No.

IN THE SUPREME COURT
OF THE UNITED STATES

♦

NAEEM JONES,
Petitioner,
VS.

SUPERINTENDENT FAYETTE SCI *et al*
Respondent(s)

♦

Appendix

Appendix A: United States District Judge Wendy Beetlestone's OPINION and ORDER (Jones v. Capozza, 2019 U.S. Dist. LEXIS 47930 (E.D. March 21, 2019), adopting Magistrate Linda K. Caracappa's Report and Recommendation Issued

Appendix B: Jones v. Capozza, 2019 U.S. Dist. LEXIS 33108.

Appendix C: Jones v. Capozza, 2018 U.S. Dist. LEXIS 187288.

Appendix: D: Jones v. Superintendent Fayette SCI, CA. No. 19-2302

Appendix A

NAEEM JONES, Petitioner, v. MARK CAPOZA, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2019 U.S. Dist. LEXIS 47930
CIVIL ACTION No. 18-1347
March 21, 2019, Decided
March 21, 2019, Filed

Editorial Information: Prior History

Jones v. Capoza, 2019 U.S. Dist. LEXIS 33108 (E.D. Pa., Feb. 26, 2019)

Counsel **{2019 U.S. Dist. LEXIS 1}**NAEEM JONES, Petitioner, Pro se, LABELLE, PA.

For MARK CAPOZA, ATTORNEY GENERAL OF PENNSYLVANIA, THE ATTORNEY GENERAL OF THE STATE OF, Respondents: SAMUEL H. RITTERMAN, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: WENDY BEETLESTONE, Judge.

Opinion

Opinion by: WENDY BEETLESTONE

Opinion

ORDER

WENDY BEETLESTONE, J.

AND NOW, this 21st day of March, 2019, upon careful and independent consideration of the petition for Writ of Habeas Corpus, together with the response thereto, and after review of the Report and Recommendation and Supplemental Report and Recommendation of United States Chief Magistrate Judge Linda K. Caracappa, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for Writ of Habeas Corpus is DISMISSED with prejudice.
3. There is no probable cause to issue a certificate of appealability.
4. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

/s/ Wendy Beetlestone

WENDY BEETLESTONE, J.

Appendix B

NAEEM JONES, Petitioner, v. MARK CAPOZA, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2019 U.S. Dist. LEXIS 33108
CIVIL ACTION No. 18-1347
February 26, 2019, Decided
February 27, 2019, Filed

Editorial Information: Subsequent History

Adopted by, Writ of habeas corpus dismissed, Certificate of appealability denied Jones v. Capoza, 2019 U.S. Dist. LEXIS 47930 (E.D. Pa., Mar. 21, 2019)Adopted by, Writ of habeas corpus dismissed, Certificate of appealability denied Jones v. Capoza, 2019 U.S. Dist. LEXIS 73311 (E.D. Pa., Apr. 30, 2019)

Editorial Information: Prior History

Jones v. Capoza, 2018 U.S. Dist. LEXIS 187288 (E.D. Pa., Oct. 30, 2018)

Counsel **{2019 U.S. Dist. LEXIS 1}**NAEEM JONES, Petitioner, Pro se, LABELLE, PA.

For MARK CAPOZA, ATTORNEY GENERAL OF PENNSYLVANIA, THE ATTORNEY GENERAL OF THE STATE OF ___, Respondents: SAMUEL H. RITTERMAN, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: LINDA K. CARACAPPA, CHIEF UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: LINDA K. CARACAPPA

Opinion

SUPPLEMENTAL REPORT AND RECOMMENDATION

LINDA K. CARACAPPA

UNITED STATES CHIEF MAGISTRATE JUDGE

Now pending before this court is a petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated at State Correctional Facility Fayette, in LaBelle, Pennsylvania. For the reasons which follow, and in the court's prior Report and Recommendation, it is recommended that the petition be denied and dismissed.

I. BACKGROUND

On October 30, 2018, the undersigned filed a Report and Recommendation ("R&R") in the instant habeas corpus matter, addressing petitioner's thirteen issues and recommending that the petition for writ of habeas corpus be denied. See 18-cv-1347, Doc. 16. The October 30, 2018 Report and Recommendation contains a full discussion of the factual and procedural background of the case. The court reiterates that petitioner was convicted first degree murder and**{2019 U.S. Dist. LEXIS 2}**

possessing an instrument of crime after shooting the victim, Steven Bartley, to death outside of Big Fella's sports bar, and on December 18, 2008, petitioner was sentenced to a mandatory life sentence for first-degree murder and no further penalty for possessing an instrument of crime. See R&R at 1-3. On November 13, 2018, in response our to October 30, 2018 Report and Recommendation, petitioner filed a motion for the Court to Rescind the Report and Recommendation to Allow Petitioner to Respond to the Respondent's Answer or, in the Alternative for an Extension to File Objections to the Report and Recommendation. See 18-cv-1347, Doc. 18. On December 17, 2018, the Honorable Wendy Beetlestone granted petitioner's motion in that petitioner was given until January 31, 2019 to file objections to the Report and Recommendation. Id., Doc. 21. On January 22, 2019, petitioner filed objections to the Report and Recommendation. Id., Doc. 22. Relevant to the instant supplemental Report and Recommendation, petitioner objects to the court's analysis of petitioner's eighth claim in the petition for writ of habeas corpus. Id. Petitioner's eighth claim alleged that trial counsel was ineffective for failing to**{2019 U.S. Dist. LEXIS 3}** investigate witnesses, specifically, potential witness Ronnetta Williams. See Habeas Pet., 3/30/18 at 23. The petition for writ of habeas corpus contained no proof that the potential witness Ronnetta Williams was available to testify and whether she would have testified. The court recommended that petitioner's eighth claim regarding Ronnetta Williams be dismissed for failure to show prejudice under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In petitioner's objections to the Report and Recommendation, petitioner attached an affidavit from Ronnetta Williams. See 18-cv-1347, Doc. 22 at Ex. A. On January 29, 2019, Judge Beetlestone referred the matter for further Report and Recommendation on petitioner's eighth claim considering the evidence provided by petitioner in the objections. Id., Doc. 24. Accordingly, the court files this Supplemental Report and Recommendation to address this specific issue.

II. RELEVANT LEGAL STANDARDS

A. Ineffective Assistance of Counsel

The Sixth Amendment recognizes the right of every criminal defendant to effective assistance of counsel. U.S. Const., Amend. VI. The applicable federal precedent for ineffective assistance of counsel claims is the well-settled two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish an ineffective**{2019 U.S. Dist. LEXIS 4}** assistance of counsel claim, a petitioner must first prove "counsel's representation fell below an objective standard of reasonableness." Id. In analyzing counsel's performance, the court must be "highly deferential." Id. at 689. The Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court 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. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). A convicted defendant asserting ineffective assistance must therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. The reviewing court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally**{2019 U.S. Dist. LEXIS 5}** competent assistance." Id. It follows that counsel cannot be ineffective for declining to raise a meritless issue. See Premo v. Moore, 562 U.S. 115, 124, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

The second part of the Strickland test requires a petitioner to demonstrate that counsel's performance "prejudiced the defense" by depriving petitioner of "a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. To establish prejudice, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694.

If a petitioner fails to satisfy either prong of the Strickland test, it is unnecessary to evaluate the other prong, as a petitioner must prove both prongs to establish an ineffectiveness claim. Moreover, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id. at 697.

B. Martinez v. Ryan

While PCRA counsel's ineffectiveness historically has not satisfied the "cause" prong to excuse procedural default, Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the United States Supreme Court has recognized a narrow exception to do this. In Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), the Court held that in "initial-review collateral proceedings," where collateral review provides the first opportunity to**{2019 U.S. Dist. LEXIS 6}** litigate claims of ineffective assistance of appointed trial counsel, ineffective assistance of counsel can be "cause" to excuse the procedural default. Id. at 7-12. The Court cautioned that its holding did not apply to counsel's error in other kinds of proceedings, such as appeals from initial-review collateral proceedings, second or successive collateral petitions, or petitions for discretionary review in state appellate courts. Id. at 16. Its "equitable ruling" was designed to reflect the "importance of the right to effective assistance of counsel." Id. In order to establish such "cause," petitioner must show that the state courts did not appoint counsel during initial-review collateral proceeding for a claim of ineffective assistance a trial, or where counsel was appointed, that counsel was ineffective under the standard set forth in Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Id. at 13-14. Further, petitioner must also demonstrate that the underlying ineffectiveness claim is "substantial" and has "some merit." Id.; see also Glenn v. Wynder, 743 F.3d 402, 409-410 (3d Cir. 2014) (quoting Martinez, 566 U.S. at 14, 132 S. Ct. 1309); see also Bey v. Superintendent Greene SCI, 856 F.3d 230, 237-238 (3d Cir. 2017). The Third Circuit Court of Appeals, noting that the Martinez Court compared this standard to that required to issue certificates of appealability, interprets the inquiry into whether the underlying**{2019 U.S. Dist. LEXIS 7}** ineffectiveness claim is "substantial" as a "'threshold inquiry'" that "'does not require full consideration of the factual or legal bases adduced in support of the claims.'" Bey, 856 F.3d at 238 (quoting Miller-El v. Cockrell, 537 U.S. 322, 327, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

III. DISCUSSION

A. Claim Eight

Petitioner's eighth claim reads as follows:

> Initial-based PCRA counsel's failure to raise all prior counsel's ineffective[ness] for failing to investigate witnesses in petitioner[s] favor to rebut[] the D.A. theory of the case that petitioner committed the crime because he was involve[d] with the D.A. key witness[,] Kamiar Woods[,] for five years and petitioner did not like the fact that she was with another guy.Habeas Pet. at 23. Petitioner alleges in the supporting facts under claim eight that "[Ronnetta] Williams is another witness that I wanted my trial counsel and my PCRA counsel to go talk to because she was there that night... [Ms. Williams] could have testified on petitioner['s] behalf that petitioner and Ms. Woods never had a[] relationship." Id.

chose to withhold the fact that petitioner was at the scene. See 18-cv-1347, Doc. 22 at Ex. A. PCRA counsel cannot be found ineffective for not bringing a claim of trial counsel ineffective assistance regarding Ms. Williams, when Ms. Williams did not originally state that she saw petitioner at the bar the night of the shooting. PCRA counsel's review**{2019 U.S. Dist. LEXIS 11}** of the record would not have raised a potential claim regarding trial counsel's failure to call Ms. Williams as a witness. The court does not find that state post-conviction counsel's actions pertaining to this claim fell below an objection standard of reasonableness. Additionally, for the reasons stated immediately below, the court does not find that petitioner was prejudiced by post-conviction counsel's performance because the underlying trial counsel ineffective assistance is not substantial and lacks merit.

