BLD-230 July 11, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1236**

SHAWN A. THOMPSON, Appellant

VS.

SUPERINTENDENT COAL TOWNSHIP

(M.D. Pa. Civ. No. 1-18-cv-01001)

Present: AMBRO, KRAUSE, and PORTER, Circuit Judges

Submitted are:

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

(2) Appellee's Response

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to deny his habeas petition. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). More specifically, reasonable jurists would not debate that Appellant's ineffective assistance of counsel and due process claims are either procedurally defaulted

" Appendix A "

or not persuasive. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Strickland v. Washington, 466 U.S. 668, 687 (1984); Middleton v. McNeil, 541 U.S. 433, 437 (2004) (per curiam).

By the Court,

s/ David J. Porter
Circuit Judge

Dated: July 16, 2019
Lmr/cc: Shawn A. Thompson
Ryan H. Lysaght

A True Copy:

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1236

SHAWN THOMPSON,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP

(M.D. Pa. Civ. No. 1:18-cv-01001)

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.

"Appendix B"

BY THE COURT,

s/ David J. Porter
Circuit Judge

Dated: August 20, 2019
Sb/cc: Shawn A. Thompson
Ryan H. Lysaght, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19-1236

Thompson v. Superintendent Coal Township SCI.
(M.D.Pa. Civ. No. 18 -cv-01001)

ORDER

Appellant has appealed denial of the petition for writ of habeas corpus that he filed in the District Court. It appearing that the appeal cannot be determined without reviewing the state court record in this case, and it further appearing that this record was never obtained by the District Court or forwarded to the Court of Appeals, it is hereby **ORDERED** that the District Court shall request the entire state court record, including all trial transcripts, from the Dauphin County Clerk of Courts in Commonwealth v. Thompson, CP-22-CR-0002146-2012. Upon receipt of the record, the District Court shall forward it to the Court of Appeals. Copies or certified copies are acceptable.

For the Court,

s/ Patricia S. Dodszuweit
Clerk

Dated: June 12, 2019

PDB/cc: Shawn A. Thompson
Ryan H. Lysaght, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk

"Appendix C"

"Incomplete Records"

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

SHAWN A. THOMPSON,	:	1:18-cv-1001
Petitioner,	:	
v.	:	Hon. John E. Jones III
SUPERINTENDENT, COAL TWP., *et al.*,	:	
Respondents.	:	

ORDER

June 12, 2019

The Clerk of Court is hereby **DIRECTED** to contact the Clerk of the Court of Common Pleas of Dauphin County, Pennsylvania, and arrange to obtain the entire state court record, including the trial transcripts, in *Commonwealth v. Thompson*, CP-22-CR-002146-2012. Upon receipt, the Clerk of this Court shall **TRANSMIT** the state court record to the United State Court of Appeals for the Third Circuit, in conjunction with that court's docket number: No. 19-1236.

John E. Jones III
United States District Judge

"Appendix D"

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

SHAWN A. THOMPSON,	:	1:18-cv-1001
Petitioner,	:	
v.	:	Hon. John E. Jones III
SUPERINTENDENT, COAL TWP., *et al.*,	:	Hon. Martin C. Carlson
Respondents.	:	

ORDER

January 14, 2019

AND NOW, upon consideration of the Report and Recommendation (Doc. 14) of United States Magistrate Judge Martin C. Carlson recommending that the instant petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be denied and that a certificate of appealability not issue,), and noting that Petitioner has filed objections[1] (Doc. 15) to the report, and the Court finding Judge Carlson's analysis to be thorough, well-reasoned, and fully supported by the record, and the

[1] Where objections to a magistrate judge's report and recommendation are filed, the court must perform a *de novo* review of the contested portions of the report. *Supinksi v. United Parcel Serv.*, Civ. A. No. 06-0793, 2009 WL 113796, at *3 (M.D. Pa. Jan. 16, 2009) (citing *Sample v. Diecks*, 885 F.2d 1099, 1106 n. 3 (3d Cir. 1989); 28 U.S.C. § 636(b)(1)(c)). "In this regard, Local Rule of Court 72.3 requires 'written objections which . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for those objections.'" *Id.* (citing *Shields v. Astrue*, Civ. A. No. 07-417, 2008 WL 4186951, at *6 (M.D. Pa. Sept. 8, 2008).

"Appendix E"

Court further finding Petitioner's objections to be without merit[2] **IT IS HEREBY ORDERED THAT:**

1. The Report and Recommendation of Magistrate Judge Carlson (Doc. 14) is **ADOPTED** in its entirety.
2. The petition for writ of habeas corpus (Doc. 1) is **DENIED**.
3. No certificate of appealability shall issue.
4. The Clerk of Court shall **CLOSE** the file on this case.

s/ John E. Jones III
John E. Jones III
United States District Judge

[2] Petitioner's submission contains no arguments that cause us to depart from the Magistrate Judge's appropriate reasoning and correct conclusions. The record amply reflects that Petitioner's trial and post-conviction counsel were not ineffective.

