UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3709

MICHAEL FELICIANO,
Appellant

v.

SUPERINTENDENT WAYMART SCI;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. No. 2-18-cv-02139)

SUR PETITION FOR REHEARING

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

Dated: September 16, 2019
Tmm/cc: Michael Feliciano
Jill M. Graziano, Esq.

ALD-212 **June 13, 2019**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-3709**

MICHAEL FELICIANO, Appellant

VS.

SUPERINTENDENT WAYMART SCI, ET AL.

(E.D. Pa. Civ. No. 2:18-cv-002139)

Present: MCKEE, SHWARTZ, and BIBAS, Circuit Judges

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

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 or meritless. 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/Stephanos Bibas
Circuit Judge

Dated: July 22, 2019
Tmm/cc: Michael Feliciano
Jill M. Graziano, Esq.

A True Copy:

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

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

MICHAEL FELICIANO, Petitioner,	:	CIVIL ACTION
v.	:	No. 18-2139
KEVIN RANSOM, et al., Respondents.	:	

ORDER

This 5th day of November, 2018, pursuant to 28 U.S.C. § 636(b)(1)(C), upon careful review of the Report and Recommendation ("R & R") issued by the Honorable Timothy R. Rice (ECF No. 8) and upon consideration of Petitioner Michael Feliciano's Reply (ECF No. 10) and Objections to the R & R (ECF No. 11), it is hereby **ORDERED** that the R & R is adopted. Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is **DISMISSED** with prejudice and without issuance of a certificate of appealability for the reasons that follow.

Petitioner seeks relief from his conviction on two grounds. First, he argues that trial counsel was ineffective for failing to call eyewitness Lawrence Cooper during trial. Second, he asserts that the trial court provided an incomplete or inaccurate jury instruction on reasonable doubt in violation of the Due Process Clause of the Fourteenth Amendment. In the R & R, Judge Rice carefully reviewed both grounds and found that neither supports Petitioner's request for relief. Petitioner subsequently filed a Reply to the Commonwealth's answer to his petition as well as Objections to the R & R. He expanded on his second ground for relief, arguing that the trial court's jury instructions on accomplice liability and consciousness of guilt, in combination with the reasonable doubt instruction, violated the Due Process Clause of the Fourteenth Amendment. Technically, these supplemental arguments need not be considered, as they are

submitted in violation of this Court's Procedural Order (ECF No. 4). I have nonetheless considered them, find the supplemental arguments unpersuasive, and agree with Judge Rice that both of Petitioner's grounds for relief are meritless.

Judge Rice thoroughly considered and properly rejected Petitioner's first ground for relief regarding trial counsel's failure to call eyewitness Lawrence Cooper. He applied the appropriate level of deference to the state court's finding on counsel's effectiveness and correctly found that the state court's determination was not objectively unreasonable. R & R at 5–7. The state court rejected Petitioner's claim of ineffective assistance of counsel because it found Cooper's testimony questionable and because Petitioner had not established that Cooper was available and willing to testify at the 2011 trial. Because Petitioner offered no clear and convincing evidence to rebut the state court's determination, Judge Rice found that determination reasonable. *Id.* No new evidence to rebut the state court's finding appears in Petitioner's Reply or his Objections to the R & R, and therefore Petitioner's first basis for relief is meritless.

Judge Rice also correctly found that Petitioner's contentions relating to jury instructions provide no grounds for relief. As explained in the R & R, Petitioner's argument on this point is procedurally defaulted because he did not raise it during his Post-Conviction Relief Act appeal and has provided no basis for excusing this default. R & R at 7–8, 10. In his Objections to the R & R, Petitioner contends that his procedural default should be excused because Lawrence Cooper's statement constitutes evidence of actual innocence. Pet'r's Obj. at 2–3. This argument is unpersuasive. Even if not procedurally barred, the substance of Petitioner's claim regarding jury instructions lacks merit. With respect to the reasonable doubt and attempted murder instructions, Judge Rice found no error after reviewing the state court's record. Upon

independent review of the record, I agree: the jury instructions the trial court provided correctly stated the law.

