No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Jose Luis Torres,

Petitioner

vs.

Smithfield SCI, et al.,

Respondents

APPENDIX

ALD-120 February 20, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-3398**

JOSE LUIS TORRES, Appellant

VS.

SMITHFIELD SCI, ET AL.

(E.D. Pa. Civ. No. 5:15-cv-02703)

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) Appellees' response

in the above-captioned case.

Respectfully,
Clerk

ORDER

Torres' 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 Torres' ineffective assistance of counsel claim is meritless because he cannot show that his counsel's performance prejudiced him, for substantially the reasons given by the District Court. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see also Velazquez v. Superintendent Fayette SCI, 937 F.3d 151, 162 (3d Cir. 2019).

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: April 2, 2020

A True Copy:

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

Appendix A

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

JOSE LUIS TORRES, **Petitioner,** **v.** **KEVIN KAUFFMAN, *et al.*,** **Respondents.**	**CIVIL ACTION NO. 5:15-02703**

ORDER

AND NOW, this 12th day of September 2019, upon careful and independent consideration of the Petition for Writ of Habeas Corpus, and all related filings, and upon review of the Report and Recommendation (R&R) of United States Magistrate Judge Henry S. Perkin, and for the reasons stated in the separate Order approving and adopting the R&R, it is hereby **ORDERED** that:

1. The Petition for Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE** and without an evidentiary hearing;
2. There is no probable cause to issue a certificate of appealability[1]; and
3. The Clerk of Court is directed to **CLOSE** the case.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

[1] There is no basis for concluding that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal citation omitted).

Appendix B

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

JOSE LUIS TORRES, Petitioner, v. KEVIN KAUFFMAN, *et al.*, Respondents.	CIVIL ACTION NO. 5:15-02703

ORDER

Petitioner, who is proceeding *pro se*, seeks relief in this Court pursuant to 28 U.S.C. § 2254, arguing that his state-court conviction was imposed in violation of the United States Constitution. Petitioner is a Pennsylvania state prisoner currently serving an aggregate sentence of 12½ to 25 years after pleading guilty to multiple counts of burglary and one count each of persons not to possess firearms and resisting arrest. The Petition was referred to Magistrate Judge Henry S. Perkin, who has issued a Report and Recommendation ("R&R") that the petition be denied. Petitioner has filed objections to the R&R. After careful, *de novo* review of the record, the Court determines that Petitioner has not shown entitlement to relief, and agrees with the thorough R&R that Petitioner has failed to meet the standard for obtaining relief.

I. BACKGROUND[1]

Between June 2010 and May 2011, Petitioner committed a series of ten burglaries in Lehigh County and neighboring jurisdictions. On July 28, 2011, the Commonwealth filed three criminal informations that charged Petitioner with the following offenses (collectively, the "2011 cases"):

[1] Unless otherwise noted, the background is primarily drawn from the Report and Recommendation.

CP-39-2821-2011

Count 1 – Persons not to possess firearms, 18 Pa.C.S.A. § 6015(a)(1) [nolle pros].

CP-39-2822-2011

Count 1 – Receiving stolen property, 18 Pa.C.S.A. § 3925(a) [withdrawn].
Count 2 – Persons not to possess firearms, 18 Pa.C.S.A. § 6105(a)(1) [guilty plea].
Count 3 – Firearms not to be carried without a license, 18 Pa.C.S.A. § 6106(a)(1) [withdrawn].

CP-39-CR-2828-2011

Count 1 – Aggravated assault, 18 Pa.C.S.A. § 2702(a)(3) [withdrawn].
Count 2 – Reckless Endangering Another Person, 18 Pa.C.S.A. § 2705 [withdrawn].
Count 3 – Resisting Arrest, 18 Pa.C.S.A. § 5104 [nolo contendere].

On February 14, 2012, the Commonwealth filed three additional criminal informations against Petitioner (collectively, the "2012 cases") that charged as follows:

CP-39-CR-282-2012

Count 1 – Burglary, 18 Pa.C.S.A. § 3502(a) [guilty plea].
Count 2 – Criminal Trespass, 18 Pa.C.S.A. § 3503(a)(1)(ii) [withdrawn].
Count 3 – Theft by unlawful taking, 18 Pa.C.S.A. § 3921(a) [withdrawn].
Count 4 – Receiving stolen property, 18 Pa.C.S.A. § 3925(a) [withdrawn].
Count 5 – Criminal mischief, 18 Pa.C.S.A. § 3304(a)(5) [withdrawn].

CP-39-CR-289-2012

Counts 1, 7, 13, 19, 25, 33, 39 – Burglary, 18 Pa.C.S.A. § 3502(a) [guilty plea].
Counts 2, 8, 14, 20, 26, 34, 40 – Criminal Trespass, 18 Pa.C.S.A. §3503(a)(1)(ii) [withdrawn].
Count 3, 9, 15, 21, 27, 35, 41 – Theft by unlawful taking, 18 Pa.C.S.A. §3921(a) [withdrawn].
Counts 4, 10, 16, 22, 28, 36, 42 – Receiving stolen property, 18 Pa.C.S.A.2 [withdrawn]
Counts 5, 11, 17, 23, 29, 37, 43 – Criminal mischief, 18 Pa.C.S.A. §3304(a)(5) [withdrawn].
Counts 6, 12, 18, 24, 30, 38, 54 – Conspiracy to commit burglary, 18 Pa.C.S.A. § 903(a), 3502(a) [guilty plea].
Counts 31, 32, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 – Person not to possess, 18 Pa.C.S.A. § 6105(a)(1) [withdrawn].

CP-39-CR-3824-2012

Counts 1 and 2 – Burglary, 18 Pa.C.S.A. § 3502(a) [guilty plea].

On February 27, 2012, pursuant to a negotiated plea agreement, Petitioner resolved the 2011 cases by pleading guilty to persons not to possess in case no. 2822/2011 and entered a nolo contendere plea to resisting arrest in case no. 2828/2011. In exchange for these guilty pleas, the Commonwealth agreed to nolle pros case no. 2821/2011 and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and 2828/2011. The trial court imposed the agreed-upon sentence of five to ten years of incarceration for Petitioner's persons not to possess conviction for case no. 2822/2011, and a concurrent sentence of one to two years of imprisonment for the resisting arrest charge in case no. 2828/2011. During the hearing, Petitioner acknowledged that the 2012 cases were still pending.

Petitioner resolved the 2012 cases by entering a separate negotiated plea agreement with the Commonwealth on September 10, 2012. At the September 10, 2012 plea hearing, Petitioner pled guilty to ten counts of burglary and one count of criminal conspiracy to commit burglary. In exchange for Petitioner's guilty pleas, the Commonwealth withdrew the remaining charges at case nos. 282/2012 and 289/2012. In addition, the trial court sentenced Petitioner to serve the agreed-upon disposition of seven and one-half to 15 years on each of the burglary and conspiracy charges, concurrent to each other but consecutive to the sentence imposed on February 27, 2012. Thus, the aggregate sentence for Petitioner's 2011 and 2012 cases was 12½ to 25 years in prison.

II. DISCUSSION

Petitioner argues that his trial counsel was ineffective for failing to prevent him from being placed in double jeopardy in violation of the Fifth Amendment to the United States Constitution. The R&R determined that these claims were procedurally defaulted and there was no basis for excusing the default.

Petitioner concedes in his Objections that these double jeopardy claims were procedurally defaulted.[2] Thus, to obtain *habeas* relief based on these claims, Petitioner argues that 1) his prosecutions were in violation of the Double Jeopardy Clause of the Fifth Amendment; 2) his trial counsel's failure to advise him of any double jeopardy concerns or to object to the prosecutions constituted ineffective assistance of counsel; and 3) based on *Martinez v. Ryan*,[3] the procedural default should be excused because Petitioner's counsel at the first collateral proceeding provided ineffective assistance by not raising a claim that Petitioner's trial counsel was ineffective.

As will be explained, Petitioner's claims fail because he was never placed in jeopardy for any of the three prosecutions he challenges. Moreover, even if the constitutional prohibition of double jeopardy were implicated by Petitioner's prosecutions, trial counsel's performance was not constitutionally deficient.

A. Double Jeopardy

Petitioner's Objections specifically reference three sets of charges which he alleges raise double jeopardy concerns. The first set are Count 1 on Docket CP-39-2821-2011 [nolle pros] of the 2011 cases and Count 45 on Docket CP-39-CR-289-2012 [withdrawn] of the 2012 cases. Both counts are for persons not to possess firearms in violation of 18 Pa.C.S.A § 6105(a)(1) and Petitioner asserts that both are for possession of the same Glock Model 23, 40 caliber pistol.

The second set are Count 2 on Docket CP-39-2822-2011 [guilty plea] from the 2011 cases and Count 31 on Docket CP-39-CR-289-2012 [withdrawn] from the 2012 cases. Again,

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[2] *See* Doc. No. 32, p. 1-2. For purposes of this Order, the Court will assume without deciding that the claims were procedurally defaulted. Regardless, as will be explained, even if the procedural default were excused, Petitioner's double jeopardy claims are without merit.

[3] 566 U.S. 1 (2012).

both counts are for persons not to possess firearms in violation of 18 Pa.C.S.A. § 6105(a)(1) and Petitioner asserts that both are for possession of the same Smith & Wesson, 9mm pistol.

The third set are Count 1 on Docket CP-39-CR-2822-2011 [withdrawn] of the 2011 cases and Count 28 on Docket CP-39-CR-289-2012 [withdrawn] of the 2012 cases. Both counts are for receiving stolen property in violation of 18 Pa.C.S.A. § 3925(a) and Petitioner alleges that both are for being in receipt of the same Smith & Wesson, 9mm pistol. From the state of the record, it is unclear whether the 2012 count was for being in receipt of the same gun, another gun, or some other stolen property.

Nevertheless, Petitioner's argument fails for the simple reason that he was never placed in jeopardy as to any of the three 2012 counts at issue. All three counts – Count 28 (Receiving stolen property), Count 31 (Possession of Smith & Wesson), and Count 45 (Possession of Glock) – were withdrawn by the Commonwealth in exchange for Petitioner's guilty plea to ten counts of burglary and one count of criminal conspiracy to commit burglary. In the context of a plea agreement, jeopardy only attaches "with the acceptance of [a] guilty plea."[4] Therefore, since Petitioner never pled guilty to, and was never convicted of, any of the challenged 2012 counts, the Double Jeopardy Clause was not violated.[5]

B. Ineffective Assistance of Counsel

Even if the second set of prosecutions violated the Double Jeopardy Clause, to overcome procedural default, Petitioner would have to show that his counsel was ineffective. Claims for

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[4] *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973); *see also United States v. Coleman*, 677 F. App'x 89, 92 (3d Cir. 2017) (ruling that the withdrawal of a guilty plea by a defendant's motion does not create a double jeopardy bar).

[5] Moreover, Petitioner fails to provide support for the proposition that double jeopardy only permits a single prosecution for possession of a particular gun no matter how many distinct incidents involved that gun. There is no basis in the record to conclude that Petitioner could not be charged for possessing the Glock and Smith & Wesson guns at different times and in different places.

ineffectiveness of counsel are governed by *Strickland v. Washington*.[6] Under *Strickland*, counsel is presumed effective and a petitioner must establish that counsel's conduct was so unreasonable that no competent lawyer would have acted similarly, and that counsel has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment."[7]

In addition, a petitioner must prove prejudice. The "[t]raditional inquiry for prejudice in the plea context is whether there is a reasonable probability that, but for counsel's errors, the petitioner would have foregone a guilty plea and insisted on trial."[8] The Third Circuit has explained that the Supreme Court has expanded "this inquiry to cover instances in which the deprivation of the right to trial was not the concern, but rather the opportunity to enter a different guilty plea."[9] However, there must "be a showing as to whether the other plea would have been available, accepted by both the petitioner and the court, and, importantly, that the other plea offered 'less severe' terms than the 'judgment and *sentence*' that was in fact imposed."[10]

As explained above, double jeopardy was not implicated with regard to any of the counts that Petitioner challenges. Therefore, counsel did not act unreasonably in failing to object to the 2012 cases on double jeopardy grounds. Moreover, even if counsel had been ineffective, Petitioner did not suffer any prejudice. The 2012 cases comprised 61 separate counts. Petitioner resolved these 61 counts by entering into a plea agreement in which he pled guilty to ten counts of burglary and one count of criminal conspiracy to commit burglary. In return, the

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[6] 466 U.S. 668 (1984).