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

SHAWN A. THOMPSON,	:	1:18-cv-1001
Petitioner,	:	
v.	:	Hon. John E. Jones III
SUPERINTENDENT, COAL TWP., *et al.*,	:	
Respondents.	:	

ORDER

April 1, 2019

Pro se Petitioner's self-styled "Motion for Relief from Judgment Pursuant to F.R.A.P. Rule 60(b)" (Doc. 24) which we construe as a motion brought pursuant to Fed. R. Civ. P. 60(b)(1) is summarily **DENIED.** Petitioner attempts to raise a new claim within the instant motion by framing it as a "mistake" that the Court did not previously consider the argument. This is not the purpose or intent of Rule 60(b).

s/ John E. Jones III
John E. Jones III
United States District Judge

"Appendix F"

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

SHAWN A. THOMPSON,	:	1:18-cv-1001
Petitioner,	:	
v.	:	Hon. John E. Jones III
SUPERINTENDENT, COAL TWP., *et al.*,	:	Hon. Martin C. Carlson
Respondents.	:	

ORDER

April 15, 2019

Petitioner's Motion for Rehearing En Banc (Doc. 30) is **SUMMARILY DENIED.**

s/ John E. Jones III
John E. Jones III
United States District Judge

"Appendix G"

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHAWN A. THOMPSON.	:	**Civil No. 1:18-CV-1001**
	:	
Petitioner,	:	**(Judge Jones)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
SUPERINTENDENT,	:	
COAL TWP., et al.	:	
Respondents.	:	

REPORT AND RECOMMENDATION

I. Introduction

On February 26, 2012, Shawn Thompson stabbed Tyrone Manley to death outside a Harrisburg nightclub and then attempted to carjack a cab in order to flee from the scene of this killing. After years of state court litigation in this case we are now called upon to consider a habeas corpus petition filed by Shawn A. Thompson. Thompson was convicted in 2013 of third degree murder and attempted robbery of a motor vehicle, and received a sentence of twenty five to fifty years in prison. Thompson requests that this court vacate his conviction or, in the alternative, suspend his sentence, because he alleges that he was denied effective assistance of counsel at trial and at his post-conviction relief proceedings. For the reasons set forth below, we recommend that Thompson's petition be denied because his claims are either unexhausted or without merit.

II. Statement of Facts and of the Case

The factual background of the petitioner's case was aptly summarized by the Pennsylvania Superior Court:

> At approximately 2:10 A.M. on February 26, 2012, Harrisburg Bureau of Police ("HBP") received a call for a fight outside of Dragonfly night club and the Hardware Bar. The Dragonfly and the Hardware Bar had just closed for the evening and a crowd of people were gathered outside.
>
> Thompson and Tyrone Manley, Jr. (the "Victim") became engaged in a fist fight. Thompson then stabbed the Victim four times. The stab wounds were located on the right upper chest, on the back of the left arm, on the left lower chest, and on the left abdomen. The Victim died as a result of the stab wounds.
>
> After stabbing the Victim, Thompson dropped the knife and ran through the crowd. A cab was parked in a parking lot with the rear sliding door open. Thompson jumped into and attempted to take over the cab. A struggle ensued between Thompson and the cab driver, at which time, the rear-view mirror of the cab was broken. HBP Officer Nicholas Ishman ("Officer Ishman") arrived at the scene and commanded Thompson to get out of the cab. Officer Ishman testified that "[Thompson] had his left arm around the neck—around the back of the neck of the driver and his right hand was on the gearshift. [Thompson] was trying to force the gearshift down to put the vehicle in drive." Officer Ishman was able to pull Thompson out of the cab and handcuff him despite Thompson's struggle.

Commonwealth v. Thompson, 2014 WL 10919639, at *1 (Pa. Super. 2014) (internal citations omitted); (Doc. 9, at 17).

Thompson was charged with murder and attempted robbery of a motor vehicle. On April 4, 2013, after a four-day jury trial in the Court of Common Pleas

of Dauphin County, Thompson was convicted of third degree murder and attempted robbery of a motor vehicle. (Doc. 9, at 17). With a prior record score of five, Thompson was sentenced to a total of twenty-five to fifty years in prison, as his sentences for each conviction were ordered to run consecutively. (Id., at 17-18). Thompson filed a timely post-sentence motion, arguing that the jury's verdict was contrary to the weight of the evidence, and that the sentence was unduly harsh. (Id., at 18). The Superior Court affirmed Thompson's judgment of sentence on June 13, 2014. (Doc. 9, at 17). In its decision, the Superior Court noted that Thompson did not present any argument suggesting how the trial court abused its discretion in determining the verdict was not against the weight of the evidence, and therefore the court found that there was no merit to Thompson's abuse of discretion claim. (Id., at 18-19). Additionally, the court found that Thompson had failed to preserve his sentencing issues in his 1925(b) statement, and thus it could not examine the merits of that claim. (Id. at 19). The Supreme Court of Pennsylvania denied Thompson's Petition for Allowance of Appeal on January 15, 2015. (Doc. 9, at 2).

