NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

RAHEEM BROWN – Petitioner

v.

SUPERINTENDENT SMITHFIELD SCI, ET AL. - Respondents

PETITIONER'S APPENDIX

OF

EXHIBITS IN SUPPORT OF PETITION FOR CERTIORARI

Pro Se Petitioner:

Raheem Brown
#JE-7697, K-B1/34
SCI-Smithfield
P.O. Box 999
1120 Pike Street
Huntingdon, PA 16652

TABLE OF SUPPORTING EXHIBITS

APPENDIX A

Third Circuit Order Denying Certificate of Appealability

ALD-134 **March 21, 2019**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-3449**

RAHEEM BROWN, Appellant

v.

SUPERINTENDENT SMITHFIELD SCI;
THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA

(E.D. Pa. Civ. No. 2-17-cv-02778)

Present: MCKEE, SHWARTZ and BIBAS, Circuit Judges

Submitted are:

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

(2) Appellees' response to motion for a certificate of appealability,

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's motion for a certificate of appealability is denied as he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). The District Court denied Appellant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For substantially the reasons stated by the District Court, Appellant has not shown that reasonable jurists would find its assessment of his claim debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Although the District Court's final order denied and dismissed the habeas petition as untimely, the District Court adopted the Magistrate Judge's report, which found the petition timely and denied

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Appellant's claim on the merits. We construe the District Court's denial of relief to be based on the reasons set forth in the Magistrate Judge's report.

By the Court,

s/ Patty Shwartz
Circuit Judge

Dated: April 15, 2019
ARR/cc: RB; JFXR

A True Copy:

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

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

April 15, 2019

Mr. Raheem Brown
Smithfield SCI
1120 Pike Street
P.O. Box 999
Huntingdon, PA 16652

John F.X. Reilly
Delaware County Office of District Attorney
201 West Front Street
Media, PA 19063

RE: Raheem Brown v. Superintendent Smithfield SCI, et al
Case Number: 18-3449
District Court Case Number: 2-17-cv-02778

ENTRY OF JUDGMENT

Today, **April 15, 2019** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App.

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P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ *Aina*, Legal Assistant
Direct Dial: 267-299-4957

APPENDIX B

District Court Order Denying Habeas Corpus Petition

And

Magistrate Judge's Report and Recommendation

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

RAHEEM BROWN,	:	**CIVIL ACTION**
Petitioner,	:	
v.	:	**No. 17-2778**
SUPERINTENDENT ERIC TICE, ET AL.	:	
Respondents.	:	

FILED OCT - 3 2018

ORDER

AND NOW, this 3rd day of October, 2018, upon consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1), Respondents' Answer thereto (Doc. No. 12), Petitioner's "Response to the Respondents' Answer" (Doc. No. 17), the Report and Recommendation of United States Magistrate Judge Timothy R. Rice, dated March 29, 2018 (Doc. No. 19), Petitioner's objections to the Report and Recommendation (Doc. No. 23), and after a thorough and independent review of the record, it is hereby **ORDERED** that:

1. Petitioner's objections are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The Petition for Writ of Habeas Corpus is **DENIED** with prejudice and **DISMISSED** as untimely without an evidentiary hearing; and
4. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

MITCHELL S. GOLDBERG, J.

ENT'D OCT - 4 2018

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RAHEEM BROWN, Petitioner, v. SUPERINTENDENT ERIC TICE, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 55851
CIVIL ACTION No. 17-2778
March 29, 2018, Decided
March 29, 2018, Filed

Editorial Information: Prior History

Commonwealth v. Brown, 24 A.3d 443, 2011 Pa. Super. LEXIS 887 (Pa. Super. Ct., Feb. 3, 2011)

Counsel RAHEEM BROWN, Petitioner, Pro se, HUNTINGDON, PA.
For THE DISTRICT ATTORNEY OF THE COUNTY OF DELAWARE, Respondent:
JOHN F.X. REILLY, DELAWARE COUNTY DISTRICT ATTORNEY'S OFFICE, MEDIA, PA.

Judges: TIMOTHY R. RICE, UNITED STATES MAGISTRATE JUDGE.

UNITED STATES DISTRICT COURT OF THE THIRD CIRCUIT / 2018 / 2018 U.S. Dist. LEXIS 55851::Brown v. Tice::March 29, 2018 / Opinion

Opinion

Opinion by: TIMOTHY R. RICE

Opinion

REPORT AND RECOMMENDATION

TIMOTHY R. RICE

U.S. MAGISTRATE JUDGE

Petitioner Raheem Brown, a prisoner at the State Correctional Institution in Smithfield, Pennsylvania, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He argues his counsel was ineffective for failing to call two exculpatory witnesses.1 Hab. Pet. (doc. 1) at 8, 8a1-8a6; Hab. Br. (doc. 7) at 9-10. He also requests an evidentiary hearing. Hab. Br. at 13-16. I respectfully recommend Brown's petition and evidentiary hearing request be denied with prejudice because his claim is meritless.

FACTUAL AND PROCEDURAL HISTORY

In September 2009, Brown was tried in Delaware County for killing Mitchell Williams ("the Victim") in Chester, Pennsylvania on November 27, 2007. See Commonwealth v. Brown, CP-23-7153-2008, Docket at 8-9; 5/8/2010 Tr. Ct. Op. at 1-4.

The prosecution's case primarily rested on four witnesses: James Smith, Christopher Loper, Myiesha Collier, and James Reynolds. N.T. 9/15/2009 at 2; N.T. 9/16/2009 at 2.

Smith testified he had been arguing with the Victim over a family matter before the murder. N.T. 9/15/2009 at 152-55, 164. Smith threw a brick at the Victim as the Victim ran towards his home on Engle Street. Id. at 155-57, 164. Smith then saw Brown, whom he had known for about twenty years, exit 227 Engle Street and approach the Victim with a shiny object in his hand. Id. at 152, 157-59. Smith heard a "boom," and saw the Victim drop to the ground. Id. Brown then went back into the house, left again, and left the scene in a white car. Id. at 159-60. Later that night, Smith told the police that he did not see who shot the Victim because his back was turned at the time of the shooting, and there was no one in the area before the shooting. Id. at 161, 165, 168-170. Smith subsequently identified Brown as the shooter.2Id. at 162. Smith later entered into a plea agreement on drug charges and the prosecution agreed to inform the sentencing judges of his cooperation in this case. Id. at 162-63, 176-77.