[7] *Id.* at 687.

[8] *Velazquez v. Superintendent Fayette SCI*, -- F.3d --, 2019 WL 4147986, at *9 (3d Cir. Sept. 3, 2019) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

[9] *Id.*

[10] *Id.* (quoting *Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012) (emphasis in *Velazquez*).

Commonwealth withdrew the other 50 counts and pursuant to the parties' plea agreement, the court sentenced Petitioner to serve seven and one-half to 15 years on each of the charges to run concurrent to each other.

Had counsel raised the double jeopardy issue, and had the court ruled in Petitioner's favor on each of the claims and dismissed all three counts, Petitioner still would have been charged with 58 counts. Even without the counts that Petitioner alleges violated double jeopardy, Petitioner was still facing another 10 counts of possession and another 6 counts of receiving stolen property. Petitioner has not made any showing in his papers that had trial counsel raised the double jeopardy issue, the Commonwealth would have made another plea available that offered "less severe" terms.[11] Therefore, Petitioner cannot show that he suffered any prejudice due to counsel not objecting to the 2012 cases on double jeopardy grounds.

Therefore, Petitioner has shown neither a violation of the Double Jeopardy Clause nor ineffective assistance of counsel. Accordingly, Petitioner's counsel at the first collateral proceeding was likewise not ineffective for failing to make an ineffective assistance of counsel claim based on the failure to raise a double jeopardy claim. Therefore, the *Martinez* exception to procedural default is inapplicable here and there is no basis to excuse the procedural default.

AND NOW, this 12th day of September 2019, upon careful and independent consideration of the Petition for Writ of Habeas Corpus, and all related filings, and upon review of the R&R of United States Magistrate Judge Henry S. Perkin, and the objections thereto, and for the reasons stated above, it is hereby **ORDERED** that

1. The Objections [Doc. No. 32] are **OVERRULED**;
2. The R&R [Doc. No. 26] is **APPROVED AND ADOPTED**;

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[11] *Id.* (internal quotation marks and citations omitted).

3. The Petition will be dismissed by separate Order.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

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

JOSE LUIS TORRES, Petitioner,	:	CIVIL ACTION
v.	:	NO. 15-2703
KEVIN KAUFFMAN, et al., Respondents.	:	

Henry S. Perkin, M.J. April 30, 2018

REPORT AND RECOMMENDATION

Presently before the Court is the pro se Petition for Writ of Habeas Corpus filed by the Petitioner, Jose Luis Torres ("Petitioner"), pursuant to 28 U.S.C. section 2254. Petitioner is a Pennsylvania state prisoner currently serving an aggregate sentence of 12½ to 25 years after pleading guilty to multiple counts of burglary and one count each of persons not to possess firearms and resisting arrest. For the reasons that follow, it is recommended that the Petition should be denied with prejudice and dismissed without an evidentiary hearing.

I. PROCEDURAL HISTORY.[1]

The Superior Court of Pennsylvania summarized the facts as follows:

> Between June 2010 and May 2011, Appellant committed a series of ten burglaries in Lehigh County and neighboring jurisdictions. Thereafter, on June 3, 2011, officers with the Allentown and Upper Saucon Police Departments, acting on information from confidential sources and pursuant to an arrest warrant on unrelated charges, stopped a vehicle operated by Appellant. A struggle ensued but the officers were eventually able to subdue Appellant. During a subsequent inventory search, the officers discovered a 9mm semi-automatic handgun on the front passenger floorboard of the vehicle. Further investigation also revealed that 1) the 9mm handgun had been reported stolen, 2) Appellant had a prior felony conviction that prohibited him from possessing a firearm, and 3) Appellant did not have a license to carry a firearm on the date of his apprehension.

[1] This information is taken from the documents of record and the state court record.

Appendix C

On July 28, 2011, the Commonwealth filed three criminal informations that charged Appellant with the following offenses:[fn]

fn. Hereafter, we shall collectively refer to the charges filed on July 28, 2011 as the "2011 cases."

CP-39-2821-2011

Count 1 – Persons not to possess firearms, 18 Pa.C.S.A. § 6015(a)(1).

CP-39-2822-2011

Count 1 – Receiving stolen property, 18 Pa.C.S.A. § 3925(a).
Count 2 – Persons not to possess firearms, 18 Pa.C.S.A. § 6105(a)(1).
Count 3 – Firearms not to be carried without a license, 18 Pa.C.S.A. § 6106(a)(1).

CP-39-CR-2828-2011

Count 1 – Aggravated assault, 18 Pa.C.S.A. § 2702(a)(3).
Count 2 – Reckless Endangering Another Person, 18 Pa.C.S.A. § 2705.
Count 3 – Resisting Arrest, 18 Pa.C.S.A. § 5104.

On February 14, 2012, the Commonwealth filed three additional criminal informations against Appellant that charged as follows:[fn]

fn. Hereafter, we shall collectively refer to the charges filed on February 14, 2012 as the "2012 cases."

CP-39-CR-282-2012

Count 1 – Burglary, 18 Pa.C.S.A. § 3502(a).
Count 2 – Criminal Trespass, 18 Pa.C.S.A. § 3503(a)(1)(ii).
Count 3 – Theft by unlawful taking, 18 Pa.C.S.A. § 3921(a).
Count 4 – Receiving stolen property, 18 Pa.C.S.A. § 3925(a).
Count 5 – Criminal mischief, 18 Pa.C.S.A. § 3304(a)(5).

CP-39-CR-289-2012

Counts 1, 7, 13, 19, 25, 33, 39 – Burglary, 18 Pa.C.S.A. § 3502(a).

Counts 2, 8, 14, 20, 26, 34, 40 – Criminal Trespass, 18 Pa.C.S.A. § 3503(a)(1)(ii).

Count 3, 9, 15, 21, 27, 35, 41 – Theft by unlawful taking, 18 Pa.C.S.A. § 3921(a).

Counts 4, 10, 16, 22, 28, 36, 42 – Receiving stolen property, 18 Pa.C.S.A.

Exhibit A

§ 3925(a).

Counts 5, 11, 17, 23, 29, 37, 43 – Criminal mischief, 18 Pa.C.S.A. § 3304(a)(5).

Counts 6, 12, 18, 24, 30, 38, 54 – Conspiracy to commit burglary, 18 Pa.C.S.A. § 903(a), 3502(a).

Counts 31, 32, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 – Person not to possess, 18 Pa.C.S.A. § 6105(a)(1).

CP-39-CR-3824-2012
Counts 1 and 2 – Burglary, 18 Pa.C.S.A. § 3502(a).

On February 27, 2012, Appellant resolved the 2011 cases by entering a negotiated plea agreement with the Commonwealth. ***See generally*** N.T., 2/27/12, at 2-16. Under the terms of the plea agreement, Appellant pled guilty to persons not to possess in case no. 2822/2011 and entered a *nolo contendere* plea to resisting arrest in case no. 2828/2011. In exchange for Appellant's pleas, the Commonwealth agreed to *nolle pros* case no. 2821/2011 and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and 2828/2011. Additionally, pursuant to the parties' plea agreement, the court imposed a sentence of five to ten years' incarceration for Appellant's persons not to possess conviction at case no. 2822/2011, together with a concurrent sentence of one to two years of imprisonment for the resisting arrest charge in case no. 2828/2011.

On June 28, 2012, Appellant moved *pro se* to discontinue trial counsel's representation. The trial court convened a hearing on Appellant's motion on July 9, 2012. At the conclusion of the hearing, the court relieved trial counsel of her duty to represent Appellant, but directed her to remain attached to Appellant's cases as stand-by counsel.

Appellant resolved the 2012 cases by entering a separate negotiated plea agreement with the Commonwealth on September 10, 2012. ***See generally*** N.T., 9/10/12, at 2-27. At the September 10, 2012 plea hearing, Appellant pled guilty to ten counts of burglary[fn] and one count of criminal conspiracy to commit burglary. In exchange for Appellant's guilty pleas, the Commonwealth withdrew the remaining charges at case nos. 282/2012 and 289/2012. In addition, pursuant to the parties' plea agreement, the court sentenced Appellant to serve seven and one-half to 15 years on each of the burglary and conspiracy charges. The court also directed that these sentences were to run concurrent to each other but consecutive to the sentence imposed on February 27, 2012. Thus, the aggregate sentence for Appellant's 2011 and 2012 cases was 12½ to 25 years in prison.

> fn. As indicated above, one count of burglary was charged at case no. 282/2012, seven were charged at case no. 289/2012, and two were charged at case no. 3824/2012.
>
> Appellant filed a *pro se* PCRA petition on February 19, 2013. Appellant's petition alleged that trial counsel rendered ineffective assistance in advising him to enter into pleas that violated 18 Pa.C.S.A. § 110. Appellant also claimed that his sentence was illegal and that the Commonwealth breached the parties' plea agreement when the sentences on the 2011 and 2012 cases were run consecutively to each other instead of concurrently. On February 26, 2013, the PCRA appointed counsel to represent Appellant. After reviewing the record, PCRA counsel concluded that the issues raised in Appellant's petition lacked merit. Accordingly, counsel forwarded Appellant a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) and moved to withdraw as counsel on March 21, 2013. The trial court convened an evidentiary hearing to address Appellant's petition for collateral relief on May 29, 2013. At the commencement of this hearing, the court permitted PCRA counsel to withdraw. ***See*** N.T., 5/29/13, at 6. Appellant proceeded *pro se* throughout the proceedings. Following the close of testimony, the PCRA court took the matter under advisement. On June 24, 2013, the PCRA court issued an opinion and order denying Appellant's petition.

Commonwealth v. Torres, 2117 EDA 2013, slip. op., pp. 6-7 (Pa. Super. Oct. 31, 2014) (internal citations and footnotes omitted). Petitioner's appeal in the Pennsylvania Superior Court from the PCRA court's denial of his petition raised the following issues for the Superior Court's review:

> Whether PCRA counsel was ineffective for failing to raise the ineffectiveness of trial counsel, where trial counsel, (a) advised the Appellant to enter guilty pleas on February 27, 2012, when there existed other duplicate and related charges, and/or charges which were part of the same criminal episode, in a separately filed matter; and (b) failed to file a timely omnibus pretrial motion to dismiss the criminal information at CP-39-CR-0000289-2012, on double jeopardy grounds?
>
> Whether the consecutive sentence imposed on 9/10/12, for burglary, is illegal, where: (a) it violates the concurrent terms of the former 2/27/12 plea agreement, involving that same theft by receiving stolen property; or (b) where the Commonwealth dismissed that "theft" as part of the former agreement; or (c) where the firearm's charge the burglary ran consecutive to was actually dismissed, as part of the terms of the second agreement, in exchange for the pleas being entered?

Commonwealth v. Torres, 2117 EDA 2013, Slip. Op., pp. 6-7 (Pa. Super. Oct. 31, 2014). On October 31, 2014, the Superior Court affirmed the decision of the PCRA court denying the PCRA petition. Id. On October 19, 2014, Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme Court that was denied on April 7, 2015. Commonwealth v. Torres, 872 MAL 2014 (Pa. Super. Apr. 7, 2015).

Petitioner filed a second *pro se* PCRA petition on April 21, 2015. On May 6, 2015, the PCRA court issued its Rule 907 notice of its intent to dismiss the petition. On June 5, 2015, the PCRA court dismissed the petition by Order, which was amended on June 22, 2015. On July 7, 2015, Judge Dantos issued a memorandum opinion for the benefit of the Superior Court pursuant to Pennsylvania Rule of Appellate Procedure 1925.