Thompson filed a timely *pro se* petition for post-conviction relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, on April 20, 2015. (Doc. 13, at 1). The PCRA petition raised three issues, all of which were intertwined with Thompson's overall ineffective assistance of counsel claim. First,

Thompson claimed that his due process rights were violated because the trial court gave a deficient reasonable doubt instruction. (Id., at 7). Second, Thompson asserted that the court failed to instruct the jury on all of the elements of attempted robbery of a motor vehicle—mainly, the definition of the intent needed to find Thompson guilty of attempt. (Id., at 8). Third, Thompson argued that the trial court gave a deficient instruction regarding the definition of "malice" for third degree murder. (Id.) Finally, Thompson raised a claim of ineffective assistance of trial counsel, arguing that his counsel failed to object to the above "defective" jury instructions. (Id., at 5-6).

The PCRA court appointed counsel, and on August 5, 2015, PCRA counsel filed a no merit letter and requested leave to withdraw. (Doc. 13, at 27). Counsel addressed the merits of Thompson's PCRA claims, and concluded that there was no merit to any of the claims Thompson raised. (Id., at 32). Counsel found that the instructions given by the trial court were adequate, and even if the instructions were given as Thompson claimed they should have been, there was not a reasonable probability that the outcome would have been different because there was more than enough evidence to find that Thompson acted with malice and with the requisite intent for attempted robbery. (Id.) The PCRA court permitted counsel to withdraw, and thereafter denied the petitioner's PCRA petition without a hearing. (Id., at 35).

In the PCRA court's opinion, it first noted that the reasonable doubt instruction given to the jury was one of two alternate versions offered by the Pennsylvania Suggested Standard Jury Instructions ("SSJI"). (Doc. 13, at 39). The only alteration made to the instruction was to change the word "crime" to "crimes," seeing that the petitioner was charged with multiple crimes. (Id.) Therefore, the court found that there was no error in the reasonable doubt instruction. With respect to the claim of a defective intent instruction for attempted robbery, the court reasoned that the only thing that was left out of the definition was a suggestion of what intent is not, and that the charge was adequate. (Id., at 40). Additionally, the court found that the definition of "malice" given by the court in the third degree murder instruction was adequate, as it used one of three alternate versions of the charge given in the SSJI, and the words that Thompson claimed were left out were "optional material" and not required to be part of the charge. (Id., at 41).

Additionally, the court addressed Thompson's claim that his trial counsel was ineffective because counsel failed to object to the instructions. At the outset, the court noted that there was no merit to the claim because the instructions were not defective. (Doc. 13, at 43). For this reason, the court found that trial counsel had a reasonable basis for not objecting to the instructions, as they were not deficient. (Id.) Finally, the court noted that, even if counsel had been ineffective,

there was sufficient evidence presented by the Commonwealth from which the jury could find that Thompson acted with the requisite malice and intent for third degree murder and attempted robbery, respectively, and therefore there was no prejudice. (Id., at 44).

Thompson appealed the PCRA court's decision to the Superior Court, raising five issues for review. Thompson alleged that the trial court erred when it gave faulty jury instructions regarding reasonable doubt, the elements of attempted robbery of a motor vehicle, and the definition of "malice" for third degree murder. Commonwealth v. Thompson, No. 16 MDA 2016, 2016 WL 5266631, at *1 (Pa. Super. Ct. Sept. 22, 2016). Further, Thompson claimed that his trial counsel was ineffective for failing to object to these faulty instructions. Id. Finally, Thompson contended that the PCRA court abused its discretion when it denied his PCRA petition without a hearing. Id.

Thompson appealed this decision to the Superior Court which provided him a further opportunity to develop some of these post-conviction claims. In its decision the court first noted that there was no arguable merit to the claim pertaining to the reasonable doubt instruction, as Thompson was actually alleging that counsel did not object to the elements of attempted robbery of a motor vehicle. Id. at *2. The court also concluded that there was no arguable merit to Thompson's claim of a faulty definition of "malice" because the definition did not require the

specific language that Thompson claimed had been left out of the instruction, rendering it deficient. Id. at *3-4. Lastly, the court reversed the PCRA court's decision with respect to the instructions of attempted robbery of a motor vehicle, as the trial court did not properly instruct the jury on the meaning of "intent." Id. at *2. The court remanded the issue for further proceedings by way of an evidentiary hearing, giving Thompson a chance to show that counsel was ineffective for failing to object to the faulty instruction, and that he was prejudiced by counsel's inaction. Id. at *3.

