CLD-256 July 16, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-1562**

ANDY BUXTON, Appellant

v.

ATTORNEY GENERAL PENNSYLVANIA; ET AL.

(W.D. Pa. Civ. No. 2-17-cv-00594)

Present: JORDAN, KRAUSE, and MATEY, Circuit Judges

Submitted are:

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

(2) Appellant's motion for appointment of counsel

in the above-captioned case.

Respectfully,

Clerk

ORDER

Buxton's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the reasons provided in the Magistrate Judge's report and recommendation, jurists of reason would agree without debate that Buxton's challenge to the sufficiency of the evidence fails on the merits, see Jackson v. Virginia, 443 U.S. 307, 319 (1979); that Buxton's claims concerning the alleged hearsay evidence are procedurally defaulted and he has provided no basis to overcome the default; and that he cannot assert his claim concerning his driving under the influence conviction because he is not in "custody" for that conviction, see Lackawanna Cty. Dist. Att'y v. Coss, 532 U.S. 394, 402 (2001). Buxton's motion for appointment of counsel is also denied.

"APPENDIX A"

By the Court,

s/Paul B. Matey
Circuit Judge

Dated: July 21, 2020
CJG/cc: Andy Buxton
Ronald Eisenberg, Esq.
Rusheen R. Pettit, Esq.

A True Copy:

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

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

ANDY BUXTON, Petitioner, vs. THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; BRIAN H. THOMPSON, Superintendent of SCI-Mercer; and DISTRICT ATTORNEY OF ALLEGHENY COUNTY, Respondents.	)	Civil Action No. 17-594 District Judge David Stewart Cercone/ Magistrate Judge Maureen P. Kelly

REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (the "Amended Petition"), ECF No. 10, be denied and that a certificate of appealability likewise be denied.

II. REPORT

A. Factual History

The Pennsylvania Superior Court in its July 28, 2014 Memorandum set forth the factual history of the underlying crimes, quoting the trial court's recounting of the factual history as follows:

> On January 13, 2013, Officer [Ilija] Tubin ["Officer Tubin"], a police officer for the City of Mckeesport [sic], was working a security detail at Pap's Sportsman's Bar. In order for a patron to enter the bar, the patron was required to undergo a pat-down performed by Officer Tubin. Shortly before 2:00 a.m. on that day, [Buxton] attempted to enter the bar. Officer Tubin conducted a pat-down of [Buxton] and discovered a bulge in the right watch pocket of [Buxton]'s pants. Officer Tubin asked [Buxton] about the bulge and [Buxton] quickly grabbed the watch pocket from the outside of his pants, protecting it from Officer Tubin's reach. Officer Tubin noticed that a plastic bag was sticking out from the pocket. Relying on his training and experience, Officer Tubin believed that the baggie

"APPENDIX B"

contained narcotics. He removed the item from [Buxton]'s pants and determined there were ten white pills in the baggie. [Buxton] became disorderly, yelling that the pills were his "vikes." [Buxton] continued screaming and carrying on. [Buxton] became aggressive and Officer Tubin feared that [Buxton] was going to assault him. Due to [Buxton]'s disorderly conduct, he arrested [Buxton] and placed [him] in handcuffs. He then requested a police transport from the police station. The pills were later determined to be Vicodin, a schedule III controlled substance.

While waiting for the police transport to arrive, [Buxton] continued to be unruly. Sergeant [Daniel] Rich ["Sergeant Rich"] soon arrived on scene and [Buxton] was placed in the rear of the police vehicle to be transported to the McKeesport police station. Trial testimony indicated that Sergeant Rich is 5'11" and approximately 245 pounds. He has been a weightlifter. Sergeant Rich testified at trial that [Buxton] was "irate" when he arrived on the scene. [Buxton] was resisting efforts by Officer Tubin and another officer, Officer Eastman, to place [Buxton] into the police vehicle. Assistance was required to get [Buxton] into the police vehicle. Once [Buxton] was finally in the police vehicle, Sergeant Rich transported [Buxton] to the police station.

When he arrived at the police station, Sergeant Rich attempted to remove [Buxton] from the police vehicle. [Buxton] was still irate. Sergeant Rich attempted to explain to [Buxton] that he did not arrest him and he was just transporting him. After [Buxton] was removed from the police vehicle, [Buxton] repeatedly attempted to spin and pull away from Sergeant Rich. Sergeant Rich had to use what he termed an "arm bar" to gain control over [Buxton]. Sergeant Rich was required to place his arm under [Buxton]'s arms where they were handcuffed against his back. This enabled Sergeant Rich to better control [Buxton] as he escorted him into the police station. However, as they entered the police station, [Buxton] tried to pull away from Sergeant Rich. Just as Sergeant Rich was about to enter the doorway of the police station, [Buxton] attempted to pull away from Sergeant Rich again. Sergeant Rich, still applying the arm bar, became stuck between a second door and [Buxton]. [Buxton] then made a very quick turn to his right causing an injury to Sergeant Rich's shoulder area. Sergeant Rich immediately released [Buxton] and began experiencing substantial pain. At this point, Officer [Julian] Thomas ["Officer Thomas"] responded to assist Sergeant Rich. [Buxton] was placed in a holding cell. Sergeant Rich then went to the hospital for his injuries. He was diagnosed with a torn rotator cuff.

Officer Thomas testified that he observed [Buxton] resisting Sergeant Rich's efforts to move [Buxton] toward the holding cell. He testified that [Buxton] attempted to push Sergeant Rich into the wall as he was being escorted down the steps of the station. After Officer Thomas became involved in the escort, [Buxton] attempted to "go limp" and not cooperate with the officers. Because of

> [Buxton]'s actions, both Sergeant Rich and Officer Thomas were required to get [Buxton] into the cell.

Superior Court Opin. on direct appeal, ECF No. 16-1 at 27 – 29 (quoting Trial Court Opinion, 2/21/14, at 1 – 4).

