"Appendix A"

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

March 1, 2021

Jennifer O. Andress, Esq.
Philadelphia County Office of District Attorney
3 South Penn Square
Philadelphia, PA 19107

Shawn Bishop
Chester SCI
500 East 4th Street
Chester, PA 19013

Ronald Eisenberg, Esq.
Office of Attorney General of Pennsylvania
1600 Arch Street
Suite 300
Philadelphia, PA 19103

RE: Shawn Bishop v. Superintendent Smithfield SCI, et al
Case Number: 20-3220
District Court Case Number: 2-14-cv-04903

ENTRY OF JUDGMENT

Today, **March 01, 2021** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ Marianne
Legal Assistant
267-299-4911

BLD-100 **February 18, 2021**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-3220**

SHAWN BISHOP, Appellant

VS.

SUPERINTENDENT SMITHFIELD SCI, ET AL.

(E.D. Pa. Civ. No. 2-14-cv-04903)

Present: AMBRO, SHWARTZ and PORTER, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because Appellant has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Jurists of reason could not debate the District Court's determination, see Slack v. McDaniel, 529 U.S. 473, 484 (2000), that Appellant's claims are either exhausted but lack merit, or are procedurally defaulted claims of ineffective assistance of trial counsel that are not "substantial" under Strickland v. Washington, 466 U.S. 668, 687, 694 (1984), to excuse procedural default under Martinez v. Ryan, 566 U.S. 1 (2012). We make our determination primarily for the reasons explained by the District Court.

By the Court,

s/Patty Shwartz
Circuit Judge

A True Copy:

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

"Appendix B"

SHAWN BISHOP v. JON FISHER, et al.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2020 U.S. Dist. LEXIS 49988
CIVIL ACTION No. 14-4903
March 23, 2020, Decided
March 23, 2020, Filed

Editorial Information: Prior History

Bishop v. Luther, 2019 U.S. Dist. LEXIS 95986 (E.D. Pa., June 5, 2019)

Counsel {2020 U.S. Dist. LEXIS 1}**SHAWN BISHOP**, Petitioner, Pro se, HUNTINGDON, PA.

For JON FISHER, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: JENNIFER O. ANDRESS, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: Juan R. Sánchez, C.J.

Opinion

Opinion by: Juan R. Sánchez

Opinion

MEMORANDUM

Juan R. Sánchez, C.J.

Pro se Petitioner **Shawn Bishop** seeks relief from his state custodial sentence pursuant to 28 U.S.C. § 2254. United States Magistrate Judge Lynne A. Sitarski issued a Report & Recommendation (R&R) recommending this Court deny Bishop relief because his claims are procedurally defaulted, meritless, and noncognizable on habeas review. Bishop now objects to the R&R's recommendation. Because the Court finds no error in the R&R's analysis and Bishop's objections meritless, the Court will overrule the objections, approve and adopt the R&R, and deny the petition.

BACKGROUND

On November 12, 2003, following a jury trial in the Philadelphia County Court of Common Pleas, Bishop was found guilty of first-degree murder and criminal conspiracy to commit murder. He was sentenced to an aggregate term of life imprisonment. Bishop timely appealed his judgment of sentence to the Pennsylvania Superior{2020 U.S. Dist. LEXIS 2} Court. The Superior Court affirmed. Bishop did not initially appeal this decision to the Pennsylvania Supreme Court.

On July 21, 2006, Bishop sought collateral relief pursuant to Pennsylvania's Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9501, et seq. Counsel was appointed to represent Bishop. On October 22, 2007, the PCRA court granted Bishop limited relief, reinstating his right to appeal his judgment of sentence to the Pennsylvania Supreme Court. On April 22, 2008, the Pennsylvania Supreme Court denied Bishop's petition for allowance of appeal. Bishop subsequently filed two additional PCRA petitions in 2006 and 2014. In both petitions counsel was appointed to represent Bishop. The PCRA court denied both petitions, and the Superior Court subsequently affirmed..