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Loper testified that he lived at 227 Engle Street with Reynolds, Brown's cousin. Id. at 64-65, 68-69. Before the shooting, Loper saw Brown leave the second floor of the house with a silver and black revolver tucked into the front of his pants and then heard the back door open, followed by the sound of a gunshot. Id. at 79-80. He went downstairs to find Brown running into the house, asking for his hat. Id. at 80, 82. Loper accidentally threw Brown a thermal shirt; another man in the room gave Brown his hat. Id. at 82. Brown left the house and drove away in his white BMW. Id. at 83-84. Loper went outside, saw the Victim lying on the ground, and called Reynolds to come home. Id. at 83-85. Loper later told the police he did not see or hear anything. Id. at 85-86, 90-91. He testified he did not want to get involved at that time because he had outstanding warrants. Id. at 91. In January 2008, Loper was arrested on those warrants, and identified Brown as the killer. Id. at 86-87, 93-96. He said on the day of the murder Brown was wearing brown Timberland boots, blue jeans, a black hat, a white thermal shirt, and a burgundy t-shirt.3Id. at 96-99.

Collier, who lived across from 227 Engle Street, testified that she saw the Victim and Smith arguing in front of her house. Id. at 111, 116. After Smith threw a rock at the Victim, Collier observed Brown walk out the back door of 227 Engle Street, approach the Victim, and shoot him.4Id. at 117-20. Collier then saw Brown go in the back door of the house, exit the front door, and drive away in a white car parked in front of the house. Id. at 120-21. The next day, Collier told the police that she did not know who killed the Victim because the shooter was wearing a hoodie and a mask. Id. at 125-26, 140-41, 143. Collier made similar statements to the police in March and April of 2008. Id. at 145. She testified she was afraid to identify Brown previously because his cousin lived across the street. Id. at 125. In May 2008, Collier spoke to the police again and said she saw Loper approach the white car with something black in his hands.5Id. at 146. In January 2009, Collier called the police and identified Brown as the shooter. Id. at 126-27. She explained that at that time, she knew Reynolds had moved out of the neighborhood and Brown had been arrested. Id. at 147-48. In March 2009, Collier agreed to plead guilty to drug charges and agreed to cooperate. Id. at 134-35.

Reynolds was at work at the time of the shooting, but said Brown was at the house that day and had parked his "grey or white" car outside the house. Id. at 188-90. Reynolds received a "frantic" call from Loper, which led him to rush home. Id. at 189. When Reynolds arrived, Brown and his car were gone. Id. at 192. Reynolds called Brown, who said he left the scene after hearing shots, and inquired what people were saying about the killing. Id. at 194-95. Although Reynolds also spoke to the police the day of the incident, he failed to mention his calls with Brown until April 2008. Id. at 206, 208, 212.

Sergeant Slowik testified that Collier, Loper, and Smith each independently identified Brown in a photo array that included pictures of other men with similar features. N.T. 9/16/2007 at 87-94 (Collier and Loper were interviewed in March 2008, and Smith in September 2008). Slowik explained Brown was arrested on October 30, 2008 and waived his Miranda rights. Id. at 75-80. Brown told the police that he had been in Wilkes-Barre at the time of the murder, had not been in Chester for years, and had never been to 227 Engle Street. Id. at 83. He admitted owning a white BMW, but told the police that it was stolen in either September or October of 2007. Id. The parties stipulated that Brown had not filed any report of a stolen BMW prior to the killing. Id. at 119-122.

In September 2009, Brown was convicted of first-degree murder, possessing an instrument of crime, and being a felon in possession of a firearm.6 Docket at 2. On November 20, 2009, the trial court sentenced Brown to life imprisonment. N.T. 11/20/2009 at 44. The Superior Court affirmed in February 2011, and the Supreme Court of Pennsylvania denied review in June 2011.

In 2012, Brown filed a pro se petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. § 9541 et seq. ("PCRA"). See Docket at 16. The PCRA court appointed counsel and an investigator. Id. at 17. PCRA counsel later determined Brown's claims were meritless and sought leave to withdraw. Id. at 19. The PCRA court granted the request to withdraw and gave notice of its intent to dismiss Brown's PCRA petition. Id. Brown filed objections and in April 2016, the PCRA court dismissed Brown's petition. Id. In July 2017, the Superior Court affirmed. Id. at 21.

Brown timely filed his federal habeas petition in June 2017.

DISCUSSION

Before seeking federal habeas relief, a petitioner must exhaust all available state court remedies, "thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) (citations omitted); see also 28 U.S.C. § 2254(b)(1). If the petitioner raised the claim in state court and the state court denied it on its merits, I can grant relief only if the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; 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). This is a "difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (internal quotations omitted).

I. Ineffective Assistance of Counsel

Brown contends trial counsel was ineffective for failing to call Lynda Williams and Ta'Kia Edwards as witnesses. Hab. Pet. at 1-2; Traverse at 2.

The clearly established law of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), governs ineffective assistance of counsel claims. See Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To establish ineffectiveness, Brown must show: (1) deficiency, meaning "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) prejudice, meaning counsel's errors deprived Brown of "a fair trial . . . whose result is reliable."7Strickland, 466 U.S. at 687. If the state court addressed counsel's effectiveness and applied the correct legal standard, Brown must show its decision was objectively unreasonable. Woodford v. Visciotti, 537 U.S. 19, 25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002). My review is "doubly deferential" because I must give "both the state court and the defense attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 13, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013).

Brown argued in state court that trial counsel was ineffective for failing to call Edwards and Williams. PCRA Pet. at 8-12(a). The PCRA court found this claim meritless because Brown failed to show that Edwards and Williams were willing to testify on his behalf. PCRA Op. at 7-8. Although Brown's investigator had located Edwards and Williams, they refused to cooperate. Id. The court also determined that Brown could not show he was prejudiced by the absence of Edwards and Williams because it could not find any statements in which they identified someone other than Brown as the shooter. Id. The Superior Court affirmed, concluding Brown's claim failed because he could not demonstrate prejudice from trial counsel's failure to call either Edwards or Williams. Super. Ct. Op. at 6-7. The court explained that "[n]either witness exonerated Brown, or identified someone other than Brown as the perpetrator." Id. at 7.

Brown argues that the state courts unreasonably determined the facts because "testimony from Edwards and Williams would have completely undermined that of Smith, Loper, and Collier concerning the identity of the shooter." Traverse at 6. He contends Edwards' and Williams' statements would have implicated Loper as the shooter. Id. at 12.

