UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2950**

WIN MIN HTUT,
Appellant

v.

SUPERINTENDENT FAYETTE SCI; ATTORNEY GENERAL PENNSYLVANIA

(D.C. No. 5-17-cv-04021)

SUR PETITION FOR REHEARING

Before: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and SCIRICA,* *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ L. Felipe Restrepo
Circuit Judge

Dated: July 2, 2020
Lmr/cc: Win Min Htut
Ronald Eisenberg

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* Judge Scirica's vote is limited to panel rehearing only.

***RESUBMIT CLD-179** **November 19, 2019**
May 9, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2950**

WIN MIN HTUT, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, et al.

(E.D. Pa. Civ. No. 17-cv-04021)

Present: CHAGARES, RESTREPO and SCIRICA, Circuit Judges

Submitted are:

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

***(2) Appellant's Response to the Clerk's Order dated October 8, 2019; and**

***(3) Appellee's Response to the Clerk's Order dated October 8, 2019**

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing responses are considered. The application for a certificate of appealability is denied. In pleading guilty, Htut waived his right to collaterally challenge his sentence. Jurists of reason would not debate "the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1)" see Miller-El v. Cockrell, 537 U.S. 322, 341 (2003), to Htut's claim that the state courts erred in determining that the collateral attack

waiver in his plea agreement was entered into "knowingly and voluntarily," see United States v. Fazio, 795 F.3d 421, 425 (3d Cir. 2015). Jurists of reason also would not debate whether enforcement of Htut's collateral attack waiver would work a miscarriage of justice. See Fazio, 795 at 426.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: April 30, 2020
Lmr/cc: Win Min Htut
Ronald Eisenberg
Heather F. Gallagher

A True Copy:

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

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18-2950

Htut v. Superintendent Fayette SCI

ORDER

By order dated June 12, 2019, the above-captioned appeal was stayed pending a decision by this Court in United States v. Tarnai, C.A. No. 17-1330. As the mandate issued in Tarnai on October 3, 2019, it is hereby ORDERED that the stay is lifted. The parties shall file written responses, within twenty-one (21) days of this order, addressing the effect, if any, of the decision in Tarnai on the question of whether a certificate of appealability should issue in the present appeal.

For the Court,

s/ Patricia S. Dodszuweit
Clerk

Dated: October 8, 2019
DWB/arr/cc: WMH; RE

WIN MIN HTUT, Petitioner, v. JAY LANE, THE DISTRICT ATTORNEY OF THE COUNTY OF LEHIGH, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 231119
CIVIL ACTION NO. 17-4021
August 9, 2018, Decided
August 9, 2018, Filed

Editorial Information: Prior History

Win Min Htut v. Capozza, 2018 U.S. Dist. LEXIS 119988 (E.D. Pa., July 17, 2018)

Counsel **{2018 U.S. Dist. LEXIS 1}**Win Min Htut, Petitioner, La Belle, PA USA.

For The District Attorney of The County of Lehigh, Respondent: HEATHER F. GALLAGHER, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, Allentown, PA USA.

Judges: EDWARD G. SMITH, Judge.

Opinion

Opinion by: EDWARD G. SMITH

Opinion

ORDER

AND NOW, this 9th day of August, 2018, after considering the petition for writ of habeas corpus filed by the *pro se* petitioner, **Win Min Htut ("Htut")** (Doc. No. 1), the response in opposition to the petition filed by the respondents (Doc. No. 7), the additional information attached to Htut's motion for this court to consider further argument (Doc. No. 13), the state-court record, United States Magistrate Judge Lynne Sitarski's report and recommendation (Doc. No. 14), Htut's motion to extend the time to file objections to Magistrate Judge Sitarski's July 17, 2018 report and recommendation (Doc. No. 17), and Htut's timely objections to the report and recommendation (Doc. No. 19); accordingly, it is hereby **ORDERED** as follows:

1. The clerk of court is **DIRECTED** to remove this action from civil suspense and **RETURN** it to the court's active docket;

2. Htut's motion to extend the time to file objections to Magistrate Judge Sitarski's July 17, 2018 report and recommendation**{2018 U.S. Dist. LEXIS 2}** (Doc. No. 17) is **DENIED AS MOOT**;

3. Htut's objections to the report and recommendation (Doc. No. 19) are **OVERRULED**;1

4. The Honorable Lynne Sitarski's report and recommendation (Doc. No. 14) is **APPROVED** and **ADOPTED**;

5. Htut's petition for writ of habeas corpus (Doc. No. 1), as amended by the article attached to the motion for the court to consider further argument (Doc. No. 13), *see* July 17, 2018 Order (Judge Sitarski's order granting the motion and considering the article), is **DENIED**;

6. Htut has not made a substantial showing of the denial of a constitutional right and is therefore not entitled to a certificate of appealability, 28 U.S.C. § 2253(c)(2); and

7. The clerk**{2018 U.S. Dist. LEXIS 3}** of court shall mark this case as **CLOSED**.

BY THE COURT:

/s/ Edward G. Smith

EDWARD G. SMITH, J.

Footnotes

1

The court conducts a de novo review and determination of the portions of the report and recommendation by the magistrate judge to which there are objections. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); *see also* E.D. Pa. Loc. R. Civ. P. 72.1(IV)(b) (providing requirements for filing objections to magistrate judge's proposed findings, recommendations or report).

In the objections, Htut contends that Magistrate Judge Sitarski failed to consider whether his waiver of appeal rights was intelligent. *See* Objs. to Magistrate Judge Sitarski's Report and Recommendation ("Objs.") at 2, Doc. No. 17-1. He believes the waiver could not have possibly been intelligent because it required him to waive claims before he knew they existed. *See id.* at 4-5. Contrary to Htut's contention, Judge Sitarski did address this argument in her report and recommendation.

Specifically, Judge Sitarski noted that

> [t]he Third Circuit rejected a similar argument in *Khattak*. There, the Third Circuit rejected the argument that "waiver-of-appeal provisions are void as contrary to public policy, because defendants cannot ever knowingly and voluntarily waive their rights to appeal future errors." The Third Circuit observed that "[w]aivers of the legal consequences of unknown future events are commonplace."Report and Recommendation ("R. & R.") at 16 n.1 (internal citations omitted) (citing *United States v. Khattak*, 273 F.3d 557, 561 (3d Cir. 2001)), Doc. No. 14. While Judge Sitarski does not frame this discussion as an "intelligence" inquiry (she frames it as a knowing and voluntary inquiry), she fully addresses the substance of Htut's objection.