B. Procedural History

1. State Court

The Superior Court recounted the procedural history of the conviction and direct appeal as follows:

> After a non-jury trial, Buxton was convicted of aggravated assault, resisting arrest, and disorderly conduct. Buxton was sentenced to an aggregate prison term of 11½ months to 23 months, followed by three years of probation. Buxton filed a timely Notice of Appeal.
>
> On appeal, Buxton raises the following questions for our review:
>
> 1. Should [Buxton's] conviction for Aggravated Assault be set aside owing to the Commonwealth's failure to prove [], beyond a reasonable doubt, (A) that [Buxton] was attempting to inflict bodily injury upon the complainant; (B) [] intentionally inflicted bodily injury upon the complainant; or (C) [] knowingly inflicted bodily injury upon the complainant?
>
> 2. Should [Buxton]'s sentence be vacated owing to the fact it was based in part upon the [t]rial [c]ourt's misconstruction of the evidence, with the [t]rial [c]ourt erroneously concluding that the mere fact that [Buxton] became angry at the police officers who illegally arrested him meant that he lived his life with a hostile attitude toward all law enforcement officers?
>
> Brief for Appellant at 3.

ECF No. 16-1 at 29. The Superior Court, on direct appeal, affirmed the conviction, finding that neither of the two issues raised had merited relief.

In a Memorandum, dated March 2, 2016, the Superior Court recounted the history of the Post-Conviction Relief Act ("PCRA") proceedings in the state court as follows:

> On March 31, 2015, Appellant filed a timely first PCRA petition. Appointed counsel filed an amended petition on June 24, 2015. On August 31, 2015, the court denied the petition after a hearing. Appellant timely appealed.
>
> Appellant raises one issue for this Court's review:
>
> > Did the [PCRA] court err in denying Appellant's PCRA petition since trial counsel . . . was ineffective for advising Appellant not to testify at his bench trial, prior to which she told him not to testify because he would have been impeached by his criminal record[?]
>
> (Appellant's Brief, at 3) (some capitalization omitted).

Superior Court Opin. on PCRA appeal, ECF No. 16-2 at 15 (footnote omitted). The Superior Court affirmed the denial of PCRA relief. Thereafter, Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which was denied on July 19, 2016. Com. v. Buxton, 144 A.3d 187 (Pa. 2016) (Table).

On July 28, 2016, Petitioner filed, pro se, a second PCRA Petition. Attorney Erika P. Kreisman was appointed to represent Petitioner. An Amended PCRA Petition (the "Second PCRA Petition") was filed on February 7, 2017. ECF No. 16-3 at 1 – 49. The PCRA trial court issued a Notice of Intent to Dismiss the Second PCRA Petition as time barred. ECF No. 16-4 at 1. Thereafter, the PCRA trial court dismissed the Second PCRA Petition as time barred. ECF No. 16 at 3.

Petitioner filed a notice of appeal to the Superior Court. ECF No. 16-4 at 2 – 5. The appeal was dismissed because Petitioner failed to comply with Pa. R.A.P. 3517.[1] Id. at 5.

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[1] Pa. R. App. 3517 provides in full as follows:

> Whenever a notice of appeal to the Superior Court is filed, the Prothonotary shall send a docketing statement form which shall be completed and returned within ten (10) days in order that the Court shall be able to more efficiently and expeditiously
>
> (...footnote continued)

2. Federal Court

On May 8, 2017, Petitioner filed a pro se Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, ECF No. 1, seeking to attack his conviction obtained in the Court of Common Pleas of Allegheny County. Commonwealth v. Buxton, CP-02-CR-0001413-2013 (CCP Allegheny County). Because he then had a pending Second PCRA Petition in state court, the undersigned issued an Order to Show Cause why the Petition in this Court should not be stayed pending the outcome of the pending Second PCRA Petition. ECF No. 3. Petitioner filed his Response to the Order to Show Cause. ECF No. 4. The undersigned issued a Report and Recommendation to stay the case pending the disposition of the Second PCRA Petition. ECF No. 5. No objections were filed, and District Judge David S. Cercone adopted the Report and Recommendation and ordered that the case be stayed. ECF No. 6.

On September 8, 2017, Petitioner filed a Notice to the Court, ECF No. 7, essentially seeking the lifting of the stay. The Court ordered the stay to be lifted and directed Petitioner to file an Amended Petition. ECF No. 8. Petitioner then filed an Amended Petition (the "Amended Petition") on October 3, 2017. ECF No. 10. In the Amended Petition, Petitioner raised the following four Grounds for Relief.

> **GROUND ONE:** Insufficient Evidence/Actual Innocence/Misscarriage [sic] of Justice[.]

Id. at 5.

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administer the scheduling of argument and submission of cases on appeal. Failure to file a docketing statement may result in dismissal of the appeal.

GROUND TWO: Ineffective Assistance/Misscarriage [sic] of Justice[.]

Id. at 7.

GROUND THREE: Prosecutorial Misconduct/Failure to turn over Brady Material[.]

Id. at 8.

GROUND FOUR: Deprivation right to counsel/Misscarriage [sic] of Justice.

Id. at 10.

Respondents filed their Answer to the Amended Petition and attached thereto copies of some of the state court record as exhibits. ECF No. 16. Petitioner filed a Motion for Evidentiary Hearing, ECF No. 19, which was denied. ECF No. 20. Petitioner appealed to District Judge Cercone from the order denying the evidentiary hearing, ECF No. 22, and the appeal was denied. ECF Nos. 23 and 24.

Petitioner filed a Motion for Status of the Case, ECF No. 15, which was granted in part and denied in part, granted to the extent of informing Petitioner that the case would be decided in the ordinary course but denied in all other respects. ECF No. 26. Petitioner also filed an affidavit, ECF No. 27, wherein he attested that he believed the outcome of his trial would have been different if the emergency room physician that treated the police officer victim in this case had testified at trial because Petitioner asserts that the officer did not suffer a "torn rotator cuff" as he testified to at trial. Id.

Petitioner filed a second Motion for an Evidentiary Hearing, ECF No. 28, which was denied without prejudice to the Court conducting such a hearing, if and only if, the Court deemed one was permitted and necessary. ECF No. 29. As explained below, no such hearing was

necessary or even permitted. Petitioner filed an appeal to Judge Cercone, ECF No. 30, and the appeal was denied. ECF No. 31.

C. Applicable Legal Principles

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, §101 (1996) (the "AEDPA") which amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254 was enacted on April 24, 1996. Because Petitioner's habeas Petition and Amended Petition were filed after its effective date, the AEDPA is applicable to this case. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000).

Where the state court has reviewed a federal issue presented to them and disposed of the issue on the merits, and that issue is also raised in a federal habeas petition, the AEDPA provides the applicable deferential standards by which the federal habeas court is to review the state court's disposition of that issue. See 28 U.S.C. § 2254(d) and (e).