On May 14, 2015, the instant Petition for Writ of Habeas Corpus was docketed by the Clerk's Office. See Dkt. No. 1. Petitioner raises the following claims in the Petition: (1) ineffective assistance where trial counsel: (a) failed to pursue the joinder of offenses which were the same, related or "multiplicious" and (b) failed to move to reduce the "multiplicious" offenses to single counts; leaving Petitioner foreseeably exposed to double jeopardy and/or a breach of the plea agreement; and (2) ineffective assistance of counsel in regards to my right to be free from unreasonable searches and seizures; Brady violation; prosecutor withheld material evidence. See Pet. The Honorable Cynthia M. Rufe referred the Petition to the undersigned for preparation of a Report and Recommendation. Respondents contend that Petitioner is not entitled to federal habeas relief because his claims were appropriately rejected as meritless by the state courts or are procedurally defaulted and meritless. Petitioner filed a "Notice of Finality of State Court

Proceedings" in which he states that he withdrew his PCRA appeal pending in the Pennsylvania Superior Court at the time that he filed the instant Petition alleging that counsel was ineffective regarding his right to be free from unreasonable searches and seizures, for not raising a Brady violation and for not objecting when the prosecutor allegedly withheld material evidence. See Dkt. No. 15, p. 1. In the Notice, Petitioner also withdrew his claims alleging that counsel was ineffective regarding his right to be free from unreasonable searches and seizures, for not raising a Brady violation and for not objecting when the prosecutor allegedly withheld material evidence in Ground Two of the instant Petition. Id.

II. STANDARD OF REVIEW.

A. Exhaustion and Procedural Default.

A petitioner may only succeed in a habeas corpus petition if he has first exhausted all remedies available in the state courts. 28 U.S.C. § 2254(b)(1)(A). To satisfy this requirement the petitioner must "fairly present" his claims to the state courts allowing the state courts a meaningful opportunity to correct alleged constitutional violations. Duncan v. Henry, 513 U.S. 364, 365 (1995); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)(requiring "one complete round" of the state's appellate procedures). Petitioner bears the burden of proving the exhaustion of all available remedies for each claim. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993).

Claims that are not exhausted will become procedurally defaulted, and the petitioner is not entitled to a review on the merits. O'Sullivan, 526 U.S. at 848. Review of a procedurally defaulted claim is permitted in extremely narrow circumstances, where the petitioner can show either (1) cause for the default and actual prejudice or (2) the failure to consider the claim will result in a fundamental miscarriage of justice. Coleman v. Thompson,

501 U.S. 722, 749 (1991).

"Cause" for procedural default is shown when the petitioner demonstrates "some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). "Actual prejudice" occurs when the errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494 (quoting United States v. Frady, 456, U.S. 152, 179 (1982)). A "fundamental miscarriage of justice" occurs when a petitioner presents new evidence of his actual innocence such that "it is [now] more likely than not that no reasonable juror would have convicted him." Schlup v. Delo, 513 U.S. 298, 327 (1995).

In Martinez v. Ryan, 132 S.Ct. 1309 (2012), the Supreme Court examined whether ineffective assistance at the initial review of a collateral proceeding on a claim of ineffective assistance at trial can provide cause for a procedural defect in federal habeas proceedings. Id. at 1315. This case recognized a narrow exception to the Coleman rule (that ineffective assistance of counsel at the state collateral review level could not establish cause to excuse procedural default), holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Martinez v. Ryan, 132 S.Ct. 1309, 1315 (2012). Thus, a PCRA claim for ineffective trial counsel during an initial state collateral review may qualify as "cause" to excuse the default if: (1) as a threshold matter, the state requires a prisoner to bring an ineffective counsel claims in a collateral proceeding; (2) the state courts did not appoint counsel at the initial review collateral proceeding for an ineffective-assistance-at-trial claim; (3) where appointed counsel at the initial-review collateral proceeding was ineffective under Strickland v.

Washington, 466 U.S. 668 (1984) and (4) the underlying ineffective-assistance-at-trial claim is substantial. Martinez, 132 S.Ct. at 1315-18.

B. Ineffective Assistance of Counsel.

Claims for ineffectiveness of counsel are governed by Strickland.[2] Under Strickland, counsel is presumed effective, and to prevail on an ineffectiveness claim, a petitioner must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689. Given this presumption, a petitioner must first prove that counsel's conduct was so unreasonable that no competent lawyer would have followed it, and that counsel has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687. In addition, a petitioner must prove prejudice. In order to do so, the petitioner must demonstrate that "counsel's errors were so serious as to deprive [petitioner] a fair trial, a trial whose result is reliable." Id. Thus, a petitioner must show a reasonable probability that, but for counsel's "unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome." Id. at 694. This determination must be made in light of "the totality of the evidence before the judge or jury." Id. at 695.

The United States Court of Appeals for the Third Circuit has cautioned that "[o]nly the rare claim of ineffectiveness should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." Beuhl v. Vaughn, 166 F.3d 163, 169 (3d

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[2] In Harrington v. Richter, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the United States Supreme Court reaffirmed the continued applicability of the Strickland standard in federal habeas corpus cases. See also Premo v. Moore, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

Cir.), cert. denied, 527 U.S. 1050 (1999) (quoting U.S. v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)). Under the revised habeas corpus statute, such claims can succeed only if the state court's treatment of the ineffectiveness claim is not simply erroneous, but objectively unreasonable as well. Berryman v. Morton, 100 F.3d 1089, 1103 (3d Cir. 1996). Recently, the Supreme Court acknowledged that "[s]urmounting Strickland's high bar is never an easy task." Premo v. Moore, 131 S. Ct. 733, 739 (2011) (quotation omitted). The Supreme Court explained that the relevant "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Id. at 740 (citing Strickland, 466 U.S. at 690).

Petitioner must show not only that counsel's conduct was improper, but also that it amounted to a constitutional deprivation. Petitioner must also show that the prosecutor's acts so infected the trial as to make his conviction a denial of due process. Greer v. Miller, 483 U.S. 756, 765 (1987)(citation omitted). Petitioner must show that he was deprived of a fair trial. Smith v. Phillips, 455 U.S. 209, 221 (1982); Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992), cert. denied, 508 U.S. 947 (1993) (citations omitted) (stating court must distinguish between ordinary trial error, and egregious conduct that amounts to a denial of due process).

Where the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the previous decision, pursuant to 28 U.S.C. § 2254(d)(1). If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Where the state court's application of governing federal law is challenged, it must be

shown to be not only erroneous, but objectively unreasonable. Yarborough v. Gentry, 540 U.S. 1, 4, 124 S. Ct. 1 (2003) (*per curiam*) (citations omitted). The Supreme Court elaborated on this standard:

> Establishing that a state court's application of Strickland was unreasonable under §2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," id., at 689; Lindh v. Murphy, 521 U.S. 320, 333 n. 7, 117 S. Ct. 2059 . . ., and when the two apply in tandem, review is "doubly" so, Knowles, 556 U.S. at 123, 129 S. Ct. at 1420. The Strickland standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Premo, 131 S. Ct. at 740 (citations omitted).

III. DISCUSSION.

Petitioner claims that trial counsel was ineffective for (a) failing to pursue the joinder of offenses which were the same, related or "multiplicious" and (b) failing to move to reduce the "multiplicious" offenses to single counts, leaving Petitioner foreseeably exposed to double jeopardy and/or a breach of the plea agreement. Respondents note that these claims were not "fairly presented" to every level of Pennsylvania's established appellate process and are thus procedurally defaulted.

Petitioner contends that his trial counsel was ineffective for allowing him to plead guilty to two offenses that he believes violate his constitutional rights proscribing double jeopardy. He presented a similar claim in his first PCRA petition. Judge Maria Dantos, sitting as the PCRA court, opined the following:

> The Defendant avers that Attorney Makoul was ineffective for advising him to

> enter into pleas that violated 18 Pa. C.S.A. § 110. . . . . Specifically, the Defendant asserts that he was charged with Persons Not to Possess a Firearm for possessing a 9 mm Smith and Wesson semiautomatic firearm that was taken during a burglary in Hamburg, Pennsylvania, to which he entered a guilty plea on February 27, 2012. The Defendant further argues that because he entered such a guilty plea, the Commonwealth was legally precluded from prosecuting him for the burglary that occurred on May 29, 2012, to which he entered a guilty plea on September 10, 2012. This argument is legally flawed.
>
> This Court recognizes that Section 110 of the Criminal Codes requires that the Commonwealth proceed with all charges arising out of the same criminal episode by prosecuting them together. However, the Defendant's possessory crime that occurred in the City of Allentown, Lehigh County, on June 3, 2011, is a totally separate criminal episode from the burglary that occurred on May 28, 2011, in Hamburg, Pennsylvania. This Court notes that the Defendant did not enter a guilty plea to the *theft* of the subject firearm on February 27, 2012. Instead, the Defendant pled guilty to Person Not to Possess a Firearm. This offense has nothing to do with how the firearm was acquired, but addresses the fact that the firearm was in the Defendant's possession in contravention of the law. Therefore, the Defendant's guilty plea to Persons Not to Possess a Firearm that was entered on February 27, 2012, does not prohibit the later prosecution for the Burglary in which the firearm was taken. Based on the foregoing, Attorney Makoul cannot be deemed ineffective for advising the Defendant that there were no viable or recognizable legal issues with regard to the Defendant's "double jeopardy" concern.

Commonwealth v. Torres, CCP Lehigh, pp. 4-6 ((Jun 24, 2013). The Superior Court affirmed the PCRA courts' denial of this claim as follows:

> Appellant's first claim asserts that trial counsel[fn] was ineffective in advising him to enter guilty pleas on February 27, 2012 where there remained outstanding duplicate and related charges arising form the same criminal episode relating to the 2011 cases. Appellant also claims that, in view of the duplicate and related charges alleged in the 2011 cases, trial counsel should have filed a pretrial motion to dismiss case no. 289/2012 under the compulsory joinder rule.[fn] Appellant maintains that trial counsel's lack of familiarity with the compulsory joinder rules caused her to advise him to accept the Commonwealth's plea offer on February 27, 2012. Appellant also asserts that counsel's recommendations were not the result of any reasonable, strategic or tactical decision and that her advise subjected him to successive trials and consecutive punishments. For the following reasons, we conclude that Appellant is not entitled to relief.

fn. In both the argument section of his brief and in his statement of questions involved, Appellant asserts a layered claim relating to PCRA counsel's failure to raise a claim based upon trial counsel's deficient stewardship. Appellant, however, never raised a claim pertaining to PCRA counsel's alleged ineffectiveness before the PCRA court. Hence, we deem this aspect of Appellant's contentions waived. ***See*** Pa.R.A.P. 302(a); ***see also Commonwealth v. Rigg***, 84 A.3d 1080, 1085 (Pa. Super. 2014)(PCRA petitioner can preserve claims challenging PCRA counsel's ineffectiveness after counsel filed a ***Turner/Finley*** letter by seeking leave from the trial court to amend his petition, by including such claims in response to the court's notice of intent to dismiss, or by otherwise raising such issues while the PCRA court retains jurisdiction). We shall therefore address only Appellant's complaints about the performance of trial counsel.

fn. Throughout his brief, Appellant refers interchangeably to "double jeopardy" and to the compulsory joinder statute found at 18 Pa.C.S.A. § 110. Appellant's references to double jeopardy, however, are not separately developed through citations to pertinent authority. This Court has found waiver where claims have not been developed through citation to pertinent authorities. Pa.R.A.P. 2119; ***see also Commonwealth v. Cox***, 72 A.3d 719, 721 n.3 (Pa. Super. 2013). We have also said that, "Consideration of the constitutional protections contained in the double jeopardy clauses [of the federal and state constitutions] is necessary where the statutory provisions relating to subsequent prosecutions are not applicable." ***Commonwealth v. Keenan***, 530 A.2d 90, 93 (Pa. Super. 1987). Section 110 of the compulsory joinder statute addresses situations where a former prosecution for a different offense is alleged to compel joinder. ***Id.*** at 92. That is precisely the claim that Appellant raises in this appeal. For each of these reasons, we shall confine our analysis to an examination of section 110 and its application to the circumstances in this case.

. . . .

As stated ***supra*** at footnote six, section 110 of the compulsory joinder statute applies to situations where it is alleged that a former prosecution for a different offense compels joinder. ***See*** 18 Pa. C.S.A. § 110.

. . . .