Upon remand, Thompson was appointed counsel and a hearing was held on January 20, 2017. (Doc. 9, at 23). Thompson's trial counsel testified at the hearing and stated that he was primarily focused on defending the murder charge and the asserted defense of self-defense. (Id.) He claimed that he considered the attempted robbery charge a "throwaway charge." (Id.) Further, he pointed out that the trial court had instructed the jury as to the definition of specific intent in connection with the murder-related charges, and that he did not think it was necessary to have the court reiterate the definition for the attempted robbery charge. (Id.) Ultimately, the PCRA court found that trial counsel was not ineffective. The court reasoned that trial counsel had a reasonable strategy of focusing on the murder-related charges, and that there was no prejudice to Thompson. (Id., at 24).

Thompson appealed this decision to the Superior Court, and the court affirmed the denial of his petition. The Superior Court reasoned that even if trial counsel's performance was deficient for failing to object to the attempted robbery instruction, Thompson was not prejudiced by the deficiency. (Doc. 9, at 25). The court went through the trial court's instruction, and found that there was a single phrase that was missing from the instruction: "If he . . . has not definitely made up his . . . mind—if his . . . purpose is uncertain or wavering—he . . . lacks the kind of intent that is required for attempt." (Id.) (quoting SSJI 12.901A(5)). The court found that, although this statement was missing, Thompson's own testimony as to the facts surrounding the attempted robbery charge evidenced the requisite intent to commit the attempted robbery. (Id.) Thus, the court ultimately found that the outcome would not have been different had the statement been included in the instruction, and therefore there was no prejudice to Thompson. (Id.)

Thompson filed the instant habeas petition on May 14, 2018, and filed an amended petition on June 28, 2018. (Docs. 1, 8). In his amended petition, Thompson raises three claims of ineffective assistance of his trial counsel: (1) failure to request a "heat of passion" voluntary manslaughter instruction; (2) failure to object to the attempted robbery instructions because of the lack of an intent definition; and (3) failure to object to the faulty instruction of malice as it relates to third degree murder. (Doc. 8, at 8, 18, 25). Additionally, Thompson claims that his

PCRA counsel, at both the initial and later evidentiary stages, "abandoned" him, effectively leaving him without counsel. (Doc. 8, at 32-33). The Commonwealth argues that the Superior Court's determination with respect to the attempted robbery instruction was not unreasonable. (Doc. 9, at 3). Further, the Commonwealth contends that the claims of the faulty malice definition and "heat of passion" instruction have not been properly exhausted and are therefore unexhausted and unreviewable by this court. (Doc. 9, at 3). In response, Thompson argues that any claims that are unexhausted and procedurally defaulted should be excused under Martinez v. Ryan, 566 U.S. 1 (2012), because his PCRA counsel was ineffective when he failed to preserve those claims. (Doc. 8, at 33).

III. Discussion

A. State Prisoner Habeas Relief—The Legal Standard

A state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides in part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

> (A) the applicant has exhausted the remedies available in the courts of the State;
> .....
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254 (a) and (b).

1. Substantive Standards for Habeas Petition

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. At the outset, a petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the United States," § 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. See, e.g., Reed v. Farley, 512 U.S. 339, 354 (1994). Thus, claimed violations of state law, standing alone, will not entitle a petitioner to § 2254 relief, absent a showing

that those violations are so great as to be of a constitutional dimension. See Priester v. Vaughan, 382 F.3d 394, 401-02 (3d Cir. 2004).

These principles apply with particular force to claims of ineffective assistance of counsel. A defendant like this petitioner faces an exacting burden when he collaterally challenges a conviction and sentence based upon the alleged ineffectiveness of counsel. As the Supreme Court has noted:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or ... sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the results unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Thus, in order to succeed in a claim of ineffective assistance of counsel, the petitioner must show both "cause"; that is, a legally deficient performance by counsel, and "prejudice" resulting from that ineffective performance. With respect to the first element of this test, in assessing the competence of counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential," id. at 689, and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.

2. Deference Owed to State Court Rulings

These same principles which inform the standard of review in habeas petitions and limit habeas relief to errors of a constitutional dimension also call upon federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under § 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law; see 28 U.S.C. § 2254(d)(1); or (2) was "based upon an unreasonable determination of the facts," see 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. See Rice v. Collins, 546 U.S. 333, 338-39 (2006); see also Warren v. Kyler, 422 F.3d 132, 139-40 (3d Cir. 2006); Gattis v. Snyder, 278 F.3d 222, 228 (3d Cir. 2002).

In addition, § 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can be shown by clear

and convincing evidence that this factual finding was erroneous. See 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings. See, e.g., Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam); Demosthenes v. Baal, 495 U.S. 731, 734-35 (1990).

These deferential standards of review also guide our assessment of the legal claims concerning the effectiveness of counsel. Thus, any state court factual findings in this field are presumed correct unless it can show by clear and convincing evidence that these findings were erroneous. Moreover, the state courts' decisions applying the Supreme Court's Strickland standard for assessing the competence of counsel must be upheld unless it can be shown that these decisions were either: (1) "contrary to" or involved an unreasonable application of clearly established case law; see 28 U.S.C. § 2254(d)(1); or (2) were "based upon an unreasonable determination of the facts," see 28 U.S.C. § 2254(d)(2). See, e.g., Roland v. Vaughn, 445 F.3d 671, 677-78 (3d. Cir. 2006) (applying § 2254(d) standard of review to ineffectiveness claim analysis); James v. Harrison, 389 F.3d 450, 453-54 (4th Cir. 2004) (same).