I reach the same conclusion with respect to the accomplice liability and consciousness of guilt instructions. Petitioner claims the trial court misstated the law on accomplice liability by suggesting that the jury did not need to find specific intent to convict him of attempted murder on an accomplice liability theory. Pet'r's Reply at 11. He points to an instruction in which the trial court stated, "[i]t is enough that the person who is the accomplice of his own volition decides to act, to help another person commit a crime." *Id.* (quoting N.T. 8/10/11 at 237–38). While this alone may have been an incomplete description of accomplice liability, the trial court explained that "in order to find someone guilty of—on the basis of accomplice liability, you have to—you must find that the Defendant in this case had the intent to promote or facilitate commission of a specific crime." N.T. 8/10/11 at 239. The trial court further elaborated: "And I want to be clear on this. Not only must you find either they acted to assist in the crime, or that the Defendant solicited, requested, encouraged, or commanded the other person to participate or commit the crime, you must find the Defendant had the specific intent that those crimes be committed." *Id.* at 240. The latter statements expanded on the trial court's initial description of accomplice liability, which was not, as Petitioner suggests, an inaccurate instruction that should have been expressly withdrawn. Taken together, the accomplice liability instructions correctly stated the law.

There was evidence that Petitioner fled from both the scene of the mid-October incident and the October 30 incident. The trial court accordingly provided a consciousness of guilt instruction: "when a crime has been committed and a person thinks he is—or may be accused of committing it, and he flees or conceals himself, such flight or concealment is circumstantial

evidence tending to prove the Defendant is—has a consciousness of guilt." N.T. 8/10/11 at 225. The trial court further noted that "[s]uch flight or concealment does not necessarily show consciousness of guilt in every case . . . You may not find the Defendant guilty solely based on evidence of flight alone." *Id.* at 225–26. The trial court's instructions correctly stated the law. *See Commonwealth. v. Thoeun Tha*, 64 A.3d 704, 714 (Pa. 2013) (quoting *Commonwealth. v. Harvey*, 526 A.2d 330, 334 (Pa. 1987)). Given that both the consciousness of guilt and accomplice liability instructions correctly stated the law, they did not—alone or in combination with the reasonable doubt instruction—create "a reasonable likelihood" that the jury applied the instructions in such a way as to relieve the government of its burden of proving each element beyond a reasonable doubt. *See Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 285 (3d Cir. 2018).

For these reasons, I overrule the objections, reject Petitioner's supplemental arguments, adopt Judge Rice's R & R, and deny the Petition.

/s/ Gerald Austin McHugh
United States District Judge

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

MICHAEL FELICIANO, Petitioner,	:	CIVIL ACTION
v.	:	No. 18-2139
KEVIN RANSOM, et al., Respondents.	:	

ORDER

GERALD A. MCHUGH, J.

AND NOW, this day of , 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 Timothy R. Rice, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The Petition for 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 the Court shall mark this case closed for statistical purposes.

BY THE COURT:

_____
GERALD A. MCHUGH
U.S. DISTRICT COURT JUDGE

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

MICHAEL FELICIANO, Petitioner, v. KEVIN RANSOM, et al., Respondents.	:	CIVIL ACTION No. 18-2139

REPORT & RECOMMENDATION

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

July 31, 2018

Petitioner Michael Feliciano, a prisoner at the State Correctional Institution in Waymart, Pennsylvania, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging his rights to effective assistance of counsel and due process were violated by: (1) counsel's failure to call a key witness; and (2) improper jury instructions on reasonable doubt. I respectfully recommend Feliciano's claims be dismissed as procedurally defaulted or meritless.

FACTUAL AND PROCEDURAL HISTORY

In August 2011, a jury convicted Feliciano of attempted murder, possessing an instrument of crime, simple assault, and two counts of aggravated assault. See Commonwealth v. Feliciano, CP-09-CR-0000497-2011, Dkt. at 4–6.