2. Underlying Ineffective Assistance of Counsel Claim

Petitioner's underlying trial counsel ineffective assistance claim for failure to investigate and call Ronnetta William as a witness is not substantial. To excuse petitioner's default under Martinez, petitioner's ineffective assistance of trial counsel claim must be substantial and have "some merit." 566 U.S. at 13-14. In order to show that his claim has "some merit", petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Workman , 16-1969, ___ F.3d ___, 2019 U.S. App. LEXIS 4258, 2019 WL 545563, at *4 (citing**{2019 U.S. Dist. LEXIS 12}** Miller-El, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931).

Petitioner argues that trial counsel was aware that Ms. Williams existed as a potential witness because trial counsel was in possession of her statement to the police. Petitioner alleges that he told trial counsel that if counsel interviewed Ms. Williams she would explain that "Williams had seen petitioner coming out the bathroom with Debbie Royster at the time shots were being fired; that Ms. Woods did not witness the shooting, but was rather told about it from Ms. Williams; and lastly, that petitioner and Ms. Woods were never romantically involved." See 18-cv-1347, Doc.22. Objs. to R&R at 6. Petitioner alleges that Ms. Williams testimony would have undermined the testimony of Commonwealth witness Kamira Woods, who identified petitioner as the shooter, would have corroborated the testimony of defense witness Debbie Royster, who placed petitioner inside of the bar at the time of the shooting outside, and would have proven that Karima Woods lied about being in a prior relationship with petitioner. Id. at 9-12.

Petitioner has provided the court with an affidavit of Ronnetta Williams. See 18-cv-1347, Doc. 22 at Ex. A. Ms. Williams states the following:

> Question: Ms. Williams, do you recall whether or not you saw**{2019 U.S. Dist. LEXIS 13}** Naeem Jones on this night in question?
>
> Answer: Yes, I seen Zeek [Naeem Jones] in the bar that night.
>
> Question: Did you see him inside of the bar when the shooting occurred?
>
> Answer: Yes.
>
> Question: Ms. Williams, what makes you sure that it was Mr. Jones that you seen?
>
> Answer: When I hear the shots, I was sitting at the game at the bar, I ran towards to the bathroom and "Zeek" and Debbie came out and asked what's going on, I said they shooting outside.
>
> Question: Ms. Williams, in your first interview you did not mention "Zeek" being in the bar, why not?
>
> Answer: People was at the front door trying to get out, he said that he didn't want to be there when

the cops came, so I didn't mention his name or Debbie's name.See 18-cv-1347, Doc. 22 at Ex. A. Ms. Williams also states that Kamira Woods lied about seeing petitioner shoot the victim. Id. Ms. Williams alleges that Ms. Williams informed Kamira Woods of the shooting the following day, and Kamira Woods had not seen the shooting. Id. Ms. Williams also alleges that Kamira Woods and petitioner were never in a relationship together. Id.

Ms. Williams gave a statement to the police following the shooting, thus, it follows that trial counsel was aware of**{2019 U.S. Dist. LEXIS 14}** the existence of Ms. Williams as a potential witness.2 However, Ms. Williams' statement to the police made no mention of petitioner being inside of the bar at the time of the shooting. Petitioner now alleges that he told trial counsel that Ms. Williams saw petitioner inside the bar at the time of the shooting. Based on the police statement from Ms. Williams that trial counsel was in possession of, trial counsel would have had no reason to investigate Ms. Williams. Ms. Williams admits in her affidavit that she purposefully did not tell the police that petitioner was present at the bar during the shooting. See 18-cv-1347, Doc. 22 at Ex. A. Ms. Williams says that petitioner "did not want to be there when the cops came." Ms. Williams is alleging that she lied to the police about who was present at the bar at the time of the shooting to help petitioner. If trial counsel had contacted Ms. Williams, Ms. Williams would have had to explain to counsel that she was purposefully untruthful with the police to help petitioner. Petitioner offers no proof that he informed trial counsel that Ms. Williams testimony would be different from what she told the police. The court notes that Ms. Williams alleges**{2019 U.S. Dist. LEXIS 15}** that she did not originally tell the police that petitioner was inside of the bar because petitioner "didn't want to be there when the cops came," however, once petitioner was arrested Ms. Williams chose not to contact the police to correct her statement. Ms. Williams states that she would have been willing to testify at petitioner's trial, however, Ms. Williams made no effort to come forward in petitioner's defense prior to now.

Trial counsel was allegedly in possession of a statement from Ms. Williams in which she makes no mention of seeing petitioner at the time of the shooting. Trial counsel was not ineffective for failing to call a witness who was interviewed after the shooting and did not state that she saw petitioner inside of the bar instead of outside at the bar at the time of the shooting. Even if petitioner did tell counsel that Ms. Williams may have something different to say, trial counsel is not ineffective if he choose not to call a witness who had already lied about petitioner in a police interview.

Additionally, as explained at length in this court's original Report and Recommendation, there was significant evidence against petitioner and trial counsel did present evidence**{2019 U.S. Dist. LEXIS 16}** through Debbie Royster placing petitioner inside of the bar, instead of outside of the bar, at the time the shooting occurred. The PCRA court summarized the evidence against petitioner to the following: "Two witnesses placed [petitioner] outside the bar at the time of the shooting. Woods told police that she witnessed [petitioner] point a gun at the victim and shoot him numerous times. Frager testified that when he left the bar, [petitioner] was standing outside with the victim. Immediately after hearing gunshots, Frager saw [petitioner] standing over the victim. In addition to there being two witnesses, [petitioner] also confessed to the murder. Following the shooting, [petitioner] told Dickerson of his involvement in the murder as well as his motive for the shooting." PCRA Ct. Op., 5/25/16 at 10. There was a witness who saw petitioner shoot the victim, a witness who saw petitioner standing outside of the bar with the victim and a witness who petitioner confessed to. Ms. Williams originally did not tell the police that she saw petitioner inside of the bar at the time of the shooting. The court finds that petitioner does not have a substantial claim that he was prejudiced by trial**{2019 U.S. Dist. LEXIS 17}** counsel not calling Ms. Williams as a witness.

To succeed on a Martinez claim, petitioner has the burden of demonstrating PCRA counsel's ineffectiveness under the Strickland standard. See Martinez, 566 U.S. at 14. Petitioner also has the burden of showing that there is some merit to the underlying ineffective assistance of trial counsel

claim. Id. Petitioner has failed to meet either burden. For these reasons, petitioner's claim is procedurally defaulted, and petitioner has not established cause and prejudice to excuse this default. It is recommended that this claim be dismissed as procedurally defaulted.

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 26th day of February, 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED. Further, there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ LINDA K. CARACAPPA

LINDA K. CARACAPPA

UNITED STATES CHIEF MAGISTRATE JUDGE

Footnotes

1

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). A petitioner must invoke "one complete round of the state's established appellate review process," in order to exhaust his remedies. Id. at 845. "If [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas." Coleman v. Thompson, 501 U.S. 722, 735, n.1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); see also McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

2

The state court record that has been provided to this court does not contain a copy of Ronnetta Williams' statement to the police after the shooting. Petitioner admits that Ms. Williams gave a statement to the police following the shooting and that trial counsel had said statement. Ms. Williams admits in her affidavit, which is attached to petitioner's objections to the Report and Recommendation at Exhibit A, that when she was originally interviewed she purposefully withheld the fact that petitioner was at the bar at the time of the shooting. For purposes of this Report and Recommendation the court accepts the fact that Ms. Williams gave a statement after the shooting and withheld the fact that petitioner was present at the bar at the time of the shooting.

Appendix C

NAEEM JONES, Petitioner, v. MARK CAPOZA, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 187288
CIVIL ACTION No. 18-1347
October 30, 2018, Decided
October 30, 2018, Filed

Editorial Information: Subsequent History

Supplemental opinion at Jones v. Capoza, 2019 U.S. Dist. LEXIS 33108 (E.D. Pa., Feb. 26, 2019)

Editorial Information: Prior History

Commonwealth v. Jones, 38 A.3d 920, 2011 Pa. Super. LEXIS 5268 (Pa. Super. Ct., Nov. 15, 2011)

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

For MARK CAPOZA ATTORNEY GENERAL OF PENNSYLVANIA, HE ATTORNEY GENERAL OF THE STATE OF, Respondents: SAMUEL H. RITTERMAN, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: LINDA K. CARACAPPA, UNITED STATES CHIEF MAGISTRATE JUDGE.

Opinion

Opinion by: LINDA K. CARACAPPA

Opinion

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA

UNITED STATES CHIEF MAGISTRATE JUDGE

Now pending before this court is a petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated at State Correctional Facility Fayette, in LaBelle, Pennsylvania. For the reasons which follow, it is recommended that the petition be denied and dismissed.

I. PROCEDURAL HISTORY

On August 25, 2008, following a jury trial before the Honorable Carolyn Engel Temin, petitioner was found guilty of first degree murder and possessing an instrument of crime. See CP-51-CR-0006591-2007 at 6. On December 18, 2008, petitioner was sentenced to a mandatory life sentenced for first-degree murder and no further penalty for possessing an instrument of crime. See id. The Superior Court summarized the facts as follows:

> On the evening of February 20, 2006, the victim (Steven Bartley) and his friend, Terrance**{2018 U.S. Dist. LEXIS 2}** Speller ("Speller"), went to Big Fella's sports bar at 33rd and Reed Streets in Philadelphia. Although Speller was treating the bar's patrons to drinks, he and the victim were not warmly received. Testimony was presented that [petitioner] argued with Speller about the use of

the juke box in the bar. (Notes of testimony 8/21/08 at 19-21.) Additionally, one of [petitioner's] friends, Charles "Biggie" Waters ("Waters"), had a heated argument with the victim when the victim tried to talk to a woman whom Waters stated was there with him and [petitioner]. (Id. at 22-24; 8/22/08 at 56-62, 73-78, 138.)

Later that evening, Kamira Woods ("Woods") was screaming in the men's bathroom. James Frager ("Frager") and others rushed in and found Speller with his pants and belt open. Speller had his hands around Woods' neck. (Notes of testimony, 8/21/08 at 25-26, 103-104.) [Petitioner] had dated Woods for five years but they broke up the year before, as she alleged he had hit her and threatened her. Frager testified that [petitioner] and the other men argued with Speller and the victim about this incident until the bartender announced "last call" and the bar patrons thereafter went out onto the street. (Id. at 27-28, 106.)

Frager testified that when he left the**{2018 U.S. Dist. LEXIS 3}** bar, [petitioner] was standing outside with the victim, Speller, Waters, and Curtis Scott. (Id. at 30-33.) A police officer driving to the scene of an unrelated accident observed the victim talking emphatically to another man outside the bar. As Frager got into his car he heard gunshots, but did not observe anything. (Id. at 33.) Frager then observed [petitioner] and others standing over the victim immediately after the shooting. (Id. at 49, 51.)

Testimony was presented that the victim died of multiple gunshot wounds and the manner of death was homicide. (Notes of testimony, 8/19/08 at 65.) Dr. Gregory McDonald stated that the victim sustained approximately nine to twelve gunshots fired from at least two semi-automatic weapons. The victim was shot twice in the face at close range. Those bullets penetrated his skull, brain stem, and cerebellum and immediately destroyed his ability to move volitionally. The victim was also shot in the back, arms, legs, and chest. Those bullets pierced his spine, liver, kidney, and lungs.

