates to this defaulted claim: that Petitioner's original appellate counsel, Mr. Meehan, was ineffective for failing to file a post-sentence motion or an appellate brief. (Mem. of Law 18-19, ECF No. 1-4). This ineffectiveness claim is, itself, unexhausted and procedurally defaulted; thus, it cannot serve as cause. *See Edwards*, 529 U.S. at 451-54; *Sandler*, 2008 U.S. Dist. LEXIS 45775, 2008 WL 2433094, at *21 n.4.

31

Petitioner asserts that the purported *Brady* violations (*see supra* n.30) form the basis of Claims Five, Six, and Seven, "which, in part have been procedurally defaulted as a result of the State's suppression of relevant evidence." (Mem. of Law 23-24, ECF No. 1-4). There was no evidence of suppression here, and Petitioner has not proven the existence of any agreement between Lane and the Commonwealth. Thus, Petitioner has not established cause to excuse the default of these claims.

32

To the extent Petitioner alleges he was not afforded an adequate opportunity for cross examination because counsel was unaware of "any unconsumated [sic] 'promise', 'agreement', or 'arrangement'" Lane had with the Commonwealth (*see* Mem. of Law 15, ECF No. 1-4), Petitioner has not demonstrated that any such agreement exists.

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