No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

..... ♦ .....

ROBERT CHIN,
Petitioner,
vs.

SUPERINTENDENT FAYETTE SCI *et al*
Respondent(s)

..... ♦ .....

JOINT APPENDIX

..... ♦ .....

Appendix A: Third Circuit Court of Appeals decision in Chin v. Superintendent Fayette SCI et al, C.A. No. 19-1654 (3d Cir. 2019) (Ambro, Krause, and Porter), denying relief.

Appendix B: Chin v. Capozza, 2018 U.S. Dist. LEXIS 211728 (E.D. December 17, 2018) (District Judge Wendy Beetlestone).

Appendix C: Chin v. Capozza, 2018 U.S. Dist. LEXIS 180804 (E.D. October 17, 2018) (Magistrate Judge Marilyn Heffley).

Appendix
"A"

(Third Circuit Court of Appeals decision in Chin v. Superintendent Fayette SCI et al, C.A. No. 19-1654 (3d Cir. 2019) (Ambro, Krause, and Porter), denying relief.)

BLD-275 September 12, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1654**

ROBERT CHIN, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, ET AL.

(E.D. Pa. Civ. No. 2-18-cv-01448)

Present: AMBRO, KRAUSE, and PORTER, Circuit Judges

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect; and

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

Chin's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would not debate that the District Court properly denied Chin's petition for the reasons outlined in the Magistrate Judge's Report and Recommendation and adopted by the District Court in its December 17, 2018 order. Chin has not made a substantial showing of the denial of a constitutional right. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/ David J. Porter
Circuit Judge

Dated: September 30, 2019
Tmm/cc: Robert Chin

A True Copy:

Patricia A. Dodszuweit

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

Appendix
"B"

(Chin v. Capozza, 2018 U.S. Dist. LEXIS 211728 (E.D. December 17, 2018) (District Judge Wendy Beetlestone.)

ROBERT CHIN, Petitioner, v. MARK CAPOZZA, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 211725
CIVIL ACTION NO. 18-1448
December 14, 2018, Decided
December 17, 2018, Filed

Editorial Information: Subsequent History

Appeal filed, 03/26/2019

Editorial Information: Prior History

Chin v. Capozza, 2018 U.S. Dist. LEXIS 180804 (E.D. Pa., Oct. 17, 2018)

Counsel **{2018 U.S. Dist. LEXIS 1}ROBERT CHIN**, Petitioner, Pro se, LABELLE, PA.

For MARK CAPOZZA, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: KELLY BRITTNEY WEAR, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: WENDY BEETLESTONE, J.

Opinion

Opinion by: WENDY BEETLESTONE

Opinion

ORDER

AND NOW, this 14th day of December, 2018, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus, and after review of the Report and Recommendation of United States Magistrate Judge Marilyn Heffley, it is ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The Petition for a Writ of Habeas Corpus is DENIED with prejudice;
3. There is no probable cause to issue a certificate of appealability; and
4. The Clerk of Court shall mark this case CLOSED.

BY THE COURT:

/s/ Wendy Beetlestone

WENDY BEETLESTONE, J.

Appendix
"C"

(Chin v. Capozza, 2018 U.S. Dist. LEXIS 180804 (E.D. October 17, 2018) (Magistrate Judge Marilyn Heffley.)

ROBERT CHIN, Petitioner, v. MARK CAPOZZA, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 180804
CIVIL ACTION NO. 18-1448
October 17, 2018, Decided
October 17, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Writ of habeas corpus denied, Certificate of appealability denied Chin v. Capozza, 2018 U.S. Dist. LEXIS 211725 (E.D. Pa., Dec. 14, 2018)

Editorial Information: Prior History

Commonwealth v. Chin, 50 A.3d 232, 2012 Pa. Super. LEXIS 2355 (Pa. Super. Ct., May 4, 2012)

Counsel **{2018 U.S. Dist. LEXIS 1}ROBERT CHIN**, Petitioner, Pro se, LABELLE, PA.

For MARK CAPOZZA, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: KELLY BRITTNEY WEAR, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: MARILYN HEFFLEY, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: MARILYN HEFFLEY

Opinion

REPORT AND RECOMMENDATION

MARILYN HEFFLEY, U.S.M.J.