On August 13, 2014, Bishop filed the instant Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254. The petition asserts seven grounds for habeas relief including Sixth Amendment compulsory process and ineffective assistance of counsel claims. On June 5, 2019, Judge Sitarski issued the R&R, which recommends the Court deny Bishop's petition with prejudice and dismiss it without an evidentiary hearing because it raises procedurally defaulted, meritless, and noncognizable claims. On July 5, 2019, Bishop filed{2020 U.S. Dist. LEXIS 3} objections to the R&R pursuant to 28 U.S.C. § 636(b)(1). On September 12, 2019, Bishop filed a supplement to his objections.[1]

DISCUSSION

Because the Court finds no error in the R&R's analysis and Bishop's objections meritless, the Court will overrule the objections. The Court reviews de novo "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Bishop's objections are duplicative of the arguments he raised in his habeas petition and briefing. In the R&R, Judge Sitarski gave careful and thorough consideration to each of Bishop's claims. After de novo review of the record, the R&R, and Bishop's

objections, the Court finds no error in the R&R's analysis of Bishop's claims. The Court will therefore overrule Bishop's objections for the reasons stated in the R&R. The Court will, however, briefly address Bishop's argument that the R&R erred in finding his Sixth Amendment compulsory process claim unexcused from procedural default.

In ground one of the petition, Bishop asserts his Sixth Amendment right to compulsory process was violated when the trial court prevented the parents of his co-defendant, Kamil McFadden, from testifying about an alleged conversation with unavailable government{2020 U.S. Dist. LEXIS 4} witness, Harry Gadson.[2] *See* Pet. 1, App. A. The R&R found this claim procedurally defaulted because it was not previously presented in state court. Further, the R&R determined this claim is not excused from procedural default because Bishop failed to show (1) cause for the default and actual prejudice; or (2) that failure to consider the claim will result in a fundamental miscarriage of justice. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). The R&R alternatively found that, even if this claim is excused from procedural default, it is meritless because the proffered testimony was properly excluded as hearsay and Bishop failed to show how this exclusion violated his constitutional rights. Bishop objects based on the arguments stated in his reply brief in support of his habeas petition. He asserts "[a] criminal defendant has a constitutional right to present a defense, and present witnesses in his favor." Reply in Supp. of Pet. 23. The Court finds no error in the R&R's analysis because Bishop has not demonstrated this claim is excused from procedural default and, even assuming it is excused, it is meritless and he is not entitled to relief.

Initially, Bishop has failed to show this claim is excused from procedural default. As{2020 U.S. Dist. LEXIS 5} noted, there are two exceptions from procedural default: (1) cause and prejudice, and (2) a fundamental miscarriage of justice. To demonstrate cause and prejudice, Bishop must show his failure to present this claim to the state court resulted from "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *See Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). Alternatively, to excuse his default under the "fundamental miscarriage of justice" exception, Bishop must demonstrate actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 324-26, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Bishop has failed to show either cause and prejudice or actual innocence. For this reason alone, this claim fails.[3] Regardless, even assuming Bishop's claim is not procedurally defaulted, it is meritless.

The Sixth Amendment right to compulsory process "protects the presentation of the defendant's case from unwarranted interference by the government, be it in the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling by the trial judge." *See Gov't of V.I. v. Mills*, 956 F.2d 443, 445, 27 V.I. 353 (3d Cir. 1992). To establish a violation of this right, Bishop must show: "[1] that he was deprived of the opportunity to present evidence in his favor; [2] that the excluded testimony would{2020 U.S. Dist. LEXIS 6} have been material and favorable to his defense; and [3] that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." *United States v. Zemba*, 59 F. App'x 459, 467 (3d Cir. 2003) (quoting *Mills*, 956 F.2d at 446). A judge's decision to exclude an inadmissible hearsay statement fails to satisfy the arbitrary or disproportionate prong. *See Richardson v. Gov't of V.I.*, 55 V.I. 1193, 2011 WL 4357329, at *5-7 (D.V.I. 2011) (finding the trial court's decision to exclude hearsay testimony was not a ground for relief under the compulsory process clause), *aff'd sub nom. Gov't of V.I. v. Richardson*, 513 F. App'x 199 (3d Cir. 2013).