At the outset, Strickland requires a petitioner to "establish first that counsel's performance was deficient." Jermyn v. Horn, 266 F.3d 257, 282 (3d Cir. 2001). This threshold showing requires a petitioner to demonstrate that counsel made

errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. Id. Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Id. However, in making this assessment "[t]here is a 'strong presumption' that counsel's performance was reasonable." Id. (quoting Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996)).

But a mere showing of deficiencies by counsel is not sufficient to secure habeas relief. Under the second Strickland prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." Id. This prejudice requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." Id.

Thus, as set forth in Strickland, a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer's "representation fell below an objective standard of reasonableness." Id. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Thomas v. Varner, 428 F.3d 491, 499 (3d Cir. 2005)

(quoting Strickland, 466 U.S. at 689). The petitioner must then prove prejudice arising from counsel's failings. "Furthermore, in considering whether a petitioner suffered prejudice, [t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' " Rolan v. Vaughn, 445 F.3d 671, 682 (3d Cir. 2006) (quoting Strickland, 466 U.S. at 696) (internal quotations omitted). Therefore, the prejudice analysis compelled by Strickland specifically calls upon us to critically assess the strength of the government's case since "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id.

Although sometimes couched in different language, the standard for evaluating claims of ineffectiveness under Pennsylvania law is substantively consistent with the standard set forth in Strickland. See Commonwealth v. Pierce, 527 A.2d 973, 976-77 (Pa. 1987); see also Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000) ("[A] state court decision that applied the Pennsylvania [ineffective assistance of counsel] test did not apply a rule of law that contradicted Strickland and thus was not 'contrary to' established Supreme Court precedent"). Accordingly, a federal court reviewing a claim of ineffectiveness of counsel brought in a petition under 28 U.S.C. § 2254 may grant federal habeas relief only if

the petitioner can show that the state court's adjudication of his claim was an "unreasonable application" of Strickland. Billinger v. Cameron, 2010 U.S. Dist. LEXIS 63759, at *11 (W.D. Pa. May 13, 2010). In order to prevail against this standard, a petitioner must show that the state court's decision "cannot reasonably be justified under existing Supreme Court precedent." Hackett v. Price, 381 F.3d 281, 287 (3d Cir. 2004); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009) (finding that where the state court's application of federal law is challenged, "the state court's decision must be shown to be not only erroneous, but objectively unreasonable") (internal citations and quotations omitted). This additional hurdle is added to the petitioner's substantive burden under Strickland. See Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (observing "the doubly deferential judicial review that applies to a Strickland claim evaluated under the § 2254(d)(1) standard"); see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas").

This doubly deferential standard of review applies with particular force to strategic judgment like those thrust upon counsel in the instant case. In this regard, the Court has held that:

> "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id., at 688, 104 S.Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption

> that counsel's conduct falls within the wide range of reasonable professional assistance." Id., at 689, 104 S.Ct. 2052. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id., at 690, 104 S.Ct. 2052.

Knowles v. Mirzayance, 556 U.S. 111, 124, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). The deference which is owed to these strategic choices by trial counsel is great.

> Therefore, in evaluating the first prong of the Strickland test, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. The presumption can be rebutted by showing "that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound." Thomas v. Varner, 428 F.3d 491, 499-500 (3d Cir.2005) (footnote omitted).

Lewis v. Horn, 581 F.3d 92, 113 (3d Cir. 2009).

3. Procedural Thresholds for Section 2254 Petitions

(a) Exhaustion of State Remedies and Procedural Default

State prisoners seeking relief under Section 2254 must also satisfy specific, and precise, procedural standards. Among these procedural prerequisites is a requirement that the petitioner "has exhausted the remedies available in the courts of the State" before seeking relief in federal court. 28 U.S.C. § 2254(b). In instances where a state prisoner has failed to exhaust the legal remedies available

to him in the state courts, federal courts typically will refuse to entertain a petition for habeas corpus. See Whitney v. Horn, 280 F.3d. 240, 250 (3d Cir. 2002).

This statutory exhaustion requirement is rooted in principles of comity and reflects the fundamental idea that the state should be given the initial opportunity to pass upon and correct alleged violations of the petitioner's constitutional rights. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999). As the Supreme Court has aptly observed, "a rigorously enforced total exhaustion rule" is necessary in our dual system of government to prevent a federal district court from upsetting a state court decision without first providing the state courts the opportunity to correct a constitutional violation. Rose v. Lundy, 455 U.S. 509, 518 (1982). Requiring exhaustion of claims in state court also promotes the important goal of ensuring that a complete factual record is created to aid the federal courts in their review of a § 2254 petition. Walker v. Vaughn, 53 F.3d 609, 614 (3d Cir. 1995). A petitioner seeking to invoke the writ of habeas corpus, therefore, bears the burden of showing that all of the claims alleged have been "fairly presented" to the state courts, and the claims brought in federal court must be the "substantial equivalent" of those presented to the state courts. Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992); Santana v. Fenton, 685 F.2d 71, 73-74 (3d Cir. 1982). A petitioner cannot avoid this responsibility merely by suggesting that he is unlikely to succeed in seeking state relief, since it is well-settled that a claim of "likely

futility on the merits does not excuse failure to exhaust a claim in state court." Parker v.Kelchner, 429 F.3d 58, 63 (3d Cir. 2005).