This is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by **Robert Chin** ("Chin" or "Petitioner"), a prisoner incarcerated at the State Correctional Institution Fayette in LaBelle, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. FACTUAL AND PROCEDURAL HISTORY

On January 24, 2011, Chin pled guilty in the Philadelphia County Court of Common Pleas to third-degree murder, attempted murder, conspiracy, firearms not to be carried without a license, carrying a firearm on public streets in Philadelphia and possession of an instrument of crime. Opinion at 1, Commonwealth v. Chin, No. CP-51-CR-0015024-2009 (Pa. Ct. Com. Pl. Phila. Cnty. May 11, 2017) [hereinafter "Tr. Ct. PCRA Op."]. Chin initially had been charged with a general charge of murder, 18 Pa. Cons. Stat. § 2502,1 and a general charge of conspiracy**{2018 U.S. Dist. LEXIS 2}** to commit a criminal act, 18 Pa. Cons. Stat. § 903. Information, Commonwealth v. Chin, No. CP-51-CR-0015024-2009 (Pa. Ct. Com. Pl. Phila. Cnty.) [hereinafter "Information"]. In exchange for a guilty plea on the third-degree murder charge, the Commonwealth agreed not to proceed with a

first-degree murder charge, which carried a mandatory sentence of life imprisonment without parole. Tr. Ct. PCRA Op. at 7 n.22. On April 20, 2011, the trial court sentenced Chin to a cumulative term of imprisonment of 30 to 60 years. Id. at 1. On May 3, 2011, Chin filed a pro se notice of appeal with the Pennsylvania Superior Court. Id. On May 4, 2012, the Superior Court affirmed the judgment of sentence. Opinion, Commonwealth v. Chin, 50 A.3d 232 (Pa. Super. Ct. (Pa. Super. Ct. 2012) (reproduced at Resp'ts' Br. (Doc. No. 11) Ex. A). The Pennsylvania Supreme Court denied Chin's petition for allowance of appeal on February 28, 2013. Commonwealth v. Chin, 619 Pa. 685, 63 A.3d 773 (Pa. Super. Ct. 2013).

On October 23, 2013, Chin filed a timely pro se petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541-9546. PCRA Pet., Commonwealth v. Chin, No. CP-51-CR-0015024-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Oct. 23, 2013).**{2018 U.S. Dist. LEXIS 3}** The PCRA court appointed counsel for Chin. Tr. Ct. PCRA Op. at 2 & n.8. However, counsel filed a letter pursuant to Pennsylvania v. Finley, 481 U.S. 551, 558-59, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), seeking to withdraw on the basis that Chin had no meritorious claim. Tr. Ct. PCRA Op. at 2. The PCRA court filed a notice pursuant to Pa. R. Crim. P. 907 of its intent to dismiss the petition, and Chin filed objections in response. Id. at 2. The PCRA court dismissed the petition on November 18, 2016. Id. at 3. The Pennsylvania Superior Court denied Chin's appeal of the rejection of his PCRA petition on February 16, 2018. Opinion, Commonwealth v. Chin, 185 A.3d 1126 (Pa. Super. Ct. Feb. 16, 2018) [hereinafter "Super. Ct. PCRA Op."] (reproduced at Resp'ts' Br. Ex. B).

Chin did not seek review in the Pennsylvania Supreme Court, but instead filed his habeas petition in this Court on April 1, 2018.2 In his petition, Chin raises a single claim, alleging ineffective assistance of counsel for advising him to plead guilty to a count that he claims charged him with conspiracy to commit third-degree murder. Pet'r's Br. (Doc. No. 12) at 7. Chin argues that because, under Pennsylvania law, third-degree murder is "a killing done with malice that is neither intentional nor committed in the course**{2018 U.S. Dist. LEXIS 4}** of a felony," Commonwealth v. Tolbert, 448 Pa. Super. 189, 670 A.2d 1172, 1179 (Pa. Super. Ct. 1995), he could not properly have been convicted of conspiracy to commit that crime because it is tantamount to a conviction for conspiring to commit an unintentional act. Pet'r's Br. at 7-11. He therefore asserts that his counsel was ineffective in allowing him to plead guilty to a crime "which did not exist under the laws of Pennsylvania." Id. at 7. As discussed below, all of these claims lack merit.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Issuance of a Writ of Habeas Corpus

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly limited the federal courts' power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

> 1. Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2. Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.28 U.S.C. § 2254(d).