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court expounded upon the standard found in 28 U.S.C. § 2254(d). In Williams, the Supreme Court explained that Congress intended that habeas relief for errors of law may only be granted in two situations: 1) where the state court decision was "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States" or 2) where that state court decision "involved an unreasonable application of[] clearly established Federal law as determined by the Supreme Court of the United States." Id. at 404-05 (emphasis deleted). A state court decision can be contrary to clearly established federal law in one of two ways. First, the state courts could apply a wrong rule of law that is different from the rule of law required by the United States Supreme Court. Second, the state courts can apply the correct rule of law but reach an outcome that is different

from a case decided by the United States Supreme Court where the facts are indistinguishable between the state court case and the United States Supreme Court case.

In addition, it is to be stressed that we look to the United States Supreme Court holdings under the AEDPA analysis as "[n]o principle of constitutional law grounded solely in the holdings of the various courts of appeals or even in the dicta of the Supreme Court can provide the basis for habeas relief." Rodriguez v. Miller, 537 F.3d 102, 106–07 (2d Cir. 2008) (citing Carey v. Musladin, 549 U.S. 70 (2006)). The United States Court of Appeals for the Third Circuit has explained that "Circuit precedent cannot create or refine clearly established Supreme Court law, and lower federal courts 'may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct.'" Dennis v. Sec., Pennsylvania Dept. of Corrections, 834 F.3d 263, 368 (3d Cir. 2016) (quoting, Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam)). As the United States Supreme Court has further explained: "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." White v. Woodall, 572 U.S. 415, 428 (2014).

The AEDPA also permits federal habeas relief where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Finally, it is a habeas petitioner's burden to show that the state court's decision was contrary to or an unreasonable application of United States Supreme Court precedent and/or an unreasonable determination of the facts. Ross v. Atty. Gen. of State of Pennsylvania, CIV.A. 07-97, 2008 WL 203361, at *5 (W.D. Pa. Jan. 23, 2008). This burden means that Petitioner must

point to specific caselaw decided by the United States Supreme Court and show how the state court decision was contrary to or an unreasonable application of such United States Supreme Court decisions. Owsley v. Bowersox, 234 F.3d 1055, 1057 (8th Cir. 2000) ("To obtain habeas relief, Mr. Owsley must therefore be able to point to a Supreme Court precedent that he thinks the Missouri state courts acted contrary to or unreasonably applied. We find that he has not met this burden in this appeal. Mr. Owsley's claims must be rejected because he cannot provide us with any Supreme Court opinion justifying his position."); West v. Foster, 2:07-CV-00021-KJD, 2010 WL 3636164, at *10 (D. Nev. Sept. 9, 2010) ("petitioner's burden under the AEDPA is to demonstrate that the decision of the Supreme Court of Nevada rejecting her claim '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) (emphasis added). Petitioner has not even begun to shoulder this burden with citation to apposite United States Supreme Court authority."), aff'd, 454 F. App'x 630 (9th Cir. 2011).

D. Discussion

1. Ground One does not merit relief.

In Ground One, Petitioner argues that there was insufficient evidence to convict him of aggravated assault on the police officer victim. More specifically, Petitioner argues that he "did not assault the officer while he was handcuffed during the entire incident. – Petitioner did not tear the officer's rotator cup [sic]. This was shown at trial the officer injured his shoulder previously from heavy weight training or some other strenuous activity." ECF No. 10 at 5.

The state courts addressed this issue on direct appeal as follows:

> In his first claim, Buxton contends that there was insufficient evidence presented to support the conclusion that he committed aggravated assault. ***Id.*** at 19-

33. Buxton argues that he was convicted even though the Commonwealth failed to prove beyond a reasonable doubt that he intentionally or knowingly injured the officer. ***Id.*** at 21.

In reviewing a challenge to the sufficiency of the evidence, we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Bibbs***, 970 A.2d 440, 445 (Pa. Super. 2009) (citation omitted).

> Evidence will be deemed sufficient to support the verdict when it established each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty, and may sustain its burden by means of wholly circumstantial evidence. Significantly, [we] may not substitute [our] judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed.

Santiago v. Collins

Id. (citation and quotation marks omitted). "Any doubt about the defendant's guilt is to be resolved by the factfinder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." ***Commonwealth v. Scott***, 967 A.2d 995, 998 (Pa. Super. 2009).

Com v. Comer 716 A.2d 593 PS lk Com v O'Hanlon 653 A.2d 616

The Crimes Code defines aggravated assault, in relevant part, as follows: "A person is guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily injury to [an] [officer[] ... while in the performance of duty." 18 Pa.C.S.A. § 2702(a)(3); ***see also Commonwealth v. Marti***, 779 A.2d 1177, 1182-83 (Pa. Super. 2001) (stating that a simple assault committed on a police officer constitutes aggravated assault under this subsection.) Bodily injury is defined as "impairment of physical condition or substantial pain." 18 Pa.C.S.A. § 2301.

Robinson Robinson 817 A.2d 1153

The trial court addressed Buxton's first claim as follows:

> The evidence in this case was clearly sufficient to convict [Buxton] of aggravated assault. Sergeant Rich suffered bodily injury, a torn rotator cuff, while he was performing his duties as a police officer. [Buxton] does not challenge that this injury constitutes bodily injury. Additionally, the torn rotator cuff occurred as Sergeant Rich was transporting [Buxton] to a holding cell after he had been arrested. ...
>
> From the point of Sergeant Rich's first interaction with [Buxton], [Buxton] had been acting aggressively and "irate." Despite Sergeant Rich's efforts to calm [Buxton], [Buxton] engaged in a

Alexander 383 A.2d 887 Com v. Anderson 650 A.2d 20

Com v. Fay 491 A.2d 843

> pattern of resistance that forced Sergeant Rich to use an arm bar to control [him]. [Buxton] was certainly aware that Sergeant Rich's arm was placed in a position under his handcuffed arms for the purpose of controlling him. [Buxton] was clearly aware that he was being taken to the police station and/or to a holding cell. [Buxton] was aware that he had Sergeant Rich's arm in a position that he could attempt to injure it. [Buxton] is a large person. He made a sudden maneuver with great force knowing that his actions were likely to cause bodily injury to Sergeant Rich. [Buxton] made the sudden maneuver when he and Sergeant Rich were in a confined area in which Sergeant Rich's ability to move was restricted. [The trial court] believes that these facts amply demonstrate that [Buxton] intentionally and knowingly caused bodily injury to Sergeant Rich while he was performing his duties as a police officer. Accordingly, the evidence was sufficient to convict [Buxton] of aggravated assault.
>
> Trial Court Opinion, 2/21/14, at 5-6. We agree with the sound reasoning of the trial court and conclude that the evidence was sufficient to convict Buxton of aggravated assault. ***See id.***

Superior Court Opin. ECF No. 16-1 at 30 – 31.