Edwin Bayron, who was in a relationship with Feliciano's estranged wife Erica Brandau, was left with near-fatal knife wounds after an October 2010 street brawl with Feliciano. 4/18/2013 Super. Ct. Op. at 1–3. The Superior Court found Feliciano's conviction was supported by sufficient evidence, including Bayron's testimony about the October 2010 fight and a prior assault against him by Feliciano. Id. at 8–10.

In its reasonable doubt instruction, which Feliciano challenges for the first time here, the trial court emphasized that Feliciano was presumed innocent, N.T. 8/10/11 at 213–14, and then explained:

> It is not the Defendant's burden to prove he is not guilty. The Commonwealth has the burden of proving each element of the crime charged beyond a reasonable doubt. The Defendant is not required to present any evidence or to prove anything in his own defense.
>
> If the Commonwealth's evidence fails to meet its burden, then your verdict must be not guilty. On the other hand, if the Commonwealth's evidence does prove beyond a reasonable doubt that the Defendant is guilty of one or more of the crimes charged, then your verdict should be guilty.
>
> . . . .
>
> A reasonable doubt is that doubt which would restrain a reasonably careful and sensible person acting upon a matter of importance in his or her own affairs. A reasonable doubt must fairly arise from the evidence that was presented, or arise out of the lack of evidence presented with respect to some element of the crime.
>
> A reasonable doubt must be a real doubt. It may not be an imagined one, nor may it be a doubt manufactured to avoid carrying out an unpleasant duty.
>
> To summarize, you may not find the Defendant guilty based on a mere suspicion of guilt. The Commonwealth has the burden of proving the Defendant guilty beyond a reasonable doubt. If it meets that burden, then the Defendant is no longer presumed to be innocent, and you should find him guilty. On the other hand, if the Commonwealth does not meet its burden, then you must find the Defendant not guilty.

Id. at 214–15.

In March 2012, Feliciano was sentenced to 10 to 20 years in prison plus five years of probation. Dkt. at 4–6. The Superior Court affirmed in April 2013, and the Pennsylvania Supreme Court denied review in October 2013. Id. at 15.

Following sentencing, Feliciano procured an unsworn, notarized statement from Lawrence Cooper, a friend of Brandau's son, who claimed to have witnessed the fight from the son's second floor room. See 7/3/2017 Super. Ct. Op. at 7–8; Resp. Br., Attach. "A".

In March 2014, Feliciano filed a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S. § 9541 et seq. ("PCRA"). Dkt. at 16. Following a hearing, the PCRA court

dismissed his petition in June 2016. Id. at 20–21. The Superior Court affirmed in July 2017, and the Pennsylvania Supreme Court denied review in December 2017. Id. at 23.

Although Cooper failed to testify at the PCRA hearing, the Commonwealth stipulated that if he were called, he would testify consistent with his notarized statement. 7/3/2017 Super. Ct. Op. at 7. Cooper claimed he saw an unidentified man pick up a knife during the Feliciano-Bayron fight but denied seeing the man stab anyone. Id. Brandau, who directed her son to call the police during the fight, had testified she saw an unidentified man watching the fight while Bayron was on top of Feliciano. N.T. 8/9/11 at 92–93. Brandau's son testified he had been sleeping, and could not see the fight from his bedroom window, but saw an unidentified man leave with Feliciano. Id. at 107–11.

At the PCRA hearing, counsel acknowledged she could not locate Cooper and that he had been deported. 11/10/2016 PCRA Ct. Op. at 5. The PCRA court found that Feliciano had failed to establish that Cooper was available and willing to testify at trial, as required by state law to prove counsel's ineffectiveness for failure to call a witness. Id. at 5–6. Similarly, the PCRA court found no prejudice because Cooper failed to state that Feliciano did not have a knife or did not stab the victim. Id. at 7. As the PCRA court explained, Feliciano was charged with conspiring with an unidentified male, and even if the male had stabbed Bayron, Feliciano would be liable as an accomplice and coconspirator. 11/10/16 PCRA Ct. Op.; accord 4/18/2013 Super. Ct. Op. at 10 ("The evidence is more than sufficient to sustain Appellant's convictions either as a principal or an accomplice.").