While this exhaustion requirement compels petitioners to have previously given the state courts a fair "opportunity to apply controlling legal principles to the facts bearing upon [the petitioner's] constitutional claim," Picard v. Connor, 404 U.S. 270, 276 (1971), this requirement is to be applied in a commonsense fashion. Thus, the exhaustion requirement is met when a petitioner submits the gist of his federal complaint to the state courts for consideration, without the necessity that the petitioner engage in some "talismanic" recitation of specific constitutional claims. Evans, 959 F.2d at 1230-33. Similarly, a petitioner meets his obligations by fairly presenting a claim to the state courts, even if the state courts decline to specifically address that claim. See Dye v. Hofbauer, 546 U.S. 1(2005) (per curiam); Johnson v. Pinchak, 392 F.3d 551, 556 (3d Cir. 2004).

A necessary corollary of this exhaustion requirement is the procedural default doctrine, which applies in habeas corpus cases. Certain habeas claims, while not exhausted in state court, may also be incapable of exhaustion in the state legal system by the time a petitioner files a federal habeas petition because state procedural rules bar further review of the claim. In such instances:

> In order for a claim to be exhausted, it must be "fairly presented" to the state courts "by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 844-45, 119 S. Ct. 1728, 144 L.Ed.2d 1 (1999). If a claim

> has not been fairly presented to the state courts and it is still possible for the claim to be raised in the state courts, the claim is unexhausted....
>
> If a claim has not been fairly presented to the state courts but state law clearly forecloses review, exhaustion is excused, but the doctrine of procedural default may come into play. A procedural default occurs when a prisoner's federal claim is barred from consideration in the state courts by an "independent and adequate" state procedural rule. Federal courts may not consider the merits of a procedurally defaulted claim unless the applicant establishes "cause" to excuse the default and actual "prejudice" as a result of the alleged violation of the federal law or unless the applicant demonstrates that failure to consider the claim will result in a fundamental "miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002) (citations omitted).

"[A] federal court will ordinarily not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus '[o]ut of respect for finality, comity, and the orderly administration of justice.' This is a reflection of the rule that 'federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds.' " Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004) (citations omitted). Given these concerns of comity, the exceptions to the procedural default rule, while well-recognized, are narrowly defined. Thus, for purposes of excusing a procedural default of a state prisoner seeking federal habeas relief, "[t]he Supreme Court has delineated what constitutes 'cause' for the procedural default: the petitioner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's

procedural rule.'" Werts v. Vaughn, 228 F.3d 178, 192-193 (3d Cir. 2000) (citations omitted). Similarly, when examining the second component of this "cause and prejudice" exception to the procedural default rule, it is clear that:

> With regard to the prejudice requirement, the habeas petitioner must prove " 'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' " This standard essentially requires the petitioner to show he was denied "fundamental fairness" at trial. In the context of an ineffective assistance claim, we have stated that prejudice occurs where "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different."

Id. at 193 (citations omitted).

B. Thompson's Petition Should Be Denied Because the Claims Raised in His Petition are either Unexhausted or Without Merit

1. Thompson's Ineffective Assistance Claim Regarding the Voluntary Manslaughter "Heat of Passion" Instruction is Unexhausted.

Thompson claims in his petition that his trial counsel was ineffective because counsel failed to object to an incomplete voluntary manslaughter instruction, and failed to request a "heat of passion" instruction. (Doc. 8, at 27-28). He claims that the trial court erroneously instructed the jury on the "unreasonable belief" voluntary manslaughter concept, but not on the "heat of passion" concept, and that his counsel did not request the "heat of passion" instruction. (Id.) Thompson argues that but for counsel's error, the jury likely would have convicted

him of voluntary manslaughter rather than third degree murder. (Id., at 28, 30). This ineffective assistance claim was not raised in Thompson's PCRA petition. Accordingly, it was not "fairly presented" to the state courts, and has not been properly exhausted. Further, Thompson's claim is procedurally defaulted, as he is now barred from bringing this claim in state court. See Pa. R. Crim. P. 901 (a petition for post-conviction collateral relief must be filed within one year of the date the judgment becomes final).

Thompson contends that his PCRA counsel was ineffective when counsel failed to raise this issue in his PCRA petition, and therefore his ineffective assistance claim fits within the narrow exception announced in Martinez v. Ryan, 566 U.S. 1 (2012). The Supreme Court of the United States in Martinez held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 566 U.S. at 17.