The United States**{2018 U.S. Dist. LEXIS 5}** Supreme Court has made clear that a writ may issue under the "contrary to" clause of § 2254(d)(1) only if the "state court applies a rule different from the governing law set forth in [United States Supreme Court] cases, or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). A writ may issue

under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court, but the state court "unreasonably applies it to the facts of the particular case." Id. This requires a petitioner to demonstrate that the state court's analysis was "objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

State court factual determinations are also given considerable deference under the AEDPA. Palmer v. Hendricks, 592 F.3d 386, 391-92 (3d Cir. 2010). A petitioner must establish that the state court's adjudication of the claim "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)(2).

B. Exhaustion and Procedural Default

"[A] federal habeas court may not grant a petition for a writ of habeas corpus . . . unless the petitioner has first exhausted the remedies**{2018 U.S. Dist. LEXIS 6}** available in the state courts." Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The exhaustion requirement mandates that the claim "have been 'fairly presented' to the state courts." Bronshtein v. Horn, 404 F.3d 700, 725 (3d Cir. 2005) (quoting Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)). Fair presentation requires that a petitioner have pursued his or her claim "through one 'complete round of the State's established appellate review process.'" Woodford v. Ngo, 548 U.S. 81, 92, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006) (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)). The procedural default barrier, in the context of habeas corpus, also precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). "[I]f [a] petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his [or her] claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is a procedural default for purposes of federal habeas . . . ." Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

To survive procedural default in the federal courts, a petitioner must either "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in**{2018 U.S. Dist. LEXIS 7}** a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

C. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 686-88, 693-94.

To satisfy the reasonable performance prong of the analysis, a petitioner must show "'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 687). In evaluating counsel's performance, the reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance" and that there are "'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular

client in the same way.'" Id. at 104, 106 (quoting Strickland, 466 U.S. at 689). The reviewing court must "'reconstruct the circumstances of counsel's**{2018 U.S. Dist. LEXIS 8}** challenged conduct' and 'evaluate the conduct from counsel's perspective at the time.'" Id. at 107 (quoting Strickland, 466 U.S. at 689). "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Id. at 111.

To satisfy the prejudice prong of the analysis, a petitioner must demonstrate that counsel's errors were "'so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable.'" Id. at 104 (quoting Strickland, 466 U.S. at 687). Thus, a petitioner must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694). This determination must be made in light of "the totality of the evidence before the judge or jury." Strickland, 466 U.S. at 695.

III. DISCUSSION

A. Chin's Claim is Defaulted

Chin raised his claim that it is impossible to conspire to commit an unintentional act in his PCRA petition in the trial court. See Tr. Ct. PCRA Op. at 5 & n.19. He failed, however, to raise the claim in his appeal of the denial of his PCRA petition. See Super. Ct. PCRA Op. at 3. Chin argues that he did raise the claim, but that the Superior**{2018 U.S. Dist. LEXIS 9}** Court "declined to adjudicate it" and instead "focused their inquiry on Petitioner's claim that his sentence violated section 903(c) of the Crimes Code." Pet'r's Br. at 7. That argument is meritless. The only claim that Chin raised in his appellate brief that was directed to the conspiracy charge was his claim regarding 18 Pa. Cons. Stat. § 903(c), which provides that "[i]f a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship." This claim is unrelated to the claim Chin asserts here. As the result of his failure to raise the argument in his Superior Court brief, the Superior Court held that he had abandoned the issue on appeal. Super. Ct. PCRA Op. at 4-5.

Chin contends, however, that because he raised the claim in the PCRA court and then appealed the denial of his petition to the Superior Court, the Superior Court should have applied the liberal construction due pro se litigants and addressed his claim regarding conspiracy to commit an unintentional act even though he failed to raise it in his appellate brief. Pet'r's Br. at 7; Traverse (Doc. No. 13) at 2-3. "Ordinarily, a state prisoner**{2018 U.S. Dist. LEXIS 10}** does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." Baldwin v. Reese, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004). This rule specifically includes arguments contained in briefs filed in lower courts' proceedings and/or in those courts' opinions. Id. at 31-32. Thus, having raised the argument before the PCRA court did not excuse Chin from the obligation to exhaust the claim in the Superior Court by fairly presenting the argument in his brief in that court. See Woodford, 548 U.S. at 92 (exhaustion requires petitioner to present his or her argument through one full round of the state's appellate review process).