Htut's argument-that his waiver could not have possibly been intelligent because he did not know (or could not have known) what claims he was giving up in the future-is not persuasive for an additional reason. As noted in *Khattak*, individuals often gain more favorable sentences in exchange for waiving future rights. *See Khattak*, 273 F.3d at 562 ("Khattak's argument ignores that waivers of appeals may assist defendants in making favorable plea bargains.") It is entirely possible that an individual could intelligently relinquish unknown future rights to obtain a better plea bargain. In fact, as noted by Judge Sitarski, this is exactly what happened here; the government did not pursue the death penalty because Htut waived his appellate rights. *See* R. & R. at 10.

Additionally, Htut's attempts to distinguish *Khattak* are unavailing. Htut contends that "the atmospherics surrounding Khattak and Petitioner's case are totally inapposite." *See* Objs. at 3. Unfortunately for Htut, these atmospherics, while present, are not legally significant. Htut correctly notes that the rights the petitioner in *Khattak* waived are different from those he waived here. *See id.;*

Khattak, 273 F.3d at 561. While these rights were different, the legal principle developed in *Khattak* is fully applicable here. The petitioner in *Khattak* waived claims before he knew they existed and he subsequently contended that his waiver of these claims could not have possibly been intelligent. *See Khattak*, 273 F.3d at 560-63. Here, Htut advances almost the exact same legal argument. *See* Objs. at 3-4. This argument did not succeed in *Khattak* and it does not succeed here either. *See Khattak*, 273 F.3d at 560-63.

Htut raises two other arguments. First, Htut references *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992), as support for the principle that "'a defendant can [never] knowingly and intelligently waive . . . the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement . . . .'" Objs. at 6 (quoting *Melancon*, 972 F.2d at 570). This quote is taken from the concurrence in *Melancon*. *See Melancon*, 972 F.2d at 570 (Parker, J., concurring). The author of the concurrence disagreed with the outcome the majority reached, but felt that he could not dissent because the panel was bound by a prior Fifth Circuit decision. *See id.* He concurred specifically to announce his disagreement with the outcome of the case. *See id.* ("I concur specially because I cannot dissent."). This out-of-circuit disagreement is insufficient for this court to turn away the binding decision in *Khattak*.

Second, Htut cites to a smattering of due process cases for the principle that a plea should be knowing, intelligent, and voluntary. *See* Objs. at 7. These cases are no more availing to Htut than the concurrence in *Melancon*. The legal principles espoused in these cases were well established at the time the Third Circuit decided *Khattak* and with full knowledge of these requirements, the Third Circuit upheld the waiver of appellate rights. Thus, these cases do not provide the court with a reason to veer from *Khattak*.

For these reasons, and for the reasons stated in Judge Sitarski's report and recommendation, the court overrules the objections and denies the petition for habeas relief.

WIN MIN HTUT, Petitioner, v. MARK CAPOZZA,1 et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 119988
CIVIL ACTION NO. 17-cv-4021
July 17, 2018, Decided
July 17, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Motion denied by, As moot, Objection overruled by, Writ of habeas corpus denied, Certificate of appealability denied Htut v. Lane, 2018 U.S. Dist. LEXIS 231119 (E.D. Pa., Aug. 9, 2018)

Editorial Information: Prior History

Commonwealth v. **Win Min Htut**, 161 A.3d 375, 2017 Pa. Super. Unpub. LEXIS 536 (Feb. 13, 2017)

Counsel **{2018 U.S. Dist. LEXIS 1}WIN MIN HTUT**, Petitioner, Pro se, LA BELLE, PA.

For THE DISTRICT ATTORNEY OF THE COUNTY OF LEHIGH, Respondent: HEATHER F. GALLAGHER, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, ALLENTOWN, PA.

Judges: LYNNE A. SITARSKI, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: LYNNE A. SITARSKI

Opinion

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI

UNITED STATES MAGISTRATE JUDGE

Presently before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by **Win Min Htut** ("Petitioner"), an individual currently incarcerated at the State Correctional Institution - Fayette located in LaBelle, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED.

I. PROCEDURAL BACKGROUND2

The Court of Common Plea of Lehigh County provided the following recitation of the facts:

> On December 17, 2013, the victim, Thida Myint, secured a final [Protection From Abuse ("PFA")] order, which excluded [Petitioner] from 319 Central Park Avenue in the City of Bethlehem. That afternoon, the Bethlehem Police responded to that address after [Petitioner's] sixteen (16) year old daughter reported that [Petitioner],**{2018 U.S. Dist. LEXIS 2}** who was armed, shot her mother.

Upon their arrival, the police found Thida Myint lying in the middle of the street with a bullet wound to her head. By her side were two of her three children, the sixteen (16) year old daughter and an eleven (11) year old son. The three (3) year old daughter, Nicole, was missing. Within a short period of time, [Petitioner] was located with Nicole, who was unharmed, by the Allentown Police Department. He was immediately taken into custody. One of the officers, without full knowledge of the events, asked [Petitioner] if the child's mother would be coming for Nicole. [Petitioner] said "no, because I shot her."

The children were interviewed and told the investigators that after lunch they returned home and "put a chair underneath the front door because at the time the family was afraid of

[Petitioner]." [Petitioner] arrived at the residence, however, and forced his way into the home. [Petitioner] had a firearm in his hand and began threatening the family. Thida Myint grabbed Nicole and fled the home, as did the other children, but she fell to the ground as [Petitioner] pursued her. He then took Nicole, and shot Thida Myint in the head. [Petitioner] discarded**{2018 U.S. Dist. LEXIS 3}** the firearm, which was later located in a sewer grate near the residence. [Petitioner] was interviewed and admitted that he was present in the courtroom when the PFA order was issued. He was aware that he was prohibited from being at the residence or having any contact with the family. He was also aware that he was not allowed to possess a firearm.