Edwards, who was fifteen at the time, gave an unrecorded statement to the police the day after the crime.8See Petr. Appx. of Exs. at 106-7. In February 2008, Edwards gave a recorded statement explaining she had been across the street from 227 Engle Street when she heard a gunshot. Id. at 106, 109. She saw the Victim fall to the ground, and saw a man in a black hoodie run into the back of 227 Engle Street. Id. at 109. She then saw a short, chubby man with a caramel complexion, facial hair, blue jeans, and a white t-shirt exit the house and pop the trunk of a white BMW. Id. at 107, 109-110. Next, Loper left the house and placed a ski mask and a gun in the trunk of the car. Id. at 110-11. Edwards, who knew Loper, described him as tall and skinny with dark skin, wearing blue jeans and carrying the hoodie.9Id. at 110-11. After the shooting, the man with the caramel complexion and facial hair drove the white BMW away from the scene, while Loper remained. Id. at 113-14.

In a March 18, 2008 recorded statement, Williams, the Victim's wife, told the police she saw a "man in a black hoodie" shoot her husband and run away. Id. at 131-32. She subsequently saw a "black male late 20s brown skin . . . medium to dark skin" leave in a white car, but later corrected herself, saying the shooter had a lighter skin tone. Id. at 139. Williams admitted she did not get a good look at the driver and never said the driver was the shooter. Id. at 132, 139. She also saw Loper, whom she knew as her daughter's ex-boyfriend, leave 227 Engle Street shortly after the driver pulled away, and then return to the house. Id. at 139.

The Superior Court did not unreasonably determine that neither Edwards nor Williams exonerated Brown or identified someone other than Brown as the shooter in their recorded statements. Super. Ct. Op. at 7. Edwards and Willams both said the shooter was wearing a black hoodie and ran from the scene into 227 Engle Street. Petr. Appx. of Exs. at 108-109, 133-36. Both witnesses then separately observed two men exit 227 Engle Street: Loper, whom they knew; and another unknown man, who drove away in a white car. Id. at 109-114, 138-39. Although Edwards said she saw Loper place a hoodie, a ski mask, and a gun in the trunk of the white car before the other man drove away, the Superior Court reasonably concluded that this failed to show Loper was the shooter. Id. at 111, 113.

Brown also argues that Edwards' and Williams' statements undermine Loper's, Collier's, and Smith's identification of him because Edwards and Williams said the shooter was wearing a hoodie, as Collier had told the police in an earlier statement. Traverse at 6-7. Loper, however, identified Brown based on his actions before and after the shooting.10 N.T. 9/15/2009 at 77-80. Even if Brown were wearing a hoodie, the Superior Court had a reasonable basis to conclude the witnesses could have still identified him based on his height, build, and other characteristics.

Brown further contends that the state courts unreasonably applied Strickland by denying his claim because he could not show that Williams and Edwards were willing to testify on his behalf. Traverse at 3-4. He asserts the Supreme Court has never held that "an essential witness be willing to testify before counsel can be held ineffective for failing to call him or her." Hab. Br. at 20. The PCRA court, however, did not deny Brown relief solely because it determined that Edwards and Williams were unwilling to testify on his behalf. See PCRA Op. at 7. The court also concluded that Brown was not

prejudiced by the absence of their testimony. Id. at 8. More importantly, the Superior Court's opinion, which is the final decision on the merits I must review, cited lack of prejudice as its sole ground for affirming. See Super. Ct. Op. at 6. The Superior Court reasonably applied Strickland when it denied Brown's claim based on lack of prejudice.11See Strickland, 466 U.S. at 697 (when "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed").

Brown also contends the state courts unreasonably applied Strickland by subjectively evaluating Williams' and Edwards' testimony "according to their own personal perspectives." Traverse at 5; Hab. Br. at 22 (citing Saranchak v. Sec'y, 802 F.3d 579, 588, 591 (3d Cir. 2015) (requiring judges to determine Strickland prejudice by objectively assessing the effect evidence would have had on an unspecified factfinder, rather than subjectively analyzing the effect on a particular factfinder)). The state courts, however, used an objective approach in reviewing Williams' and Edwards' police statements and finding they did not implicate anyone other than Brown as the shooter. See Super. Ct. Op. at 6-7; PCRA Op. 7-8.

Because the Superior Court did not unreasonably determine the facts and did not unreasonably apply Strickland, Brown's claim should be denied as meritless. See Woodford, 537 U.S. at 25.

II. Evidentiary Hearing

I have discretion to grant an evidentiary hearing if it would potentially advance Brown's claims. See 28 U.S.C. § 2254(e)(2); Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000). Brown, however, fails to establish that the hearing would advance his claims by "'forecast[ing] . . . evidence beyond that already contained in the record' that would help his cause, 'or otherwise explaining how a hearing would be meaningful.'" Campbell, 209 F.3d at 287 (quoting Cardwell v. Greene, 152 F.3d 331, 338 (4th Cir. 1998)).

Accordingly, I make the following:

RECOMMENDATION

AND NOW, on March 29, 2018, it is respectfully recommended that Petitioner Raheem Brown's petition for writ of habeas corpus and request for an evidentiary hearing be DENIED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability.12 Petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva, 504 F.3d at 364.

BY THE COURT:

/s/ Timothy R. Rice

TIMOTHY R. RICE

U.S. MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT OF THE THIRD CIRCUIT / 2018 / 2018 U.S. Dist. LEXIS 55851::Brown v. Tice::March 29, 2018 / Footnotes

Footnotes

1

Although Brown originally argued that his conviction was contrary to the weight and sufficiency of the evidence, he has withdrawn that claim. Hab. Pet. at 10; Notice of Withdrawal of Claim (doc. 16) at 1-2.

2

Smith also subsequently admitted that Christopher Cosmen was present at the time of the shooting. N.T. 9/15/2009 at 167. Brown suggests Smith and Cosmen colluded to protect one another. Hab. Br. at 30-31. Never, however, does he argue that Cosmen should have been called at trial. N.T. 9/15/2009 at 167-68.

3

At trial, Loper testified that the thermal shirt was actually grey and the t-shirt over the thermal shirt had several colors. N.T. 9/15/2009 at 103.

4

Collier saw Brown in the area for the first time a few days earlier. N.T. 9/15/09 at 120.

5

Brown incorrectly asserts that Collier's March 2008 statement describes Loper wearing the same clothes as the shooter. Hab. Br. at 39-40. Collier stated that the shooter came out of 227 Engle Street wearing a "blue jeans, black jacket with a mask," which she corrected to a "black hoodie." Petr. Appx. of Exs. at 121.

6

Brown waived his right to a jury trial with respect to the felon-in-possession charge. See N.T. 9/15/2009 at 9-10.

7

Pennsylvania courts apply an equivalent test. See Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000); Commonwealth v. Sneed, 587 Pa. 318, 899 A.2d 1067, 1075-76 (Pa. 2006).