The Martinez exception is narrow in that it provides a petitioner with a method to establish "cause" for a procedural default on some legal claim. Id. It does not, however, allow a petitioner to rely on the ineffectiveness of post-conviction counsel as a ground for relief, as that is precluded by § 2254(i). Id. To

the extent that the petitioner seeks relief on the ground that his PCRA counsel was ineffective, such relief should be denied.

To the extent petitioner seeks to use PCRA counsel's alleged ineffectiveness as "cause" to excuse procedural default of his unexhausted ineffective assistance claim, he has not met his burden of proof or persuasion. Under Martinez, the failure to raise a claim in a PCRA petition is excused only if counsel rendered ineffective assistance in developing, or failing to develop, the claim. Martinez, 566 U.S. at 21-22. Additionally, the claim of ineffective assistance of trial counsel that was not raised must be a substantial one—that is, it must have some merit. Id. at 14. This is a very high standard, as counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Burt v. Titlow, 571 U.S. 12, 22, 134 S. Ct. 10, 17, 187 L. Ed. 2d 348 (2013) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)).

In the instant case, we conclude that Thompson's ineffective assistance claim regarding the "heat of passion" instruction is not substantial under Martinez because it is meritless. Thompson's trial counsel put forth a defense of self-defense to the murder-related charges. (Doc. 8, at 29). In doing so, he proposed the theory of unreasonable belief for voluntary manslaughter. (Id.) The Pennsylvania Superior Court has stated:

> Unreasonable belief voluntary manslaughter, therefore, does not entail a finding that serious provocation caused sudden passion, with

> "passion" being interpreted as fear. A person who commits heat of passion voluntary manslaughter must not have been able to think clearly enough to control his actions as a result of an objectively serious provocation. A person who commits unreasonable belief voluntary manslaughter may hold his mistaken belief about the necessity for self-defense without being subject to the strong emotion of sudden passion, or may be mistaken because he was the aggressor or violated a duty to retreat. While it is possible to conceive of situations where both theories of voluntary manslaughter are applicable, they are not coextensive.

Commonwealth v. Galloway, 485 A.2d 776, 783-84 (Pa. Super. 1984). Additionally, the Supreme Court of Pennsylvania has held that "only where an instruction is requested and only if the evidence supports 'heat of passion' voluntary manslaughter, is such an instruction thereon required." Commonwealth v. Browdie, 671 A.2d 668, 674 (Pa. 1996). The court reasoned that instructions regarding matters that are not supported by the evidence in the case "serve no purpose other than to confuse the jury." Id.

At the PCRA hearing, trial counsel testified that he was concerned with the murder-related charges and the asserted defense of self-defense. (Doc. 9, at 23). Thompson argues that trial counsel should have "shifted his focus" from the self-defense strategy and should have "seen the supported evidence that could have supported a theory of . . . serious provocation." (Doc. 8, at 30). The failure to do so, he argues, undermined the confidence in the outcome because he could have been convicted of voluntary manslaughter instead of third degree murder. (Id., at 30-31). However, trial counsel testified that his focus on the self-defense claim was

his trial strategy with respect to the murder-related charges, which the PCRA court found was a reasonable strategy. (Doc. 9, at 23-24). Under Strickland, it is Thompson's burden to show that the strategy was unsound, as counsel is presumed to have exercised reasonable professional judgment. Thomas v. Varner, 428 F.3d at 499-500. Thompson has not argued that counsel's strategy was unsound, but instead argues that counsel could have pursued a different strategy other than the one used at trial. Further, Thompson does not attempt to provide any evidence or argument to the effect that counsel's strategy fell below objective standards of reasonableness. He simply argues that, in hindsight and with the clarity of hindsight, that counsel took a different approach to his defense than he now wishes had been pursued. We cannot conclude from this that counsel's performance was constitutionally deficient. Indeed, from our perspective, the choice to pursue an unreasonable self-defense claim was eminently reasonable given the charges pending against Thompson and the factual background of this slaying. In fact, the alternate manslaughter claim that Thompson now belatedly proposes—heat of passion killing—was fraught with risk since it would have highlighted Thompson's anger and aggression at the time of Manley's death, as opposed to advancing a claim that Thompson feared for his safety at the time of this fatal affray. Thus, Thompson's voluntary manslaughter instruction claim lacks merit and should not

be considered "substantial" under Martinez so as to excuse his procedurally defaulted claim.

2. Thompson's Ineffective Assistance Claims for the Attempted Robbery Instruction and the Third Degree Murder Instruction are Meritless.