The Commonwealth presented evidence that later that day, [petitioner] called his friend, Vincent Dickerson ("Dickerson"), and stated that there had been a problem with Woods at the bar. (Notes of testimony,**{2018 U.S. Dist. LEXIS 4}** 8/21/08 at 188-190.) [Petitioner] stated that Woods had been prostituting herself and that he shot a man that was trying to get involved on Woods' behalf. [Petitioner] told Dickerson that he thought the police were looking for him and that he did not know where to go or what to do. 1 (Id. at 189.) The police encountered [petitioner] later that night in an unrelated incident; he was in a car with Biggie and others. The police stopped the car due to a suspicion of marijuana. The car was searched and [petitioner] was arrested for drug possession.

1 Dickerson testified that the statement presented by the Commonwealth that [petitioner] confessed was fabricated by the police. (See notes of testimony, 8/21/08 at 183-184, 188-192.)

Woods gave statements to the police on February 21, 2006 and November 3, 2006. (Notes of testimony, 8/22/08 at 9-10, 52-63, 66.) In her first statement, she omitted reference to [petitioner]; in the second, she overcame her fear of him and his history of violence and described his participation in the murder. (Id. at 52-63.) Woods told police that she observed [petitioner] point a gun at the victim, stretch out his arm, and shoot at the victim numerous times. (Id. at 56, 60.) When [petitioner] learned**{2018 U.S. Dist. LEXIS 5}** that Woods gave a statement to the police on February 21, 2006, he sought her out the next day to ask if the detectives mentioned his name, whose picture they showed her, and whose names the police had. (Id. at 60-61.) Thereafter, in early November, Dickerson also provided a statement to the police detailing [petitioner's] involvement in the murder. 2 [Petitioner] was arrested on November 8, 2006.

2 At trial, Woods did not contradict her statement but indicated that she did not remember the

incident due to drug use

A Cobra Arms M-11 semi-automatic weapon was found in an abandoned house around the corner from 33rd Street. Officer Ernest Bottomer, a forensic ballistics expert, testified that the gun was one of the murder weapons. Officer Bottomer testified that there was at least one other gun used in the murder. (Id. at 197-198.)

The defense presented the testimony of Debbie Royster ("Royster"). Royster testified that when the shots rang out she was in the ladies' room of the bar with [petitioner]. Royster averred that she and [petitioner] were doing cocaine together at that time and exited the bathroom upon hearing the gunshots. (Id. at 241-245.)Commonwealth v. Jones, 3389 EDA 2010, (Pa. Super. 2011)(unpublished memorandum**{2018 U.S. Dist. LEXIS 6}** at 1-5.

Petitioner did not file a direct appeal. On May 13, 2009, petitioner filed a timely pro se petition for post-conviction relief, pursuant to the Post Conviction Relief Act (APCRA@), 42 Pa. C.S. § 9541, *et seq*, seeking reinstatement of his direct appeal rights nunc pro tunc. On November 19, 2010, petitioner's direct appeal rights were reinstated, and petitioner filed a direct appeal with the Superior Court on December 9, 2010. See CP-51-CR-0006591-2007, at 13. The Superior Court affirmed petitioner's sentence of judgment on November 15, 2011. Commonwealth v. Jones, 38 A.3d 920 (Pa. Super. 2011)(unpublished memorandum). Petitioner sought discretionary review with the Pennsylvania Supreme Court, which was denied on April 4, 2012. Commonwealth v. Jones, 615 Pa. 774, 42 A.3d 291 (Pa. 2012) (table).

On December 21, 2011, petitioner filed a timely pro se PCRA petition. Counsel was appointed, and filed an amended PCRA petition on August 12, 2015. See CP-51-CRCase 0006591-2007, at 15. On January 21, 2016 and April 1, 2016, the PCRA court held an evidentiary hearing. See id. at 16-17. On April 28, 2016, the PCRA court dismissed petitioner's petition. The Superior Court affirmed the dismissal of the PCRA petition on April 19, 2017. **{2018 U.S. Dist. LEXIS 7}**Commonwealth v. Jones, 169 A.3d 1184 (Pa. Super. 2017)(unpublished memorandum). The Supreme Court of Pennsylvania denied petitioner's request for allocatur on November 16, 2017. Commonwealth v. Jones, 174 A.3d 568 (Pa. 2017)(table).

On March 30, 2018, petitioner filed the instant pro se petition for Writ of Habeas Corpus. On May 24, 2018, petitioner motioned to amend the habeas petition to raise an additional claim. 18-CV-1347, Doc. 6. On May 30, 2018, the undersigned granted petitioner's motion to amend and accepted the amended petition. 18-CV-1347, Doc. 9. Petitioner raises the following thirteen (13) grounds for relief:

(1) The PCRA court erred in finding newly discovered evidence incredible;

(2) The PCRA court erred in finding trial counsel was not ineffective for failing to request an alibi jury instruction;

(3) The PCRA court erred in finding trial counsel was not ineffective for failing to object to testimony about petitioner's arrest for marijuana and to the prosecutor showing petitioner's arrest photo to a witness;

(4) The PCRA court unreasonably applied Strickland when the court found trial counsel was not ineffective for failing to subpoena the phone records of witness Vincent Dickerson;

(5) The PCRA court unreasonably applied Strickland when**{2018 U.S. Dist. LEXIS 8}** the court denied petitioner relief on the cumulative effect of all of trial counsel's errors;

(6) Trial counsel was ineffective for failing to object to the photograph of the victim's face being shown to the jury;

(7) Trial counsel was ineffective for advising petitioner not to testify;

(8) Trial counsel was ineffective for failing to call certain witnesses;

(9) Trial counsel was ineffective for not objecting to comments made by the trial court;

(10) Trial counsel was ineffective for not objecting to the jury instructions;

(11) Trial counsel was ineffective for not objecting to the trial court threatening a witness;

(12) Trial counsel was ineffective for not calling "Tanina" as a witness; and

(13) Trial counsel was ineffective for not interviewing Charles Waters.See Habeas Pet., 3/30/18; see also Amended Habeas Pet., 5/24/18.

After detailed review of the state court records, we find that petitioner is not entitled to relief and petitioner's petition for habeas corpus should be denied.

II. STANDARDS OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for Writ of Habeas Corpus from a state court judgment bears a significant**{2018 U.S. Dist. LEXIS 9}** burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues - a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court as follows:

> 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless adjudication of the claim -
>
> (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 Supreme Court of the United States, in Williams v. Taylor, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 1518-19, 146 L. Ed. 2d 389 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded state court legal decisions, and more clearly defined the two-part analysis set forth in the statute. Under the first part of the review, the federal habeas court must**{2018 U.S. Dist. LEXIS 10}** determine whether the state court decision was "contrary to" the "clearly established federal law, as determined by the Supreme Court of the United States." Williams, 529 U.S. at 404. Justice O'Connor, writing for the majority of the Court on this issue, explained that a state court decision may be contrary to Supreme Court precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours [the Supreme Court's]." Id. at 405. However, this "contrary to" clause does not encompass the "run-of-the-mill" state court decisions "applying the correct legal rule from [Supreme Court] cases to the facts of the prisoner's case." Id. at 406.

To reach such "run-of-the-mill" cases, the Court turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). Id. at 407-08. The Court found that a state court decision can involve an unreasonable application of Supreme Court precedent in one of two ways: (1) "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies**{2018**

U.S. Dist. LEXIS 11} it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407. However, the Supreme Court specified that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. The Supreme Court has more recently pronounced: "The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007).

III. DISCUSSION

a. Claim One: Whether The PCRA Court Erred in Finding Newly Discovered Evidence Incredible

Petitioner argues that the PCRA court's finding that petitioner's "newly discovered evidence" was incredible was an unreasonable determination of the facts in light of the evidence. See Habeas Pet. at 8. Petitioner presented "newly**{2018 U.S. Dist. LEXIS 12}** discovered evidence," in the way of new eye-witness testimony from Robert Corbin, to the PCRA court on collateral appeal. The PCRA court found the testimony incredible and denied petitioner's claim for a new trial. See PCRA Op., 5/25/16 at 10-12. For the reasoning that follows, we find the PCRA court did not make an unreasonable factual finding.

Petitioner argues that his due process rights were violated because the newly discovered evidence entitled petitioner to a new trial. Petitioner claims that the outcome of his trial would have been different if Mr. Corbin had testified that petitioner was not the shooter. Petitioner argues that the newly discovered evidence shows petitioner is innocent.

The threshold showing of actual innocence is high, requiring a movant to demonstrate (a) "new reliable evidence" that was previously unavailable and establishes that it is more likely than not that no reasonable juror would have convicted him, and (b) that he exercised reasonable diligence in bringing his claim ("Schlup standard"). See Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993); Schlup v. Delo, 513 U.S. 298, 324, 327-28, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); Reed v. Harlow, 448 Fed.Appx. 236, 238 n.2 (3d Cir. 2011). Petitioner must prove that it is more likely than not that no reasonable juror would have convicted him. Schlup, 513 U.S. at 298. The Schlup Court cautioned that only "new reliable**{2018 U.S. Dist. LEXIS 13}** evidence" can meet that exacting standard:

> To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial.

Id. at 324.

The PCRA court found petitioner's new evidence was not reliable and the eyewitness account was not trustworthy. The PCRA court held an evidentiary hearing in which petitioner's new evidence witness, Robert Corbin, testified that he was walking to purchase cigarettes when he witnessed the shooting of the victim. Mr. Corbin testified that he knew petitioner and that petitioner was not one of the two men he saw shoot the victim. N.T. 1/21/16 at 40-60. The PCRA court found Mr. Corbin's testimony incredible and that it was unlikely that Mr. Corbin's testimony would have compelled a different verdict.1 See PCRA Ct. Op., 5/25/16 at 10-12.

Petitioner fails to rebut the PCRA court's credibility finding. There were three reasons that the PCRA

court found Mr. Corbin's testimony incredible: (1) Mr. Corbin did not come forward as a witness until nine years after the murder**{2018 U.S. Dist. LEXIS 14}** was committed. Mr. Corbin testified that his mother and father prevented him from coming forward. However, Mr. Corbin's mother had passed away one year after the murder and Mr. Corbin's father moved away after that. N.T. 1/21/16 at 59; N.T. 4/1/16 at 45-49. (2) Mr. Corbin gave inconsistent statements as to what time he was near the shooting location. Mr. Corbin's original affidavit indicated that he was outside of the bar at 1:45 a.m. However, Mr. Corbin testified at the PCRA evidentiary hearing that he was outside the bar at 12:40 a.m. N.T. 1/21/2016 at 43. (3) Mr. Corbin testified that he could identify the two shooters, however, when shown pictures, Mr. Corbin was unable to identify the victim or any other individual who was shown through trial testimony to have been present outside the bar at the time of the shooting. Id. at 22-25, 48-49, 54.