He told the investigators that he disregarded the order, entered the residence, and after finding no one home, he went to his parents' home and retrieved the firearm. He returned to the residence with a female companion. He claimed that he intended to threaten his wife, and then kill himself. Instead, he unlawfully entered the home, pursued his wife, and then killed her. He claimed the gun "went off", but other evidence that was uncovered shows that [Petitioner] had recently used the weapon at a gun range. [Petitioner], during the sentencing proceeding, stated, "[i]f she don't come to court and not lying about the PFA all these things wouldn't happen."*Commonwealth v. Htut*, No. CP-39-CR-0000308-2014, 2016 Pa. Dist. & Cnty. Dec. LEXIS 4, *5-7, (Lehigh Cnty. Com. Pl. Feb. 18, 2016) (citations omitted) [hereinafter "PCRA 1925(a) Op."]. On September 2, 2014, Petitioner pleaded guilty to second degree murder, 18 Pa. Cons. Stat. § 2502(b), and was sentenced**{2018 U.S. Dist. LEXIS 4}** to life imprisonment. Crim. Docket at 3, 10-11. Petitioner's plea agreement contained a waiver of appellate rights, in which Petitioner agreed not to file any direct or collateral appeal in state or federal court. (Ex. A to Resp. to Pet., ECF No. 7 [hereinafter "Waiver of App. Rights"]).

On August 3, 2015, Petitioner filed a *pro se* petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"). Crim. Docket at 12; (Pet. for Post-Conviction Relief, SCR No. 26). Counsel was appointed and filed an amended petition on Petitioner's behalf, raising the following claim:

Petitioner's plea was not knowing, voluntary, or intelligent for the following reasons:

a. Counsel incorrectly told petitioner that if he went to trial his home and property would be seized whether or not he was successful in defending himself, thereby leaving his children with no place to live;

b. Trial Counsel was ineffective for talking the defendant into pleading guilty rather than considering possible defenses or preparing for trial by telling him that if he went to trial he would be found guilty of capital murder and receive[ ] the death penalty;

c. Trial counsel was ineffective by allowing the defendant to plead guilty to murder in the second degree**{2018 U.S. Dist. LEXIS 5}** when the facts recited in the guilty plea colloquy failed to

support that charge;

d. Trial counsel was ineffective by failing to adequately inform the defendant[ ] of the elements of the charges he pled guilty to and the facts of the case prior to his guilty plea;

e. Trial counsel was ineffective for failing to interview and investigate potential character witnesses;

f. Trial counsel was ineffective by failing to adequately prepare for trial by failing to investigate possible exculpatory witnesses.Crim. Docket at 12; (Am. PCRA Pet. ¶ 5, SCR No. 28). Following a hearing to determine the enforceability of Petitioner's waiver of appellate rights, the amended petition was denied on January 5, 2016. Crim. Docket at 14; PCRA 1925(a) Op., 2016 Pa. Dist. & Cnty. Dec. LEXIS 4 at *7; (Order, SCR No. 36). Petitioner filed a counseled notice of appeal to the Superior Court. Crim. Docket at 14. Thereafter, his counsel filed a no-merit brief and motion to withdraw as counsel, to which

Petitioner filed a *pro se* response.3 *Commonwealth v.* ***Win Min Htut***, 161 A.3d 375, 2017 Pa. Super. Unpub. LEXIS 536, *3 (Pa. Super. 2017). On February 13, 2017, the Superior Court affirmed the PCRA Court's decision and granted counsel's motion to withdraw. 2017 Pa. Super. Unpub. LEXIS 536 at *8. Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied on August 28, 2017. Crim. Docket at 16; *Commonwealth v. Htut*, 170 A.3d 1012 (Pa. 2017).

On September 1, 2017,4 Petitioner filed a *pro se* petition for writ of habeas corpus, raising the following claims:

(1) Petitioner entered into a plea that was not voluntary, intelligent, or knowingly given[.]

(2) The written waiver of appeal rights colloquy that Petitioner entered into is, nonsensical, unworkable, and does not comport with the United States Constitution.

(3) The PCRA Court's ruling resulted in a fundamental miscarriage of justice where the waiver itself was the result of counsel's ineffectiveness in negotiating the plea agreement containing the waiver.

(4) Petitioner guilty plea was not knowingly, voluntarily, or intelligently given and he was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions, when counsel gave legally incorrect advice.(Hab. Pet. 7, 9-10, 12-13, 14-15, ECF No. 1).

The petition was assigned to the Honorable Edward G. Smith, who referred it to the undersigned for a Report and Recommendation. (Order, ECF No. 2). The Commonwealth filed a Response, and Petitioner filed a Traverse. (Resp. to Pet., ECF No. 7; Traverse, ECF No. 12). That matter is fully briefed and**{2018 U.S. Dist. LEXIS 7}** ripe for disposition.

II. LEGAL STANDARDS

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication 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)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of

rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law, or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *see**{2018 U.S. Dist. LEXIS 8}** also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citation omitted). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citation omitted).

III. DISCUSSION

In Claims One, Three, and Four, Petitioner avers that his plea was not voluntary, intelligent, or knowing due to counsel's ineffectiveness.5 (Hab. Pet. 7, 15, ECF No. 1; Mem. of Law 6-7, ECF No. 1-1). In Claim Two, Petitioner argues the appellate rights waiver is "nonsensical, unworkable, and does not comport**{2018 U.S. Dist. LEXIS 9}** with the United States Constitution," and "has resulted in a miscarriage of justice." (Mem. of Law 53-57, ECF No. 1; Mem. of Law 1-2, ECF No. 1-1). The Commonwealth counters that Petitioner's waiver precludes the instant habeas petition, that the waiver was knowing and intelligent, and enforcing the waiver will not result in a miscarriage of justice. (Resp. to Pet. 8-20, ECF No. 1). As will be discussed in more detail below, the Court finds that the waiver is enforceable.6

A. Enforcement of Collateral Appeal Waiver

Waivers of appellate rights contained in guilty plea agreements are valid if entered into knowingly and voluntarily, and if their enforcement does not work a miscarriage of justice. *United States v. Mabry*, 536 F.3d 231, 237 (3d Cir. 2008); *United States v. Khattak*, 273 F.3d 557, 562-63 (3d Cir. 2001). The language of the waiver is to be "strictly construe[d]," and if "the waiver applies by its terms, it is the defendant's burden to show the waiver should not be enforced." *United States v. Morrison*, 282 F. App'x 169, 171 (3d Cir. 2008) (not precedential).