The trial judge's decision to exclude testimony from McFadden's parents about an alleged conversation with Gadson, an unavailable government witness, was not arbitrary.[4] McFadden's parents would have testified that "Gadson approached them several months after he testified at the preliminary hearing and apologized to them for testifying against their son, stating that the police forced him to do so." *See* Mem., *Commonwealth v. Bishop*, No. 343 EDA 2004, at 3-4 (Pa. Super. Ct. July 22, 2005). As the trial judge and the R&R found, the proffered testimony from McFadden's parents is hearsay. It seeks to introduce Gadson's out-of-court statement to establish that he lied at Bishop and McFadden's preliminary hearing. *See* Pa. R. Evid. 801(c) ("'Hearsay' means a statement that (1) the declarant does not make while testifying at the current trial{2020 U.S. Dist. LEXIS 7} or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). Moreover, the proffered hearsay testimony is not subject to an exception under the Pennsylvania Rules of Evidence. *See, e.g.*, Pa. R. Evid. 802 ("Hearsay is

not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute."). The proffered testimony is thus inadmissible hearsay. As a result, the trial judge's decision to exclude the testimony of McFadden's parents regarding Gadson's statements was not arbitrary and this claim is meritless. *See Richardson*, 55 V.I. 1193, 2011 WL 4357329, at *5-7. Therefore, even assuming Bishop's claim is excused from procedural default, it is meritless and he is not entitled to relief.

CONCLUSION

In sum, because the Court finds no error in the R&R's analysis and Bishop's objections meritless, the Court will overrule the objections, approve and adopt the R&R, and deny the petition.

An appropriate order follows.

BY THE COURT:

/s/ Juan R. Sánchez

Juan R. Sánchez, C.J.

ORDER

AND NOW, this 23rd day of March, 2020, upon careful consideration of pro se Petitioner Shawn Bishop's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, and after independent review of the June 5,**{2020 U.S. Dist. LEXIS 8}** 2019, Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski and Bishop's objections thereto, it is ORDERED:

1. Bishop's objections (Document 37 & 39) are OVERRULED.

2. The Report and Recommendation (Document 33) is APPROVED and ADOPTED.

3. Bishop's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (Document 1) is DENIED with prejudice and DISMISSED without an evidentiary hearing.

4. Judgment is entered in favor of Respondents.

5. Because Bishop has not made a substantial showing of the denial of a constitutional right, i.e., that reasonable jurists would disagree with this Court's procedural or substantive rulings on Bishop's claims, a certificate of appealability shall not issue. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

BY THE COURT:

The Clerk of Court is DIRECTED to mark this case closed.

/s/ Juan R. Sánchez

Juan R. Sánchez, C.J.

Footnotes

1

Although the supplement to his objections was filed outside of the 14-day period for Bishop to timely object to the R&R, *see* Local R. Civ. P. 72.1(IV)(a), the Court has nevertheless considered them, *see Perez-Barron v. United States*, No. 09-0173, 2010 U.S. Dist. LEXIS 86321, 2010 WL 3338762, at *1 (W.D. Pa. Aug. 23, 2010) (considering objections to a report and recommendation even though they were untimely filed).

2

Although Bishop styles this claim as a Fourteenth Amendment due process claim, it is properly characterized as a Sixth Amendment compulsory process claim.

3

Bishop argues the R&R should have applied the procedural default exception test set forth in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) rather than the test set forth in *Edwards v. Carpenter*, 529 U.S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Bishop's argument is misguided. *Martinez* applies where a petitioner is raising a claim of ineffective assistance of trial counsel. Here, Bishop is asserting a Sixth Amendment compulsory process claim. Therefore, *Martinez* does not apply. Regardless, even if *Martinez* applied, his claim would still fail because, as discussed below, it is meritless. *See id.* at 14 (stating, to excuse an unexhausted claim of ineffective assistance of counsel, a petitioner must show that the underlying claim is "a substantial one, which is to say that the prisoner must demonstrate the claim has some merit").