Based on the above listed reasons, the PCRA court found Mr. Corbin's testimony incredible. This factual finding is entitled to deference in habeas proceedings. AEDPA instructs that a state court's findings of fact, including its assessment of witness credibility, are presumed to be correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). Furthermore, "[w]hen**{2018 U.S. Dist. LEXIS 15}** a state court arrives at a factual finding based on credibility determinations, the habeas court must determine whether that credibility determination was unreasonable." See Keith v. Pennsylvania, 484 Fed.Appx. 694, 697 (3d Cir. 2012) (citing Rice v. Collins, 546 U.S. 333, 339, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006)). While a federal court has the ability to disagree with a state court's credibility determinations, it should only do so where a habeas petitioner has overcome, by clear and convincing evidence, the state court's credibility determinations. See Weeks v. Snyder, 219 F.3d 245, 259 (3d Cir. 2000) (stating that credibility determinations are entitled to a strong presumption of correctness under 28 U.S.C. § 2254(e)(1)). Here, petitioner has failed to rebut the PCRA court's credibility determination and has failed to show that the Superior Court's holding that the PCRA court's factual determinations were supported by the record was unreasonable. Petitioner has failed to demonstrate by clear and convincing evidence that the PCRA court's factual finding was based on an unreasonable determination of the facts in light of the evidence presented at trial. See 28 U.S.C. § 2254(e)(1); see Miller-El v. Dretke, 545 U.S. 231, 240, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). Petitioner's newly discovered evidence fails to prove that it is more likely than not that no reasonable juror would have convicted him. Schlup, 513 U.S. at 298. As such, we must find that petitioner has failed to meet the incredibly high standard**{2018 U.S. Dist. LEXIS 16}** presented in Schlup; thus, petitioner's first claim is mertiless.

b. Claim Two: Whether the PCRA Court Erred in Finding Trial Counsel was Not Ineffective for Failing to Request an Alibi Jury Instruction

Petitioner claims that the PCRA court unreasonably applied Strickland v. Washington when the PCRA court ruled that trial counsel's failure request an alibi instruction would not have changed the outcome of the case. See Habeas Pet. at 10. Petitioner argues that trial counsel should have requested an alibi instruction based on Debbie Felicia Royster's trial testimony. At trial, Ms. Royster testified that she was inside in the bathroom snorting cocaine with petitioner at the time of the shooting. N.T. 8/22/08 at 241-245. Ms. Royster testified that while she and petitioner were snorting cocaine in the bathroom, they heard gunshots. Ms. Royster testified that after hearing the gunshots, she and petitioner ran to the bar's front door, which was locked by the bartender, temporarily preventing them from going outside. Id. Petitioner argues that the PCRA court unreasonably found that trial counsel was not ineffective for failing to request an alibi instruction based on Ms. Royster's testimony.**{2018 U.S. Dist. LEXIS 17}** We find petitioner's claim meritless.

The Sixth Amendment recognizes the right of every criminal defendant to effective assistance of counsel. U.S. Const., Amend. VI. The applicable federal precedent for ineffective assistance of

counsel claims is the well-settled two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish an ineffective assistance of counsel claim, a petitioner must first prove "counsel's representation fell below an objective standard of reasonableness." Id. In analyzing counsel's performance, the court must be "highly deferential." Id. at 689. The Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court 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. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). A convicted defendant asserting ineffective**{2018 U.S. Dist. LEXIS 18}** assistance must therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. The reviewing court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. It follows that counsel cannot be ineffective for declining to raise a meritless issue. See Premo v. Moore, 562 U.S. 115, 124, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

The second part of the Strickland test requires a petitioner to demonstrate that counsel's performance "prejudiced the defense" by depriving petitioner of "a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. To establish prejudice, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694.

If a petitioner fails to satisfy either prong of the Strickland test, it is unnecessary to evaluate the other prong, as a petitioner must prove both prongs to establish an ineffectiveness claim. Moreover, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id. at 697.

The PCRA court reviewed petitioner's**{2018 U.S. Dist. LEXIS 19}** claim that trial counsel was ineffective for failing to request an alibi instruction and found it meritless. See PCRA Ct. Op., 5/25/16 at 8-10. The PCRA court held an evidentiary hearing and trial counsel testified. Trial counsel testified that he did not request an alibi instruction because Ms. Royster placed petitioner in the bar at the time of the shooting. Trial counsel believed that placing petitioner on the premises at the time of the shooting lent to an argument that petitioner left the bar and committed the murder. N.T. 4/1/16 at 68-69. The PCRA court found that even without trial counsel's reasonable explanation, petitioner failed to prove that he was prejudiced by the lack of an alibi instruction. During closing argument trial counsel highlighted Ms. Royster's testimony and noted that the jury should evaluate her testimony. N.T. 8/25/16 at 63-63. The PCRA court explained that the jury's verdict indicated that they did not believe Ms. Royster, thus, it was unlikely-with or without an alibi instruction-that the jury would have believed Ms. Royster yet still convicted petitioner of the crime. PCRA Ct. Op., 5/25/16 at 9-10. The PCRA court also explained that the evidence was**{2018 U.S. Dist. LEXIS 20}** overwhelming, citing to the following: "Two witnesses placed [petitioner] outside the bar at the time of the shooting. Woods told police that she witnessed [petitioner] point a gun at the victim and shoot him numerous times. Frager testified that when he left the bar, [petitioner] was standing outside with the victim. Immediately after hearing gunshots, Frager saw [petitioner] standing over the victim. In addition to there being two witnesses, [petitioner] also confessed to the murder. Following the shooting, [petitioner] told Dickerson of his involvement in the murder as well as his motive for the shooting." Id. at 10. The PCRA court

found that based on the overwhelming evidence petitioner could not prove that he was prejudiced by trial counsel's decision to not request an alibi instruction. Id.

"Under Strickland, courts are precluded from finding that counsel was ineffective unless they find both that counsel's performance fell below an objectively unreasonable standard, and that the defendant was prejudiced by that performance." Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002). Petitioner has failed to prove either element necessary under Strickland.

First, petitioner has failed to prove that trial counsel's failure to request an alibi**{2018 U.S. Dist. LEXIS 21}** instruction fell below an objective standard of reasonableness. A convicted defendant asserting ineffective assistance must identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. The reviewing court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. Trial counsel gave a legally reasonable reason for the decision to not request an alibi instruction.

Second, petitioner also failed to prove that petitioner was prejudiced by trial counsel's decision to not request an alibi instruction. The PCRA court summarized the eyewitness and confession testimony that was offered at trial against petitioner. In light of the evidence against petitioner, this court cannot find that petitioner was prejudiced by trial counsel not requesting an alibi instruction. Petitioner has failed to prove to this court that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

The PCRA court applied Strickland and found that petitioner failed to show that trial**{2018 U.S. Dist. LEXIS 22}** counsel's actions fell below an objective standard of reasonableness and that petitioner was prejudiced by counsel's decision. Petitioner "must demonstrate that 'the state court decision evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under Strickland.'" Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000). Considering the state court's well-reasoned analysis, we find that the state court's rejection of this claim does not amount to an unreasonable application of Strickland, nor was the state court's ruling based upon an unreasonable interpretation of the facts in light of the evidence of record. As such, and in light of the above, we recommend claim two be denied.

c. Claim Three: Whether the PCRA Court Erred in Finding Trial Counsel Was Not Ineffective for Failing to Object to Testimony About Petitioner's Arrest for Marijuana and to The Prosecutor Showing Petitioner's Arrest Photo to a Witness.

Petitioner argues that the PCRA court unreasonably applied Strickland when the PCRA court ruled that trial counsel's failure to object to bad acts, misleading testimony, and the showing of petitioner's mug shot to the jury did not prejudice petitioner. See Habeas Pet. at 12. Petitioner was arrested**{2018 U.S. Dist. LEXIS 23}** on drug charges twenty hours after the murder. At trial, Officer Gamble testified about petitioner's drug arrest and explained that petitioner had a small amount of marijuana on him. N.T. 8/21/2008 at 234. When questioning witness James Frager about Mr. Frager's statement to the police, the Commonwealth showed petitioner's drug arrest photograph to the jury. N.T. 8/21/2008 at 54-55. Petitioner argues that trial counsel should have objected at these instances, and that the PCRA court erred in finding trial counsel was not ineffective for failing to object. For the reasons that follow, we find petitioner's claim meritless.

Petitioner raised the claims of trial counsel ineffective assistance on collateral review and the PCRA court denied them.

The PCRA court first reviewed the claim that trial counsel was ineffective for failing to object to the testimony in regards to petitioner's drug arrest. The PCRA court explained that during side bar, the

Commonwealth stated the testimony was relevant to show that the description of petitioner's clothing at the time of the drug arrest matched petitioner's clothing description from the shooting. Petitioner's trial counsel also explained that he planned**{2018 U.S. Dist. LEXIS 24}** on cross-examining Officer Gamble to show that petitioner did not attempt to flee when he was stopped in the drug incident. PCRA Ct. Op. 5/25/16 at 7, citing N.T. 8/21/08 at 251-52. In light of the side bar testimony the PCRA court found that trial counsel offered a reasonable basis for not objecting to the officer's testimony. Id. Additionally, the PCRA court explained that petitioner failed to show without the reference to petitioner's possession of a small amount of marijuana, a reasonable probability existed that the result of the proceeding would have been different. Id., citing Commonwealth v. Weiss, 622 Pa. 663, 81 A.3d 767 (Pa. 2013) (finding a minimal drug reference that was not dwelled on by the Commonwealth did not amount to prejudice).

The PCRA court then reviewed the claim that trial counsel was ineffective for failing to object to the jury seeing petitioner's photograph related to the marijuana arrest. The PCRA court explained that on sidebar trial counsel reasoned that he was not objecting to the use of the photograph because petitioner was arrested later that day for the subject homicide. PCRA Ct. Op. 5/25/16 at 7, citing N.T. 8/21/08 at 54-44. The PCRA court explained that under Pennsylvania law an arrest photo itself does**{2018 U.S. Dist. LEXIS 25}** not imply the defendant is a criminal. Id. citing Commonwealth v. Brown, 511 Pa. 155, 512 A.2d 596 (Pa. 1986) (where "mugshots" were shown to the jury, the court held that "prior contact with the police in itself proves nothing. It does not prove a prior record or previous crime, it only proves a previous contact."). The PCRA court found that petitioner could not show that he was prejudiced by the showing of the photograph, because "[a]t best, the photograph ...indicated prior contact with police, not a prior arrest or conviction." Id. The PCRA court also found that even if the photograph did indicate a prior arrest, petitioner could not show prejudice because the jury was already aware that petitioner was arrested for a small amount of marijuana. Id. at fn7.