"A waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues-indeed, it includes a waiver of the right to appeal blatant error." *Khattak*, 273 F.3d at 562 (quoting *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999)). The Third Circuit has observed that such waivers "preserve the finality of judgments and sentences imposed." *Id.* at 561 (quoting**{2018 U.S. Dist. LEXIS 10}** *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992)). Permitting defendants "to retract waivers would prolong litigation, affording defendants the benefits of their agreements while shielding them from their self-imposed burdens." *Id.*

These principles apply to both waivers of appellate rights and waivers of rights to seek collateral review, including federal habeas review. *See Mabry*, 536 F.3d at 238 n.6 (noting the inquiry into the validity of an appellate waiver and a waiver in a collateral challenge "is the same"); *see generally id.* (enforcing waiver of collateral review). Courts in this jurisdiction have upheld collateral appeal waivers,

where it is determined that the waiver was knowing and voluntary, and the petitioner has not established a miscarriage of justice. *See, e.g., Glass v. Lane*, No. 16-154, 2017 U.S. Dist. LEXIS 121022, 2017 WL 4214145, at *1 (E.D. Pa. July 31, 2017), *report and recommendation adopted*, No. 16-154, 2017 U.S. Dist. LEXIS 153955, 2017 WL 4179724 (E.D. Pa. Sept. 21, 2017), *certificate of appealability denied*, No. 17-3308, 2018 U.S. App. LEXIS 21253, 2018 WL 1968081 (3d Cir. Mar. 23, 2018) (merits review of § 2254 petition foreclosed by knowing and voluntary waiver of appellate rights in guilty plea agreement, and petitioner had not established miscarriage of justice); *Swinson v. Pennsylvania*, 2008 U.S. Dist. LEXIS 117342, No. 2008 WL 4790608 (E.D. Pa. Oct. 31, 2008) (same); *Watts v. Wilson*, No. 07-2820, 2008 U.S. Dist. LEXIS 121493, 2008 WL 5094251 (E.D. Pa. June 27, 2008), *report and recommendation adopted*, No. 07-2820, 2008 U.S. Dist. LEXIS 96153, 2008 WL 5000277 (E.D. Pa. Nov. 25, 2008) (same).

1. Knowing and Voluntary

The purpose of the "'knowing and voluntary' inquiry . . . is to determine whether the defendant**{2018 U.S. Dist. LEXIS 11}** actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n.12, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). In *United States v. Mabry*, the Third Circuit found a waiver knowing and voluntary when:

> The written plea agreement here clearly provides that the waiver is very broad, admits of no exceptions, and applies to both direct and collateral challenge rights. Counsel explained the waiver to Mabry and Mabry signed it, acknowledging that he understood the terms of the agreement.
>
> . . . Having scrutinized the colloquy . . . we are satisfied that the district court "inform[ed] the defendant of, and determine[d] that the defendant underst[ood] . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence" . . . . Before the court accepted the plea agreement, it assured itself that Mabry had not been coerced or misled in any way into entering into the agreement. The court explained the waiver at some length, Mabry responded directly to the court's questions, the prosecution reviewed the waiver with the defendant in open court, and defense counsel was permitted to explain further.*Mabry*, 536 F.3d at 238-39.

The Court finds the waiver here was also entered**{2018 U.S. Dist. LEXIS 12}** into knowingly and voluntarily. The PCRA Court explained that although Petitioner asserted the "waiver of appeal rights was presented to him at the 'very last minute,'" the waiver document itself showed that Petitioner signed the document on August 26, 2014, seven days before he entered his guilty plea. PCRA 1925(a) Op., 2016 Pa. Dist. & Cnty. Dec. LEXIS 4 at *8. Petitioner also conceded that trial counsel read the waiver document to him. *Id.* Although Petitioner contended that he refused to sign the waiver form on two occasions, trial counsel testified at the PCRA hearing that Petitioner never objected to signing the document. Counsel testified:

> That never happened. If he had ever done that, first of all, I would not have gone forward with it. If there was any doubt in my mind that he was hesitant to sign the waiver of appellate rights, I would not have gone forward. Period.*Id.* (citing N.T. 01/05/16 at 70-71). Moreover, Petitioner never objected to the waiver of appellate rights during the guilty plea proceeding. *Id.* The PCRA Court found that trial counsel's testimony was "credible and consistent," and Petitioner "provided an untrustworthy version of the proceedings." *Id.*

The PCRA Court further explained, "PCRA counsel .**{2018 U.S. Dist. LEXIS 13}** . . suggests that although [Petitioner] signed the waiver colloquy, trial counsel was somehow ineffective because he

either did not use the magic words PCRA, or did not explain to [Petitioner] his right to file a PCRA. This is, at best, sophistry[.]" 2016 Pa. Dist. & Cnty. Dec. LEXIS 4 at *12. Trial counsel testified that he explained the Written Waiver of Appeal Rights Colloquy form in detail; he testified that he "read every word, every line, and stopped after each line to make sure [Petitioner] understood what [counsel] was saying to him . . . and after each number, and [counsel] went through everything with [Petitioner] and [Petitioner] understood everything." 2016 Pa. Dist. & Cnty. Dec. LEXIS 4 at *9 (citing N.T. 01/05/16 at 53-54, 59-60). The PCRA Court also noted that the waiver document spells out in clear terms Petitioner's reciprocal agreement "not to seek or file or have filed on [his] behalf, any direct [or] collateral appeals of [his] conviction, sentence, or this agreement to the appellate courts of Pennsylvania . . ." upon the Commonwealth's agreement not to seek the death penalty. 2016 Pa. Dist. & Cnty. Dec. LEXIS 4 at *13. The waiver document explained that collateral appeals include "request for relief under the state Post Conviction Relief Act" and tracked the language of the PCRA statute.**{2018 U.S. Dist. LEXIS 14}** *Id.* The PCRA Court found Petitioner was "fully aware of the global nature of his waiver of appeal rights, and that 'no other court would review his case' when he signed the waiver document." 2016 Pa. Dist. & Cnty. Dec. LEXIS 4 at *14.