8

Brown asserts that Edwards named "Chris" as the shooter in her unrecorded statement. Traverse at 12; Petr. Appx. of Exs. at 164-65. Brown concedes that this statement could not have been admitted as substantive evidence. Traverse at 13 (citing Pa. R.E. 803.1(1) (prior inconsistent statement admissible only if made under oath, in writing, and signed by the declarant or recorded)). Thus, counsel could not have been ineffective for failing to use this uncorroborated accusation. Moreover, in her subsequent recorded statement, Edwards said only that she saw an unidentified man in a black hoodie running away from the scene. Petr. Appx. Of Exs. at 107-115.

9

Brown asserts that Edwards described Loper as wearing "a black ski mask, black hoodie, black shirt, and blue jeans and . . . carrying a silver gun." Hab. Br. at 44. Edwards' statement, however, says that Loper was carrying "[t]he ski mask and the gun" and was wearing "a white (inaudible) some blue jeans." Petr. Appx. of Exs. at 111.

10

Although Loper identified Brown as wearing a white thermal shirt and a burgundy t-shirt, N.T. 9/15/2009 at 99, and Edwards said the shooter had on a white t-shirt, Petr. Appx. of Exs. at 109, this was a minor discrepancy.

11

Although the Third Circuit has expressed some concern with Pennsylvania's requirement that witnesses be "ready, willing, and able" to testify, the court has never addressed the constitutionality of that requirement. Gregg v. Rockview, 596 Fed. App'x 72, 76 n.4 (3d Cir. 2015) (citing Grant v. Lockett, 709 F.3d 224, 239 n.10 (3d Cir. 2013)).

12

Because jurists of reason would not debate my recommended dispositions of the petitioner's claims, no certificate of appealability should be granted. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

UNITED STATES DISTRICT COURT OF THE THIRD CIRCUIT / 2018 / 2018 U.S. Dist. LEXIS 55852::McIlwaine v. Bush::March 29, 2018

APPENDIX C

Third Circuit Order Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3449

RAHEEM BROWN, Appellant

v.

SUPERINTENDENT SMITHFIELD SCI;
THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA

(E.D. Pa. Civ. No. 2-17-cv-02778)

SUR PETITION FOR REHEARING

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

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

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: May 14, 2019
Lmr/cc: Raheem Brown
John F.X. Reilly

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EXHIBIT D

Opinion of the Superior Court of Pennsylvania

Affirming Denial of

Petition for Post-Conviction Collateral Relief

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RAHEEM ASMAR BROWN,	:	
Appellant	:	No. 1489 EDA 2016

Appeal from the PCRA Order April 21, 2016
in the Court of Common Pleas of Delaware County,
Criminal Division, No(s): CP-23-CR-0007153-2008

BEFORE: OLSON, STABILE and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED JUNE 01, 2017**

Raheem Asmar Brown ("Brown"), *pro se*, appeals from the Order denying his first Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

On November 26, 2007, Mitchell Williams ("Williams") and James Smith ("Smith") argued in an alleyway near 227 Engle Street, in Chester, Pennsylvania. At that time, Brown and Christopher Loper ("Loper") were inside of the residence located at 227 Engle Street. While inside of the residence, Loper observed a gun tucked inside the front of Brown's pants. Brown exited the residence and, in the alleyway, shot and killed Williams. Brown then re-entered 227 Engle Street through the back door, exited the residence through the front door, and departed from the scene in a white vehicle.

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[1] ***See*** 42 Pa.C.S.A. §§ 9541-9546.

Police arrested Brown on October 30, 2008. Following a jury trial, Brown was convicted of first-degree murder and possession of an instrument of crime.[2] The trial court found Brown guilty of the additional offense of person not to possess a firearm.[3] Brown filed a Post-Sentence Motion, which the trial court denied. Thereafter, this Court affirmed Brown's judgment of sentence, after which the Pennsylvania Supreme Court denied allowance of appeal. ***Commonwealth v. Brown***, 24 A.3d 443 (Pa. Super. 2011) (unpublished memorandum), ***appeal denied***, 23 A.3d 1054 (Pa. 2011).

On May 21, 2012, Brown filed a *pro se* Motion for relief under the PCRA. The PCRA court appointed Stephen Dean Molineaux, Esquire ("Counsel"), to represent Brown. Subsequently, Counsel filed an Application to Withdraw from his representation of Brown, and a "No-Merit" Letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). Brown submitted additional documents, *pro se*, which were filed of record. The PCRA court thereafter granted Counsel's Application to Withdraw, and issued a Pa.R.Crim.P. 907 Notice of its intent to dismiss Brown's PCRA Petition without a hearing. Brown filed a *pro se* Objection to the PCRA court's Notice. On April 22, 2016, the PCRA court entered an Order denying

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[2] ***See*** 18 Pa.C.S.A. §§ 2501, 907.

[3] ***See*** 18 Pa.C.S.A. § 6105. Brown elected to waive his right to a jury trial on this charge, so as to prevent the jury from hearing evidence regarding his status as a former convict.

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Brown's PCRA Petition, after which Brown filed the instant timely appeal. The PCRA court did not order Brown to file a Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal.

Brown, *pro se*, presents the following issue for our review:

> Whether [Counsel] rendered ineffective assistance by failing to properly investigate and present at a PCRA evidentiary hearing[, and] utilizing compulsory process if necessary, several important, exculpatory witnesses in support of [Brown's] claim of trial counsel's ineffectiveness for failing to utilize compulsory process to compel the attendance at trial of these same exculpatory witnesses, including eyewitnesses, to testify regarding information contained in audiotaped or written statements given to police shortly after the homicide for which [Brown] was convicted, which exonerates [Brown] and actually implicates two other individuals as having committed the homicide for which [Brown] was convicted, including one of the main Commonwealth witnesses against him?

Brief for Appellant at 9.

"In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination is supported by the record and free of legal error." ***Commonwealth v. Montalvo***, 114 A.3d 401, 409 (Pa. 2015) (citation and internal quotation marks omitted).

> Where a PCRA court fails to support its holding with sufficient explanations of the facts and law, or fails to provide an adequate opinion addressing all of the claims raised in a PCRA petition, including factual and credibility disputes, a remand is appropriate.

Id. at 410.