The PCRA court reasoned that petitioner failed to show that trial counsel's decision fell below an objective standard of reasonableness and petitioner failed to prove that he was prejudiced by counsel's decisions. Petitioner was being tried for shooting the victim numerous times, this court does not find that petitioner has proved that but for the jury hearing the testimony from Officer Gamble that petitioner was arrested on a minor marijuana possession charge, the result of the proceeding**{2018 U.S. Dist. LEXIS 26}** would have been different. We also do not find that petitioner has proven that he was prejudiced by the use of petitioner's mug shot photograph. Petitioner has failed to prove to this court that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. We find the PCRA court's determination that trial counsel was not ineffective was not contrary to clearly established federal law or an unreasonable determination of the facts. It is recommended that the habeas petition be denied as to this claim.

d. Claims Four and Five

Claim Four: Petitioner's fourth claim alleges that the state court unreasonably applied Strickland when the court found trial counsel was not ineffective for failing to subpoena the phone records of witness Vincent Dickerson. Claim Five: Petitioner's fifth claim alleges that the state court unreasonably applied Strickland when the court denied petitioner relief on the cumulative effect of all of trial counsel's errors. See Habeas Pet. at 13-14, 20. We find petitioner's claims four and five are procedurally defaulted due to petitioner's failure to raise these claims on appeal to the Superior**{2018 U.S. Dist. LEXIS 27}** Court from the denial of petitioner's PCRA petition. Petitioner makes an argument that the default of any claim that wasn't properly exhausted on collateral appeal should be excused under Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). A petitioner is not deemed to have exhausted the remedies available to him if he has a right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c) (1994); Castille v. Peoples, 489 U.S. 346, 350, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989). In other words, a petitioner must invoke "one complete round of the state's established appellate review process," in order to exhaust his remedies. O'Sullivan, 526 U.S. at 845. A habeas petitioner retains the burden of showing all of the alleged claims have been "fairly presented" to the state courts, which demands, in turn, that the claims brought in federal court be the "substantial equivalent" of those presented to the state courts. Santana v. Fenton, 685 F.2d 71, 73-74 (3rd Cir. 1982). In the case of an unexhausted petition, the federal courts should dismiss without prejudice, otherwise they risk depriving the state courts of the "opportunity to correct their own errors, if any." Toulson v. Beyer, 987 F.2d 984, 989 (3rd Cir. 1993). However, "[i]f [a] petitioner failed to exhaust state remedies and the court to which**{2018 U.S. Dist. LEXIS 28}** petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas." Coleman v. Thompson, 501 U.S. 722, 735, n.1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); see also McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

In the event a petitioner brings a claim which is procedurally defaulted, he is not entitled to federal habeas review unless he can show that his default should be excused. Such excuse is allowed only where the petitioner can show "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 would result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

Petitioner raised claims four and five in regards to trial counsel ineffectiveness on collateral appeal before the PCRA court. The PCRA court reviewed and denied the claims that trial counsel was ineffective for failing to subpoena the phone records of witness Vincent Dickerson and that petitioner was prejudiced by the cumulative effect of all of trial counsel's errors. Petitioner appealed to the denial of his PCRA petition to the Superior Court. On appeal to the Superior Court petitioner abandoned these claims.

To satisfy the exhaustion**{2018 U.S. Dist. LEXIS 29}** requirement, a petitioner must present his claims to both the trial court and the Pennsylvania Superior Court. See O'Sullivan v. Boerckel, 526 U.S. 838, 842-49, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."); Lambert v. Blackwell, 387 F.3d 210, 233-34 (3d Cir. 2004) (exhausting state-court remedies involves the appeal of issues to the Superior Court of Pennsylvania). Petitioner failed to raise these claims on appeal to the Superior Court. Petitioner cannot now return to state court to litigate these claims, because they would be time barred. See Whitney v. Horn, 280 F.3d 240, 252 (3d Cir. 2002). As such, petitioner's claims are procedurally defaulted. See Coleman, 501 U.S. at 735, n. 1.

Petitioner argues that PCRA counsel's failure to adequately raise these claims during collateral proceeding before the PCRA court excuses petitioner's default under Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

While PCRA counsel's ineffectiveness historically has not satisfied the "cause" prong to excuse procedural default, Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the United States Supreme Court recently recognized a narrow exception to do this. In Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), the Court held that in

"initial-review collateral proceedings," where collateral review provides the first opportunity to litigate claims of ineffective assistance of appointed**{2018 U.S. Dist. LEXIS 30}** trial counsel, ineffective assistance of counsel can be "cause" to excuse the procedural default. Id. at 7-12. The Court cautioned that its holding did not apply to counsel's error in other kinds of proceedings, such as appeals from initial-review collateral proceedings, second or successive collateral petitions, or petitions for discretionary review in state appellate courts. Id. at 16. Its "equitable ruling" was designed to reflect the "importance of the right to effective assistance of counsel." Id. In order to establish such "cause," petitioner must show that the state courts did not appoint counsel during initial-review collateral proceeding for a claim of ineffective assistance a trial, or where counsel was appointed, that counsel was ineffective under the standard set forth in Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Id. at 13-14. Further, petitioner must also demonstrate that the underlying ineffectiveness claim is "substantial" and has "some merit." Id.; see also Glenn v. Wynder, 743 F.3d 402, 409-410 (3d Cir. 2014) (quoting Martinez, 566 U.S. at 14, 132 S. Ct. 1309); see also Bey v. Superintendent Greene SCI, 856 F.3d 230, 237-238 (3d Cir. 2017). The Third Circuit Court of Appeals, noting that the Martinez Court compared this standard to that required to issue certificates of appealability, interprets the inquiry into whether the underlying ineffectiveness claim is "substantial" as a "'threshold**{2018 U.S. Dist. LEXIS 31}** inquiry'" that "'does not require full consideration of the factual or legal bases adduced in support of the claims.'" Bey, 856 F.3d at 238 (quoting Miller-El v. Cockrell, 537 U.S. 322, 327, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

Martinez does not excuse the default of petitioner's claims four and five. These claims were raised by PCRA counsel on "initial-review collateral proceedings." Martinez can only potentially excuse the default of an underlying trial counsel ineffective assistance claim, when that default was caused by the ineffective assistance of PCRA counsel at initial-review collateral proceedings. Martinez does not apply to counsel's error in other kinds of proceedings, such as appeals from initial-review collateral proceedings. 566 U.S. at16. Petitioner's claims four and five were defaulted due to petitioner's failure to raise said claims on appeal to the Superior Court. Thus, Martinez does not excuse the default of claims four and five. We recommend that claims four and five be dismissed.

e. Claims Six, Seven, Eight, Nine, Ten, Eleven, Twelve and Thirteen

Petitioner's remaining eight claims raise ineffective assistance of trial counsel issues. Petitioner argues that PCRA counsel was ineffective for failing to raise these eight claims on collateral appeal. Petitioner raises the following**{2018 U.S. Dist. LEXIS 32}** ineffective assistance of trial counsel claims:

(1) Claim six: Trial counsel was ineffective for failing to object to the photograph of the victim's face being shown to the jury;

(2) Claim seven: Trial counsel was ineffective for advising petitioner not to testify;

(3) Claim eight: Trial counsel was ineffective for failing to call certain witnesses;

(4) Claim nine: Trial counsel was ineffective for not objecting to comments made by the trial court;

(5) Claim ten: Trial counsel was ineffective for not objecting to the jury instructions;

(6) Claim eleven: Trial counsel was ineffective for not objecting to the trial court threatening a witness;

(7) Claim twelve: Trial counsel was ineffective for not calling "Tanina" as a witness; and

(8) Claim thirteen: Trial counsel was ineffective for not interviewing Charles Waters.See Habeas Pet. at 20-27; see also Amended Habeas Pet., 5/24/18.

We find these claims procedurally defaulted.

As explained supra, a petitioner must invoke "one complete round of the state's established appellate review process," in order to exhaust his remedies. O'Sullivan, 526 U.S. at 845. Petitioner failed to raise claims six through thirteen at any level in the state court. Petitioner cannot now return to**{2018 U.S. Dist. LEXIS 33}** state court to litigate these claims, because they would be time barred. See Whitney v. Horn, 280 F.3d 240, 252 (3d Cir. 2002). As such, petitioner's claims are procedurally defaulted. See Coleman, 501 U.S. at 735, n. 1.

Petitioner argues that PCRA counsel's failure to adequately raise these claims during initial-review collateral proceeding before the PCRA court excuses petitioner's default under Martinez.

i. Claim Six: Trial counsel was ineffective for failing to object to the photograph of the victim's face being shown to the jury

Petitioner argues that trial counsel was ineffective for failing to object to the photograph of the victim's face being shown to the jury. See Habeas Pet. at 21. Petitioner argues that the photograph of the victim's face was cumulative and similar to other evidence admitted at trial. Petitioner argues that PCRA counsel was ineffective for not pursuing this claim on collateral appeal. See id.

Petitioner failed to raise this claim in state court, causing the claim to be procedurally defaulted. Petitioner argues that his default should be excused because PCRA counsel was ineffective in failing to exhaust the claim on collateral appeal.

Under Martinez, the failure of collateral attack counsel to raise an ineffective assistance of trial counsel**{2018 U.S. Dist. LEXIS 34}** claim in an initial-review collateral proceeding can constitute 'cause' if (1) collateral attack counsel's failure itself constituted ineffective assistance of counsel under Strickland and (2) the underlying ineffective assistance of trial counsel claim is 'a substantial one,' which is to say 'the claim has some merit.'" Glenn v. Wynder, 743 F.3d 402, 410 (3d Cir. 2014) (citations omitted). Martinez does not offer cause to excuse the default of this claim of ineffective assistance of counsel for failure to object to the admission of the photograph of the victim's face because that claim is not substantial.

Pennsylvania case law allows the introduction of victim photographs into evidence for the purpose of showing assailant's intent and for supporting other trial testimony. "A photograph which is judged not inflammatory is admissible if it is relevant and can assist the jury in understanding the facts." Commonwealth v. Reed, 400 Pa. Super. 207, 583 A.2d 459 (1990). "If the photographs are deemed inflammatory, then the trial judge must decide whether the photographs are of such essential evidentiary value that the need clearly outweighs the likelihood of their inflaming the passion of the jurors." Id. Further, "conditions of the victim's body provides evidence of the assailant's intent, and,**{2018 U.S. Dist. LEXIS 35}** even where the body can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs." Commonwealth v. Jacobs, 536 Pa. 402, 407, 639 A.2d 786, 788 (1994).

Additionally, under Federal Rule of Evidence 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Thus, when determining whether evidence violates Rule 403, courts must balance the probative value of the evidence against its prejudicial effect. United States v. Guerrero, 803 F.2d 783, 785 (3d Cir. 1986).