By the plain terms of section 110, a former prosecution precludes a subsequent prosecution only when the former prosecution results in an acquittal or a conviction. Appellant cites his February 27, 2012 pleas as the former prosecution that triggered the Commonwealth's obligation to prosecute the burglary charges alleged in case no. 289/2012 in the same proceeding. As we stated above, Appellant, on February 27, 2012, pled guilty to persons not to possess in case no. 2822/2011[fn] and entered a *nolo contendere* plea to resisting arrest in case no. 2828/2011. In exchange for Appellant's pleas, the Commonwealth agreed to *nolle pros* case no. 2821/2011[fn] and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and 2828/2011. Under

the particular circumstances of this case, then, we must first identify the precise offenses within the former prosecution that are capable of barring a subsequent prosecution under section 110.

> fn. The persons not to possess charge in case no. 2822/2011 related to the recovery of the 9mm handgun found in Appellant's vehicle at the time of his arrest.
>
> fn. The sole charge alleged at case no. 2821/2011 involved the offense of persons not to possess. This charge arose from the recovery of a Glock handgun that officers recovered form a garage that they searched after Appellant's June 3, 2011 arrest.

Here, Appellant makes no claim that his conviction for resisting arrest compelled the joinder of the burglary charges alleged at case no. 289/2012. Moreover, pursuant to Appellant's February 27, 2012 plea deal, the Commonwealth agreed to *nolle pros* case no. 2821/2011 and further agreed not to pursue other charges alleged in case no. 2822/2011 and 2828/2011. Black's Law Dictionary defines *nolle prosequi* as "[a] legal notice that a lawsuit or prosecution has been abandoned." Black's Law Dictionary, Eighth Edition at 1074. That source goes on to state that,

> [*n*]*olle prosequi* is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further, either as to some of the counts of the indictment, or as to part of a divisible count, or as to some of the persons accused, or altogether. It is a judicial determination in favor of [an] accused and against his conviction, **but it is not an acquittal**, nor is it equivalent to a pardon.

Id. (emphasis added); ***Commonwealth v. Ahearn***, 670 A.2d 133, 135-136 (Pa. 1996)("Since a *nolle prosequi* acts neither as an acquittal nor a conviction, double jeopardy does not attach to the original criminal bill or information.").[fn] As such, neither the charge alleged at case no. 2821/2011, nor the offenses withdrawn at case nos. 2822/2011 and 2828/2011, are capable of preclusive effect under the express terms of section 110. Only Appellant's guilty plea to persons not to possess at case no. 2822/2011 (arising from the seizure of the 9mm handgun found in Appellant's vehicle) qualifies as a potentially preclusive offense under section 110. We therefore review the facts underlying Appellant's guilty plea to that offense.

> fn. We note ***Ahearn*** is legally distinguishable from the present case. In ***Ahearn***, our Supreme Court confronted the question of whether the Commonwealth improperly reinstituted the **exact same** charges that had previously been nolle prossed when the defendant entered a guilty plea to unrelated charges. By contrast, in the present case, the Commonwealth withdrew a receiving stolen

property charge which arose from the fact that Appellant had been apprehended with a 9mm firearm that had been reported stolen and later filed burglary charges accusing Appellant of entering the residence of another without authority for the purpose of committing a crime therein.

The Commonwealth described the factual basis for Appellant's plea at the hearing conducted on February 27, 2012. During that proceeding, the district attorney entered the following recitation on the record:

> On June 3rd, 2011, at approximately 4:19 p.m. members of the Allentown Police Department stopped a burgundy over gold in color Chevrolet Tahoe bearing Pennsylvania registration HND2110 in the 800 block of Hickory Street in Allentown.
>
> It was being operated by [Appellant], who was wanted by police on unrelated charges.
>
> [A co-defendant] was seated in the front passenger [seat]. During an inventory of the vehicle's contents a Smith & Wesson model 659, 9 mm semi-automatic pistol, bearing a serial number TBF 2165 was located on the passenger front floorboard of the vehicle.
>
> Upon checking the handgun for ownership, [an officer], learned that the handgun had been reported stolen to Pennsylvania State Police, Hamburg during a burglary and had subsequently been entered into NCIC Clean as such.
>
> It was later learned [] that the handgun was owned by [an individual], as he had registered the firearm, Smith & Wesson 659, manufactured serial number TBF 2165.
>
> [The officer] did a check and it was determined that [Appellant] did not have a license.
>
> In addition, [the officer] obtained a copy of [Appellant's] criminal history and in 1997 [Appellant] pled guilty to burglary, a felony of the first degree, which makes him a person prohibited from possessing, using, manufacturing, controlling or selling a firearm under Subsection of 6105.

N.T., 2/27/12, at 6-8. Appellant agreed to the Commonwealth's recitation of the facts without hesitation. ***Id.*** at 8 (indicating Appellant's acceptance of "full responsibility" for the firearm despite the presence of an accomplice).

With these facts in mind, we now address Appellant's claims that his

firearms conviction barred prosecution of the burglary offenses alleged at case no. 289/2012. Initially, appellant raises a claim under 18 Pa. C.S.A. § 110(1)(i). Section 110(1)(I) povides that a prior conviction bars subsequent prosecution of "any offense of which the defendant could have been convicted on the first prosecution." 18 Pa. C.S.A. § 110(1)(I). Appellant cites four factors supporting his contention that his guilty plea precluded later prosecution of burglary charges under section 110(1)(i). First, Appellant notes that the Commonwealth, on October 5, 2011, filed a single complaint in case no. 289/2012 that encompassed both burglary and firearms related offenses. ***See*** Appellant's Brief at 16-18. Second, Appellant claims that the two prosecutions could have been consolidated because offenses charged in both cases (*i.e.* firearms possession charges) constituted a single continuous possession. ***See id.*** at 18-22. Third, Appellant alleges that the two prosecutions could have been consolidated because the receiving stolen property charge in the first prosecution was a lesser-included offense of the burglary charges leveled in the second prosecution. ***See id.*** at 22-23. Fourth, Appellant asserts that he could have been convicted of both prosecutions on February 27, 2012 because the Commonwealth filed notice, pursuant to Pa.R.Crim.P. 582, of its intent to try all of Appellant's offenses (i.e. the 2011 cases and the 2012 cases) in a single proceeding in which Appellant and his accomplices were named as defendants. ***See id.*** at 23-25. Notwithstanding Appellant's contentions, even a cursory review of the admitted factual basis of Appellant's guilty plea reveals that it could not support a conviction for burglary. Hence, Appellant's claim under section 110(1)(i) lacks merit and trial counsel cannot be deemed ineffective for failing to consider or take action under this provision.

Appellant next asserts that the robbery offenses charged in case no. 2012 should have been joined in the prior prosecution under section 110(1)(ii).

. . . .

Appellant argues that there are common issues of law and fact that run between the two prosecutions. To establish the requisite logical and factual relationship, Appellant claims that the burglaries, his firearms conviction, and the offenses that were *nolle prossed* or withdrawn following the entry of his pleas on February 27, 2012 (e.g. receiving stolen property) all arose from a single criminal episode. For example, Appellant argues that when he burglarized the residence of one of his victims on May 28, 2011 and stole firearms that were located within the home, he simultaneously committed burglary, receiving stolen property, and persons not to possess firearms. ***See*** Appellant's Brief at 31. Appellant then argues that the two prosecutions involve factual duplication since the victims of his offenses would be called upon to prove the theft charges in the first prosecution as well as the burglary offenses in the second prosecution. ***See id.*** at 34. Appellant seems to suggest that, given the logical relationship between the first and second

prosecutions, it was improper for the Commonwealth to institute burglary charges after it withdrew the receiving stolen property charge on February 27, 2012 since the withdrawal of the theft charge led Appellant to believe that no further prosecution would be forthcoming. ***See id.*** at 33 (noting that the receiving stolen property charge substantially duplicates the burglary charges and that the withdrawal of the receiving charge was part of the *quid pro quo* of the February 27, 2011 plea agreement); ***see also Ahearn***, 670 A.2d at 136 (to substantiate claim that Commonwealth was barred from reinstating *nolle prossed* charges following entry of guilty plea, appellant was required to show an actual representation by the Commonwealth or a commitment by the Commonwealth which led appellant to reasonably believe that guilty plea obligated the Commonwealth to withdraw the charges as part of the plea agreement).

The record refutes Appellant's understanding and firmly establishes that there is no logical relationship between Appellant's firearms conviction and the subsequent burglary prosecution. At the February 27, 2012 plea hearing, the trial court stated on the record that, notwithstanding Appellant's pleas to persons not to possess and resisting arrest, Appellant still had open cases. N.T., 2/27/12, at 3. Appellant nodded his head in agreement with the trial court. ***Id.*** Then, after the trial court accepted Appellant's pleas, the following exchange between the court, trial counsel, and Appellant took place on the record:

> [Trial Counsel]: Your Honor, he does have other charges, obviously, that he needs to resolve here in Lehigh County. This is a - and elsewhere, as you heard. So this is a maximum penalty. It's within the standard range. Other than that, there really is nothing more to say.
>
> The Court: Anything that you want to say?
>
> [Appellant]: No.

Id. at 15.

The record contains no evidence of an agreement by the Commonwealth to forego Appellant's burglary charges as part of the plea agreement entered by the parties on February 27, 2012. The guilty plea colloquy does not establish an interrelationship between the pleas entered on February 27, 2012 and the subsequent burglary charges. In exchange for Appellant's pleas to resisting arrest and persons not to possess, the Commonwealth agreed to nolle pros case no. 2821/2011 and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and 2828/2011. The facts placed on the record at Appellant's first plea hearing related exclusively to resisting arrest and a discreet [sic] firearms possession charge relating to the date of Appellant's apprehension. Moreover, the written plea colloquy signed by Appellant states that he received no other

> promises (apart from the plea agreement) that induced his entry of a plea. The PCRA court found that Appellant understood the terms and consequences of his guilty pleas. Thus, Appellant has not established that the withdrawal of any charges on February 27, 2012 led him to believe that he would not face prosecution for the burglaries that he committed.
>
> Turning to the logical relationship between Appellant's possessory firearms conviction and the subsequent burglary charges, we find no error in the PCRA court's conclusion that this claim lacked merit. . . . For the reasons expressed by the PCRA court, we conclude that Appellant is not entitled to relief under section 110(1)(ii).

Commonwealth v. Torres, 2117 EDA 2013, Slip. Op., pp. 7-8, 10-15, 17-21 (Pa. Super. Oct. 31, 2014). If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). See also Vega v. Klem, No. CIV.A. 03-5485, 2005 WL 3216738, at *6 (E.D. Pa. Nov. 29, 2005)(citing 28 U.S.C. § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 404-405 (2000); Fountain v. Kyler, 420 F.3d 267, 272-273 (3d Cir. 2005)). Where the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable. Yarborough v. Gentry, 540 U.S. 1, 4, 124 S. Ct. 1 (2003)(*per curiam*)(citations omitted). Petitioner has not identified any decision of the trial court or the appellate court which is contrary to, or an unreasonable application of, Sixth Amendment jurisprudence. Petitioner, therefore, does not meet his burden of proving ineffective assistance of counsel on this claim and it is recommended that this claim should be denied.

To the extent that any claims have been raised that were not exhausted in the state courts, these claims are procedurally defaulted and unreviewable. The Pennsylvania Superior Court did not address Petitioner's claims in the context of a double jeopardy violation. Petitioner

failed to meaningfully develop a double jeopardy claim in his brief to the Superior Court, prompting the Superior Court to determine the claim waived under Pa.R.A.P. 2119. Commonwealth v. Torres, No. 2117 EDA 2013, slip op. at 8 n.6 (Pa. Super. Oct. 31, 2014). Pursuant to Rule 2119, Pennsylvania courts have routinely and consistently found that the failure to adequately develop claims in any meaningful way constitutes waiver of those claims. See, e.g., Commonwealth v. Johnson, 985 A.2d 915 (Pa. 2009) (holding appellate claim waived where appellant fails to discuss or develop issue in any meaningful way). Because the Superior Court refused to address defendant's double jeopardy claim based on an adequate and independent state procedural rule, Petitioner's double jeopardy claim is defaulted and unreviewable. State appellate review of this claim is now foreclosed.