Brown claims ineffective assistance of Counsel and trial counsel. Generally, counsel's performance is presumed to be constitutionally

adequate, and counsel will only be deemed ineffective upon a sufficient showing by the defendant. ***Commonwealth v. Spotz***, 47 A.3d 63, 76 (Pa. 2012). A petitioner claiming ineffective assistance of counsel must plead and prove that "(1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel's action or inaction." ***Id.*** (applying ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).[4] A defendant establishes prejudice when he demonstrates "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Commonwealth v. Mallory***, 941 A.2d 686, 704 (Pa. 2008). The failure to establish any prong

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[4] Brown argues that the ***Strickland*** test applies where, as here, the petitioner alleges ineffective assistance based upon counsel's failure to compel a witness's testimony through the use of compulsory process. Brief for Appellant at 45-46. However, we observe that in ***Commonwealth v. Chmiel***, 889 A.2d 501 (Pa. 2005), where the appellant had claimed that counsel was ineffective for failing to subpoena his daughter during the penalty phase of his murder trial, our Supreme Court applied the following five-part test:

> To prevail on a claim of trial counsel's ineffectiveness for failure to call a witness, [the] [a]ppellant] must prove: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced appellant."

Id. at 545-546. Based upon our review, we conclude that Brown is not entitled to relief, even applying the ***Strickland*** test.

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of the test will defeat an ineffectiveness claim. ***Commonwealth v. Solano***, 129 A.3d 1156, 1163 (Pa. 2015).

Brown claims that Counsel rendered ineffective assistance by "failing to pursue trial counsel's ineffectiveness for not calling at trial several highly credible witnesses and eyewitness to the shooting death of [] Williams ...." Brief for Appellant at 43. Brown asserts that certain witnesses in the area, at the time of the shooting, initially denied knowledge of the shooting or implicated one of two other individuals as Williams's assailant. ***Id.*** at 48. According to Brown, the evidence "strongly suggests" that Mynesha Cosmen ("Cosmen"), who was armed with a black handgun, was the actual perpetrator. ***Id.*** at 49-50.

In support of this claim, Brown first argues that Counsel rendered ineffective assistance by not using compulsory process to compel the testimony of Ta'Kia Edwards ("Edwards") and Lynda Williams ("Lynda"), the wife of the victim. ***Id.*** at 50. Brown asserts that the testimony of Edwards and Lynda, regarding their prior statements to police,[5] would have

[5] In its Opinion, the PCRA court reviewed this claim and concluded that there is no record support for it. PCRA Court Opinion, 9/7/16, at 7 (wherein the PCRA court stated, "[t]his court's exhaustive review of the records did not uncover said statements."). Our review of the record discloses that in his Objections to counsel's No-Merit Letter, Brown included the statements made by Edwards and Lynda. In addition, it appears from the record that on December 9, 2016, the Commonwealth forwarded to the PCRA court the statements of Edwards, Lynda, Dante Norman ("Norman"), Francesca Granados ("Granados") and Dante Lewis ("Lewis"). The statements were filed with the PCRA court on December 9, 2016.

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undermined the credibility of Collier's trial testimony. ***Id.*** at 51. Brown also suggests that their testimony, combined with Collier's recorded statement, "would have pointed the finger of blame at [] Loper ...." ***Id.***

Our review of the record discloses that, Edwards, who was 15 years old at the time, told police that she was cleaning her car when she heard a gunshot. Supplemental Summary (Edwards), at 3 (unnumbered). After the gunshot, Edwards observed a man in a black hoodie run into the back door of the house at 227 Engle Street. ***Id.*** at 4 (unnumbered). Edwards then saw a "short and chubby" man wearing a white t-shirt, blue jeans and a white hoodie leave through the front door of the house. ***Id.*** at 5. This man went to a white car and opened the trunk. ***Id.*** At that time, a man known to Edwards as "Chris" exited through the front door of the same house and placed a ski mask and gun into the trunk of the car. ***Id.*** at 5-6.

In her statement to police, Lynda identified the man who shot Williams as wearing a black hoodie. Supplemental Summary (Lynda), at 2. After the shooting, Lynda observed a black male, wearing a black jacket, drive by her in a white car. ***Id.*** at 8. Lynda, too, saw a man known to her as "Chris" exit the same back door used by the gunman. ***Id.*** at 10.

Upon review, Brown has failed to establish prejudice resulting from trial counsel's failure to present the testimony of Edwards or Lynda. ***See Commonwealth v. Dennis***, 950 A.2d 945, 954 (Pa. 2008) (stating that to establish prejudice, the petitioner must show that there is a reasonable

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probability that the outcome of the proceedings would have been different but for counsel's action or inaction). Neither witness exonerated Brown, or identified someone other than Brown as the perpetrator. Accordingly, we cannot grant Brown relief based upon the failure to present the testimony of Edwards or Lynda. ***See Solano***, 129 A.3d at 1163 (stating that "[f]ailure to establish any prong of the test will defeat an ineffectiveness claim.").

Brown next argues that Counsel rendered ineffective assistance by not using compulsory process to compel the testimony of Norman.[6] Brief for Appellant at 57. Brown acknowledges that Counsel's investigator was unable to locate Norman. ***Id.*** However, Brown argues that Counsel should have presented Norman's audiotaped statement to police, in Norman's absence. ***Id.*** at 58-60. Brown further argues that Counsel had no reasonable basis for failing to produce this audiotape, and that Counsel's dereliction caused him prejudice. ***Id.*** at 60-61.

In its Opinion, the PCRA court found that Counsel and his investigator were unable to locate Norman. ***See*** PCRA Court Opinion, 9/7/16, at 7. We cannot conclude that Counsel was ineffective for failing to secure the testimony of a witness who could not be found. ***See Solano***, 129 A.3d at 1162 (stating that to establish ineffective assistance of counsel, the petitioner must demonstrate, *inter alia*, that the claim has arguable merit, and that there was no reasonable basis for trial counsel's action or inaction).

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[6] In his No-Merit Letter, Counsel indicated that Norman was 12 years old at the time of the shooting. No-Merit Letter at 2.

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Our review further discloses that the content of Norman's audiotaped statement to police, describing the clothes worn by the shooter, was presented through the testimony of Chester Police Sergeant John Slowik ("Sergeant Slowik"). Sergeant Slowik testified at trial that no witness had specifically identified Cosmen as the perpetrator of the shooting. N.T., 9/16/09, at 111-12. Sergeant Slowik confirmed that a statement by one witness indicated that the shooter was a black male wearing a white shirt with a gold design on it. ***Id.*** at 113. Sergeant Slowik testified that another officer later observed Cosmen, at the crime scene, wearing a white shirt with a gold design on it. ***Id.*** at 114. In addition, Sergeant Slowik testified that subsequently, when officers went to the home of Cosmen, Cosmen answered the door wearing a white shirt with a gold design. ***Id.*** During his closing argument, trial counsel argued to the jury that a witness had identified the shooter as wearing the same clothing as worn by Cosmen. ***Id.*** at 148.