The Superior Court found the impact of Cooper's testimony was "questionable" because Cooper did not see who stabbed the victim. 7/3/2017 Super. Ct. Op. at 8 (quoting 8/27/2012 Tr. Ct. Op. at 13). The court also doubted the reliability and credibility of Cooper's statement based

on his failure to alert police that evening of what he saw, his failure to alert Brandau or her son, and his disclosure only after he met Feliciano "by happenstance" in prison. Id. at 8.

In May 2018, Feliciano timely filed his habeas petition. See Hab. Pet. (doc. 1) at 19.

DISCUSSION

Before seeking federal relief, a habeas petitioner must exhaust all available state court remedies, see 28 U.S.C. § 2254(b)(1), "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 (2004) (citations omitted). If a petitioner has failed to exhaust his state court remedies and the state court would now refuse to review a claim on procedural grounds, the claim is procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Bey v. Superintendent Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017).

If the state courts have denied a claim on its merits, I can grant relief only if the state court's decision: (1) "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) "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). 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 (2011) (internal quotations omitted). State court factual determinations "are presumed correct absent clear and convincing evidence to the contrary." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)).

Two showings must be made to establish ineffective assistance of counsel: (1) deficiency, meaning "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) prejudice, meaning "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). I must be "highly deferential" and "indulge a strong presumption" that counsel's challenged actions were strategic. Id. at 689. The relevant inquiry is not whether Feliciano's counsel was prudent, appropriate, or perfect. Burger v. Kemp, 483 U.S. 776, 794 (1987). Rather, the focus is on ensuring the proceedings resulting in Feliciano's conviction and sentence were fair. See Strickland, 466 U.S. at 684–85.

If the state court addressed counsel's effectiveness and applied the correct legal standard, Feliciano must show the decision was objectively unreasonable. Woodford v. Visciotti, 537 U.S. 19, 25 (2002). Review of such ineffectiveness claims is "doubly deferential," requiring me to give "both the state court and the defense attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 15 (2013). "[I]t is not enough to convince a federal habeas court that, in its independent judgment," the state court misapplied Strickland. Bell v. Cone, 535 U.S. 685, 699 (2002).

I. Alibi Witness Claim

Feliciano argues trial counsel was ineffective because he failed to call Cooper, "who[] would have testified Feliciano was actually innocent of the crime of attempted murder." Hab. Pet. at 8. This claim is meritless.

Feliciano must establish prejudice by showing: (1) what the testimony would have been, (2) that it could have been elicited, and (3) that it would have produced a different trial result if presented.[1] See Corley v. United States, Nos. 8-422, 12-2213, 2013 WL 3272411, at *7 (M.D. Pa. June 27, 2013) (citing Patel v. United States, 19 F.3d 1231, 1237 (7th Cir. 1994)); accord

[1] Under Pennsylvania law, a petitioner asserting an ineffective assistance of counsel claim based on failure to call a witness must establish: (1) the witness's "existence"; (2) his "availability"; (3) "counsel's actual awareness, or duty to know" of him; (4) his "willingness and ability" to testify; and (5) the "necessity" of his testimony "to avoid prejudice." Commonwealth v. Gibson, 951 A.2d 1110, 1133–34 (Pa. 2008).

United States v. Throckmorton, Nos. 2:05-0219, 2:09-0529, 2009 WL 3465111, at *6 (W.D. Pa. Oct. 22, 2009); United States v. Edwards, No. 96-591, 2000 WL 57270, at *5 (E.D. Pa. May 8, 2000). Such post-conviction claims are highly suspect because the decision to call a witness is a "strategic trial decision that Strickland protects from second-guessing." Henderson v. DiGuglielmo, 138 F. App'x 463, 469 (3d Cir. 2005).