Generally, appellate courts have been reluctant to overturn determinations by district courts that photographs, even particularly "gruesome" ones, are not unfairly prejudicial and are, therefore,

admissible. See, e.g., United States v. Fields, 483 F.3d 313, 354 (5th Cir. 2007); United States v. Rodriguez-Estrada, 877 F.2d 153, 155-56 (1st Cir. 1989). This has been true even if the photographs are probative of a relevant, yet undisputed, fact. Old Chief v. United States, 519 U.S. 172, 186-87, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). The Supreme Court explained, "evidentiary relevance under Rule 401" is not "affected by the availability of alternative proofs," such as a defendant's admission, and that the exclusion of relevant evidence "must rest not on the ground that other evidence has rendered it 'irrelevant,' but on its character**{2018 U.S. Dist. LEXIS 36}** as unfairly prejudicial." Old Chief, 519 U.S. at 179, 117 S. Ct. at 649-50. "Admitting gruesome photographs of the victim's body in a murder case ordinarily does not rise to an abuse of discretion where those photos have nontrivial probative value." Fields, 483 F.3d at 355.

Petitioner has failed to show the underlying claim that trial counsel was ineffective for failing to object to the photograph of the victim's face has any merit. "Under Strickland, courts are precluded from finding that counsel was ineffective unless they find both that counsel's performance fell below an objectively unreasonable standard, and that the defendant was prejudiced by that performance." Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002). Petitioner has failed to prove either element necessary under Strickland. The trial court reviewed the photograph of the victim's face and limited the photograph to show just the part that would show the stippling to prove that the victim sustained a close-range gunshot wound. N.T. 8/18/08 at 8, 13. The trial court removed the portions of the photograph that the court found to be particularly upsetting, such as the blood clots and the wound itself. Id. The trial court reviewed the photograph and altered it as the court viewed necessary to minimize the prejudicial effect of the photo while**{2018 U.S. Dist. LEXIS 37}** retaining its probative value. There was testimony at trial that the victim was shot at close-range in the face. N.T. 8/19/08 at 67-69. The photograph at issue was altered by the trial court to only show the stippling, which indicated that the victim was shot at close-range. The trial court ruled that the photograph could be used in the limited fashion decided by the trial court. Petitioner has failed to show that trial counsel's decision to not object to a photograph that had already been altered and deemed admissible by the trial court fell below an objective standard of reasonableness. Thus, petitioner has failed to prove that his underlying claim that trial counsel was ineffective for failing to object to the photograph is a substantial one. Glenn, 743 F.3d at 410. Petitioner's default of this claim cannot be excused under Martinez. It is recommended that petitioner's sixth claim be dismissed as procedurally defaulted.

ii. Claim Seven: Trial counsel was ineffective for advising petitioner not to testify

Petitioner's seventh claim is that trial counsel was ineffective for advising petitioner not to testify. See Habeas Pet. at 22. Petitioner alleges that trial counsel advised petitioner not to testify because**{2018 U.S. Dist. LEXIS 38}** petitioner would be impeached with his criminal record, despite the law that would prevent his record from being mentioned. Petitioner alleges that his only conviction was for a DUI, and because his prior crime was not *crimen falsi* the evidence about it could not have been admitted as such. Petitioner argues that PCRA counsel was ineffective for not pursuing this claim on collateral appeal. See id.

Petitioner failed to raise this claim in state court, causing the claim to be procedurally defaulted. Petitioner argues that his default should be excused because PCRA counsel was ineffective in failing to exhaust the claim on collateral appeal.

As explained supra, in order to meet the standard of Martinez, petitioner must show that the underlying ineffective assistance of trial counsel claim is 'a substantial one,' which is to say 'the claim has some merit.'" Glenn, 743 F.3d at 410. Petitioner has failed to show the underlying trial counsel ineffectiveness claim has any merit.

Petitioner argues that trial counsel was ineffective for advising petitioner not to testify. Petitioner

alleges that he wanted to testify at trial to explain that the Commonwealth's evidence that petitioner and Kamira Woods had a romantic**{2018 U.S. Dist. LEXIS 39}** relationship was false. It is petitioner's belief that if he testified that he did not have a romantic relationship with Ms. Woods, he would disprove the Commonwealth's theory of motive. Ms. Wood's police statement was presented at trial. Ms. Woods told the police that she and petitioner had been in a relationship for about five years, and the relationship had ended about a year prior to the shooting. N.T. 8/22/08 at 59-60. Along with the evidence that Ms. Woods and petitioner had a relationship, there were also multiple witnesses who testified to either seeing petitioner shoot the victim or seeing petitioner outside with the victim at the time of the shooting. N.T. 8/21/08 at 30-33, 49, 51; N.T. 8/22/08 at 56, 60. There was also evidence presented at trial that petitioner confessed to a friend after the shooting. N.T. 8/21/08 at 188-190. Petitioner was not convicted solely on evidence of the motive that petitioner had a prior romantic relationship with Ms. Woods. There was ample witness testimony against petitioner. Petitioner has failed to prove any prejudice from trial counsel advising petitioner not to testify at trial. Petitioner certainly provides no reason for this court to**{2018 U.S. Dist. LEXIS 40}** conclude that there is a reasonable probability, but for his decision not to testify, that the result of his trial would have been different. Because petitioner has not shown that the result of trial would likely have been different had petitioner testified on his own behalf, petitioner has failed to show Strickland prejudice. Petitioner's default cannot be excused under Martinez and it is recommended that petitioner's seventh claim be dismissed as procedurally defaulted.

iii. Claim Eight: Trial counsel was ineffective for failing to investigate certain witnesses

Petitioner's eighth claim is that trial counsel was ineffective for failing to investigate witnesses who would have testified that petitioner did not have a relationship with Kamira Woods. See Habeas Pet. at 23. Petitioner argues that his fiancé and cousins of Ms. Woods would have testified on petitioner's behalf that he never had a romantic relationship with Ms. Woods, thus, Commonwealth's theory that petitioner killed the victim because the victim's friend, Terrance Speller choked Ms. Woods would have been rebutted. See id. Petitioner argues that PCRA counsel was ineffective for not pursuing this claim on collateral appeal.**{2018 U.S. Dist. LEXIS 41}** See id.

Petitioner failed to raise this claim in state court, causing the claim to be procedurally defaulted. Petitioner argues that his default should be excused because PCRA counsel was ineffective in failing to exhaust the claim on collateral appeal.

As explained supra, in order to meet the standard of Martinez, petitioner must show that the underlying ineffective assistance of trial counsel claim is 'a substantial one,' which is to say 'the claim has some merit.'" Glenn, 743 F.3d at 410. The second part of the Strickland test requires a petitioner to demonstrate that counsel=s performance "prejudiced the defense" by depriving petitioner of "a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Petitioner has failed to show the underlying trial counsel ineffectiveness claim has any merit.

In Pennsylvania, to prevail on a claim of ineffective assistance of trial counsel for failure to call a witness, the appellant must show:

> (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the**{2018 U.S. Dist. LEXIS 42}** absence of the testimony prejudiced appellant.Commonwealth. v. Fulton, 574 Pa. 282, 830 A.2d 567, 572 (Pa. 2003) (citations omitted). Although this standard is not identical to the Strickland standard, the Third Circuit has held that "the Pennsylvania test is not contrary to the test set forth in Strickland." Moore v. DiGuglielmo, 489 Fed.Appx. 618, 626 (3d Cir. 2012) ("The five requirements set forth by the Pennsylvania Supreme Court would necessarily

need to be shown to prevail under Strickland on a claim of this nature.")

Petitioner names four witnesses, petitioner's fiancé, two of Ms. Wood's cousins, Nekeya McNeal and Tanisha Woods, and a fourth individual, Ranetta Williams, and alleges that they would have testified that petitioner did not have a romantic relationship with Ms. Woods. However, petitioner offers the court no proof that these witnesses were available or that they were willing to testify on petitioner's behalf. Petitioner's assertions are not proof. The Third Circuit Court of Appeals has found a petitioner fails to establish prejudice in a failure to investigate and call a witness claim where the petitioner fails to adduce sworn testimony from the potential witness because a court cannot speculate whether the witness would have testified on the petitioner's behalf and what the testimony**{2018 U.S. Dist. LEXIS 43}** would have been. Duncan v. Morton, 256 F.3d 189, 201-02 (3d Cir. 2001). Petitioner fails to provide the court with evidence that these witnesses were available to testify and whether they would have testified. Absent evidence from these alleged witnesses, petitioner has failed to show prejudice under Strickland. Thus, petitioner has failed to show that his claim has "some merit" and petitioner's default of the instant claim cannot be excused under Martinez. It is recommended that petitioner's eighth claim be dismissed as procedurally defaulted.

iv. Claim Nine: Trial counsel was ineffective for not objecting to comments made by the trial court

Petitioner argues that PCRA counsel was ineffective for failing to raise all prior counsel were ineffective for failing to raise the abuse of discretion of the trial court in the jury selection process. See Habeas Pet. at 24.

Petitioner failed to raise this claim in state court, causing the claim to be procedurally defaulted. Petitioner argues that his default should be excused because PCRA counsel was ineffective in failing to exhaust the claim on collateral appeal.

It is unclear to the court what petitioner is arguing was an abuse of discretion by the trial court. Petitioner cites to a portion of**{2018 U.S. Dist. LEXIS 44}** the notes of testimony where the trial court discussed jury selection with counsel and petitioner alleges that the trial court made those comments to the jury.

The notes of testimony read as follows:

> (Whereupon the following takes place in **chambers**:)
>
> The Court: I just want to explain my way of jury selection. I found it is much faster. What we do is when we finish the questioning, we divide the pile up, get rid of the hardships and then we divide the pile up into people who haven't answered Questions 8 through 15 and people who have and we start with a good pile. The only bad question is question Number 2, and usually when people answer yes to that, they mean the death penalty, so I'm going to explain right at the get-go that there is no death penalty. And then we go through that pile and my experience has been we've been getting a jury--or 13 jurors out of the first pile and then sometimes we get a 14th juror out of the second pile, but each one of those we go through they only ask them one question, whatever the worst question is they answered yes to.
>
> So what we'll do is after I finish the questioning, we'll take a recess to reorganize the jury and divide the pile and you'll come back**{2018 U.S. Dist. LEXIS 45}** and we'll go over who I put in the good pile so that we make sure we're all on the same page.N.T. 8/18/08 at 3-4.

Petitioner's claim fails for two reasons. First, petitioner's allegation that the trial court made the above comments to the jury is incorrect, the trial judge made the comments to counsel, in chambers. See N.T. 8/18/08 at 3. Second, petitioner makes zero argument as to what portion of the trial judges comments were an abuse of discretion or in what way those comments were an abuse of discretion.