Thus, Norman's audiotaped statement regarding the clothing worn by the shooter was presented through the testimony of Sergeant Slowik. Notwithstanding this evidence, the jury found Brown guilty of the above-stated crimes. We cannot conclude that trial counsel's failure to compel Norman's testimony, or to present Norman's audiotaped statement, caused prejudice to Brown, warranting PCRA relief. ***See Solano***, 129 A.3d at 1162 (stating that prejudice "means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding

would have been different."). Accordingly, we cannot grant Brown relief on this claim.

Brown next argues that trial counsel rendered ineffective assistance by not using compulsory process to compel the testimony of Granados. Brief for Appellant at 51. The PCRA court reviewed the record and concluded that Granados's testimony would not be exculpatory. PCRA Court Opinion, 9/7/16, at 9. The PCRA court explained that Granados had informed the police that she saw Williams, the victim, arguing with another person prior to the shooting:

> [Granados] did not say it was [Brown] .... She simply said she saw an "individual." She told police that she heard someone say[,] "put it down, put it down" before she heard a gunshot. She then came out of her house and saw the decedent lying in the alley. The court fails to see the significance of the statement "put it down, put it down." ... [Brown] in no way showed how the absence of her testimony prejudiced his case....

Id. (citation omitted). We agree with the PCRA court's analysis and conclusion, as stated above, and affirm on this basis with regard to trial counsel's failure to present the testimony of Granados. ***See id.***

Finally, Brown claims that Counsel rendered ineffective assistance for not using compulsory process to compel the testimony of Lewis. Brief for Appellant at 48-49. Our review discloses that Brown first discussed Lewis's statement in his Objection to Notice of Intent to Dismiss ("Objections"). In Objection Number 6, Brown claimed that Counsel was ineffective for failing to investigate and present the testimony of Lewis. Objections, ¶ 121.

Brown argued that Lewis's statement to police would have impeached the testimony of Smith. ***Id.***, ¶ 122. Brown referred to Lewis's statement, *i.e.*, that Cosmen had left the corner while Smith and Williams were still arguing and before Smith threw a brick at Williams. ***Id.***, ¶ 123. According to Brown's Objection, this testimony would "lend[] support to the theory that [Cosmen] had, in fact, r[u]n around the corner of 3rd and Engle Streets to where Mary and Engle Streets intersect, intending to help his friend Smith by intercepting Williams." ***Id.***, ¶ 124. Brown raised no claim regarding trial counsel's ineffectiveness.

Our review discloses that Brown failed to establish a reasonable probability that the outcome of the proceedings would have been different, had Counsel presented this claim. Rather, Brown argues only that Lewis's testimony would have lent support to the statements of other witnesses. ***See id.*** Further, Lewis did not witness the shooting. ***See id.*** Based on the foregoing, we cannot conclude that Brown established prejudice resulting from Counsel's failure to investigate and present this claim. ***See Solano***, 129 A.3d at 1162. Accordingly, we cannot grant Brown relief on this claim.

For the foregoing reasons, we affirm the Order of the PCRA court.

Commonwealth's Application granted. Motion to file Post-Submission Communication granted. Order affirmed.

Judge Stabile joins the memorandum.

Judge Olson concurs in the result.

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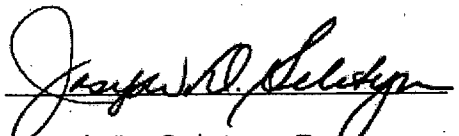
Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/1/2017

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APPENDIX E

Opinion of the Court of Common Pleas,

Delaware County, Pennslvania,

Denying Petition for Post-Conviction Collateral Relief

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	NO. 7153-08
V.	
RAHEEM BROWN	

OPINION

Mallon, J. Filed: 9-7-16

I. FACTUAL AND PROCEDURAL HISTORY

On September 17, 2009, following a jury trial, Raheem Brown (hereinafter "Appellant") was found of guilty of first degree murder and possessing instruments of a crime.[1] The facts at trial, as previously set forth in this court's 1925(a) opinion, established the following:

> On November 26, 2007, Mitchell Williams (hereinafter "the decedent") was shot in the chest with a revolver in an alley near 227 Engle Street, Chester, Pennsylvania. Initially, witnesses in the area denied knowing anything about the shooting, including who was responsible for it. However, several witnesses later came forward, implicating [Appellant] in the shooting of the decedent. One witness, James Smith, told the police that he had been arguing with the decedent in the alleyway near 227 Engle Street on the evening of November 26, 2007. Smith told police that he saw the Appellant shoot the decedent. (N.T., 9/15/09, pp. 153-159.) Another witness, Christopher Loper, told the police that he had been with the Appellant inside of 227 Engle Street, and saw the Appellant carrying a gun in the front of his pants. (*Id.* at 79.) Shortly thereafter, Mr. Loper heard a gunshot and witnessed the Appellant come back into the house "[a]nxious[ly]. Ready to go. Rowdy, like something happened," and watched as the Appellant got into his car and drove away. (*Id.* at 79-84.) A neighbor, Myiesha Collier, who lives across the street at 232 Engle Street, told the police that she was standing in the front doorway of her house and witnessed the shooting from across the street. (*Id.* at 114). Ms. Collier told the police that she saw Mr. Smith, who she referred to as "Hoop," arguing with the decedent. (*Id.* at 116). While the two were arguing, she saw the Appellant come out of the back door of 227 Engle Street, walk up to the decedent, and shoot him. (*Id.* at 119). She then saw the Appellant reenter the backdoor of 227 Engle Street and walk out the front door. (*Id.*). Ms. Collier then saw the Appellant get into a white car and leave the scene. (*Id.* at 119-124.)

[1] The court subsequently found the Appellant guilty of firearms not to be possessed by a former convict. The Appellant elected to waive his right to a jury trial on this charge since to allow the jury to consider this charge would apprise them that he was a former convict.