On PCRA appeal, the Superior Court found the oral and written guilty plea colloquies and written waiver colloquy supported the PCRA Court's credibility findings. *Htut*, 2017 Pa. Super. Unpub. LEXIS 536 at *7. The Superior Court also rejected Petitioner's claim that when he signed the waiver form, he was unaware that he was forfeiting his right to file a PCRA petition. *Id.* The Superior Court found "that plea counsel need not have used the acronym 'PCRA' while explaining the waiver form to [Petitioner]." *Id.* That form "clearly stated that [Petitioner] was 'giving up his right to make allegations, including but not limited to, asserting that [his] conviction or sentence resulted from' a constitutional violation, ineffective assistance of counsel, or an unlawfully induced guilty plea." *Id.* The form also stated that "no other court will review [Petitioner's] case after today." 2017 Pa. Super. Unpub. LEXIS 536 at *8. Trial counsel credibly testified that he read and explained the entire waiver form to Petitioner, and that Petitioner understood it. 2017 Pa. Super. Unpub. LEXIS 536 at *8. The Superior**{2018 U.S. Dist. LEXIS 15}** Court concluded, "The record supports the PCRA court's determination that [Petitioner's] waiver of his appeal and post-conviction rights, including his right to file the instant PCRA petition, was knowing and voluntary." *Id.* Thus, the Superior Court found the PCRA Court properly dismissed his PCRA petition. *Id.*

Whether the state courts' finding that Petitioner's waiver was knowing and voluntary is entitled to deference under 28 U.S.C. § 2254(d) is not entirely clear. *See, e.g., Glass*, 2017 U.S. Dist. LEXIS 121022, 2017 WL 4214145, at *10; *Swinson*, 2008 U.S. Dist. LEXIS 117342, 2008 WL 4790608, at *5-6. Section 2254(d) applies to "any claim that was adjudicated on the merits." In *Fahy v. Horn*, the Third Circuit found the state courts' determination that the petitioner's waiver was valid was not entitled to deference when "resolution of the question as to whether [petitioner's] waiver was valid will not entitle him to relief on the merits of his habeas petition" and therefore, "the waiver question [was] not a 'claim.'" 516 F.3d 169, 180 (3d Cir. 2008); *see also id.* (defining "claim" as "that which, if granted, provides entitlement to relief on the merits"). However, the waiver issue in *Fahy* was raised in a procedurally different context than the waiver issue here; the petitioner there waived his right to collateral review during the pendency of his PCRA proceeding. *See**{2018 U.S. Dist. LEXIS 16}** *id.* at 177. Unlike *Fahy*, Petitioner's case involves a waiver of collateral review rights and a negotiated guilty plea, and a finding that the waiver is invalid "may provide [petitioner] entitlement to habeas relief based on an invalid guilty plea." *Swinson*, 2008 U.S. Dist. LEXIS 117342, 2008 WL 4790608, at *6; *see also Glass*, 2017 U.S. Dist. LEXIS 121022, 2017 WL 4214145, at *10 n.18 ("[T]he validity of the waiver would determine entitlement to relief.").

In any event, "even assuming that the state court's ultimate findings on the validity of petitioner's

waiver and plea are not entitled to deference under § 2254(d), the underlying explicit and implicit factual findings upon which the state court based its conclusions must be afforded a presumption of correctness under § 2254(e)(1)," where the petitioner has failed to rebut the presumption with "clear and convincing evidence." *Swinson*, 2008 U.S. Dist. LEXIS 117342, 2008 WL 4790608, at *7 (quoting 28 U.S.C. § 2254(e)(1)); *see also Glass*, 2017 U.S. Dist. LEXIS 121022, 2017 WL 4214145, at *10. Accordingly, the state courts' findings that counsel fully explained the waiver to Petitioner, and that Petitioner understood the waiver, support a finding that Petitioner's waiver was knowing and voluntary.7

Moreover, an independent review of the record reflects that Petitioner's waiver was knowing and voluntary. Seven days before entering his guilty plea, Petitioner signed the Written Waiver of Appeal Rights Colloquy, and agreed to "forever**{2018 U.S. Dist. LEXIS 17}** giv[e] up" his rights to file a direct or collateral appeal. The waiver provided, *inter alia*, that: Petitioner would never seek a direct or collateral appeal, including "a request for writ of habeas corpus from a federal court"; that Petitioner was "forever" giving up his right to request habeas review by a federal judge; "that no other court will review [his] case after today"; and that he would never file any claims of ineffective assistance of counsel, trial court error, or prosecutorial misconduct. (Waiver of App. Rights ¶ 6, ECF No. 7).

Additionally, the trial court conducted a detailed and thorough colloquy at Petitioner's guilty plea hearing. Specifically, the trial court asked whether Petitioner can speak English and the extent to which he can do so.8 (N.T. 09/02/14 at 5-7). Petitioner explained that he speaks English "in ordinary forms," and that he sufficiently understood his conversations with his attorney. (*Id.* at 6-7). His attorney confirmed this; he stated, "I have never gotten the impression that [Petitioner] has any difficulty understanding English or the legal concepts that I was presenting to him, and I explained every right that he has as contained in the various colloquies**{2018 U.S. Dist. LEXIS 18}** and he acknowledged that he understood those rights." (*Id.* at 7-8). Petitioner also confirmed that he had not consumed drugs or alcohol within the past 48 hours, was not prescribed any medication, and was not under the care of a physician. (*Id.* at 12). He stated that he was satisfied with the representation of his attorney, and that he completed the guilty plea form with his attorney's assistance.9 (Id. at 9, 13). Petitioner also confirmed that he understood the Court's explanation of the elements of first and second degree murder, and that he understood the charges to which he was pleading guilty. (*Id.* at 24-27). Thereafter, the trial court discussed the appellate rights waiver, and the voluntariness of Petitioner's plea:

> The Court: Okay. Now, one of the things that you signed is what's called a written waiver of appeal rights colloquy. Mr. Charles, will you tell me how that was completed?
>
> Mr. Charles: That was a form that I received from the Commonwealth. I went through every line of it with him. He understood the - every allegation, every concept contained in the document, and he agreed to sign it.
>
> The Court: Okay. Is that right, Mr. Htut?
>
> Mr. Htut: Yes, Your Honor.
>
> The Court: This document indicates that you will not be able to**{2018 U.S. Dist. LEXIS 19}** allege that your lawyer, Mr. Charles, was ineffective, that he did not - not competent - did not do his job correctly in his representation of you. Do you understand that?
>
> Mr. Htut: Yes, Your Honor.
>
> The Court: And furthermore as I indicated to you, this colloquy indicates that you will not be able to seek a commutation from the governor to have your sentence reduced. Do you understand that?