4

For the purposes of this analysis, the Court assumes Bishop was deprived of an opportunity to present evidence and McFadden's parent's testimony was material and favorable to his defense.

"Appendix C"

SHAWN BISHOP, Petitioner, v. JAMEY LUTHER,[1] et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2019 U.S. Dist. LEXIS 95986
CIVIL ACTION NO. 14-cv-4903
June 5, 2019, Decided
June 5, 2019, Filed

Editorial Information: Subsequent History

Adopted by, Objection overruled by, Writ of habeas corpus denied, Dismissed by Bishop v. Fisher, 2020 U.S. Dist. LEXIS 49988 (E.D. Pa., Mar. 23, 2020)

Editorial Information: Prior History

Commonwealth v. Bishop, 883 A.2d 684, 2005 Pa. Super. LEXIS 2536 (Pa. Super. Ct., July 22, 2005)

Counsel {2019 U.S. Dist. LEXIS 1}**SHAWN BISHOP**, Petitioner, Pro se, HUNTINGDON, PA.

For JON FISHER, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: JENNIFER O. ANDRESS, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, 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

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by **Shawn Bishop** ("Petitioner"), an individual currently incarcerated at the State Correctional Institution-Smithfield. 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. FACTUAL AND PROCEDURAL HISTORY[2]

The Pennsylvania Superior Court provided the following facts in its decision affirming Petitioner's judgment of sentence:

> On April 23, 2001, Officer James Abadie was working radio patrol duties with his partner Officer Hogue when they received a call at around 12:30 A.M. to go to 1220 South 18th Street in South Philadelphia. When Officer Abadie responded to the{2019 U.S. Dist. LEXIS 2} call, he observed a gray Chevy Caprice with the passenger's door open. The decedent, Asmar Byron Davis, was slumped over in the passenger seat with his eyes closed and blood on his T-shirt. Mr. Davis appeared to have been shot multiple times in the neck, chest and face and the officer felt no vital signs. The post mortem examination confirmed that the cause of Mr. Davis' death was multiple gunshot wounds.
>
> On the evening of April 22, 2001, at around 11:00 P.M., Darren Birch was driving in the 500 block of Cross Street in Philadelphia when he saw Mr. Davis. The two men were hungry, so Mr. Davis got into the passenger's side of Mr. Birch's car and, together, they went to South Street to get some pizza. After they drove around for a little while, the two headed back to Mr. Birch's house at 1218 South 18th Street. Mr. Birch agreed to let Mr. Davis borrow his car for the night if Mr. Davis agreed to pick Mr. Birch up at a club later in the night. Mr. Birch parked outside his house and was about to run inside to change his shoes when he heard a series of about seven to ten gunshots and saw flashes of light coming in through the passenger side window. After the shots ended, Mr. Birch got out{2019 U.S. Dist. LEXIS 3} of the car and called the police.
>
> The same evening, three men, Harry Gadson, and defendants [Petitioner] and [Petitioner's co-defendant] McFadden, were also driving around in South Philadelphia. Mr. Gadson relayed that at some point when the three rode around, defendant McFadden instructed [Petitioner] to pull over and park at 17th and Federal Streets. [Petitioner] parked the car and Defendant McFadden got out and ran toward