> The police arrested the Appellant on October 30, 2008; he waived his Miranda rights. (N.T., 9/16/09, pp. 77-80.) During interrogation, the Appellant denied being in Chester on the day of the murder, saying that it had been "years" since he had been there. (*Id.* at 82-85.) However, the prosecution produced a witness, James Reynolds, the Appellant's cousin who lives at 227 Engle Street. Mr. Reynolds testified that the Appellant had been staying with him on the day of the murder. (N.T., 9/15/09, pp. 188-189.) Mr. Reynolds told police that he was at work on the evening of November 26, 2007. He told police that he received a phone call from Mr. Loper that evening and, as a result of that call, he hurried home. (*Id.* at 190). Upon arriving home, Mr. Reynolds called the Appellant to see where he was. (*Id.* at 192). Mr. Reynolds stated that the Appellant relayed that "he heard [shots] and got the (expletive) out of there." (*Id.* at 194). Appellant also stated that he had nothing to do with the shooting. (*Id.*) However, shortly thereafter, the Appellant called Mr. Reynolds and asked what he heard people were saying about the shooting that had occurred. (*Id.* at 195). The Appellant told the police that while he did own a white BMW, it had been stolen before November, 2007. (N.T., 9/16/09, pp. 84-85.) However, the Commonwealth and defense counsel stipulated at trial that there was no report made by the Appellant of a stolen BMW during the months prior to November, 2007. (N.T., 9/16/09, pp. 119-122, CW Ex-31, CW Ex-32.)
>
> Upon his examination of the decedent, the Chief Medical Examiner for Delaware County, Dr. Frederic Hellman, concluded, to a reasonable degree of medical certainty, that the decedent was killed by a single gunshot wound to the chest, and that the manner of death was homicide. (N.T., 9/16/09, p. 35.)

1925(a) Opinion, 8/5/2010.

Following his trial and conviction, on November 20, 2009, Appellant was sentenced to life imprisonment for first degree murder, plus four to eight years for firearms not to be possessed by a former convict, to run consecutively to the life sentence. Appellant subsequently filed a post sentence motion which was denied on February 12, 2010.[2] An appeal followed, and the Superior Court affirmed the Appellant's judgment of sentence on February 3, 2011 at 678 EDA 2010. The Supreme Court of Pennsylvania denied his petition for allowance of appeal on June 30, 2011 at 174 MAL 2011.

[2] Appellant was represented by Scott D. Galloway, Esquire, at trial and through his direct appeal.

On May 21, 2012 Appellant filed a Motion for Post Conviction Collateral Relief (hereinafter "PCRA Petition").[3] Counsel was appointed, who, after reviewing and pursuing Appellant's claims for many months, and after employing a court-approved private investigator,[4] determined that Appellant's claims lacked merit and filed a "No Merit" letter on October 1, 2014 indicating such. This court reviewed the letter and counsel was permitted to withdraw. The court issued its notice of intent to dismiss without a hearing on August 31, 2015.

On September 16, 2015 Appellant responded to the court's notice of intent to dismiss in a *pro se* filing entitled "Petitioners Objections to No-Merit Letter" (hereinafter "Response to Notice of Intent to Dismiss").[5] This court then thoroughly re-reviewed the records in this case, the trial transcripts in this case, Appellant's lengthy response, and all of Appellant's previous filings in the case and ultimately concluded that the Appellant was not entitled to any relief. Accordingly, the court entered an Order on April 22, 2016 denying Appellant's PCRA Petition. The instant appeal followed.

II. STANDARD OF REVIEW

In reviewing the propriety of a Post-Conviction Relief Act (hereinafter "PCRA") court's dismissal of a PCRA petition, the reviewing court is limited to a determination as to whether the record supports the PCRA court's findings and whether the order in question is free of legal error. *Commonwealth v. Ragan*, 592 Pa. 217, 220, 923 A.2d 1169, 1170 (2007). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. *Commonwealth v. Spencer*, 892 A.2d 840, 841 (Pa. Super. 2006).

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[3] It is worth noting that the Appellant's PCRA Petition was 362 pages long.
[4] The court approved the hiring of a court-funded private criminal investigator on May 14, 2013.
[5] This *pro se* filing totaled 171 pages.

III. DISCUSSION

It is well established that the court presumes that counsel was effective unless a petitioner proves otherwise. *Commonwealth v. Williams*, 524 Pa. 218, 230, 570 A.2d 75, 81 (1990). In order to prevail on a claim that counsel was ineffective, a petitioner must show that: (1) the issue underlying the ineffectiveness claim has arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction, and (3) that, but for the errors or omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. *Commonwealth v. Kimball*, 555 Pa. 299, 312, 724 A.2d 326, 333 (1999).

Appellant first claims that trial counsel failed to investigate and call certain witnesses to testify at trial. Specifically, Appellant maintains that counsel was ineffective for failing to call Dante Norman, Takia Edwards, Lynda Williams, Christopher Cosmen, and Francesca Granados. He further claims that trial counsel was ineffective for failing to impeach James Smith and Christopher Loper with prior inconsistent statements made to the police.

The court will dispose of the latter of these two claims first.

A. Trial Counsel Was Not Ineffective In His Cross Examination of Witnesses Smith and Loper

Appellant alleges that trial counsel was deficient in his cross-examination of James Smith and Christopher Loper during his jury trial. Specifically, he alleges that counsel was ineffective in failing to impeach these witnesses with prior inconsistent statements made to the police.

As set forth above, a PCRA petitioner may be entitled to relief if he effectively pleads and proves that the underlying claim has arguable merit, that counsel's actions lacked any reasonable basis, and that counsel's actions prejudiced the petitioner. *Commonwealth v. Miner*, 44 A.3d 684, 687 (Pa. Super. 2012) (internal citations omitted). Counsel's actions will not be

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found to have lacked a reasonable basis unless the petitioner establishes that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. *Id.* Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. *Id.* The Appellant in this case failed to plead and prove any of the above mentioned prongs.

In the case *sub judice*, James Smith, testified at trial that he had been arguing with the decedent in the alleyway near 227 Engle Street on the evening of November 26, 2007 and saw the Appellant shoot the decedent. *See* N.T., 9/15/09, pp. 153-159. The record reflects that Smith was vigorously and effectively cross examined by trial counsel regarding his reluctance to provide any statements to police as well as on his criminal history. Moreover, on cross examination, Smith was asked about a guilty plea and upcoming sentencing on drug charges. Smith was questioned about his cooperation in testifying in exchange for the Commonwealth's agreement to inform the sentencing judge of his role in the investigation and the resulting prosecution of Appellant. *Id.* at 175-177. He explained that he wasn't made any promises in exchange for his testimony, only that his sentencing judge would be informed of his testimony in Appellant's case. Smith testified at trial that he initially didn't provide a statement regarding who shot the decedent because he didn't want to be a snitch. *Id.* at 161-62.