Chin asserts that he did fairly present his argument to the Superior Court by stating that he had pled guilty to a crime that does not exist and by attaching the opinion in Commonwealth ex rel. Musante v. Coleman, No. 300 WDA 2009 (Pa. Super. Ct. Feb. 12, 2010). Traverse at 3 & Ex. A. Chin only made that reference, however, in his discussion of the "Procedural History" of his case in a listing of the arguments that he had raised before the PCRA court. Appellant's Br. at**{2018 U.S. Dist. LEXIS 11}** 6, Commonwealth v. Chin, No 3849 EDA 2016 (Pa. Super. Ct. May 2017) (Doc. No. 15) (The exact date of the submission does not appear on the document. See id. at 23). He did not list it among his

"Questions Presented" to the Superior Court, id. at 3, and did not mention it in his argument, see id. at 9-22. To exhaust a claim, a petitioner must "fairly present[]" the claim to the state courts. This means that a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." Keller v. Larkins, 251 F.3d 408, 413 (3d Cir. 2001) (quoting McCandless, 172 F.3d at 262). A mere "passing reference" is insufficient for exhaustion purposes. Id. at 414; Laird v. Wetzel, No. 11-1916, 2016 U.S. Dist. LEXIS 110545, 2016 WL 4417528, at *3 (E.D. Pa. Aug. 18, 2016). Thus, Chin failed to fairly present his current argument to the Pennsylvania Superior Court and as a result, it has not been exhausted. This failure to exhaust the issue in state court precludes habeas review. As previously noted, this Court "may not grant a petition for a writ of habeas corpus . . . unless the petitioner has first exhausted the remedies available in the state courts." Lambert, 134 F.3d at 513.

Moreover, because the PCRA requires that any post-conviction petition, including second or subsequent petitions, be filed within one year of the date the judgment of**{2018 U.S. Dist. LEXIS 12}** sentence becomes final, and Chin does not assert that his ineffectiveness claim falls within any of the statutory exceptions to that rule, a Pennsylvania court would find any attempt to raise the claim now through a new PCRA petition to be time-barred. See 42 Pa. Cons. Stat. § 9545(b)(1) (one-year PCRA filing limit); Whitney v. Horn, 280 F.3d 240, 251 (3d Cir. 2002) ("It is now clear that this one-year limitation is a jurisdictional rule that precludes consideration of the merits of any untimely PCRA petition, and it is strictly enforced in all cases, including death penalty appeals."); see also O'Sullivan, 526 U.S. at 848 (when state law precludes state court review of unexhausted claim as time-barred, the claim is procedurally defaulted and unreviewable in a habeas proceeding). Consequently, Chin's claim is procedurally defaulted and does not qualify for habeas relief. Coleman, 501 U.S. at 729; McCandless, 172 F.3d at 260.

In addition, Chin's argument also is procedurally defaulted because the Superior Court rejected the argument on the independent state-law ground that he had abandoned the argument by failing to adequately address it in his brief. Super. Ct. PCRA Op. at 4-5. The rule under which an appellant waives his or her arguments by failing to meaningfully develop them and support them with appropriate authorities in his or her**{2018 U.S. Dist. LEXIS 13}** brief is a firmly established and regularly followed rule of Pennsylvania law. Leake v. Dillman, 594 F. App'x 756, 758-59 (3d Cir. 2014); Kirnon v. Kopotoski, 620 F. Supp. 2d 674, 695-96 (E.D. Pa. 2008). The Superior Court relied solely on that rule in denying Chin's claim that he had been improperly convicted for conspiracy to commit an unintentional act and did not reach the merits of that claim. Super. Ct. PCRA Op. at 4-5. Because the Superior Court rejected Chin's claim on that independent state-law ground, federal habeas review of the claim is barred unless Chin can establish cause for the default and actual prejudice. Coleman, 501 U.S. at 750; Sistrunk v. Vaughn, 96 F.3d 666, 673 (3d Cir. 1996).