At the outset of our analysis of Ground One, the Court notes that Petitioner does not point to any United States Supreme Court precedent which he contends the Superior Court's decision herein is contrary to or an unreasonable application of. - Gilson v. United States 502 U.S. 183, 112 S. Ct. 466, 116 L.Ed.2d 476 (1991)

(a) Petitioner does not show an unreasonable determination of facts.

Petitioner appears to argue that the trial evidence was insufficient to prove aggravated assault or that the state courts made an unreasonable determination of the facts because he contends that the emergency room physician who treated Sergeant Rich did not testify at trial and that the police officer testified wrongly when he stated that he suffered from a torn rotator cuff. ECF Nos. 27, 28 ("Petitioner has rebutted by clear and convincing evidence the state courts [sic] findings based on Officer Rich's statement(opinion). [sic] that petitioner tore his rotator cuff."); ECF No. 30 at 1 ("The facts clearly show there was never a diagnosis of a torn rotator cuff as well as intentionally or knowingly causing this injury failing to prove the elements.").

There are several problems with Petitioner's arguments. First and foremost, in order for there to be sufficient evidence supporting an aggravated assault conviction, the Commonwealth merely had to show that the criminal defendant caused a "bodily injury to [an] [officer[] ... while in the performance of duty." 18 Pa.C.S.A. § 2702(a)(3). The evidence of record clearly supports that Petitioner caused bodily injury to the police officer-victim and did so intentionally or knowingly.

Respondents included Sergeant Rich's medical records in the exhibits attached to the Answer. These records were admitted into evidence at Petitioner's trial. ECF No. 16-3 ¶ 19 ("Medical records were introduced by the Commonwealth..."). The medical records establish that "PT likely has a shoulder sprain due to a ligament tear." ECF No. 16-3 at 16. In addition, the medical records indicate "RELEVANT CLINICAL INFORMATION: injured at work[.]" Id. at 17.

We find that the medical records evidence supports a finding of Petitioner causing bodily injury to the police officer victim. It was not necessary in order to establish sufficient evidence of aggravated assault that the Commonwealth prove the police officer victim suffered a "torn rotator cuff" as Petitioner argues. The evidence that the police officer victim suffered at least a sprain or a torn ligament, as supported by the medical records, is apparently sufficient under Pennsylvania law to constitute "bodily injury" within the meaning of the statute. See, e.g., Com. v. Bryant, 361 A.2d 350, 351 (Pa. Super. 1976) (finding sufficient evidence of bodily injury where the victim "Stanley Talley sustained a sprained right shoulder, a sprain of the collateral tendon of the right index finger, and a bruise on the right side of his face."); Com. v. Rahman, 75 A.3d 497, 502 (Pa. Super. 2013) ("Sergeant Grant sustained bruises to his left rib and a sprained right shoulder that required him to be out of work for two months. Appellant's violent behavior clearly demonstrates

that Appellant intended to cause Sergeant Grant bodily injury. Accordingly, this evidence was sufficient to convict Appellant of both simple assault under Section 2701(a)(1) and aggravated assault of a police officer under Section 2702(a)(3)."); Com. v. Brunson, 938 A.2d 1057, 1061 (Pa. Super. 2007) ("we conclude the evidence sufficiently established that Appellant actually inflicted bodily injury upon Reverend Taylor. Specifically, Reverend Taylor testified that, as a direct result of the robbery, he suffered torn ligaments in his right shoulder, for which surgery has been recommended. *See Commonwealth v. Richardson*, 431 Pa. Super. 496, 636 A.2d 1195 (1994) (holding that a punch to the face which caused pain for a few days but which required no medical treatment or missed work was sufficient for a finding of bodily injury)").

Based on our review, Petitioner has not carried his burden to show that the trial court's factual assertion that "Sergeant Rich suffered bodily injury, a torn rotator cuff, while he was performing his duties as a police officer[,]" ECF No. 16-1 at 31, constituted an unreasonable determination of the facts in light of the record.

In addition, we recognize that Petitioner's claim of insufficient evidence of bodily injury to support the verdict of aggravated assault was previously adjudicated on the merits by the state court. Hence, in conducting our evaluation of the state courts' disposition of this claim, we are limited to the record created before the state court. 28 U.S.C. § 2254(d)(2) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- ... (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."). Cullen v. Pinholster, 563 U.S. 170, 206 (2011) (Breyer, J., concurring in part and dissenting in part) ("There is no role in (d) analysis for a habeas petitioner to introduce evidence

that was not first presented to the state courts."); Grant v. Lockett, 709 F.3d 224, 231 (3d Cir. 2013) ("In addition, review of a claim under § 2254(d)(2) is specifically limited to 'evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2). We have recently held that, as a general rule, 'district courts cannot conduct evidentiary hearings to supplement the existing state court record under 28 U.S.C. § 2254(d).'"), *rejected on other grounds by*, Dennis v. Secretary, Pennsylvania Department of Corrections, 834 F.3d 263 (3d Cir. 2016)(en banc); Fears v. Bagley, 462 F. App'x 565, 568 (6th Cir. 2012) (Federal courts must rely "on only the record that was before the state court in overcoming AEDPA's deference requirements.") (citing *Pinholster*, 131 S.Ct. at 1400). See also Keaton v. Folino, 11-CV-07225-PD, 2018 WL 8584252, at *42 (E.D. Pa. Nov. 15, 2018) ("In *Pinholster,* seven justices agreed that no federal evidentiary hearing was appropriate when a district court reviewed whether the state court made a reasonable determination of the facts under section 2254(d)(2)."), *report and recommendation adopted,* 2019 WL 2525609 (E.D. Pa. June 19, 2019), *request for certificate of appealability filed*, 19-2633 (3d Cir. 7/16/2019); Blue v. Thaler, 665 F.3d 647, 655–56 (5th Cir. 2011) ("To this, the Supreme Court has recently added 'that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.' The same rule necessarily applies to a federal court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged.") (footnotes omitted).

(b) Petitioner was not entitled to a hearing.