In addition, this Court will not entertain claims that allege only errors of state law. Habeas relief is available only to those petitioners who claim that their judgment of sentence violates federal constitutional rights. See 22 U.S.C. § 2254(a). Errors of state law are not cognizable. See, e.g., Priester v. Vaughn, 382 F.3d 394, 402 (3d Cir. 2004) ("Federal courts reviewing habeas claims cannot reexamine state court determinations on state-law questions."). Because the Superior Court resolved Petitioner's claim within the context of Pennsylvania's compulsory joinder statute, a state law claim, this issue is unexhausted, procedurally defaulted, and unreviewable. See Commonwealth v. Torres, No. 2117 EDA 2013, slip op. at 8, n.6 (Pa. Super. Oct. 31, 2014) (internal citations omitted).

Petitioner's judgment of sentence in case numbers 2822/2011 and 2828/2011 became final on March 28, 2012, upon the expiration of the time period for filing a direct appeal. See Pa.R.Crim.P. 720(A)(3). Petitioner's judgment of sentence in case numbers 282/2012,

289/2012, and 3824/2012 became final on October 10, 2012, upon the expiration of the time period for filing a direct appeal. The PCRA one-year statute of limitations would thus bar Petitioner from presenting claims in a new PCRA petition. See 42 Pa.C.S. § 9545(b)(1). These claims are also procedurally defaulted because they were not properly presented to the state courts, and independent and adequate state law grounds now preclude state court review. See Coleman, 501 U.S. at 729.

Procedural default can only be overcome with a showing of "cause and prejudice" or by showing a "fundamental miscarriage of justice." Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000); Coleman, 501 U.S. at 750. To show "cause," a petitioner must establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). "Prejudice" requires that the "habeas petitioner . . . show 'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Id. at 494 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

If a petitioner is unable to demonstrate cause and prejudice, the defaulted claims may still be reviewed if the failure to do so would result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 748. The miscarriage of justice exception is "explicitly tied . . . to the petitioner's innocence." Schlup v. Delo, 513 U.S. 298, 321 (1995). An actual innocence claim "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. Petitioner has not produced any

new evidence demonstrating his actual innocence. He alleges no new reliable scientific or physical evidence and presents no trustworthy eyewitness exculpatory statements. In fact, at the May 29, 2013, evidentiary hearing, Petitioner admitted to the court that he was not innocent of the charges to which he pled guilty.

Petitioner attempts to excuse the procedural default by alleging that PCRA counsel was ineffective for failing to present these claims in state court. "Under Martinez v. Ryan, ---U.S. --- , 132 S.Ct. 1309 (2012), 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.'" Glenn v. Wynder, 743 F.3d 402, 409–10 (3d Cir. 2014)(citing Martinez, 132 S.Ct. at 1319). The default will be excused only where the petitioner establishes that PCRA counsel's conduct was such that no competent attorney would have followed it, and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694. In order to establish that a claim is "substantial," Petitioner must demonstrate that "the claim has some merit." Martinez, 132 S.Ct. at 1318. In making this determination, the Martinez Court advises courts to adopt the test normally used for deciding whether it is appropriate to issue a certificate of appealability: if "reasonable jurists" would find the claim to be "debatable." See Miller–El v. Cockrell, 537 U.S. 322, 338 (2003); Martinez, 132 S.Ct. at 1318–19.

Petitioner's attempt to invoke the exception to procedural default announced in Martinez fails. Appointed PCRA counsel reviewed the record and filed a letter pursuant to

Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), stating that the issues raised in the PCRA petition were meritless. PCRA counsel also filed a Petition to Withdraw as Counsel, and the PCRA court permitted counsel's withdrawal prior to the commencement of the evidentiary hearing conducted on May 29, 2013. As noted by the Pennsylvania Superior Court in its opinion denying PCRA relief, a "PCRA petitioner can preserve claims challenging PCRA counsel's effectiveness after counsel files a Turner/Finley letter by seeking leave from the trial court to amend his petition, by including such claims in response to the court's notice of intent to dismiss, or by otherwise raising such issue while the PCRA court retains jurisdiction." Commonwealth v. Torres (citing Commonwealth v. Rigg, 84 A.3d 1080, 1085 (Pa. Super. 2014). Petitioner pursued none of those avenues of relief. Thus, Petitioner fails to invoke the narrow exception to the rules of procedural default carved out by Martinez, and his claims remain unreviewable.

IV. CERTIFICATE OF APPEALABILITY.

The court must also determine whether to recommend granting a certificate of appealability ("COA") with respect to the Petitioner's claims. A COA can issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [if] jurists of reason would find it debatable whether the district court was correct in its [] ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The court is of the view that reasonable jurists would not debate the court's determinations, and a COA should not be granted.

For all of the above reasons, I make the following:

RECOMMENDATION

AND NOW, this 30th day of April, 2018, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. No. 1) should be DENIED with prejudice and DISMISSED without an evidentiary hearing. There is no probable cause to issue a certificate of appealability.

The Petitioner may file objections to this Report and Recommendation. See Local Civ. R. 72.1. Failure to timely file objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Henry S. Perkin
HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3398

JOSE LUIS TORRES,
Appellant

v.

SMITHFIELD SCI; DISTRICT ATTORNEY LEHIGH COUNTY;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. Civ. No. 5-15-cv-02703)

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

Appendix D

panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Date: June 4, 2020

kr/cc: Jose Luis Torres
Heather F. Gallagher, Esq.
Ronald Eisenberg, Esq.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 872 MAL 2014
Respondent	:	
	:	Petition for Allowance of Appeal from the
	:	Order of the Superior Court
v.	:	
JOSE LUIS TORRES,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 7th day of April, 2015, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Elizabeth E. Zisk
As Of 4/7/2015

Attest: [signature]
Chief Clerk
Supreme Court of Pennsylvania

Appendix E

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

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOSE LUIS TORRES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2117 EDA 2013

Appeal from the PCRA Order June 21, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0000282-2012
CP-39-CR-0000289-2012
CP-39-CR-0002821-2011
CP-39-CR-0002822-2011
CP-39-CR-0002828-2011
CP-39-CR-0003824-2012

BEFORE: MUNDY, OLSON and WECHT, JJ.

MEMORANDUM BY OLSON, J.: **FILED OCTOBER 31, 2014**

Appellant, Jose Luis Torres, appeals, *pro se*, from an order entered on June 21, 2013 that denied his petition filed pursuant to the Post conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

Between June 2010 and May 2011, Appellant committed a series of ten burglaries in Lehigh County and neighboring jurisdictions. Thereafter, on June 3, 2011, officers with the Allentown and Upper Saucon Police Departments, acting on information from confidential sources and pursuant to an arrest warrant on unrelated charges, stopped a vehicle operated by Appellant. A struggle ensued but the officers were eventually able to subdue

Appendix F

Appellant. During a subsequent inventory search, the officers discovered a 9mm semi-automatic handgun on the front passenger floorboard of the vehicle. Further investigation also revealed that 1) the 9mm handgun had been reported stolen, 2) Appellant had a prior felony conviction that prohibited him from possessing a firearm, and 3) Appellant did not have a license to carry a firearm on the date of his apprehension.

On July 28, 2011, the Commonwealth filed three criminal informations that charged Appellant with the following offenses:[1]

CP-39-CR-2821-2011

Count 1 – Persons not to possess firearms, 18 Pa.C.S.A. § 6105(a)(1).

CP-39-CR-2822-2011

Count 1 – Receiving stolen property, 18 Pa.C.S.A. § 3925(a).

Count 2 - Persons not to possess firearms, 18 Pa.C.S.A. § 6105(a)(1).

Count 3 – Firearms not to be carried without a license, 18 Pa.C.S.A. § 6106(a)(1).

CP-39-CR-2828-2011

Count 1 – Aggravated assault, 18 Pa.C.s.a. § 2702(a)(3).

Count 2 – Recklessly endangering another person, 18 Pa.C.S.A. § 2705.

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[1] Hereafter, we shall collectively refer to the charges filed on July 28, 2011 as the "2011 cases."

Count 3 – Resisting arrest, 18 Pa.C.S.A. § 5104.

On February 14, 2012, the Commonwealth filed three additional criminal informations against Appellant that charged as follows:[2]

CP-39-CR-282-2012

Count 1 – Burglary, 18 Pa.C.S.A. § 3502(a).

Count 2 – Criminal trespass, 18 Pa.C.S.A. § 3503(a)(1)(ii).

Count 3 – Theft by unlawful taking, 18 Pa.C.S.A. § 3921(a).

Count 4 – Receiving stolen property, 18 Pa.C.S.A. § 3925(a).

Count 5 – Criminal mischief, 18 Pa.C.S.A. § 3304(a)(5).

CP-39-CR-289-2012

Counts 1, 7, 13, 19, 25, 33, 39 – Burglary, 18 Pa.C.S.A. § 3502(a).

Counts 2, 8, 14, 20, 26, 34, 40 – Criminal trespass, 18 Pa.C.S.A. § 3503(a)(1)(ii).

Counts 3, 9, 15, 21, 27, 35, 41 – Theft by unlawful taking, 18 Pa.C.S.a. § 3921(a).

Counts 4, 10, 16, 22, 28, 36, 42 – Receiving stolen property, 18 Pa.C.s.a. § 3925(a).

Counts 5, 11, 17, 23, 29, 37, 43 – Criminal mischief, 18 Pa.C.S.A. § 3304(a)(2).

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[2] Hereafter, we shall collectively refer to the charges filed on February 14, 2012 as the "2012 cases."

Counts 6, 12, 18, 24, 30, 38, 54 – Conspiracy to commit burglary, 18 Pa.C.S.A. § 903(a), 3502(a).

Counts 31, 32, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 – Persons not to possess, 18 Pa.C.S.A. § 6105(a)(1).

CP-39-CR-3824-2012

Counts 1 and 2 – Burglary, 18 Pa.C.S.A. § 3502(a).

On February 27, 2012, Appellant resolved the 2011 cases by entering a negotiated plea agreement with the Commonwealth. ***See generally*** N.T., 2/27/12, at 2-16. Under the terms of the plea agreement, Appellant pled guilty to persons not to possess in case no. 2822/2011 and entered a *nolo contendere* plea to resisting arrest in case no. 2828/2011. In exchange for Appellant's pleas, the Commonwealth agreed to *nolle pros* case no. 2821/2011 and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and 2828/2011. Additionally, pursuant to the parties' plea agreement, the court imposed a sentence of five to ten years' incarceration for Appellant's persons not to possess conviction at case no. 2822/2011, together with a concurrent sentence of one to two years of imprisonment for the resisting arrest charge in case no. 2828/2011.

On June 28, 2012, Appellant moved *pro se* to discontinue trial counsel's representation. The trial court convened a hearing on Appellant's motion on July 9, 2012. At the conclusion of the hearing, the court relieved trial counsel of her duty to represent Appellant, but directed her to remain attached to Appellant's cases as stand-by counsel.

Appellant resolved the 2012 cases by entering a separate negotiated plea agreement with the Commonwealth on September 10, 2012. ***See generally*** N.T., 9/10/12, at 2-27. At the September 10, 2012 plea hearing, Appellant pled guilty to ten counts of burglary[3] and one count of criminal conspiracy to commit burglary. In exchange for Appellant's guilty pleas, the Commonwealth withdrew the remaining charges at case nos. 282/2012 and 289/2012. In addition, pursuant to the parties' plea agreement, the court sentenced Appellant to serve seven and one-half to 15 years on each of the burglary and conspiracy charges. The court also directed that these sentences were to run concurrent to each other but consecutive to the sentence imposed on February 27, 2012. Thus, the aggregate sentence for Appellant's 2011 and 2012 cases was 12½ to 25 years in prison.