Without more concrete allegations petitioner cannot overcome the presumption that counsel performed reasonably. See Rule 2(c), 28 U.S.C. § 2254; United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000) ("vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation"); see also McFarland v. Scott, 512 U.S. 849, 856, 114 S. Ct. 2568, 129 L. Ed. 2d 666 (1994) (habeas petitions "must meet heightened pleading requirements"). Petitioner has failed to argue in what way he was prejudiced by trial counsel's failure to object to the trial court's comments. Petitioner has not shown that his underlying trial counsel ineffective assistance claim has "some merit." Therefore, Martinez does not excuse the default of petitioner's trial counsel ineffective assistance claim. Further, Martinez does not excuse default**{2018 U.S. Dist. LEXIS 46}** of claims of trial court error. 566 U.S. at 16. Petitioner's ninth claim is procedurally defaulted and should be dismissed as such.

v. Claim Ten: Trial counsel was ineffective for not objecting to the jury instructions

Petitioner argues that PCRA counsel was ineffective for failing to raise all prior counsel's ineffective assistance for failing to object to the trial court giving the jury accomplice liability and conspiracy instructions. See Habeas Pet at 25. Petitioner argues that he was never charged with conspiracy and the trial court erred in charging on conspiracy. See id. Petitioner failed to raise this claim during state court appellate review, thus the claim is procedurally defaulted. Petitioner seeks to excuse his default under Martinez, arguing that PCRA counsel was ineffective for failing to raise the claim.

Petitioner's default cannot be excused under Martinez because there is no merit to petitioner's claim that trial counsel was ineffective for failing to object to the trial court's jury instruction on conspiracy. Glenn, 743 F.3d at 410. A review of the notes of testimony is clear that the trial court did not instruct the jury on conspiracy. The trial court instructed the jury on accomplice liability. The Commonwealth requested**{2018 U.S. Dist. LEXIS 47}** an instruction on accomplice liability, explaining that because the evidence indicated two different guns, and three men standing over the body, accomplice liability was appropriate. N.T. 8/25/08 at 5. The trial court agreed, stating a charge on accomplice liability would be given and it would explain that "if you find [petitioner] was an accomplice, you could find him guilty of the act of somebody with whom he was an accomplice." N.T. 8/25/08 at 5-7. The trial court then thoroughly instructed the jury on accomplice liability. N.T. 8/25/08 117-120. The trial court did not instruct the jury on conspiracy. Thus, there is no merit to the petitioner's claim that trial counsel should have objected to the jury being charged on conspiracy. It is recommended that petitioner's tenth claim be dismissed as procedurally defaulted.

vi. Claim Eleven: Trial counsel was ineffective for not objecting to the trial court threatening a witness

Petitioner's next argument is that trial counsel was ineffective for failing to object to the trial court threatening and intimidating a witness to take the stand. See Habeas Pet. at 26. Petitioner also argues that trial counsel was ineffective for not requesting**{2018 U.S. Dist. LEXIS 48}** a competency hearing for said witness. See id. Petitioner again argues that PCRA counsel was ineffective for failing to raise this claim on collateral appeal and that his default of the claim should be excused under Martinez.

Petitioner's claim is procedurally defaulted for failure to exhaust in state court. We find petitioner's default may not be excused under Martinez because petitioner's underlying claim of trial counsel ineffective assistance for failure to object to the trial court threatening a witness is meritless. Glenn, 743 F.3d at 410.

Petitioner failed to provide the court with the name of the witness that petitioner is referring to but a review of the notes of testimony makes it evident that petitioner's claim is about witness Kamira Woods. See N.T. 8/22/08 at 5-73. As explained supra, Ms. Woods was found in the bathroom being choked by the victim's friend, prior to petitioner shooting the victim outside of the bar. Ms. Woods was

transported to petitioner's trial after being detained by the U.S. Marshals. Id. at 7. The notes of testimony show that Ms. Woods was an uncooperative witness, claiming to not remember whether she told the police many of the things from her police statement. N.T. 8/22/08 at 13-18;**{2018 U.S. Dist. LEXIS 49}** 23-38. Ms. Woods then informed the court that she was not answering any more questions and became unresponsive. Id. at 39-42. Outside the presence of the jury the following instruction took place:

> The Court: All right. Let me tell you what you have to do. You have to behave respectfully to myself and the District Attorney and Mr. Harrison. You have to take that statement, we'll give you another copy, and listen to Mr. Berardinelli's questions and answer whatever you want to answer. That is up to you. It will be up to the jury to decide whether they believe your statement on the stand or what you wrote, but that is different. That's none of your business. You just answer the questions, do you understand?
>
> The Witness: (Nods head yes.)
>
> The Court: You answer whatever you want to answer.
>
> The Witness: Can I tell you something?
>
> The Court: Just a minute. If you answer the questions whatever way you want to answer them, when you're finished you'll be allowed to walk out of here and go home. Do you understand that?
>
> The Witness: (Nods head yes).
>
> The Court: Do you understand what I am saying?
>
> The Witness: Yes
>
> The Court: That's all you have to do, sit on the witness stand, look at the statement follow along. And I**{2018 U.S. Dist. LEXIS 50}** know you're intelligent because you made all those grammatical corrections and other corrections on the statement. Very few people actually read their statements over and correct them. I know you say you don't remember, but the evidence shows that you're intelligent, that you made corrections on there and some of the corrections are grammatical corrections, very important. So you're obviously smart, and if you're really smart and you want to do what is smart for you and your kids, you will take that witness stand, you will answer the questions. I don't care if you say I don't remember, I don't care if you say I don't know, I don't care if you say whatever you want to say, but, you will answer the questions and at the end you will be allowed to walk out of here and go wherever you want. Do you understand that?
>
> The Witness: Yes
>
> The Court: Do you understand that if you don't do that, you will walk out of here to a cell room and you will stay in prison until you either--while this trial is going on--until you either decide to answer the questions, or when the trial is over. We'll have a hearing and I can put you in jail for 6 months. Do you understand that?
>
> The Witness: Yes
>
> The Court: So you**{2018 U.S. Dist. LEXIS 51}** want to try the first way, the easy way?
>
> The Witness: Can I tell you something?
>
> The Court: Yes.
>
> The Witness: I just got out of a mental, psychiatric hospital for the second time. Somebody slipped me something two times. I'm not mentally stable right now, that's why I wasn't in

Philadelphia. I really don't remember nothing.

The Court: That's fine. Then Mr. Berardinelli will read the statement, read it in its entirety and then he'll ask you did you say that. If you want to say I don't remember, that fine. Mr. Harrison now has heard what your mental state is and he'll be able to get you to explain that to the jury, if he wants to, during his questioning. All you have to do is be cooperative; do you understand that?

The Witness: Yes.N.T. 8/22/08 at 46-49.

The trial court did not threaten the witness, rather the court informed the witness that if she did not cooperate she could be held in contempt of court. Petitioner alleges that the trial court should have told the witness that she had to tell the truth, not that she could say whatever she wanted and go home. The trial court did not tell the witness that it was okay to lie. The trial court clearly explained that if the witness did not remember,**{2018 U.S. Dist. LEXIS 52}** she could testify that she did not remember. The trial court discussed with petitioner's trial counsel the option of the court explaining to the witness that she could be held in contempt for not answering the questions. N.T. 8/22/08 at 43. Trial counsel agreed with the trial court addressing the witness about responding to the questions asked. Id.

We do not find that, in light of all the circumstances, trial counsel's failure to object to the trial court "threatening" the witness fell outside "the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Trial counsel agreed with the court decision to address the witness and the court was permitted to explain contempt of court to the witness. Petitioner's underlying trial counsel ineffective assistance claim is meritless, thus, petitioner's default of the claim cannot be excused under Martinez.

Petitioner's argument that trial counsel was ineffective for failing to request a competency hearing for the witness because the witness told the court that she was in a psychiatric hospital is also meritless. Trial counsel questioned the witness on cross-examination and allowed the witness to explain that she had been in a mental institution on**{2018 U.S. Dist. LEXIS 53}** three occasions after smoking embalming fluid. The witness explained that the drugs affect her memory. N.T. 8/22/08 at 64-65. Trial counsel ensured that the jury heard testimony that the witness had been hospitalized multiple times for mental health issues. Petitioner has failed to show or allege any prejudice from trial counsel not requesting a competency hearing. Petitioner's underlying trial counsel ineffective assistance claim is meritless, thus, petitioner's default of the claim cannot be excused under Martinez. Petitioner's eleventh claim should be dismissed as procedurally defaulted.

vii. Claim Twelve: Trial counsel was ineffective for not calling "Tanina" as a witness

Petitioner argues that trial counsel was ineffective for failing to investigate, interview and subpoena Tanina as a witness. See Habeas Pet. at 27. As explained supra, at trial the Commonwealth presented evidence that petitioner called his friend, Vincent Dickerson, and stated that there had been a problem with Ms. Woods and the victim at the bar and that petitioner subsequently shot the victim. N.T. 8/21/08 at 188-190. At trial Mr. Dickerson testified that the statement presented by the Commonwealth that [petitioner]**{2018 U.S. Dist. LEXIS 54}** confessed was fabricated by the police and petitioner never confessed to him. N.T. 8/21/08 at 183-184, 188-192. Mr. Dickerson also testified that along with his wife, a woman named Tanina lived with Mr. Dickerson. N.T. 8/21/08 at 218. Petitioner alleges that Tanina would have provided exculpatory evidence that petitioner did not call Mr. Dickerson to confess. See Habeas Pet. at 27. Petitioner argues that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness on collateral appeal.

Petitioner failed to raise this claim in state court, causing the claim to be procedurally defaulted. Petitioner argues that his default should be excused because PCRA counsel was ineffective in failing

to exhaust the claim on collateral appeal.

Petitioner offers no evidence as to what Tanina would have testified to or how her testimony could have been exculpatory. Petitioner fails to present the court with any evidence as to how Tanina would have known if petitioner had called Mr. Dickerson, or how Tanina would have known if petitioner confessed to Mr. Dickerson. As explained supra, in Pennsylvania, to prevail on a claim of ineffective assistance of trial counsel for failure to call**{2018 U.S. Dist. LEXIS 55}** a witness, the appellant must show:

> (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the absence of the testimony prejudiced appellant.Commonwealth. v. Fulton, 574 Pa. 282, 830 A.2d 567, 572 (Pa. 2003) (citations omitted). In order to show ineffective assistance of counsel, petitioner must show that the witness was available to testify. Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991). Petitioner offers no evidence that Tanina existed, was available, or was willing to testify on petitioner's behalf. Without more concrete allegations petitioner cannot overcome the presumption that counsel performed reasonably in light of petitioner's statements at trial. See Rule 2(c), 28 U.S.C. § 2254; United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000) ("vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation"); see also McFarland v. Scott, 512 U.S. 849, 856, 114 S. Ct. 2568, 129 L. Ed. 2d 666 (1994) (habeas petitions "must meet heightened pleading requirements"). Petitioner has failed to show under Strickland that trial counsel was ineffective for failing to investigate, interview, and subpoena Tanina, because petitioner has not shown that Tanina was available to testify.**{2018 U.S. Dist. LEXIS 56}** Because petitioner fails to show that his underlying trial counsel ineffective assistance of counsel claim has any merit, PCRA counsel's failure to raise trial counsel's ineffectiveness on collateral appeal cannot excuse petitioner's default of the instant claim under Martinez. Glenn, 743 F.3d at 410. Therefore, it is recommended that petitioner's eleventh claim be dismissed as procedurally defaulted.

viii. Claim Thirteen: Trial counsel was ineffective for not interviewing Charles Waters

Petitioner's thirteenth and final claim is that trial counsel was ineffective for failing to interview witness Charles Waters. See Amended Habeas Pet. 5/24/15 at 1-2. Petitioner argues that Charles Waters would have informed trial counsel that Detective Ronald Dove asked Mr. Waters to lie in a statement inculpating petitioner in the shooting at bar. See id. Petitioner attempts to excuse the default of this claim by invoking Martinez, and arguing that PCRA counsel was ineffective for failing to raise trial counsel's ineffective assistance on collateral appeal. See id.