Because the state courts adjudicated this allegation claim of evidentiary insufficiency on the merits, this Court is limited to the record before the state court and Petitioner is not only **not** entitled to an evidentiary hearing, as he twice requested in motions filed before this Court, ECF Nos. 19 and 28, but this Court is affirmatively prohibited by AEDPA from holding an evidentiary

hearing. Keaton v. Folino, 2018 WL 8584252, at *43 ("Mr. Keaton has limited his claim to a contention that the state court's fact finding was unreasonable, under section 2254(d)(2) .... In light of *Pinholster*, my review is limited to the state court record. The Petitioner's request for an evidentiary hearing must be denied.").

In addition, precisely because Petitioner challenges a state court factual determination, i.e., that the victim suffered a "torn rotator cuff," Petitioner must contend with 28 U.S.C. § 2254(e) (1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). See also Lambert v. Blackwell, 387 F.3d 210, 234 - 36 (3d Cir. 2004) (explaining the relationship between Section 2254(d)(2) and (e)(1).

It is strikingly clear that where the state courts have adjudicated a claim on the merits, the interplay between Sections (d)(2) (limiting review to the state court record) and (e)(1) requires that the federal habeas petitioner carry his burden to rebut by clear and convincing evidence the presumed correctness of state court factual findings by pointing to evidence solely contained in the state court record. Pinholster, 563 U.S. at 206 (Breyer, J., concurring in part and dissenting in part) ("There is no role in (d) analysis for a habeas petitioner to introduce evidence that was not first presented to the state courts."). See, e.g., Grant, 709 F.3d at 232 – 33 (finding that the State courts' factual finding was an unreasonable determination of the facts by pointing to evidence solely contained in the state court record).

Moreover, this is so despite any diligence on Petitioner's part in trying to develop a factual record in state court as he argued before this Court. ECF No. 28 at 1 ("Petitioner was diligent"); ECF No. 30 ("Petitioner was diligent in attempting to develop the factual basis of his claims in the

state court proceedings, and this [sic] he did not fail to develop the facts under §§2254 (e)(2). But was indeed denied the opportunity to do so."). It is crystal clear that there is no diligence exception to either Pinholster or its equivalent in (d)(2), limiting federal habeas review to the state court record and prohibiting the federal habeas court from conducting an evidentiary hearing. Djerf v. Ryan, 931 F.3d 870, 884 (9th Cir. 2019) ("*Pinholster* clarified that this statutory exception [found in 2254(e)(2) which permits a federal court hearing in limited circumstances] applies only to claims reviewed de novo; evidentiary expansion is prohibited for a claim subject to AEDPA review, regardless of diligence."); Foster v. Cassady, 4:15-CV-225-CAS-SPM, 2016 WL 3511726, at *2 (E.D. Mo. Apr. 1, 2016) ("Petitioner also argues that *Williams v. Taylor*, 529 U.S. 420 (2000), contains an 'exception' to *Pinholster* and permits discovery where a petitioner has been diligent during the relevant stages in the state proceedings but the facts are still not developed. That argument is also without merit."), *objections overruled*, 4:15-CV-225 CAS/SPM, 2016 WL 3564240 (E.D. Mo. June 22, 2016); Ogle v. Mohr, 2:15-CV-776, 2016 WL 1457882, at *3 (S.D. Ohio Apr. 14, 2016) ("The Supreme Court has never recognized a diligence exception to *Pinholster*..."); Lynch v. Hudson, 182 F. Supp. 3d 787, 791 (S.D. Ohio 2016) ("But *Pinholster* does not contain a due diligence exception. That is, Petitioner has not cited and the Court is not aware of any language in either *Pinholster* itself or any decision interpreting *Pinholster* suggesting that a petitioner who diligently attempts to convince the state courts to consider new evidence, but ultimately does not succeed, can escape the reach of *Pinholster* to have a federal habeas court consider his new evidence."). Federal courts must rely "on only the record that was before the state court in overcoming AEDPA's deference requirements." Fears v. Bagley, 462 F. App'x 565, 568 (6th Cir. 2012) (citing Pinholster, 131 S.Ct. at 1400). Accord McCamey v. Epps, 658 F.3d 491, 498 (5th Cir. 2011) ("Because the present case, like *Pinholster*, concerns only claims under §

Wharton v. Vaughn 722 Fed. Appx 268

See 667 F.3d at 405-06

Lark v. Sec'y Pa. Dept of Corr 645 F.3d 596, 614 (3d Cir. 2011) Thomas v. Varner, 428 F.3d 491 498 (3d Cir. 2005)

2254(d)(1), we must reject the district court's application of *Williams* and decline to consider the evidence developed in the federal court hearing. This court's review of McCamey's waiver therefore considers only the state-court record."). Hence, this Court was correct in denying Petitioner's requests for an evidentiary hearing, notwithstanding that Petitioner asserts he acted with diligence in state court to attempt to adduce evidence in support of his claim that the police officer victim did not, in fact, suffer a torn rotator cuff.

In light of AEDPA and the fact that the state courts adjudicated Petitioner's claim of insufficient evidence to support his conviction for aggravated assault, Petitioner is limited to rebutting the state courts' factual finding of the victim suffering a torn rotator cuff by pointing to clear and convincing evidence in the state court record that rebuts the presumptively correct factual finding of a torn rotator cuff. Petitioner has simply failed to carry his burden to rebut the presumed correctness of the state court factual finding. In this regard we note that the medical records indicate that the police officer victim "likely has a shoulder sprain due to a ligament tear." ECF No. 16-3 at 16.

(c) The unreasonably determined fact must be a material fact.

Even if Petitioner were able to establish that the state courts unreasonably determined that the police officer victim suffered a torn rotator cuff, such would not be sufficient to show that the state courts' conclusion that he suffered a "bodily injury" irrespective of the specific diagnosis, was unreasonable. In other words, Petitioner must show that the state courts unreasonably determined a material fact, i.e., a fact that was of legal significance. See, e.g., Pappas v. Miller, 750 F. App'x 556, 558 (9th Cir. 2018)(unpublished), *as amended on denial of reh'g* (Dec. 13, 2018) ("We must defer to the California courts' conclusion that the prosecutor's comments during closing argument here did not so taint the trial as to violate due process, unless that conclusion

was either contrary to, or an objectively unreasonable application of, clearly established federal law or based on an unreasonable determination of **material** fact.")(emphasis added); Gladfelter v. Atty. Gen. of Pennsylvania, CIV.4:08-CV-0275, 2009 WL 1324058, at *5 (M.D. Pa. Jan. 26, 2009) ("the 28 U.S.C. § 2254 habeas corpus court does not have grounds to find that the state courts have made an unreasonable determination of the **material** facts as to this claim."), *report and recommendation adopted*, 650 F. Supp. 2d 359 (M.D. Pa. 2009) (emphasis added). Unless Petitioner can establish on the basis of the state court record alone, that the police officer victim suffered no "bodily injury" as a result of Petitioner's actions, he necessarily loses, as he fails to carry his burden to show that the adjudication of his sufficiency of the evidence claim by the state courts on the merits was an unreasonable determination of the material fact that the victim did suffer some bodily injury.