Appellant filed a *pro se* PCRA petition on February 19, 2013. Appellant's petition alleged that trial counsel rendered ineffective assistance in advising him to enter into pleas that violated 18 Pa.C.S.A. § 110. Appellant also claimed that his sentence was illegal and that the Commonwealth breached the parties' plea agreement when the sentences on the 2011 and 2012 cases were run consecutively to each other instead of concurrently. On February 26, 2013, the PCRA court appointed counsel to

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[3] As indicated above, one count of burglary was charged at case no. 282/2012, seven were charged at case no. 289/2012, and two were charged at case no. 3824/2012.

represent Appellant. After reviewing the record, PCRA counsel concluded that the issues raised in Appellant's petition lacked merit. Accordingly, counsel forwarded Appellant a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) and moved to withdraw as counsel on March 21, 2013. The trial court convened an evidentiary hearing to address Appellant's petition for collateral relief on May 29, 2013. At the commencement of this hearing, the court permitted PCRA counsel to withdraw. ***See*** N.T., 5/29/13, at 6. Appellant proceeded *pro se* throughout the proceedings. Following the close of testimony, the PCRA court took the matter under advisement. On June 24, 2013, the PCRA court issued an opinion and order denying Appellant's petition. This timely appeal followed.[4]

Appellant's brief raises the following questions for our review:

> WHETHER PCRA COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE INEFFECTIVENESS OF TRIAL COUNSEL, WHERE TRIAL COUNSEL: (A) ADVISED THE APPELLANT TO ENTER GUILTY PLEAS ON FEBRUARY 27, 2012, WHEN THERE EXISTED OTHER DUPLICATE AND RELATED CHARGES, AND/OR CHARGES WHICH WERE PART OF THE SAME CRIMINAL EPISODE, IN A SEPARATELY FILED MATTER; AND (B) FAILED TO FILE A TIMELY OMNIBUS PRETRIAL MOTION TO DISMISS THE CRIMINAL INFORMATION AT CP-39-CR-0000289-2012, ON DOUBLE JEOPARDY GROUNDS?
>
> WHETHER THE CONSECUTIVE SENTENCE IMPOSED ON 9/10/12, FOR BURGLARY, IS ILLEGAL, WHERE: (A) IT VIOLATES THE

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[4] The requirements of Pa.R.A.P. 1925(c) have been satisfied in this case.

> CONCURRENT TERMS OF THE FORMER 2/27/12 PLEA AGREEMENT, INVOLVING THAT SAME THEFT BY RECEIVING STOLEN PROPERTY; OR (B) WHERE THE COMMONWEALTH DISMISSED THAT "THEFT" AS PART OF THE FORMER AGREEMENT; AND/OR (C) WHERE THE FIREARM'S CHARGE THE BURGLARY RAN CONSECUTIVE TO WAS ACTUALLY DISMISSED, AS PART OF THE TERMS OF THE SECOND AGREEMENT, IN EXCHANGE FOR THE PLEAS BEING ENTERED?

Appellant's Brief at 3.

Appellant challenges an order that denied his petition for relief under the PCRA. Our standard of review for an order denying collateral relief is well settled. We have said:

> This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA court's decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level. We may affirm a PCRA court's decision on any grounds if it is supported by the record.

Commonwealth v. Rivera, 10 A.3d 1276, 1279 (Pa. Super. 2010) (internal citations omitted).

Appellant's first claim asserts that trial counsel[5] was ineffective in advising him to enter guilty pleas on February 27, 2012 where there

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[5] In both the argument section of his brief and in his statement of questions involved, Appellant asserts a layered claim relating to PCRA counsel's failure to raise a claim based upon trial counsel's deficient stewardship. Appellant, however, never raised a claim pertaining to PCRA counsel's alleged ineffectiveness before the PCRA court. Hence, we deem this aspect of Appellant's contentions waived. ***See*** Pa.R.A.P. 302(a); ***see also Commonwealth v. Rigg***, 84 A.3d 1080, 1085 (Pa. Super. 2014) (PCRA

(Footnote Continued Next Page)

remained outstanding duplicate and related charges arising from the same criminal episode relating to the 2011 cases. Appellant also claims that, in view of the duplicate and related charges alleged in the 2011 cases, trial counsel should have filed a pretrial motion to dismiss case no. 289/2012 under the compulsory joinder rule.[6] Appellant maintains that trial counsel's lack of familiarity with the compulsory joinder rules caused her to advise him to accept the Commonwealth's plea offer on February 27, 2012. Appellant also asserts that counsel's recommendations were not the result of any reasonable, strategic or tactical decision and that her advice subjected him

(Footnote Continued) ———————————

petitioner can preserve claims challenging PCRA counsel's effectiveness after counsel files a ***Turner/Finley*** letter by seeking leave from the trial court to amend his petition, by including such claims in response to the court's notice of intent to dismiss, or by otherwise raising such issues while the PCRA court retains jurisdiction). We shall therefore address only Appellant's complaints about the performance of trial counsel.

[6] Throughout his brief, Appellant refers interchangeably to "double jeopardy" and to the compulsory joinder statute found at 18 Pa.C.S.A. § 110. Appellant's references to double jeopardy, however, are not separately developed through citations to pertinent authority. This Court has found waiver where claims have not been developed through citation to pertinent authorities. Pa.R.A.P. 2119; ***see also Commonwealth v. Cox***, 72 A.3d 719, 721 n.3 (Pa. Super. 2013). We have also said that, "Consideration of the constitutional protections contained in the double jeopardy clauses [of the federal and state constitutions] is necessary where the statutory provisions relating to subsequent prosecutions are not applicable." ***Commonwealth v. Keenan***, 530 A.2d 90, 93 (Pa. Super. 1987). Section 110 of the compulsory joinder statute addresses situations where a former prosecution for a different offense is alleged to compel joinder. ***Id.*** at 92. That is precisely the claim that Appellant raises in this appeal. For each of these reasons, we shall confine our analysis to an examination of section 110 and its application to the circumstances in this case.

to successive trials and consecutive punishments. For the following reasons, we conclude that Appellant is not entitled to relief.

To be eligible for relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from "one or more" of the seven, specifically enumerated circumstances listed in 42 Pa.C.S.A. § 9543(a)(2). One of these statutorily enumerated circumstances is the "[i]neffectiveness of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii).

Counsel is, however, presumed to be effective and "the burden of demonstrating ineffectiveness rests on [A]ppellant." ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa. Super. 2010). To satisfy this burden, Appellant must plead and prove by a preponderance of the evidence that:

> his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different.

Commonwealth v. Fulton, 830 A.2d 567, 572 (Pa. 2003). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." ***Id.*** "[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim." ***Commonwealth v. Tharp***, 2014 WL 474578, *5 (Pa. 2014).

As stated ***supra*** at footnote six, section 110 of the compulsory joinder statute applies to situations where it is alleged that a former prosecution for a different offense compels joinder. ***See*** 18 Pa.C.S.A. § 110. We are guided by the following principles in our review of claims that invoke section 110.

> The compulsory joinder statute is a legislative mandate that a subsequent prosecution for a violation of a provision of a statute that is different from a former prosecution, or is based on different facts, will be barred in certain circumstances. 18 Pa.C.S.A. § 110. As amended in 2002, Section 110 states in relevant part:
>
> **§ 110. When prosecution barred by former prosecution for different offense**
>
> Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is for:
>
> (i) any offense of which the defendant could have been convicted on the first prosecution;
>
> (ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and occurred within the same judicial district as the former prosecution unless the court ordered a separate trial of the charge of such offense; or

Commonwealth v. Fithian, 961 A.2d 66, 71-72 (Pa. 2008).

By the plain terms of section 110, a former prosecution precludes a subsequent prosecution only when the former prosecution results in an

acquittal or a conviction. Appellant cites his February 27, 2012 pleas as the former prosecution that triggered the Commonwealth's obligation to prosecute the burglary charges alleged in case no. 289/2012 in the same proceeding. As we stated above, Appellant, on February 27, 2012, pled guilty to persons not to possess in case no. 2822/2011[7] and entered a *nolo contendere* plea to resisting arrest in case no. 2828/2011. In exchange for Appellant's pleas, the Commonwealth agreed to *nolle pros* case no. 2821/2011[8] and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and 2828/2011. Under the particular circumstances of this case, then, we must first identify the precise offenses within the former prosecution that are capable of barring a subsequent prosecution under section 110.

Here, Appellant makes no claim that his conviction for resisting arrest compelled the joinder of the burglary charges alleged at case no. 289/2012. Moreover, pursuant to Appellant's February 27, 2012 plea deal, the Commonwealth agreed to *nolle pros* case no. 2821/2011 and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and

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[7] The persons not to possess charge in case no. 2822/2011 related to the recovery of the 9mm handgun found in Appellant's vehicle at the time of his arrest.

[8] The sole charge alleged at case no. 2821/2011 involved the offense of persons not to possess. This charge arose from the recovery of a Glock handgun that officers recovered from a garage that they searched after Appellant's June 3, 2011 arrest.

2828/2011. Black's Law Dictionary defines *nolle prosequi* as "[a] legal notice that a lawsuit or prosecution has been abandoned." Black's Law Dictionary, Eighth Edition at 1074. That source goes on to state that,

> [*n*]*olle prosequi* is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further, either as to some of the counts of the indictment, or as to part of a divisible count, or as to some of the persons accused, or altogether. It is a judicial determination in favor of [an] accused and against his conviction, **but it is not an acquittal**, nor is it equivalent to a pardon.

Id. (emphasis added); ***Commonwealth v. Ahearn***, 670 A.2d 133, 135-136 (Pa. 1996) ("Since a *nolle prosequi* acts neither as an acquittal nor a conviction, double jeopardy does not attach to the original criminal bill or information.").[9] As such, neither the charge alleged at case no. 2821/2011, nor the offenses withdrawn at case nos. 2822/2011 and 2828/2011, are capable of preclusive effect under the express terms of section 110. Only Appellant's guilty plea to persons not to possess at case no. 2822/2011 (arising from the seizure of the 9mm handgun found in Appellant's vehicle)

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[9] We note ***Ahearn*** is legally distinguishable from the present case. In ***Ahearn***, our Supreme Court confronted the question of whether the Commonwealth improperly reinstituted the **exact same** charges that had previously been *nolle prossed* when the defendant entered a guilty plea to unrelated charges. By contrast, in the present case, the Commonwealth withdrew a receiving stolen property charge which arose from the fact that Appellant had been apprehended with a 9mm firearm that had been reported stolen and later filed burglary charges accusing Appellant of entering the residence of another without authority for the purpose of committing a crime therein.

qualifies as a potentially preclusive offense under section 110. We therefore review the facts underlying Appellant's guilty plea to that offense.

The Commonwealth described the factual basis for Appellant's plea at the hearing conducted on February 27, 2012. During that proceeding, the district attorney entered the following recitation on the record:

> On June the 3rd, 2011 at approximately 4:19 p.m. members of the Allentown Police Department stopped a burgundy over gold in color Chevrolet Tahoe bearing Pennsylvania registration HND 2110 in the 800 block of Hickory Street in Allentown.
>
> It was being operated by [Appellant], who was wanted by police on unrelated charges.
>
> [A co-defendant] was seated in the front passenger [seat]. During an inventory of the vehicle's contents a Smith & Wesson model 659, 9mm semi-automatic pistol, bearing a serial number TBF 2165 was located on the passenger front floorboard of the vehicle.
>
> Upon checking the handgun for ownership, [an officer], learned that the handgun had been reported stolen to Pennsylvania State Police, Hamburg during a burglary and had subsequently been entered into NCIC Clean as such.
>
> It was later learned [] that the handgun was owned by [an individual], as he had registered the firearm, Smith & Wesson 659, manufactured serial number TBF 2165.
>
> [The officer] did a check and it was determined that [Appellant] did not have a license.
>
> In addition, [the officer] obtained a copy of [Appellant's] criminal history and in 1997 [Appellant] pled guilty to burglary, a felony of the first degree, which makes him a person prohibited from possessing, using, manufacturing, controlling or selling a firearm under Subsection of 6105.

N.T., 2/27/12, at 6-8. Appellant agreed to the Commonwealth's recitation of the facts without hesitation. ***Id.*** at 8 (indicating Appellant's acceptance of "full responsibility" for the firearm despite the presence of an accomplice).