The state courts' rejection of Feliciano's claim was not objectively unreasonable. The Superior Court found Cooper's testimony "questionable," 7/3/2017 Super. Ct. Op. at 8 (quoting 8/27/2012 Tr. Ct. Op.), because Cooper did not see who stabbed the victim. The court further questioned the reliability and credibility of Cooper's statement based on his failure to alert police that evening of what he saw, his failure to alert Brandau or her son, and his disclosure "by happenstance" after he met Feliciano in prison. Id. The Superior Court found Feliciano had failed to establish that Cooper was available and willing to testify at trial, as required by state law to prove counsel was ineffective for failing to call a witness. Id. at 5–6. Similarly, the state courts found no prejudice because Cooper failed to state that Feliciano did not have a knife or did not stab the victim, id. at 7, and Feliciano would have been liable as an accomplice or coconspirator regardless, 11/10/16 PCRA Ct. Op. at 7; accord 4/18/13 Super. Ct. Op. at 10 ("The evidence is more than sufficient to sustain Appellant's convictions either as a principal or an accomplice.").

The state courts reasonably determined that Cooper's unsworn, after-the-fact declaration was insufficient to establish ineffective assistance of counsel. See Duncan v. Morton, 256 F.3d 189, 201–02 (3d Cir. 2001) (where petitioner's "only evidence regarding the content of [the uncalled witness's] potential testimony [was] an unsworn letter," he could not establish prejudice resulting from counsel's alleged failure to interview that witness); Scott v. Lavan, 190 F. App'x

196, 198 (3d Cir. 2006) (noting the "dubious" reliability of several unsworn statements submitted by a habeas petitioner). Feliciano fails to identify any clear and convincing evidence to rebut the state courts' factual findings that Cooper was not available and willing to testify. Their determination that Feliciano was not prejudiced is not objectively unreasonable because Cooper failed to exculpate Feliciano in the stabbing. Instead, he merely placed a third party at the crime scene, a fact acknowledged by Brandau, her son, and the state courts.

II. Jury Instruction Claim

Feliciano argues the trial court "omitted to charge the jury of an essential element of an offense that the jury must find me guilty beyond a reasonable doubt of every fact necessary to constitute the crime with which I was charged," and alleges trial counsel was ineffective for failing to object. Hab. Pet. at 10. His claim is procedurally defaulted and meritless.

Because Feliciano failed to raise this claim on PCRA and would now be time-barred from doing so, it is procedurally defaulted. See Coleman, 501 U.S. at 735 n.1; Commonwealth v. Grant, 813 A.3d 726, 733, 737 (Pa. 2002) (requiring petitioner to raise ineffective assistance of counsel claims on collateral review); 42 Pa. C.S. § 9545(b)(1) (PCRA petition must be filed within one year of final judgment except in limited circumstances); Glenn v. Wynder, 743 F.3d 402, 409 (3d Cir. 2014) (PCRA time-bar is adequate and independent state ground). Feliciano argues PCRA counsel was ineffective for failing to assert trial counsel's ineffectiveness, and also asserts that he is actually innocent. Hab. Pet. at 10–11, 17.

Procedural default may be excused if a petitioner demonstrates a legitimate cause for the default and actual prejudice from the alleged constitutional violation. Coleman, 501 U.S. at 750. PCRA counsel may provide cause for defaulting a claim of trial counsel ineffectiveness if: (1) PCRA counsel's failure to raise the claim constituted ineffective assistance under Strickland; and

(2) the underlying trial counsel ineffectiveness claim is "a substantial one," meaning it has "some merit." Martinez v. Ryan, 566 U.S. 1, 14 (2012). Procedural default also may be excused if "failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. To meet this "demanding" standard, a petitioner must provide new evidence of innocence that renders it "more likely than not" that "no reasonable juror would find him guilty." House v. Bell, 547 U.S. 518, 538 (2006).

I must determine whether the "instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72–73 (1991). Due process is violated only where there is "a reasonable likelihood" the jury applied the challenged instruction in a way that relieves the government of its burden of proving every element beyond a reasonable doubt. Bennett v. Superintendent Graterford SCI, 886 F.3d 268, 285 (3d Cir. 2018) (quoting Waddington v. Sarausad, 555 U.S. 179, 190–91 (2009)).