Indeed, the medical records, which were made part of the state court record, support that "PT [i.e., patient, the police officer victim] likely has a shoulder sprain due to a ligament tear." ECF No. 16-3. This is sufficient evidence, under AEDPA deference, for this Court to conclude that Petitioner has failed to show what he needs to show herein. Namely, Petitioner failed to show that the state court determination that sufficient evidence supported Petitioner's conviction involved an unreasonable determination of a material fact in light of the evidence presented in the state court proceeding.

Strickland v Washington 466 US 668 104 S.Ct. 2052 80 L.Ed.2d 674 (1984)

2. Grounds Two and Three are procedurally defaulted.

In Ground Two, Petitioner claims that his trial and appellate counsel were ineffective. Specifically, he alleges that his trial counsel "offered ineffective assistance of counsel by purposely not objecting to hearsay evidence (diagnosis)." ECF No. 10 at 7. Petitioner seems to be asserting that the police officer victim testified to the fact that he was told he suffered a torn

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United States v. Delucca 889 F.2d 503, 506 (3d Cir. 1989)

rotator cuff and that Petitioner's trial counsel was ineffective for failing to object to this alleged hearsay. Petitioner goes on to assert that his trial counsel's alleged "failure to correct the record about the injury led actually to the conviction." Id.

Relatedly, in Ground Three, Petitioner first asserts that there was "Prosecutorial Misconduct/Failure to turn over Brady Material." Id. at 8. However, in explaining the facts supporting this claim, Petitioner asserts that "[i]ntroduction of inadmissible hearsay, violation of petitioner's right to confront the witnesses who prepared the medical records&hearsay [sic] testimony. Which substantially influenced the verdict. ..." Id.

Respondents point out that both of these Grounds for Relief were procedurally defaulted because Petitioner failed to raise these claims at all in state court or for failing to do so in a procedurally proper manner in state court. Specifically, Ground Two (the claim of trial counsel's ineffectiveness) was procedurally defaulted because Petitioner only raised it for the first time in the state courts in his second untimely filed PCRA Petition, which is one procedural default, and, then the appeal of the second PCRA Petition was dismissed for failure to comply with the Pennsylvania Rules of Appellate Procedure, which constitutes a second independent procedural default. ECF No. 16.

As to Ground Three, Respondents point out that this claim of trial error was waived because Petitioner failed to raise it on direct appeal. Id. Respondents also argue that the admission of hearsay is a matter of state law and, therefore not cognizable as a ground for relief in federal habeas proceedings.

We agree with Respondents that these two grounds were procedurally defaulted.

Petitioner implicitly concedes that he procedurally defaulted these two grounds for relief. Petitioner does so, when, in conclusory fashion, he invokes Martinez v. Ryan, 566 U.S. 1 (2012)

to excuse his procedural default of Grounds Two and Three, apparently, suggesting by the invocation of Martinez that his PCRA counsel was allegedly ineffective for failing to raise the claim of trial counsel's ineffectiveness in state court. ECF No. 28 at 1. However, Petitioner fails to carry his burden to show that he satisfies the requirements of Martinez.

As this Court has previously explained:

> The decision of the United States Supreme Court in Martinez v. Ryan created a sea change in the doctrine of procedural default, holding for the first time that a claim of ineffective assistance of post-conviction relief counsel could serve as cause to excuse the procedural default of a claim of trial counsel's ineffectiveness. However, the Supreme Court in Trevino v. Thaler, 133 S.Ct. 1911, 1918 (2013) explained that Martinez only permits a federal habeas court to find "cause" based on post conviction counsel's ineffectiveness and "thereby excus[e] a defendant's procedural default, where (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding."

Taylor v. Pennsylvania, CIV. A. 15-1532, 2018 WL 446669, at *9 (W.D. Pa. Jan. 16, 2018).

Petitioner cannot bring himself within the ambit of Martinez for the following reasons.

First, Petitioner fails to show he comes within Martinez with respect to Ground Three because Ground Three does not raise an ineffective assistance of trial counsel claim but rather a trial court error claim or, in his mind, a prosecutorial misconduct/Brady claim. Such claims do not, by the clear language of Martinez, fall within its exception, which is reserved solely to procedurally defaulted claims of trial counsel ineffectiveness.

Secondly, although Ground Two raises a claim of ineffectiveness of trial counsel, Petitioner fails to show cause under Martinez to excuse the procedural default of this ineffectiveness of trial counsel claim. Petitioner has failed to make a showing that, had PCRA

counsel raised the issue of trial counsel's alleged ineffectiveness which Petitioner claims he should have, there was a reasonable likelihood that the result of the PCRA proceedings would have been different i.e., that he would have received relief. Ramirez v. Ryan, 10-99023, 2019 WL 4281731, at *8 (9th Cir. Sept. 11, 2019) (Thus, to establish 'cause' under *Martinez* ... Ramirez must demonstrate that post-conviction counsel was ineffective under *Strickland v. Washington*... In turn, *Strickland* requires demonstrating 'that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different.' *Id.* (citation omitted). Determining whether there was a reasonable probability that the result of the post-conviction proceedings would be different 'is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective.'") (citations omitted).

Lastly, Petitioner fails to show cause under Martinez, because he fails to show that the claim of trial counsel's ineffectiveness raised in Ground Two was "substantial." In light of the evidence of Petitioner's guilt, namely, the testimony of the officer whom he clearly injured, it is unlikely that had trial counsel objected to the alleged hearsay concerning the officer suffering a torn rotator cuff, the result of the trial would have been different.

In other words, Petitioner fails to show a substantial question of prejudice with respect to the claim of trial counsel's alleged ineffectiveness for failing to object to the "hearsay." This is because under Pennsylvania state law, the police officer victim's testimony that he suffered pain and/or an injury was sufficient by itself to establish "bodily injury" without the necessity of a medical expert opining or the introduction of medical records. See e.g., Com. v. Lee, 78 MDA 2018, 2019 WL 2407751, at *6 (Pa. Super. June 7, 2019) ("Appellant has not cited any authority for his argument that expert medical testimony or the victim's medical records were necessary to

prove that the victim suffered 'serious bodily injury.' Appellant's claim, therefore, fails.");

Commonwealth v. Bartlebaugh, 465 WDA 2017, 2018 WL 1056534, at *2–4 (Pa. Super. Feb. 26, 2018).