With these facts in mind, we now address Appellant's claims that his firearms conviction barred prosecution of the burglary offenses alleged at case no. 289/2012. Initially, appellant raises a claim under 18 Pa.C.S.A. § 110(1)(i). Section 110(1)(i) provides that a prior conviction bars subsequent prosecution of "any offense of which the defendant could have been convicted on the first prosecution." 18 Pa.C.S.A. § 110(1)(i). Appellant cites four factors supporting his contention that his guilty plea precluded later prosecution of burglary charges under section 110(1)(i). First, Appellant notes that the Commonwealth, on October 5, 2011, filed a single complaint in case no. 289/2012 that encompassed both burglary and firearms related offenses. ***See*** Appellant's Brief at 16-18. Second, Appellant claims that the two prosecutions could have been consolidated because offenses charged in both cases (*i.e.* firearms possession charges) constituted a single continuous possession. ***See id.*** at 18-22. Third, Appellant alleges that the two prosecutions could have been consolidated because the receiving stolen property charge in the first prosecution was a lesser-included offense of the burglary charges leveled in the second prosecution. ***See id.*** at 22-23. Fourth, Appellant asserts that he could have been convicted of both prosecutions on February 27, 2012 because the

Commonwealth filed notice, pursuant to Pa.R.Crim.P. 582, of its intent to try all of Appellant's offenses (*i.e.* the 2011 cases and the 2012 cases) in a single proceeding in which Appellant and his accomplices were named as defendants. ***See id.*** at 23-25. Notwithstanding Appellant's contentions, even a cursory review of the admitted factual basis of Appellant's guilty plea reveals that it could not support a conviction for burglary. Hence, Appellant's claim under section 110(1)(i) lacks merit and trial counsel cannot be deemed ineffective for failing to consider or take action under this provision.

Appellant next asserts that the burglary offenses charged in case no. 2012 should have been joined in the prior prosecution under section 110(1)(ii).

> As has been summarized by our [Supreme] Court, Section 110(1)(ii) . . . contains four requirements which, if met, preclude a subsequent prosecution due to a former prosecution for a different offense:
>
> (1) the former prosecution must have resulted in an acquittal or conviction;
>
> (2) the current prosecution is based upon the same criminal conduct or arose from the same criminal episode as the former prosecution;
>
> (3) the prosecutor was aware of the instant charges before the commencement of the trial on the former charges; and
>
> (4) the current offense occurred within the same judicial district as the former prosecution.
>
> ***See [Commonwealth v.] Nolan***, 855 A.2d [834, 839 (Pa. 2004)]; ***Commonwealth v. Hockenbury***, 701 A.2d 1334, 1337

> ([Pa.] 1997). Each prong of this test must be met for compulsory joinder to apply.

Commonwealth v. Fithian, 961 A.2d 66, 71-72 (Pa. 2008) (parallel citation omitted).

In this case, we focus our attention upon the second requirement listed above, as we find it dispositive of Appellant's contentions. In deciding whether the current prosecution is based upon the same criminal conduct or arose from the same criminal episode as the former prosecution,[10] our Supreme Court has said that, "courts considering the logical relationship prong [must look to] the temporal and logical relationship between the charges to determine whether they arose from a single criminal episode." ***Commonwealth v. Reid***, 77 A.3d 579, 582 (Pa. 2013). "Generally, charges against a defendant are clearly related in time and require little analysis to determine that a single criminal episode exists." ***Commonwealth v. Hude***, 458 A.2d 177, 181 (Pa. 1983). With respect to whether a logical relationship exists, the Supreme Court has explained:

> In ascertaining whether a number of statutory offenses are logically related to one another, the court should initially inquire as to whether there is a substantial duplication of factual, and/or legal issues presented by the offenses. If there is duplication, then the offenses are logically related and must be prosecuted at one trial. The mere fact that the additional statutory offenses involve additional issues of law or fact is not sufficient to create

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[10] This factor is commonly referred to as the "logical relationship" prong. ***See Commonwealth v. Reid***, 77 A.3d 579, 582 (Pa. 2013).

> a separate criminal episode since the logical relationship test does not require an absolute identity of factual backgrounds.

Id. (internal quotation marks omitted). Substantial duplication of issues of law and fact is a prerequisite, as *de minimis* duplication is insufficient to establish a logical relationship between offenses. ***Commonwealth v. Bracalielly***, 658 A.2d 755, 761 (Pa. 1995). Where different evidence is required to establish the defendant's involvement in criminal activity, substantial duplication is not demonstrated.[11] ***See id.*** at 761–62.

Appellant argues that there are common issues of law and fact that run between the two prosecutions. To establish the requisite logical and factual relationship, Appellant claims that the burglaries, his firearms conviction, and the offenses that were *nolle prossed* or withdrawn following the entry of his pleas on February 27, 2012 (*e.g.* receiving stolen property) all arose from a single criminal episode. For example, Appellant argues that

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[11] In considering the temporal and logical relationship between criminal acts, we are guided by the policy considerations that § 110 was designed to serve:

> (1) to protect a person accused of crimes from governmental harassment of being forced to undergo successive trials for offenses stemming from the same criminal episode; and (2) as a matter of judicial administration and economy, to assure finality without unduly burdening the judicial process by repetitious litigation.

Commonwealth v. Anthony, 717 A.2d 1015, 1018–1019 (Pa. 1998) (citation omitted).

when he burglarized the residence of one of his victims on May 28, 2011 and stole firearms that were located within the home, he simultaneously committed burglary, receiving stolen property, and persons not to possess firearms. ***See*** Appellant's Brief at 31. Appellant then argues that the two prosecutions involve factual duplication since the victims of his offenses would be called upon to prove the theft charges in the first prosecution as well as the burglary offenses in the second prosecution. ***See id.*** at 34. Appellant seems to suggest that, given the logical relationship between the first and second prosecutions, it was improper for the Commonwealth to institute burglary charges after it withdrew the receiving stolen property charge on February 27, 2012 since the withdrawal of the theft charge led Appellant to believe that no further prosecution would be forthcoming. ***See id.*** at 33 (noting that the receiving stolen property charge substantially duplicates the burglary charges and that the withdrawal of the receiving charge was part of the *quid pro quo* of the February 27, 2011 plea agreement); ***see also Ahearn***, 670 A.2d at 136 (to substantiate claim that Commonwealth was barred from reinstating *nolle prossed* charges following entry of guilty plea, appellant was required to show an actual representation by the Commonwealth or a commitment by the Commonwealth which led appellant to reasonably believe that guilty plea obligated the Commonwealth to withdraw the charges as part of the plea agreement).

The record refutes Appellant's understanding and firmly establishes that there is no logical relationship between Appellant's firearms conviction

and the subsequent burglary prosecution. At the February 27, 2012 plea hearing, the trial court stated on the record that, notwithstanding Appellant's pleas to persons not to possess and resisting arrest, Appellant still had open cases. N.T., 2/27/12, at 3. Appellant nodded his head in agreement with the trial court. ***Id.*** Then, after the trial court accepted Appellant's pleas, the following exchange between the court, trial counsel, and Appellant took place on the record:

> [Trial Counsel]: Your Honor, he does have other charges, obviously, that he needs to resolve here in Lehigh County. This is a – and elsewhere, as you heard. So this is a maximum penalty. It's within the standard range. Other than that, there really is nothing more to say.
>
> The Court: Anything that you want to say?
>
> [Appellant]: No.

Id. at 15.

The record contains no evidence of an agreement by the Commonwealth to forgo Appellant's burglary charges as part of the plea agreement entered by the parties on February 27, 2012. The guilty plea colloquy does not establish an interrelationship between the pleas entered on February 27, 2012 and the subsequent burglary charges. In exchange for Appellant's pleas to resisting arrest and persons not to possess, the Commonwealth agreed to *nolle pros* case no. 2821/2011 and further agreed not to pursue the other charges alleged in case nos. 2822/2011 and 2828/2011. The facts placed on the record at Appellant's first plea hearing

related exclusively to resisting arrest and a discreet firearms possession charge relating to the date of Appellant's apprehension. Moreover, the written plea colloquy signed by Appellant states that he received no other promises (apart from the plea agreement) that induced his entry of a plea. The PCRA court found that Appellant understood the terms and consequences of his guilty pleas. Thus, Appellant has not established that the withdrawal of any charges on February 27, 2012 led him to believe that he would not face prosecution for the burglaries that he committed.

Turning to the logical relationship between Appellant's possessory firearms conviction and the subsequent burglary charges, we find no error in the PCRA court's conclusion that this claim lacked merit. In rejecting Appellant's claim, the court stated:

> [The PCRA court] recognizes that [s]ection 110 of the Criminal Code requires that the Commonwealth proceed with all charges arising out of the same criminal episode by prosecuting them together. However, [Appellant's] possessory crime that occurred in the City of Allentown, Lehigh County, on June 3, 2011, is a totally separate criminal episode from the burglary that occurred on May 28, 2011, in Hamburg, Pennsylvania. [The PCRA court] notes that [Appellant] did not enter a guilty plea to the **theft** of the subject firearm on February 27, 2012. Instead, [Appellant pled guilty to [p]ersons [n]ot to [p]ossess a [f]irearm. This offense has nothing to do with how the firearm was acquired, but addresses the fact that the firearm was in [Appellant's] possession in contravention of the law. Therefore, [Appellant's] guilty plea to [p]ersons [n]ot to [p]ossess a [f]irearm that was entered on February 27, 2012, does not prohibit the later prosecution for the [b]urglary in which the firearm was taken. Based on the foregoing, [trial counsel] cannot be deemed ineffective for advising [Appellant] that there were no viable or recognizable legal issues with regard to [Appellant's contentions under section 110].

PCRA Court Opinion, 6/24/13, at 5-6 (emphasis in original). For the reasons expressed by the PCRA court, we conclude that Appellant is not entitled to relief under section 110(1)(ii).

In his final claim, Appellant alleges that the consecutive sentence imposed on September 10, 2012 for his burglary conviction is illegal. Appellant advances three reasons in support of his contention. First, Appellant claims that his burglary conviction should have merged with the receiving stolen property charge that was withdrawn by the Commonwealth as part of Appellant's February 27, 2012 plea agreement. Second, Appellant asserts that the withdrawal of the persons not to possess charge alleged at case no. 289 retroactively voided Appellant's prior conviction for that offense at case no. 2822/2011. Third, Appellant claims that a consecutive sentence in this case violates a promise he received to the effect that all of his theft and firearms related offenses would be imposed concurrently. These claims merit no relief.

This Court has held that:

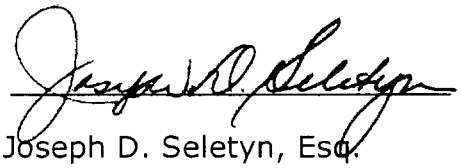
> The phrase 'illegal sentence' is a term of art in Pennsylvania Courts that is applied to three narrow categories of cases. Those categories are: (1) claims that the sentence fell outside of the legal parameters prescribed by the applicable statute; (2) claims involving merger/double jeopardy; and (3) claims implicating the rule in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).

Commonwealth v. Munday, 78 A.3d 661, 664 (Pa. Super. 2013) (internal citations and parallel citations omitted).

In this case, Appellant does not allege that his sentence fell outside the legal parameters prescribed by the applicable statute or that his punishment ran afoul of ***Apprendi***. In addition, for reasons largely related to our prior analysis, we conclude that Appellant has failed to advance a viable claim involving merger, double jeopardy, or compulsory joinder. Thus, Appellant's final claim does not challenge the legality of his sentence. Rather, Appellant objects to the trial court's exercise of its discretion to impose consecutive sentences.[12] This Court has previously held that undeveloped challenges to the discretionary aspects of a sentence are not cognizable under the PCRA. ***See Commonwealth v. Evans***, 866 A.2d 442, 444-445 (Pa. Super. 2005). For these reasons, we conclude the Appellant's sentencing claim merits no relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/31/2014

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[12] Appellant's sentencing challenge is not set forth under the rubric of an ineffective assistance of counsel claim.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	Case No. 2822/2011
	)	2828/2011
JOSE LUIS TORRES,	)	2821/2011
Defendant	)	0282/2012
	)	0289/2012
	)	3824/2012

* * * * * * * *

APPEARANCES:

CHARLES GALLAGHER, ESQUIRE,
CHIEF DEPUTY DISTRICT ATTORNEY,
On behalf of the Commonwealth

JOSE LUIS TORRES, DEFENDANT, Pro Se

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CLERK OF COURTS
LEHIGH COUNTY, PA

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OPINION

MARIA L. DANTOS, J.