Jury instructions must be viewed as a whole to determine whether they were fair or prejudicial. Henderson v. Kibbe, 431 U.S. 145, 153 (1977). No specific words are required to explain reasonable doubt, as long the instruction accurately conveys the concept to the jury. Victor v. Nebraska, 511 U.S. 1, 5 (1994). Courts have routinely upheld state court language about "the kind of doubt that would make a reasonable person hesitate to act." See United States v. Isaac, 134 F.3d 199, 202–03 (3d Cir. 1998); Third Circuit Model Criminal Jury Instructions ¶ 1.13 ("A reasonable doubt means a doubt that would cause an ordinary reasonable person to hesitate to act in matters of importance in her or her own life.") (collecting cases).

I must assess whether the state court's instruction created a reasonable likelihood that the jury applied it in an unconstitutional manner. Bennett, 886 F.3d at 285. For example, in Brooks v. Gilmore, No. 15-5659, 2017 WL 3453324 (E.D. Pa. Aug. 11, 2017) (McHugh, J.), this court

held that use of an emotionally charged hypothetical shifted the jury's inquiry from "a hesitation to act" to a "motivation to act," thereby creating a reasonable likelihood that the jury applied the concept in an unconstitutional manner. See id. at *1–4 (granting habeas relief based on an instruction directing jurors to analogize reasonable doubt to making a decision about whether to elect a single, life-saving, medical option for a loved one); but see Corbin v. Tice, No. 16-4527, slip op. at 19–20 n.6 (E.D. Pa. June 6, 2018) (Report & Recommendation) (Rueter, M.J.) (rejecting Brooks and finding identical reasonable doubt instruction constitutional).

I have identified no error in the state court's explanation of reasonable doubt, and Feliciano has cited none. Indeed, Feliciano fails even to specify which portion of the reasonable doubt instruction was unconstitutional.[2] The court carefully outlined the presumption of innocence and how it could be removed only if the jury determined the Commonwealth had proved each element of the charges beyond a reasonable doubt. See N.T. 8/10/2011 at 213–15.

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[2] Although his description of his second claim repeatedly references reasonable doubt, see Hab. Pet. at 10, Feliciano also mentions "trial counsel's failure to object to [the] court's erroneous instructions of attempted murder" in response to a prompt about state court exhaustion, see id. at 16. The trial court instructed:

> To find the Defendant guilty of attempted murder, you have to find three elements: That the Defendant did a certain act; in this case, the Commonwealth is arguing the Defendant stabbed the victim, the named victim, Edwin Bayron.
>
> Second, that at the time that he engaged in that conduct, he had the specific intent to kill Edwin Bayron; that is, he had a fully-formed intent to kill at the time that he—that he stabbed, the Commonwealth alleges, Edwin Bayron.
>
> And, third, the Defendant—the Defendant's act constituted a substantial step towards the commission of murder.
>
> A substantial step is a major step towards the commission of a crime, and also is a step that would strongly corroborate your belief that the Defendant at the time he engaged in that act had the firm intent to commit the crime of attempted murder.
>
> An act can be a substantial step even though other things and other steps would be required for the crime to be completed.

N.T. 8/10/2011 at 227–28. The court then "repeat[ed]" and "summarize[d]" the instruction. Id. at 228–29. This claim is procedurally defaulted, and also meritless because the instructions accurately describe the elements of attempted murder. See 18 Pa. Cons. Stat. §§ 901(a), 2502(a) (substantial step towards an intentional killing with a specific intent to kill).

The concept of reasonable doubt was properly conveyed in the "hesitate to act in a matter of importance" language that has been universally accepted as constitutional.

The jury instruction did not violate due process, so trial counsel was not ineffective for failing to object and PCRA counsel was not ineffective for failing to raise the underlying ineffectiveness claim. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument."). Because Feliciano has also failed to provide reliable new evidence of innocence, see House, 547 U.S. at 538, his procedural default cannot be excused under Martinez or the fundamental-miscarriage-of-justice exception.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, on July 31, 2018, it is respectfully recommended that the petition for a writ of habeas corpus be DISMISSED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability.[4] The 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 v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/ Timothy R. Rice
TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

[4] Jurists of reason would not debate my recommended procedural or substantive dispositions of the petitioner's claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Therefore, no certificate of appealability should be granted. See id.