Bartlebaugh is on point in this case. In that case, the victim of the assault testified that the attacker "broke his jaw." There, a hearsay objection was raised and even sustained but despite this, the victim testified to what the doctors allegedly told him, i.e., that he had a broken jaw. The Superior Court rejected the claim regarding a hearsay objection as follows:

> On appeal, Appellant claims that the trial court erred when it allowed the Victim to testify that his jaw was broken. Appellant claims that the statement was inadmissible, as it constituted hearsay. Appellant's Brief at 19.
>
> ....
>
> Secondly, Appellant's claim fails because he did not suffer any prejudice by the statement's introduction. As noted, since this was a bench trial, we presume that the trial court disregarded inadmissible evidence. ***Smith***, 97 A.3d at 788. Moreover, Appellant was convicted of simple assault under 18 Pa.C.S.A. § 2701(a)(1). This section defines simple assault as: "attempt[ing] to cause or intentionally, knowingly or recklessly caus[ing] bodily injury to another." 18 Pa.C.S.A. § 2701(a)(1). The term "bodily injury" is then defined as: "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S.A. § 2301. Further, we have held: "[t]he Commonwealth need not establish that the victim actually suffered bodily injury; rather, it is sufficient to support a conviction if the Commonwealth establishes an attempt to inflict bodily injury. This intent may be shown by circumstances which reasonably suggest that a defendant intended to cause injury." ***Commonwealth v. Richardson***, 636 A.2d 496, 498–499 (Pa. Super. 1994).
>
> The evidence in this case demonstrates that Appellant punched the Victim in the face and, in so doing, caused the Victim to suffer the following injury: "[m]y face was hurting, so I don't remember, like I was thinking it was a jaw or a tooth. So I was, like—I had my finger up in my mouth and my tooth was in place. So it didn't fell, so it must be a jaw." N.T. Trial, 12/14/16, at 14. Therefore, even if Appellant did not break the Victim's jaw, the evidence demonstrates that Appellant "attempt[ed] to cause or intentionally, knowingly or recklessly caus[ed] bodily injury" to the Victim—and, thus, that Appellant's action and mindset satisfied the elements of 18 Pa.C.S.A. § 2701(a)(1). ***See*** Trial Court Opinion, 6/19/17, at 8 ("Here, [the Victim] testified that he suffered pain in his face and jaw area. As the injured person, [the Victim] was certainly permitted to testify regarding what parts of his body hurt after the assault. Even if [the Victim's] statement that his jaw was

> broken is deemed hearsay, the remaining statements regarding the location of his pain are admissible and sufficient to establish the injury necessary for the charge of simple assault"); ***see also Richardson***, 636 A.2d at 1196 ("[a]ppellant first argues that [the victim] did not suffer bodily injury because he did not receive any medical treatment or miss any work as a result of the blow to the face. Such a claim is frivolous. Appellant cites no authority which states that such consequences are necessary to sustain a simple assault conviction. [The victim] testified that [a]ppellant's punch broke his glasses, caused him to stumble backwards, and caused pain for the next few days. Such testimony was sufficient to sustain a finding that [a]ppellant actually caused bodily injury to [the victim]") (emphasis omitted).
>
> Appellant's first claim on appeal thus fails.

Bartlebaugh, 465 WDA 2017, 2018 WL 1056534, at *2–4 (Pa. Super. Feb. 26, 2018) (footnote omitted). This reasoning applies equally to Petitioner's case and therefore, he cannot establish either prejudice from his trial counsel's failure to object to the alleged hearsay statement in his bench trial that Petitioner suffered a torn rotator cuff, nor can he establish that the alleged error of the trial court in permitting the police officer victim's un-objected to statement caused him prejudice.

Accordingly, we find Grounds Two and Three to be procedurally defaulted. Petitioner fails to show cause under Martinez in order to overcome the procedural default of his Ground Two claim of ineffectiveness of trial counsel regarding the failure to object to "hearsay." Petitioner also fails to show cause for overcoming the procedural default of Ground Three because Martinez does not provide "cause" for such a claim of trial court error or prosecutorial misconduct error or any error other than ineffective assistance of trial counsel.

To the extent that Petitioner attempts to invoke the miscarriage of justice exception to procedural default, as he points to no new evidence of his actual innocence, he cannot carry his burden to establish this second exception to procedural default.

3. Ground Four does not merit relief.

In Ground Four, Petitioner alleges a "[d]eprivation of a right to counsel/Misscarriage [sic] of Justice." Specifically, Petitioner argues that he was, in effect, denied counsel on appeal in a prior Driving Under the Influence ("DUI") criminal case, which was used to "convict/enhanced petitioner in this case" i.e., the aggravated assault conviction under attack in this Court. ECF No. 10 at 10.

Respondents correctly point out that Petitioner may not utilize a federal habeas attack on his current conviction to attack a previous conviction for which he is no longer in custody. ECF No. 16 at 16. Petitioner counters, invoking an exception to this rule, by pointing to Gideon v. Wainwright, 372 U.S. 335 (1963) (failure to appoint counsel for an indigent defendant violates the constitution). ECF No. 22 at 2. Petitioner argues that his trial/direct appeal counsel failed to perfect his direct appeal in the DUI conviction and that this is tantamount to a Gideon violation, which would permit him to attack the validity of his prior DUI conviction in this case even though all custody stemming from the DUI conviction ended long ago simply because he claims the DUI conviction caused him harm in the aggravated assault conviction which he attacks herein.

Petitioner is simply wrong as a matter of law. The failure of Petitioner's counsel to file an appeal in Petitioner's prior DUI case, which is the basis for Ground Four, is not analogous to a Gideon error of the state failing to appoint counsel at all in the prior DUI proceedings. In fact, the failure of counsel to file an appeal, when requested, is an ineffective assistance of counsel claim and, not a denial of appointed counsel claim within the meaning of Gideon, as well explained in Tatarinov v. Super. Ct. of the State of California, 07CV2033-L, 2008 WL 7985604, at *8 (S.D. Cal. July 10, 2008) ("Notwithstanding the egregiousness of Mr. Verhovskoy's error in failing to perfect the appeal and concealing the fact from Petitioner, Petitioner states an ineffective

assistance claim rather than a *Gideon* claim. *Custis* holds that the *Gideon* exception does not apply to ineffective assistance claims but only to violations of an indigent defendant's right to appointment [of] counsel. *Custis*, 511 U.S. at 496. Petitioner's attack on the 1996 Conviction therefore does not warrant the *Gideon* exception.").