Chin contends that he can make the necessary showing of cause and prejudice based on the Supreme Court's decision in Martinez v. Ryan, 566 U.S. 1, 9-13, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), because his PCRA counsel was ineffective in not raising the ineffectiveness of trial counsel in his PCRA proceeding. Pet'r's Br. at 11. In Martinez, the United States Supreme Court noted that when a state requires a petitioner to raise an ineffective assistance claim on post-conviction review, rather than on direct appeal, a post-conviction relief hearing is the first opportunity the petitioner has to have his or her ineffective assistance claim heard.3 566 U.S. at 9-13. The Court therefore concluded that a habeas petitioner may establish cause and prejudice to allow a court to**{2018 U.S. Dist. LEXIS 14}** hear a defaulted ineffective assistance claim by showing that his or her post-conviction relief counsel was ineffective in failing to properly raise that claim in the initial post-conviction relief proceeding. Id. at 13-14. Chin cannot overcome his procedural default based on Martinez, however, because the Martinez court made it clear that the exception to the cause and prejudice requirement that it was

adopting applies only to ineffective assistance of counsel in initial collateral relief proceedings. Id. The Court explicitly stated that "[t]he holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." Id. at 16. Here, Chin concedes that his counsel did raise the unintentional conspiracy theory in the PCRA court. Pet'r's Br. at 7. It was Chin, himself, who failed to raise the claim in his pro se PCRA brief in the Superior Court. Accordingly, Martinez provides no basis for Chin to escape his procedural default.4

B. Chin's Argument is Substantively Meritless

In addition**{2018 U.S. Dist. LEXIS 15}** to being procedurally defaulted, Chin's argument is completely lacking in merit. Whether a person can be convicted of conspiracy to commit third-degree murder in Pennsylvania is a matter of state law. A habeas court may not review whether a state court properly applied state law. Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Thus, a habeas court may only address an asserted state-law error if that error results in a due process violation. See Taylor v. Horn, 504 F.3d 416, 448-49 (3d Cir. 2007); see also Rolan v. Vaughn, 445 F.3d 671, 678, 680 (3d Cir. 2006) (district court erred in failing to defer to state courts because it thought they had made an error under state law "[u]nless the District Court was prepared to find that the failure went so far as to impugn the integrity of the entire proceeding"). In the present case, Chin has failed to identify any error, let alone one that establishes a due process violation.

As a factual matter, Chin is simply mistaken when he asserts that he was convicted of conspiracy to commit third-degree murder. Instead, he was charged with a general count of conspiracy, pursuant to 18 Pa. Cons. Stat. § 903. Information; Colloquy for Plea of Guilty or Nolo Contendere, No. CP-51-CR-0015024-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Jan. 24, 2011) (written colloquy) [hereinafter "Colloquy"]; Opinion at 1, Commonwealth v. Chin, No. CP-51-CR-0015024-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Aug. 3, 2011) [hereinafter "Tr. Ct. Direct Op."]; Tr. Ct. PCRA Op. at 1, 5 n.19. During the plea hearing, Chin's counsel expressly stated that Chin was pleading guilty to "shooting at [the victims]." Transcript of Record at 5, Commonwealth v. Chin, No. CP-51-CR-0015024-2009 (Pa. Ct. Com. Pl. Phila. Cnty. Jan 24, 2011) (reproduced at Doc. No. 16). **{2018 U.S. Dist. LEXIS 16}**Chin also pled guilty to a separate count of third-degree murder. Id. at 6, 12; see also Colloquy; Tr. Ct. Direct Op. at 1, 5. It is clear under Pennsylvania law that there is nothing inconsistent in Chin's having been convicted of those two counts.

Under Pennsylvania law, "[t]o sustain a criminal conspiracy conviction, the Commonwealth must establish a defendant entered into an agreement to commit or aid in an unlawful act with another person or persons, with a shared criminal intent, and an overt act was done in the conspiracy's furtherance." Commonwealth v. Weimer, 602 Pa. 33, 977 A.2d 1103, 1105-06 (Pa. 2009). Thus, Chin had completed the commission of the crime of conspiracy when he had agreed with his co-defendant to commit drive-by shootings and then took any overt act towards accomplishing that purpose, such as retrieving his gun or driving to find a victim. Even**{2018 U.S. Dist. LEXIS 17}** if he and his co-defendant had not shot at anyone, he would still be guilty of conspiring to commit an unlawful act: shooting at a person. See id. at 1106 ("no crime at all need be accomplished for the conspiracy to be committed").