A November 6, 2006 police activity sheet contains a summary statement from Mr. Waters. See Motion to Expand Record, 9/4/18, Exhibit B. The statement indicates that while**{2018 U.S. Dist. LEXIS 57}** Mr. Waters did not want to make a formal interview, Mr. Waters stated that he was at the bar with petitioner the night of the shooting, he saw the victim, he remained inside the bar while petitioner and the victim went outside, he heard gunshots, and after exiting the bar he witnessed the victim lying on the ground with gunshot wounds. See id. On September 4, 2018, petitioner submitted to the court a July 19, 2018 affidavit from Charles Waters. See Motion to Expand Record, 9/4/18, Exhibit A. The affidavit is of a statement that Mr. Waters made to a private investigator that was hired by petitioner. See id. In the affidavit, Mr. Waters alleges that the above summarized November 6, 2006 statement from Mr. Waters was fabricated by Detective Dove. See id. Mr. Waters states that when Detective Dove questioned Mr. Waters about the shooting, Detective Dove had the above summarized

statement pre-written, and attempted to force Mr. Waters to sign it. See id. In the affidavit, Mr. Waters claims that he left the bar prior to the shooting. See id.

Based on Mr. Waters affidavit, petitioner alleges that trial counsel was ineffective for failing to interview Mr. Waters. See Motion to Expand Record,**{2018 U.S. Dist. LEXIS 58}** 9/4/18 at 2. Petitioner alleges that trial counsel was in possession of the November 6, 2006 police activity sheet containing Mr. Waters statement, and that petitioner informed trial counsel that Mr. Waters had left the scene prior to the shooting, so the statement could not have been true. Id. Petitioner argues that because witness Vincent Dickerson and witness Kamira Woods both testified at petitioner's trial that Detective Dove forced them to sign false statements, trial counsel should have investigated Mr. Waters statement. Id. at 3. Petitioner also argues that he informed PCRA counsel that Mr. Waters statement was false. Id. at 2. Thus, petitioner argues that PCRA counsel was ineffective for failing to interview Mr. Waters and raise the claim of trial counsel's ineffectiveness during PCRA review. Id.

Under Martinez, the failure of collateral attack counsel to raise an ineffective assistance of trial counsel claim in an initial-review collateral proceeding can constitute 'cause' if (1) collateral attack counsel's failure itself constituted ineffective assistance of counsel under Strickland and (2) the underlying ineffective assistance of trial counsel claim is 'a substantial one,' which is to say**{2018 U.S. Dist. LEXIS 59}** 'the claim has some merit.'" Glenn, 743 F.3d at 410. Martinez does not offer cause to excuse the default of this claim of ineffective assistance of counsel for failure to interview Charles Water because that claim is not substantial.

As explained supra, in Pennsylvania, to prevail on a claim of ineffective assistance of trial counsel for failure to call a witness, the appellant must show:

> (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the absence of the testimony prejudiced appellant.Commonwealth. v. Fulton, 574 Pa. 282, 830 A.2d 567, 572 (Pa. 2003) (citations omitted). Petitioner has failed to show that the absence of the testimony from Mr. Waters prejudiced petitioner.

There was a significant amount of evidence against petitioner. Witnesses Kamira Woods, Vincent Dickerson, and James Frager all indicated that petitioner was outside of the bar with the victim at the time of the shooting and that petitioner confessed to the shooting. Additionally, James Frager placed Mr. Waters (also known as "Biggie") with petitioner at the bar at the time**{2018 U.S. Dist. LEXIS 60}** of the shooting. Witness Woods' statement to the police placed petitioner outside of the bar with the victim. Witness Dickerson's statement to the police asserted that petitioner called Mr. Dickerson and admitted to the murder. Witness Frager testified that petitioner was with Charles Waters inside the bar on the night in question. N.T. 8/21/08 at 22-24, 8/22/08 at 138. Mr. Frager testified that when he left the bar, petitioner was standing outside with the victim and Mr. Waters. N.T. 8.21.08 at 30-33. As Mr. Frager got into his car he heard gunshots, but did not observe anything. Id. at 33. Mr. Frager then observed petitioner and others standing over the victim immediately after the shooting. Id. at 49, 51. Mr. Frager testified that Mr. Waters was also outside of the bar with petitioner. Id. at 32.

Mr. Waters was not a witness at petitioner's trial. Mr. Waters statement against petitioner was not introduced a petitioner's trial. Mr. Waters statement to the police would have been the third witness statement to put petitioner outside of the bar with the victim at the time of the shooting. If trial counsel had interviewed and called Mr. Waters as a witness to testify that Detective Dove fabricated the statement, trial**{2018 U.S. Dist. LEXIS 61}** counsel would have been introducing yet another statement from an individual that put petitioner outside of the bar with victim at the time of the shooting. Petitioner has failed to show that the jury would have credited Mr. Waters testimony about

the police fabrication and come to a different result.

At trial the jury heard testimony from both Ms. Woods and Mr. Dickerson that the police fabricated their statements. The jury considered the testimony at trial and still convicted petitioner. We cannot reweigh credibility determinations made by the jury, which merit deference. The court cannot find that if the jury heard one more witness, Charles Waters, allege that the police fabricated a statement, that the jury would have decided Mr. Water was credible and would have then decided that Ms. Woods and Mr. Dickerson were credible. The Commonwealth had evidence that would call into question Mr. Waters credibility. The testimony from Mr. Frager placed Mr. Waters outside of the bar at the time of the shooting. Additionally, at the time of petitioner's arrest on drug charges within hours of the shooting, petitioner was in a vehicle with Mr. Waters.

Considering all of the above referenced evidence**{2018 U.S. Dist. LEXIS 62}** placing petitioner outside of the bar with the victim at the time of the shooting, the jury's decision to convict petitioner after hearing from Ms. Woods and Mr. Dickerson that the police fabricated statements, and the issues with Mr. Waters credibility, the court cannot find that the absence of the testimony from Mr. Waters prejudiced petitioner. Thus, petitioner has failed to show that the underlying claim that trial counsel was ineffective for failing to interview Charles Waters has any merit. Petitioner default of the instant claim cannot be excused on Martinez. It is recommended that this claim be dismissed as procedurally defaulted.

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 30th day of October, 2018, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED. Further, there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ LINDA K. CARACAPPA

LINDA K. CARACAPPA

UNITED STATES CHIEF MAGISTRATE JUDGE

Footnotes

1

The PCRA court offered the following explanation: "This Court finds Corbin's testimony contrived, inconsistent, and incredible. First, Corbin's story on why he waited nine years to come forward lacked believability. Corbin testified that he failed to come forward at his mother's request. N.T. 411/2016 at 41-42. A year later when his mother died, Corbin again failed to come forward, even though he knew the wrong man had been arrested for the murder-he claimed that his father prevented him from doing so. When his father moved away a few years later, Corbin failed to come forward yet again. In the subsequent years, no longer afraid nor under his parents' control-and admittedly still able to identify the two shooters-Corbin still failed to go the police or inform anyone of what he saw that night. N.T. 1/21/2016 at 59; N.T. 4/1/2016 at 45-49.

Next, Corbin's testimony was inconsistent. The record reflects that the shooting occurred right after "last call," at or about 2 a.m. In Corbin's statement attached to the Petitioner's petition, Corbin

asserted that he was outside the bar at 1:45 a.m. when he witnessed the shooting. Yet at the evidentiary hearing, Corbin stated that he was outside the bar at 12:40 a.m. N.T. 1/21/2016 at 43. This Court finds this disparity even more glaring since Corbin testified that he knew what time the bar closed-2 a.m.-because the "bar close[d] at the same time every night." N.T. 4/01/2016 at 9 (emphasis added).

Finally, Corbin's testimony also conveniently eliminated all of the people who were outside the bar at the time of the shooting. As noted above, Corbin stated that he still could identify the two shooters; yet when shown photographs at the evidentiary hearing of Terrance Speller, Steven Barkley (the victim), Curtis Scott, Charles "Biggie" Waters, as well as James Frager-who witnessed the aforementioned people and the Petitioner outside the bar-Corbin failed to identify any of them as being present outside the bar at the time of the shooting. Id. at 22-25, 48-49, 54. Because Corbin was unable to identify any of the participants outside the bar, this Court finds it exceedingly unlikely that he could say with any level of certainty that the Petitioner was not one of those participants. Accordingly, this Court finds Corbin's testimony unlikely to compel a different verdict. PCRA Ct. Op., 5/25/16 at 10-12 (footnotes omitted).

Appendix D

***AMENDED ALD-037**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-2302**

NAEEM JONES, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, ET AL.

(E.D. Pa. Civ. No. 2:18-cv-01347)

Present: MCKEE, SHWARTZ, and PHIPPS, Circuit Judges

Submitted are:

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

***(2) Appellant's supplemental request for a certificate for appealability**

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would agree, without debate, that all of Jones' claims either lack merit, are procedurally defaulted, or are not cognizable on habeas review. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jones cannot show that his trial counsel was ineffective for five of the claims he raised in his application for a certificate of appealability, for the substantially the same reasons provided by the District Court, adopting the Magistrate Judge's reports, in

evaluating the merits of those claims. See Strickland v. Washington, 466 U.S. 668, 687 (1984). As the District Court also properly concluded, Jones' cumulative error claim was procedurally defaulted because Jones did not raise it on PCRA appeal and cannot return to state court to raise it now; Jones has not made a showing of cause or prejudice or a fundamental miscarriage of justice to excuse the default. See 42 Pa. Cons. Stat. § 9545(b)(1); Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Whitney v. Horn, 280 F.3d 240, 252-53 (3d Cir. 2002); Lines v. Larkins, 208 F.3d 153, 166 (3d Cir. 2000). Finally, Jones' claim that the PCRA court erred in its resolution of his arguments about his innocence is not cognizable on habeas review. See Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004) ("[H]abeas proceedings are not the appropriate forum . . . to pursue claims of error at the PCRA proceeding.").

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: February 6, 2020
Sb/cc: Naeem Jones
Samuel R. Ritterman, Esq.

A True Copy:

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

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-2302**

NAEEM JONES, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, ET AL.

(E.D. Pa. Civ. No. 2:18-cv-01347)

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/ Theodore McKee
Circuit Judge

Date: March 3, 2020
Lmr/cc: Naeem Jones
Samuel H. Ritterman