On February 27, 2012, Defendant, Jose Torres, entered a guilty plea to Person Not to Possess a Firearm[1] in Case No. 2822/2011 and entered a nolo contendere plea to Resisting Arrest[2] in Case No. 2828/2011. (N.T. 2/27/12, p. 2). In exchange for these pleas, the Commonwealth agreed to nolle pros Case No. 2821/2011 and not pursue the other counts of the Criminal Informations in Case Nos. 2822/2011 and 2828/2011. (N.T. 2/27/12, p. 2). Additionally, pursuant to the plea agreements, in Case No. 2822/2011, the Court was bound to impose a sentence of not less than five (5)

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1 18 Pa. C.S.A. § 6105(a)(1).
2 18 Pa. C.S.A. § 5104.

Appendix G

years nor more than ten (10) years in a state correctional institution, and the sentence imposed in Case No. 2828/2011 would run concurrently thereto. (N.T. 2/27/12, pp. 2-3). In compliance with the plea agreement, this Court sentenced the Defendant to a term of imprisonment of not less than five (5) years nor more than ten (10) years in a state correctional institution in Case No. 2822/2011. (N.T. 2/27/12, p. 15). Moreover, in Case No. 2828/2011, this Court imposed a sentence of not less than one (1) year nor more than two (2) years in a state correctional institution, and ordered this sentence to run concurrently to that in Case No. 2822/2011. (N.T. 2/27/12, p. 16).

On September 10, 2012, in Case Nos. 282/2012, 289/2012 and 3824/2012, the Defendant entered a guilty plea to ten (10) counts of Burglary[3] and one (1) count of Criminal Conspiracy to Commit Burglary,[4] for a negotiated plea sentence of seven and a half (7 ½) years to fifteen (15) years on each of the eleven (11) counts, concurrent to each other, but which would run consecutively to the sentence imposed on February 27, 2012. (N.T. 9/10/12, pp. 2-3). It was contemplated that the aggregate sentence in all of the Defendant's cases would be twelve and a half (12 ½) years to twenty-five (25) years. (N.T. 9/10/12, p. 3).

Presently before this Court is Defendant's Motion for Post Conviction Collateral Relief that was filed on February 19, 2013, as amended on March 21, 2013, by conflicts counsel Charles Banta, Esquire. Based upon Attorney Banta's review of the record, he concluded that the issued raised in the Defendant's Motion for Post Conviction Collateral Relief were without merit. Consequently, Attorney Banta filed a letter pursuant to the requirements established in Commonwealth v. Finley, 379 Pa.

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3 18 Pa. C.S.A. § 3502(a).

4 18 Pa. C.S.A. § 5104; 18 Pa. C.S.A. § 903.

Super. 390, 550 A.2d 213 (1988) and a Petition to Withdraw as Counsel. An evidentiary hearing relative to Defendant's motion was conducted before this Court on May 29, 2013. At the commencement of this hearing, this Court permitted Attorney Banta's withdrawal as counsel. The Defendant proceeded *pro se* at the evidentiary hearing, from which we make the following findings of fact.

Kimberly Makoul, Esquire, a private criminal defense attorney practicing over twenty-two (22) years, represented the Defendant in the above-captioned matters. Attorney Makoul met and counseled the Defendant on numerous occasions. Trial strategy was discussed, as was the option of entering guilty pleas. The Defendant admitted to Attorney Makoul that he was not innocent,[5] and consequently Attorney Makoul's goal throughout her representation of the Defendant was to prevent him from spending the rest of his life in prison. To further this aim, Attorney Makoul reviewed all discovery material with the Defendant, and she provided him with copies of most documents for his records. Attorney Makoul discussed with the Defendant the possible sentences that could be imposed by this Court if he were convicted of the charges. The Defendant discussed with Attorney Makoul his concern about a "double jeopardy" violation because he believed that all charges stemmed from a single criminal episode. Attorney Makoul assured the Defendant that "double jeopardy" was not an issue in his case, as he was pleading guilty to different offenses. Attorney Makoul was prepared to go to trial on February 27, 2012, as she was on the Defendant's second set of cases. However, the Defendant indicated to his attorney on February 26, 2012, that he wished to accept the Commonwealth's offer and not proceed to trial on the first set of charges.

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5 At the evidentiary hearing, the Defendant candidly admitted to this Court that he was not innocent of the charges to which he entered pleas.

Similarly, the Defendant told Attorney Makoul that if she were able to negotiate an aggregate sentence of twelve and a half (12 ½) years on the second set of charges, he would accept such an offer. In both instances, Attorney Makoul was successfully able to negotiate the plea arrangement that the Defendant instructed her to so do. While Attorney Makoul counseled the Defendant, it was abundantly clear that the Defendant was calling all of the shots and making all of the decisions with regard to his cases.

In his motion for Post Conviction Collateral Relief, Defendant contends that Attorney Makoul rendered ineffective assistance of counsel by advising him to enter into pleas that violated 18 Pa. C.S.A. § 110. The Defendant also argues that the Commonwealth failed to abide by the plea agreement when the two (2) sets of cases were run consecutively to each other instead of concurrently. Initially we note that claims of ineffective assistance of counsel are subject to a three part analysis:

> To establish an ineffective assistance of counsel claim, [defendant] must first demonstrate that the underlying claim is of arguable merit; then, that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate [defendant's] interest; and finally, that but for the act or omission in question, the outcome of the proceedings would have been different.

Commonwealth v. Travaglia, 541 Pa. 108, 118, 661 A.2d 352, 356-357 (1995), U.S. cert. denied, 116 S.Ct. 931 (1996) (citations omitted). Defendant bears the burden of proving all three prongs of this standard. Id.

With the above standards in mind, we address the Defendant's contentions. The Defendant avers that Attorney Makoul was ineffective for advising him to enter into pleas that violated 18 Pa. C.S.A. § 110. This statute provides in pertinent part:

> Although a prosecution is for a violation of a different provision of the

statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is for:

(i) any offense of which the defendant could have been convicted on the first prosecution;

(ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and occurred within the same judicial district as the former prosecution unless the court ordered a separate trial of the charge of such offense; or

(iii) the same conduct, unless:

(A) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or

(B) the second offense was not consummated when the former trial began.

18 Pa. C.S.A. §110. Specifically, the Defendant asserts that he was charged with Persons Not to Possess a Firearm for possessing a 9mm Smith and Wesson semiautomatic firearm that was taken during a burglary in Hamburg, Pennsylvania, to which he entered a guilty plea on February 27, 2012. The Defendant further argues that because he entered such a guilty plea, the Commonwealth was legally precluded from prosecuting him for the burglary that occurred on May 28, 2011, to which he entered a guilty plea on September 10, 2012. This argument is legally flawed.

This Court recognizes that Section 110 of the Criminal Codes requires that the Commonwealth proceed with all charges arising out of the same criminal episode by prosecuting them together. However, the Defendant's possessory crime that occurred

in the City of Allentown, Lehigh County, on June 3, 2011, is a totally separate criminal episode from the burglary that occurred on May 28, 2011, in Hamburg, Pennsylvania. This Court notes that the Defendant did not enter a guilty plea to the *theft* of the subject firearm on February 27, 2012. Instead, the Defendant pled guilty to Person Not to Possess a Firearm. This offense has nothing to do with how the firearm was acquired, but addresses the fact that the firearm was in the Defendant's possession in contravention of the law. Therefore, the Defendant's guilty plea to Persons Not to Possess a Firearm that was entered on February 27, 2012, does not prohibit the later prosecution for the Burglary in which the firearm was taken. Based on the foregoing, Attorney Makoul cannot be deemed ineffective for advising the Defendant that there were no viable or recognizable legal issues with regard to the Defendant's "double jeopardy" concern.

Next, the Defendant argues that the Commonwealth failed to abide by the plea agreement when the two (2) sets of charges were ordered to run consecutively to each other instead of concurrently. This argument is factually undermined by the clear record that exists in the within matters. Indeed, on February 27, 2012, the Defendant appeared before this Court and entered a guilty plea to Person Not to Possess a Firearm in Case No. 2822/2011 and entered a *nolo contendere* plea to Resisting Arrest in Case No. 2828/2011. (N.T. 2/27/12, p. 2). In exchange for these pleas, the Commonwealth agreed to nolle pros Case No. 2821/2011 and not pursue the other counts of the Criminal Informations in Case Nos. 2822/2011 and 2828/2011. (N.T. 2/27/12, p. 2). Additionally, pursuant to the plea agreements, in Case No. 2822/2011, the Court was bound to impose a sentence of not less than five (5) years nor more than ten (10) years

in a state correctional institution, and the sentence imposed in Case No. 2828/2011 would run concurrently thereto. (N.T. 2/27/12, pp. 2-3). At the time of entering these pleas, this Court explicitly stated on the record that the Defendant still had cases that remained open. (N.T. 2/27/12, p. 3). Furthermore, during the Defendant's oral plea colloquy, the Defendant acknowledged the terms of his plea agreement (N.T. 2/27/12, p. 4); indicated that he read and understood the written plea colloquy (N.T. 2/27/12, p. 4); stated that he understood that he did not have to give up his rights but could proceed to trial (N.T. 2/27/12, p. 4); affirmed that it was his desire to enter the guilty plea (N.T. 2/27/12, p. 5); posed no questions to the judge (N N.T. 2/27/12, p. 6); articulated that no one was forcing or threatening him to plead guilty (N.T. 2/27/12, p. 5); testified that no promises were made to him other than the plea agreement (N.T. 2/27/12, p. 5); and expressed satisfaction with his attorney (N.T. 2/27/12, pp. 5-6). The record clearly indicates that the Defendant understood the consequences of his entering his pleas. Thereafter, on the same date, and in compliance with the plea agreement, this Court sentenced the Defendant to a term of state imprisonment of not less than five (5) years nor more than ten (10) years in Case No. 2822/2011. (N.T. 2/27/12, p. 15). Moreover, in Case No. 2828/2011, this Court imposed a sentence of not less than one (1) year nor more than two (2) years in a state correctional institution, and ordered this sentence to run concurrently to that in Case No. 2822/2011. (N.T. 2/27/12, p. 16).

Then, on September 10, 2012, in Case Nos. 282/2012, 289/2012 and 3824/2012, the Defendant again came before this Court and entered a guilty plea to ten (10) counts of Burglary and one (1) count of Criminal Conspiracy to Commit

Burglary, for a negotiated plea sentence of seven and a half (7 ½) years to fifteen (15) years on each of the eleven (11) counts, concurrent to each other, but which would run consecutively to the previous sentence imposed on February 27, 2012. (N.T. 9/10/12, pp. 2-3). It was contemplated that the aggregate sentence in all of the Defendant's cases would be twelve and a half (12 ½) years to twenty-five (25) years. (N.T. 9/10/12, pp. 3, 7-8). Again, during the Defendant's oral plea colloquy, the Defendant acknowledged the terms of his plea agreement (N.T. 9/10/12, pp. 6-7); the Commonwealth and the Court reiterated the charges that he was pleading guilty to and informed him of the possible sentences that he could face if a plea had not been entered into (N.T. 9/10/12, pp. 6-8); the Defendant denied having any drugs, alcohol or other medication that would affect his ability to know what he was doing (N.T. 9/10/12, p. 6); indicated that he read and understood the written plea colloquy (N.T. 9/10/12, p. 10); stated that he understood that he did not have to give up his rights but could proceed to trial (N.T. 9/10/12, p. 10); affirmed that it was his desire to enter the guilty plea (N.T. 9/10/12, p. 10); posed no questions to the judge (N.T. 9/10/12, p. 11); articulated that no one was forcing or threatening him to plead guilty (N.T. 9/10/12, p. 10); testified that no promises were made to him other than the plea agreement (N.T. 9/10/12, p. 10); and expressed satisfaction with his stand-by counsel (N.T. 9/10/12, pp. 10-11). Again, the record clearly indicates that the Defendant understood the consequences of his pleading guilty. Based on this factual record, the Defendant's argument is baseless.

Accordingly, for the foregoing reasons, we deny Defendant's Motion for Post Conviction Collateral Relief.

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