Accordingly, Ground Four cannot serve as a basis for relief in these federal habeas proceedings.

E. Certificate of Appealability

It is recommended that a certificate of appealability be denied because jurists of reason would not find the foregoing debatable.

III. CONCLUSION

For the reasons set forth herein, it is respectfully recommended that the Petition be dismissed and that a Certificate of Appealability should be denied.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Respectfully submitted,

Date: October 18, 2019

MAUREEN P. KELLY
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable David Stewart Cercone
United States District Judge

ANDY BUXTON
MS1885
SCI MERCER
801 Butler Pike
Mercer, PA 16137

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

ANDY BUXTON, Petitioner, vs. THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; BRIAN H. THOMPSON, Superintendent of SCI-Mercer; and DISTRICT ATTORNEY OF ALLEGHENY COUNTY, Respondents.	)	Civil Action No. 17-594 District Judge David Stewart Cercone/ Magistrate Judge Maureen P. Kelly

MEMORADUM ORDER

Andy Buxton ("Petitioner") has filed an Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (the "Amended Petition"), ECF No. 10, seeking to attack his state court convictions of aggravated assault, resisting arrest, and disorderly conduct in connection with his injuring of a police officer.

The case was referred to Magistrate Judge Maureen Kelly in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D.

Magistrate Judge Kelly's Report and Recommendation, ECF No. 32, filed on October 18, 2019, recommended that the Amended Petition be dismissed and that a certificate of appealability be denied. Petitioner was informed that he could file Objections to the Report by November 1, 2019. Petitioner filed his Objections timely pursuant to the prisoner mail box rule as the post mark date shows a post mark of October 31, 2019. However, there appeared to be missing pages in the Objections. Accordingly, the Court ordered Petitioner to rectify the missing pages. ECF No. 35. Petitioner complied, filing a complete set of Objections. ECF No. 36.

The Objections do not require rejection of the Report and Recommendation.

The fundamental error in Petitioner's Objections is that he reads the state court record in the light most favorable to himself instead of in the light most favorable to the Commonwealth as the verdict winner. We are not permitted to read the record in that manner. See Jackson v. Virginia, 443 U.S. 307, 326 (1979) ("a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."); Farnsworth v. Edwards, 947 F.2d 948 (Table), 1991 WL 218007, at *2 (7th Cir.1991) ("This court must review a habeas corpus petition by construing the evidence in the light most favorable to the government.").

That the victim police officer may have had a pre-existing injury of osteoarthritis does not render Petitioner innocent of the aggravated assault of the police officer, as Petitioner seemingly contends. The Report correctly found that the medical evidence was more than sufficient to support a finding that Petitioner caused the police officer victim bodily injury in the form of a shoulder sprain due to a ligament tear. ECF No. 32 at 12 – 13. Moreover, Petitioner fails to account for the fact that the police officer testified to experiencing great pain as a result of Petitioner's behavior. As the Report notes, this also was sufficient evidence to sustain an aggravated assault conviction. Id. at 21 - 22 ("This is because under Pennsylvania state law, the police officer victim's testimony that he suffered pain and/or an injury was sufficient by itself to establish 'bodily injury' without the necessity of a medical expert opining or the introduction of medical records.") (citing, Com. v. Lee, 78 MDA 2018, 2019 WL 2407751, at *6 (Pa. Super. June 7, 2019); Com. v. Bartlebaugh, 465 WDA 2017, 2018 WL 1056534, at *2 – 4 (Pa. Super. Feb. 26, 2018)). See also 18 Pa. C.S.A. § 2301 (defining "bodily injury" as "impairment of physical condition or substantial pain.").

Insofar as Petitioner contends there is not sufficient evidence of his mens rea, ECF No. 36 at 4, the factfinder may infer that an actor intends the natural consequences of his actions and Petitioner's actions described by the state courts clearly satisfy this standard. ECF No. 32 at 11 ("[Buxton] was aware that he had Sergeant Rich's arm in a position that he could attempt to injure it. [Buxton] is a large person. He made a sudden maneuver with great force knowing that his actions were likely to cause bodily injury to Sergeant Rich. [Buxton] made the sudden maneuver when he and Sergeant Rich were in a confined area in which Sergeant Rich's ability to move was restricted. [The trial court] believes that these facts amply demonstrate that [Buxton] intentionally and knowingly caused bodily injury to Sergeant Rich while he was performing his duties as a police officer.") (quoting Superior Court Opin. ECF No 16-1 at 30 – 31)).

None of Petitioner's other Objections even merit further discussion. The fact of the matter is Petitioner clearly engaged in an aggravated assault of the police officer victim. This is simply not the type of case worthy of federal habeas relief. Harrington v. Richter, 562 U.S. 86, 102–03 (2011) ("habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal.").

Accordingly, IT IS ORDERED this 25th day of February, 2020, after *de novo* review of the record and the Objections and the Report and Recommendation, the Amended Petition for Writ of Habeas Corpus is denied. A certificate of appealability is likewise denied as jurists of reason would not find this disposition to be debatable. The Report and Recommendation, ECF No. 32, as augmented herein is adopted as the opinion of the Court.

s/David Stewart Cercone
David Stewart Cercone
Senior United States District Judge

cc: The Honorable Maureen P. Kelly
United States Magistrate Judge

All counsel of record via CM-ECF

ANDY BUXTON
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1562

ANDY BUXTON,
Appellant

v.

ATTORNEY GENERAL PENNSYLVANIA;
SUPERINTENDENT MERCER SCI;
DISTRICT ATTORNEY ALLEGHENY COUNTY

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-17-cv-00594)
District Judge: Honorable David S. Cercone

SUR PETITION FOR REHEARING

BEFORE: SMITH, *Chief Judge*, and MCKEE, AMBRO, CHAGARES, JORDAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by appellant, Andy Buxton, in the above-captioned matter having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

"APPENDIX C"

judges of the Court in regular active service who are not disqualified not having voted for rehearing by the Court en banc, the petition for rehearing by the panel and the Court en banc is DENIED.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: August 21, 2020

CJG/cc: Rusheen R. Pettit, Esq.
Ronald Eisenberg, Esq.
Andy Buxton