> the parked Caprice. When Mr. Gadson asked [Petitioner] where defendant McFadden was going, [Petitioner] said that McFadden was going to "merk" Mr. Davis, meaning that he was going to murder Mr. Davis. Mr. Gadson then heard a series of gunshots and about one minute later, defendant McFadden returned to [Petitioner's] car. Defendant McFadden, while bragging about killing Davis, racked his gun to show it was empty. After [Petitioner] drove away, they rode around for approximately 15-20 minutes and then dropped off Mr. Gadson.
>
> Rahjai Black, an acquaintance of the defendants from the neighborhood, saw and altercation between Mr. Gadson and defendant McFadden ensue because defendant McFadden was angry that Mr. Gadson was "telling his business." On more than one occasion,**{2019 U.S. Dist. LEXIS 4}** defendant McFadden told Mr. Black that he followed Mr. Davis, put on a mask and shot him several times in the chest and head. According to Mr. Black, defendant McFadden often bragged about killing Mr. Davis, but was angry at Mr. Gadson for telling other people about this incident because it was not his business. Mr. Black also testified that defendant McFadden mentioned that he had been paid to kill Mr. Davis.*Commonwealth v. Bishop*, No. 343 EDA 2004, slip op. at 1-3 (Pa. Super. Ct. July 22, 2005), SCR No. D4.

Petitioner was charged with criminal conspiracy to commit murder, first-degree murder, and possession of an instrument of a crime (PIC). (Crim. Docket at 5-6). On November 12, 2003, following a joint trial, a jury convicted Petitioner and his co-defendant McFadden of first-degree murder and criminal conspiracy to commit murder. (Crim. Docket at 7-9; N.T., Trial, 11/12/2003, at 5:8-7:5). Petitioner was found not guilty on the PIC charge. (*Id.*). On January 9, 2004, Petitioner was sentenced to a term of life imprisonment for the first-degree murder conviction, with a concurrent sentence of 10 to 20 years' imprisonment for the criminal conspiracy. (Crim. Docket at 10-11).

Petitioner timely appealed his judgment of sentence. (Notice of Appeal, SCR No. D2; *see also Bishop*, No. 343 EDA 2004,**{2019 U.S. Dist. LEXIS 5}** slip op., SCR No. D4 (Pa. Super. Ct. July 22, 2005)). Petitioner claimed: (1) the trial court erred by excluding hearsay evidence; (2) the trial court violated his rights under the Confrontation Clause; (3) there was insufficient evidence to support his convictions; and (4) the prosecutor committed misconduct in her closing argument. (*Id.* at 3). On July 22, 2005, the Superior Court affirmed Petitioner's judgment of sentence. (*Id.* at 6). Petitioner did not file a petition for allowance of appeal with the Pennsylvania Supreme Court. (*See* Crim. Docket).

On July 21, 2006, Petitioner filed a petition pursuant to Pennsylvania's Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541, *et seq.* (Crim. Docket at 14; Pet'r's PCRA Pet., SCR No. D6). The PCRA Court appointed counsel, who filed an Amended PCRA Petition. (Crim. Docket at 14; Pet'r's Am. PCRA Pet., SCR No. D7). On October 22, 2007, the PCRA Court granted the Amended PCRA Petition "limited to the failure of counsel to file a petition for allowance of appeal. [Petitioner] is permitted to file a petition for allowance of appeal [nunc] pro tunc, but must do so within 30 days." (Crim. Docket at 15). On April 22, 2008, the Pennsylvania Supreme Court denied the petition for allowance of appeal. *Commonwealth v. Bishop*, No. 659 EAL 2007, 597 Pa. 703, 948 A.2d 802 (Pa. 2008) (Table).

On January 26, 2009, Petitioner filed a subsequent**{2019 U.S. Dist. LEXIS 6}** *pro se* PCRA Petition. (Crim. Docket at 15). PCRA Counsel was appointed, who filed a Supplemental PCRA Petition. (*Id.* at 17). After numerous continuances, the Commonwealth filed a Motion to Dismiss the PCRA Petition. (*Id.*; Mot. Dismiss PCRA Pet., SCR No. D7A). On February 13, 2012, the PCRA Court issued its Rule 907 Notice, reasoning that "[t]he issues raised in your PCRA petition have no arguable merit or have been previously litigated." (Rule 907 Not., SCR No. D8; Crim. Docket at 18-19). Petitioner filed a *pro se* Response to the Rule 907 Notice. (Pet'r's Resp. to Not., SCR No. D10; Crim. Docket at 19). On March 14, 2012, the PCRA Court dismissed the petition. (Order, SCR No. D12; Crim. Docket at 20).