Mr. Htut: Yes, Your Honor.

The Court: Do you want me to review with you in greater detail each and every aspect of this document?

Mr. Htut: No, Your Honor.

The Court: Okay. Do you feel that you satisfactorily understand it?

Mr. Htut: Yes, Your Honor.

The Court: Okay. Counsel, do you want me to go through each of the paragraphs with the defendant or are both of you satisfied that he understands it?

Mr. Charles: I'm satisfied he understands it, Your Honor.

Mr. Luksa: I'm satisfied, Your Honor.

The Court: Okay. Have there been any promises made to you other than what we have talked about? Any other promise?

Mr. Htut: No, Your Honor.

The Court: Are you doing this of your own free will?

Mr. Htut: Yes, Your Honor.

The Court: Is anyone forcing you to plead guilty?

Mr. Htut: (Shakes head.)

The Court: Are you going it voluntarily?**{2018 U.S. Dist. LEXIS 20}**

Mr. Htut: Yes, Your Honor.(N.T. 09/02/14 28-30). After this exchange, the trial court found that Petitioner "tendered a knowing, intelligent, and voluntary plea[.]"10 (*Id.* at 30).

Having reviewed the appellate waiver form and the written and oral colloquies, the Court finds Petitioner's waiver and plea were knowing and voluntary. The waiver was clear and unambiguous that Petitioner was "forever giving up" his rights to file a direct or collateral appeal. *See Mabry*, 536 F.3d at 238; *United States v. Mitchell*, No. 15-21-6, 2017 U.S. Dist. LEXIS 177258, 2017 WL 4838841, at *3 (E.D. Pa. Oct. 25, 2017) (plea and waiver were knowing and voluntary when waiver's language was clear and unambiguous). Petitioner signed the waiver form, expressly acknowledging that he read it, discussed it with his attorney, "fully [understood] what is set forth by this agreement," and that he was "knowingly, intelligently, and voluntarily" agreeing to the waiver's terms and conditions. (Waiver of App. Rights ¶ 16, ECF No. 7). Additionally, a review of the guilty plea colloquy confirms that Petitioner's waiver and plea were knowing and voluntary. The trial court informed Petitioner of the appellate rights waiver and confirmed that he understood it, explained the waiver at some length, and assured itself that Petitioner had not been coerced**{2018 U.S. Dist. LEXIS 21}** before entering into the plea agreement. *See Mabry*, 536 F.3d at 238-39; *Mitchell*, 2017 U.S. Dist. LEXIS 177258, 2017 WL 4838841, at *3 (plea and waiver were knowing and voluntary when district court's colloquy was similar to colloquy that occurred in the instant case). Thus, the Court finds both the waiver and the plea containing the waiver were knowing and voluntary.11

2. Miscarriage of Justice

Having determined that the waiver was knowing and voluntary, the Court must next consider whether enforcement of the waiver would work a miscarriage of justice under the facts of this case. *Mabry*, 536

F.3d at 237. "There may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver."12 *Khattak*, 273 F.3d at 562. In evaluating whether a miscarriage of justice would result from enforcement of a waiver, courts should consider "'the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.'" *Mabry*, 536 F.3d at 242-43 (quoting *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001)). Allegations that counsel was ineffective or coercive in negotiating the plea agreement that contained the waiver may rise to a miscarriage**{2018 U.S. Dist. LEXIS 22}** of justice. *See id.* at 243 (citing *United States v. Wilson*, 429 F.3d 455 (3d Cir. 2005)); *see also Glass*, 2017 U.S. Dist. LEXIS 121022, 2017 WL 4214145, at *11. The miscarriage of justice exception should "be applied sparingly and without undue generosity." *Wilson*, 429 F.3d at 458 (quoting *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001)) (quotation marks omitted).

Petitioner raises the ineffective assistance of counsel. Specifically, he alleges that counsel was ineffective because: counsel "failed to fully explain the rights that Petitioner was relinquishing" (Mem. of Law 6, ECF No. 1-1); counsel "incorrectly told Petitioner that if he chose to exercise his Constitutional rights and go to trial, Petitioner's home and property would be seized . . . ." (*id.* at 8-9); and counsel advised him to enter a "lopsided" agreement, in which he "received no benefit" in exchange for his plea (*id.* at 1-6; Mem. of Law 53, ECF No. 1). The Commonwealth argues that these issues would not result in a miscarriage of justice if the collateral attack waiver was enforced. (Resp. to Pet. 13-20, ECF No. 7). The Court agrees that enforcement of the waiver would not work a miscarriage of justice under the circumstances Petitioner has alleged. Petitioner's allegations of ineffective assistance of counsel are contradicted by the record.

First, the record shows that counsel adequately explained the rights Petitioner was**{2018 U.S. Dist. LEXIS 23}** waiving. The state courts credited trial counsel's testimony that he read and explained the waiver form to Petitioner. *See supra* Part III.A.1. Additionally, the waiver form itself indicates that Petitioner discussed his rights and the waiver form with counsel, and that Petitioner understood the waiver.13 (*See* Waiver of App. Rights ¶ 5, ECF No. 7); (*see also id.* ¶ 9) ("I have read this colloquy and agreement and discussed the same, in its entirety, with my counsel, Dennis Charles, Esquire. I have no questions regarding the terms and conditions of the agreement and I understand exactly what is written here.").14

Petitioner's assertion that counsel incorrectly advised him that his home and property would be seized is similarly contradicted by the record. At the PCRA hearing, the PCRA Court noted that prior to Petitioner entering his guilty plea, the solicitor filed a petition concerning "whether [Petitioner] was going to be required to pay the costs of the public defender." (N.T. 01/05/16 at 68). However, the solicitor ultimately withdrew the petition on July 30, 2014, and "the matter proceeded without anybody making a claim against [Petitioner's]**{2018 U.S. Dist. LEXIS 24}** property." (*Id.* at 68, 71). This issue surrounding Petitioner's house was "removed prior to [Petitioner] tendering the guilty plea and[ ] waiver[ ] of his appeal rights." (*Id.* at 69). Moreover, counsel was specifically asked whether he advised Petitioner that he would lose his house if he proceeded to trial, and denied ever giving Petitioner such advice:

> Q: You never threatened him and said, if you go to trial or if you don't plead, you're going to lose your house?
>
> A: I've never said anything like that to him. Why would I say that?
>
> Q: Right, because the house issue had been resolved prior to the plea?