Christopher Loper was a reluctant witness at trial, but testified that he had been with the Appellant inside of 227 Engle Street on November 26, 2007, and saw the Appellant carrying a gun in the front of his pants prior to the shooting. N.T., 9/15/09, p. 79. Loper testified that shortly after the Appellant left, he heard a gunshot and witnessed the Appellant come back into the house "[a]nxious[ly]. Ready to go. Rowdy, like something happened," and watched as the Appellant got into his car and drove away. *Id.* at 79-84. Similarly, a review of the record reflects

that a vigorous and effective cross examination of Loper was accomplished at trial. The record clearly reflects that Loper was cross examined about his prior convictions for attempted theft and receiving stolen property, and about his reluctance to speak to the police following the murder. *Id.* at 86-91. Loper admitted to the Commonwealth that he did not initially speak to police because "it had nothing to do with me" and there were warrants out for his arrest for violating his probation at the time of the murder. *Id.* at 86. Loper admitted on cross examination that he initially denied knowing anything about the crime to police and provided a statement after he was arrested on his outstanding warrants. *Id.* at 90-93.

A review of the record in this case reveals that trial counsel effectively and completely cross examined both of these witnesses by challenging their credibility before the jury. Moreover, this issue was raised on direct appeal.[6] Accordingly, this court submits that this claim is entirely without merit. The record reflects that trial counsel was very effective in his cross examination of both James Smith and Christopher Loper at trial.

B. Trial Counsel Was Not Ineffective For Failing to Call Certain Witnesses at Trial

As set forth above, Appellant also claims that trial counsel failed to investigate and call Dante Norman, Takia Edwards, Lynda Williams, Christopher Cosmen, and Francesca Granados to testify at his trial.

An ineffectiveness claim that is based upon the failure of counsel to call or investigate witnesses requires that a PCRA petitioner demonstrate that the witness existed and was available,

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[6]Additionally, this claim has been previously litigated. *See Commonwealth v. Bond,* 572 Pa. 588, 819 A.2d 33 (2002) (a PCRA petitioner cannot obtain review of claims that were previously litigated on direct appeal by presenting new theories of relief, including allegations of ineffectiveness of counsel); *see also* Memorandum Opinion, February 3, 2011, p. 10 ("the jury heard all of the witnesses testify, including testimony regarding delayed reports made by the witnesses to police, *variations in their statements*, and involvement in criminal activity") (emphasis added).

trial counsel knew or should have known of the existence of the witness, the witness was willing to testify on his behalf, and the absence of the witness' proposed testimony prejudiced his case. *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111, 1143 (2011). It is the petitioner's burden to demonstrate that trial counsel had no reasonable basis for declining to call a particular person as a witness. *Commonwealth v. Hammond*, 953 A.2d 544, 558 (Pa. Super. 2008).

In the case *sub judice*, despite the assistance of court appointed counsel and two private investigators that investigated and explored the Appellant's claims, the Appellant failed to meet his burden of proving the factors above with regard to each proposed witness. In pursuing Appellant's claims, PCRA counsel attempted to locate the named individuals on his own as well as with the assistance of investigator Don Fredricks. Appellant's family then retained investigator Richard Stohm. Despite their combined efforts, while both Takia Edwards and Lynda Williams were located, they refused to cooperate, and Dante Norman was never located. Accordingly, the Appellant did not satisfy the prongs set forth above. *Chmiel*, 30 A.3d at 1143 (the witness existed and was available, and the witness was willing to testify on his behalf).

Throughout his many filings related to the instant PCRA Petition, the Appellant attempts to establish that either Christopher Cosmen or Christopher Loper shot and killed the decedent. He claims that Norman, Edwards and Williams gave statements to the police identifying these individuals as the shooters. Specifically, he claims that Norman identified Cosmen, and claims that Edwards and Williams identified Loper. This court's exhaustive review of the records did not uncover said statements.[7]

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[7] At trial, the Commonwealth asked witness Sergeant John Slowick of the Delaware County Criminal Investigation Division, the following:

> Commonwealth: Counsel asked you about a Search Warrant that Chester -- the police department did the night of the homicide at Christopher Cosman's house.

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With regard to witnesses Edwards, Norman and Williams, because Appellant did not establish that these witnesses were available, that these witnesses were willing to testify on his behalf, and that the absence of these witnesses' proposed testimony prejudiced his case, his claim is without merit.

As for witnesses Francesca Granados and Christopher Cosmen, the Appellant failed to demonstrate that the witnesses existed and were available, trial counsel knew or should have known of the existence of the witnesses, the witnesses were willing to testify on his behalf, and that the absence of the witnesses' proposed testimony prejudiced his case.

Significantly, trial counsel attempted to implicate Christopher Cosmen as the shooter during the Appellant's trial. *See* N.T., 9/16/09, pp. 95-111; *see also* Exhibit D-5. During the course of the instant PCRA proceedings, Appellant provided this court with a statement given to police on November 26, 2007 by Cosmen in which Cosmen *explicitly identified the Appellant as the decedent's shooter*. *See* Response to Notice of Intent to Dismiss, Exhibit P. Not only did the Appellant fail to establish that Cosmen was willing to testify on his behalf, he in no way showed how the absence of Cosmen's testimony prejudiced his case. *Chmiel*, 30 A.3d at 1143. This court cannot discern how Cosmen's testimony (or the use of this statement) would have been in any way beneficial to the Appellant at trial. Because the Appellant failed to satisfy his burden with regard to Cosmen, his claim is without merit.

Slowick: Yes.

Commonwealth: From November 26 of 2007 until today, September 16, 2009, has anyone identified Christopher Cosman as being involved in any way in this case?

Slowick: No one.

N.T., 9/16/09, p. 111.

A review of the record reveals that Francesca Granados' proposed testimony would not have been helpful to the Appellant because it would not have been exculpatory. According to the records in this case, Granados is a 32 year-old female who told the police that she saw the decedent arguing with another individual before they walked out of her sight. She did not say it was the Appellant or that it was the Appellant. She simply said she saw an "individual." She told police that she heard someone say "put it down, put it down" before she heard a gunshot. She then came out of her house and saw the decedent lying in the alley. *See* Response to Notice of Intent to Dismiss, Exhibit N. The court fails to see the significance of the statement "put it down, put it down." Again, not only did the Appellant fail to establish that Granados was willing to testify on his behalf, he in no way showed how the absence of her testimony prejudiced his case. *Chmiel*, 30 A.3d at 1143. Because the Appellant failed to satisfy his burden with regard to Granados, his claim is without merit. Accordingly, this court found that trial counsel was not ineffective for failing to call or investigate any of the witnesses named by the Appellant.

IV. CONCLUSION

For the reasons outlined above, it is respectfully submitted that, the correct standards were applied and the dismissal of Appellant's petition for Post-Conviction Collateral Relief should be affirmed.

BY THE COURT:

GREGORY M. MALLON, JUDGE

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