Thompson raises two other ineffective assistance claims involving what he insisted were "faulty" jury instructions. He contends that his trial counsel was ineffective for failing to object to the attempted robbery instruction and the third degree murder instruction. He argues that the attempted robbery instruction was erroneous because the court did not adequately define the requisite "intent" needed for attempt. Further, he argues that the court's definition of "malice" in the third degree murder instruction left out specific language that confused the jury, leading them to convict him of third degree murder. Both of these ineffective assistance claims have been properly exhausted, as they were raised in Thompson's PCRA petition and addressed by the Pennsylvania Superior Court on appeal. Commonwealth v. Thompson, No. 16 MDA 2016, 2016 WL 5266631 (Pa. Super. Ct. Sept. 22, 2016). Thus, our review of these claims turns on the question of whether the Superior Court's denial of Thompson's claims was contrary to, or involved an unreasonable application of Strickland.

In his PCRA petition, Thompson raised an ineffective assistance claim involving trial counsel's failure to object to the attempted robbery instruction. He

argued that the court did not properly define "intent" as it related to the attempt charge. (Doc. 13, at 7). On this score, we note that Thompson was given ample opportunity to develop this claim by the state courts, but simply failed to do so. Initially, Thompson's petition was denied without a hearing. (Id., at 45). On appeal, the Superior Court found that there was arguable merit to his claim because the court instructed the jury that attempt required intent, but did not define the meaning of "intent" with respect to the charged offense. Commonwealth v. Thompson, No. 16 MDA 2016, 2016 WL 5266631, at *3. Accordingly, the Superior Court remanded the case for an evidentiary hearing. (Doc. 9, at 23). At the PCRA hearing, trial counsel testified that he was more concerned with defending the murder charge, and saw the attempted robbery charge as a "throwaway charge." (Id.) Further, he stated that he did not believe it was necessary for the court to reiterate the definition of intent, as it had instructed the jury on specific intent with respect to the murder charge. (Id.) The PCRA court found that trial counsel's strategy of focusing on the murder-related charges was reasonable, and that there was not a reasonable probability that the outcome would have been different if the language had been included. (Id., at 24).

On appeal, the Superior Court affirmed. (Doc. 9, at 22). After reviewing the instruction as a whole, the court found that, while the instruction was missing a statement provided in the SSJI—that there is no intent when the defendant's

purpose is "uncertain or unwavering,"—there was no prejudice to Thompson because Thompson's own testimony confirmed his intent to commit the robbery. (Id., at 25 (quoting SSJI 12.901A(5))). Thompson testified that his "intent was to just ask [the cab driver,] 'Can you take me off?' Can you take me out of the area?" (Id., quoting N.T. 4/113-4/4/13 at 193-94). Furthermore, the testimony of the arresting officer, who described a struggle between Thompson and the cabbie and Thompson's efforts to overwhelm the driver and commandeer his vehicle, graphically underscored Thompson's fixed and firm intention to steal this vehicle to make his escape from the scene of this killing. Thus, the court found that the outcome would not have been different had trial counsel requested that the specific language be included in the instruction. (Id.) Accordingly, the court ultimately concluded after a review of the entire instruction that the instruction was adequate and that there was no prejudice to Thompson. See Krepps v. Snyder, 112 A.3d 1246, 1256 (Pa. Super. 2015) ("Error in a charge occurs when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse the jury rather than clarify a material issue"). On this score, we conclude that the Superior Court's application of Strickland was not unreasonable, and Thompson should not be entitled to habeas relief on this claim.

Thompson also raised an ineffective assistance claim regarding the failure of trial counsel to object to a faulty third degree murder instruction, in which he

contends the definition of "malice" was incomplete and confused the jury. This claim was addressed by the Superior Court in Thompson's first appeal of the denial of his PCRA petition:

> Thompson's third argument challenges the instructions that the court used to define the charge of third degree murder. According to Thompson, the trial court failed to instruct the jury that malice, an element of third degree murder, must include "hatred, spite or ill will." We disagree.
> Third degree murder "occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice." Commonwealth v. Truong, 36 A.3d 592, 597 (Pa. Super. 2012) (en banc). This Court has defined "malice" as:
>
> > wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured[.] Malice may be found where the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury. Malice may be inferred by considering the totality of the circumstances.
>
> Commonwealth v. Dunphy, 20 A.3d 1215, 1219 (Pa. Super. 2011). Nothing in this definition requires the court to include the terms "hatred, spite or ill will". Therefore, this claim lacks arguable merit.

Commonwealth v. Thompson, No. 16 MDA 2016, 2016 WL 5266631, at *3-4. As evidenced by the decision of the Superior Court, the trial court's decision to leave out the specific language regarding "hatred, spite, or ill will" of the definition of malice did not render the instruction erroneous or deficient. Accordingly, it cannot be said that trial counsel's failure to object to the instruction constitutes ineffective

assistance of counsel, as there is a reasonable basis for counsel not to object to a proper jury instruction. Thus, this claim offers Thompson no basis for relief.

IV. Recommendation

Accordingly, for the foregoing reasons, upon consideration of this Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, and the Response in Opposition to this Petition, IT IS RECOMMENDED that the Petition be denied and that a certificate of appealability should not issue. The petitioner is further placed on notice that pursuant to Local Rule 72.3:

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

Submitted this 7th day of November, 2018.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

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