A: Yes. Even if it hadn't, I don't know what's going to happen with regard to his house. I mean, my concern of defending him is to accumulate the best evidence that would allow me to vigorously defend the charges and to zealously defend him, and that's what I did do.

The decision was made by him to take the Commonwealth's offer of a plea to second degree murder. He was fully aware of what he was doing. There was never any threat or coercion or anything of that nature on my part towards him, and I certainly didn't bring up the house as some type of tool to leverage him into this guilty plea.(N.T. 01/05/16 at 69-70);**{2018 U.S. Dist. LEXIS 25}** (*see also id.* at 72, 74) (counsel testifying that "the house wasn't an issue" in his discussions with Petitioner). Although the PCRA Court did not explicitly address the "house issue" in its 1925(a) Opinion, it found counsel's testimony to be "credible and consistent," and that Petitioner was not "forced [to plead guilty] by counsel," but rather, "made an informed decision to plead guilty and waive his appeal rights." PCRA 1925(a) Op., 2016 Pa. Dist. & Cnty. Dec. LEXIS 4 at *11-12. The Court affords these findings a presumption of correctness, as Petitioner has not rebutted them with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Moreover, in the waiver form, written guilty plea colloquy, and oral guilty plea colloquy, Petitioner confirmed that his decision to plead guilty and waive his appellate rights was voluntary and not coerced. (*See* Waiver of App. Rights ¶ 8, ECF No. 7) ("Other than the terms and conditions set forth in this agreement, nobody has promised me anything or forced me or threatened me to accept the terms of this agreement. I, myself, have decided to accept all terms and conditions of this agreement."); (*see also* Guilty Plea Colloquy ¶¶ 34-37, SCR No. 22; N.T. 09/02/14 at 29-30).

Finally, Petitioner's claim that he was "duped" into**{2018 U.S. Dist. LEXIS 26}** pleading guilty to second degree murder because he did not face a realistic chance of being sentenced to death, and that he "received no benefit" in exchange for his plea (Mem. of Law 4-6, ECF No. 1-1) is likewise contradicted by the record. Petitioner was initially charged with criminal homicide, "a classification that includes murder one and murder two[.]" (N.T. 09/02/14 at 3-4). Thus, if Petitioner had proceeded to trial, he faced the possibility of a first degree murder conviction and death sentence.15 (Waiver of App. Rights ¶¶ 2-3, ECF No. 7). Indeed, the Commonwealth filed a Notice of Aggravating Circumstances, stating its intention to seek the death penalty if the jury returned a verdict of guilty to the crime of first degree murder. (Not. of Aggravating Circumstances, SCR No. D3). If that occurred, the Commonwealth intended to offer evidence of the following aggravating circumstances at the sentencing hearing:

(a) [Petitioner] committed a killing while in the perpetration of a felony. 42 Pa. Cons. Stat. § 9711(d)(6).

(b) In the commission of the offense [Petitioner] knowingly created a grave risk of death to another person in addition to the victim of the offense. 42 Pa. Cons. Stat. § 9711(d)(7).

(c) At the time of the killing [Petitioner]**{2018 U.S. Dist. LEXIS 27}** was subject to a court order restricting [Petitioner's] behavior toward the victim pursuant to 23 Pa. Cons. Stat. Ch. 61 (relating to protection from abuse) designed to protect the victim from [Petitioner]. 42 Pa. Cons. Stat. § 9711(d)(18).(Not. of Aggravating Circumstances, SCR No. D3). However, in exchange for his guilty plea, the charge was amended to second degree murder, and Petitioner pleaded guilty to that count. (N.T. 09/02/14 at 4; Waiver of App. Rights ¶¶ 1, 6, ECF No. 7).

Despite Petitioner's assertions to the contrary, Petitioner *could have* been convicted of first degree murder and sentenced to death. The evidence in this case established that: Petitioner was aware that a PFA order prevented him from being in contact with his wife or children; in violation of the PFA order, Petitioner entered his wife's house with an unloaded firearm; when his children and wife ran

from him, Petitioner loaded a magazine into his firearm; Petitioner then chased his wife and children and shot his wife in the head; and Petitioner practiced firing a weapon at a gun range the day before the murder. (N.T. 09/02/14 at 14-23). Moreover, the PCRA Court discussed the aggravating factors at issue in Petitioner's case and observed:**{2018 U.S. Dist. LEXIS 28}** "So was the death penalty realistic here? Absolutely, it was realistic." (N.T. 01/05/16 at 62-63). Accordingly, Petitioner's allegation that he was "duped" into pleading guilty to second degree murder, and that he "received no benefit" in exchange for his plea is contradicted by the record.

Thus, Petitioner's allegations of ineffective assistance of counsel would not result in a miscarriage of justice if the waiver is enforced.

IV. CONCLUSION

As fully explained herein, I respectfully recommend that Petitioner's petition for writ of habeas corpus be denied.16

Therefore, I make the following:

RECOMMENDATION

AND NOW this 16th day of July, 2018, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without the issuance of a certificate of appealability.

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

BY THE COURT:

/s/ Lynne A. Sitarski

LYNNE A. SITARSKI

UNITED STATES MAGISTRATE JUDGE

Footnotes

1 I have substituted Mark Capozza, who is the current Superintendent of SCI Fayette, as the respondent in this case. See Rules Governing Section 2254 Cases, Rule 2 (requiring the current custodian to be named as respondent).

2

Respondents have submitted the relevant transcripts and portions of the state court record ("SCR") in hard-copy format. Documents in the state court record will be cited to as "SCR No. __." The Court has also consulted the Court of Common Pleas criminal docket sheet for *Commonwealth v. Htut*, No. CP-39-CR-0000308-2014 (Lehigh Cnty. Com. Pl.), Criminal Docket, *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-39-CR-0000308-2014 (last visited July 16, 2018).