Even putting aside that Chin only pled guilty to third-degree murder to obtain the benefit of not being convicted of first-degree murder, the fact that he entered that plea to the third-degree murder charge did not affect the fact that he had committed the crime of conspiracy before he actually shot at anyone. The "convict[ion] of murder in the third degree does not render the preexisting conspiracy a nonentity." Id. at 1105. "Put another way, the ultimate gradation of the crime accomplished does not in and of itself delimit the degree of crime originally planned-the crime ultimately accomplished does not

retroactively limit the scope of the original conspiracy." Id. (holding that the defendant was properly convicted of both conspiracy to commit homicide and third-degree murder); see also Commonwealth v. Fisher, 622 Pa. 366, 80 A.3d 1186, 1195 (Pa. 2013) (Under Pennsylvania's conspiracy statute, "one does not conspire to commit a denominated offense; one conspires to engage in certain conduct.").

Chin's attempted reliance on Commonwealth v. Clinger, 2003 PA Super 368, 833 A.2d 792 (Pa. Super. Ct. 2003), is misplaced. In**{2018 U.S. Dist. LEXIS 18}** Clinger, the defendant specifically pled guilty to "the charge of criminal conspiracy to commit murder in the third degree." Id. at 794. Thus, Clinger is factually distinguished from the present case. See Fisher, 80 A.3d at 1188 (distinguishing Weimar from Clinger on the basis of the specific crimes to which each defendant pled); Musante, No. 300 WDA 2009 at 3 n.2 (same). Moreover, to the extent the Pennsylvania Superior Court's decision in Clinger could be considered inconsistent with the Pennsylvania Supreme Court's prior decision in Weimar, Clinger is not valid precedent. See Castellani v. Scranton Times, L.P., 916 A.2d 648, 655, 2007 PA Super 2 (Pa. Super. Ct. 2007) (a Superior Court panel cannot overrule the Pennsylvania Supreme Court's precedent).5

Because there was no plea to a crime that was not recognized under Pennsylvania law, Chin's counsel could not have been ineffective in failing to object to the charges on that basis or in failing to inform him (erroneously) that such an error existed. Ross v. District Attorney, 672 F.3d 198, 211 n.9 (3d Cir. 2012) (counsel cannot be ineffective for failing to raise a meritless argument). Thus, Chin cannot show that he has been deprived of due process and consequently, cannot establish a basis for habeas relief.

IV. CONCLUSION

For the foregoing reasons, I recommend that Chin's habeas petition**{2018 U.S. Dist. LEXIS 19}** be denied.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 17th day of October, 2018, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus be DENIED and DISMISSED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. The 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.

/s/ Marilyn Heffley

MARILYN HEFFLEY

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

Under Pennsylvania law, a general charge of murder subsumes charges of first-, second- or third-degree murder. See 18 Pa. Cons. Stat. § 2502(a)-(c). The Information charged Chin with murder pursuant to § 2502 generally and included, in the alternative, the elements of each of the degrees of murder. Information, Commonwealth v. Chin, No. CP-51-CR-0015024-2009 (Pa. Ct. Com. Pl. Phila. Cnty.).

2

Chin's habeas petition was received by this Court on April 4, 2014. Doc. No. 1. However, because that petition was dated April 1, 2018, this Court will apply the prisoner mailbox rule and use the earlier date. See Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998).

3

In Pennsylvania, ineffective assistance claims cannot be brought on direct appeal. Torres-Rivera v. Bickell, No. 13-3292, 2014 U.S. Dist. LEXIS 159669, 2014 WL 5843616, at *16 (E.D. Pa. Nov. 10, 2014) (citing Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726, 738 (Pa. 2002)).

4

Chin also cannot rely upon Martinez because to obtain review under that ruling, a petitioner must show that his or her underlying ineffective assistance of counsel claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit" as defined by reference to the standard applicable to determining whether to grant certificates of appealability. Martinez, 566 U.S. at 14 (citing Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)); see also Valentin-Morales v. Mooney, No. 13-3271, 2015 U.S. Dist. LEXIS 16958, 2015 WL 617316, at *4 (E.D. Pa. Feb. 11, 2015) (Miller-El standard applies to Martinez merit analysis). As discussed infra in Section III(B), Chin's claim is meritless.

5

As the Weimar court noted, Clinger contradicted the well-established prior Superior Court precedent holding that a defendant could be properly convicted of conspiracy to commit third-degree murder. 977 A.2d at 1105 (collecting cases); see also Fisher, 80 A.3d at 1191-93. Thus, Clinger was wrongly decided because a panel of the Superior Court lacks the power to overrule a prior decision by that court. Commonwealth v. Pepe, 2006 PA Super 49, 897 A.2d 463, 465 (Pa. Super. Ct. 2006).