3

Counsel's no-merit brief raised the claim that "trial counsel [was] ineffective for failing to explain to [Petitioner] that he was giving up his rights to file a PCRA petition against his trial attorney. This resulted in an unknowing and involuntary waiver of right to appeal." ***{2018 U.S. Dist. LEXIS 6}****Htut*, 2017 Pa. Super. Unpub. LEXIS 536 at *4. Petitioner's *pro se* brief also "challenge[d] the validity of his waiver of appeal rights," and "raise[d] numerous additional claims regarding, *inter alia*, the

voluntariness of his guilty plea and the ineffectiveness of both plea counsel and PCRA counsel." 2017 Pa. Super. Unpub. LEXIS 536 at *4 n.4; *see also* Br. for Appellant, *Commonwealth v. Htut*, 161 A.3d 375, 2017 Pa. Super. Unpub. LEXIS 536, *4, 2016 WL 6673466, at *5-6 (Pa. Super.) [hereinafter "PCRA App. Br."].

4

Pennsylvania and federal courts employ the prisoner mailbox rule, pursuant to which a *pro se* petition is deemed filed when given to prison officials for mailing. *See Perry v. Diguglielmo*, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. 1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Commonwealth v. Castro*, 2001 PA Super 17, 766 A.2d 1283, 1287 (Pa. Super. 2001). Petitioner certified that he gave his petition to prison officials on September 1, 2017, and it will be deemed filed on that date. (Hab. Pet. 22, ECF No. 1).

5

Petitioner specifically alleges that counsel "failed to fully explain the rights petitioner was relinquishing" and provided "legally incorrect advice." (Hab. Pet. 7, 15, ECF No. 1; Mem. of Law 6-7, ECF No. 1-1).

6

Because the waiver's enforceability is dispositive of Petitioner's claims, the Court will only address Petitioner's claims to the extent necessary to assess the waiver's enforceability.

7

Petitioner has not rebutted the presumption of correctness afforded to these findings with "clear and convincing evidence." Rather, Petitioner argues that the state courts' rulings "resulted in a miscarriage of justice" because the state courts cited *Commonwealth v. Barnes*, 455 Pa. Super. 267, 687 A.2d 1163 (Pa. Super. 1996) in finding Petitioner's waiver was voluntary. (Mem. of Law 2, ECF No. 1-1). The state courts' decisions are not evidence.

8

Petitioner had a Burmese interpreter at the hearing. (N.T. 09/02/14 at 3).

9

Petitioner completed a written Guilty Plea Colloquy on September 2, 2014. (Guilty Plea Colloquy, SCR No. 22). Therein, he indicated, *inter alia*, that: he understood the charges against him; he was giving up his right to a trial and the presumption of innocence; he was satisfied with the representation of his attorney; he was not forced to plead guilty; and he was pleading guilty of his own free will. (*See id.*).

10

After finding that Petitioner tendered a knowing, intelligent, and voluntary plea, the trial court again explained to Petitioner that he "will not be permitted to appeal for any reason/purpose." (*See* N.T. 09/02/14 at 47-48).

11

Petitioner argues that the waiver is "nonsensical, unworkable, and unconstitutional," and that he could not have knowingly waived his ability to raise claims before he knew whether such claims existed. (Mem. of Law 53-57, ECF No. 1; Traverse 1-4, ECF No. 11). The Third Circuit rejected a similar argument in *Khattak*. There, the Third Circuit rejected the argument that "waiver-of-appeal provisions are void as contrary to public policy, because defendants cannot ever knowingly and voluntarily waive their rights to appeal future errors." *Khattak*, 273 F.3d at 560. The Third Circuit observed that "[w]aivers of the legal consequences of unknown future events are commonplace." *Id.* at 561. The Third Circuit also noted that by waiving the right to appeal, a defendant necessarily waives the opportunity to raise a meritorious issue that may arise. *See id.* ("[B]y waiting the right to appeal, a defendant necessary waives the opportunity to challenge the sentence imposed, regardless of the

merits.").
12

Some appellate courts have delineated specific instances in which waiver provisions may be found invalid, such as where: the sentence was imposed in excess of the maximum penalty provided by law; the sentence was based on a constitutionally impermissible factor such as race; the defendant claims his plea agreement was the product of ineffective assistance of counsel; or the waiver broadly exchanges the right to appeal a specific sentencing range. *See Khattak*, 273 F.3d at 562-63. However, the Third Circuit has chosen "not to earmark specific situations." *Id.* at 563.
13

Moreover, the trial court also explained the waiver to Petitioner, and the waiver form itself explained the rights that Petitioner was waiving. *See supra* Part III.A.1.
14

Petitioner has asked this Court to consider an article published in *Pennsylvania Law Weekly*, in which Samuel C. Stretton suggests a criminal defendant presented with a collateral appeal waiver "is not in a position to really appreciate what rights they may be giving up," unless they are advised of the need for, and given an opportunity to consult with, independent counsel. (Ex. A to Mot. to Consider Further Argument, ECF No. 13). However, Mr. Stretton notes that "[t]here are apparently no court decisions on this particular issue." (*Id.*). In the apparent absence of case law on this specific issue, and given the record in Petitioner's case, the Court continues to find that counsel adequately advised Petitioner of the rights he was waiving. The Court also notes that courts have declined to find waivers invalid based on arguments that such waivers presented a conflict of interest. *See, e.g., United States v. Mitchell*, 538 F. App'x 201, 203 (3d Cir. 2013); *United States v. Gardner*, No. 14-1441, 2015 U.S. Dist. LEXIS 103762, 2015 WL 4714927, at *5-7 (W.D. Pa. Aug. 7, 2015).
15

"A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa. Cons. Stat. § 2502(a). An "intentional killing" is a "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa. Cons. Stat. § 2502(d).
16

Petitioner also filed a "Motion for this Court to Consider Further Argument" (ECF No. 13), which this Court construes as a Motion to Amend and grants in an Order accompanying this Report and Recommendation. The Court has considered Petitioner's "further argument" in this Report and Recommendation. *See supra* n.14.