Petitioner appealed the PCRA Court's dismissal to the Superior Court. (Crim. Docket at 20; Notice of Appeal, SCR No. D13). On May 16, 2014, the Superior Court affirmed the PCRA Court's dismissal, concluding that "[Petitioner's] issues are patently without merit, with no support in the record or from other evidence, [thus], the PCRA court did not err in dismissing [Petitioner's] petition without a hearing." *Commonwealth v. Bishop*, No. 1205 EDA 2012, 2014 Pa. Super. Unpub. LEXIS 1216, 2014 WL 10920367, at *5 (Pa. Super. Ct. May 16, 2014).

On July 11, 2014, Petitioner filed another *pro se* PCRA Petition.[3] (Crim. Docket at 22; Pet'r's Third PCRA Pet., SCR No. D20). Counsel entered her

appearance and filed an amended PCRA Petition on January 26, 2015. (Crim. Docket at 22-23; Entry of Appearance, SCR No. D21; Am. PCRA Pet., SCR No.{2019 U.S. Dist. LEXIS 7} D23). On October 14, 2015, the PCRA Court issued its Rule 907 Notice because the "petition was untimely filed and no exception for the timeliness requirements apply." (Rule 907 Not., SCR No. D25). The PCRA Court dismissed the petition on November 16, 2015. (Order, SCR No. D26). Petitioner appealed to the Superior Court, (Notice of Appeal, SCR No. D27), who affirmed the dismissal on November 15, 2016, concluding the petition was untimely and that his ineffectiveness claim was unavailing. *Commonwealth v. Bishop*, 159 A.3d 586, 2016 WL 6778182, at *3 (Pa. Super. Ct. 2016).

On August 13, 2014, Petitioner filed the instant *pro se* petition for habeas corpus, raising the following seven claims for relief (recited verbatim):

> (1) Petitioner was Denied his Due Process Right to Present Evidence that the Commonwealth's only witness Against him Lied at the Preliminary Hearing.
>
> (2) Petitioner was Denied his Sixth Amendment Right to Confront the Commonwealth's Only Witness against him When the Trial Court Erred by Allowing his Preliminary Hearing Testimony to be Introduced at Trial.
>
> (3) Petitioner was Denied Due Process Because the Commonwealth Presented Insufficient Evidence to Support Conviction for First Degree and Conspiracy.
>
> (4) Petitioner was Denied his Right to Effective Assistance of Counsel in Violation{2019 U.S. Dist. LEXIS 8} of the Sixth and Fourteenth Amendments of the United States Constitution Where a Per Se Bruton Violation Occurred at his trial When his Co-Defendant's confession was Introduced Against his Co-Defendant and Petitioner's Name was Mentioned and Trial Counsel Failed to Object on the Grounds that a Curative Instruction Could not Remedy the Irreparable Harm to Petitioner's Right to Cross-Examination Secured by the Confrontation Clause.
>
> (5) Petitioner was Denied his Right to Effective Assistance of Counsel in Violation of the Sixth and Fourteenth Amendments of the United States Constitution where Trial Counsel Failed to Request Curative Instruction and or a Mistrial Where the Prosecutor's Remarks in Closing Vouched for the State's Witnesses Credibility and Argued Evidence Not in the Record.
>
> (6) Petitioner was Denied his Right to Effective Assistance of Counsel in Violation of the Sixth and Fourteenth Amendments of the United States Constitution when Trial Counsel Failed to Object to the Testimony of Officer Bunch as it Violated Pennsylvania Rules of Criminal Procedure 573, and Pennsylvania Rule of Evidence 403.
>
> (7) Petitioner was Denied Due Process and Equal Protection When the State Post Conviction Relief Act Procedures did not Comport with Due Process in Bringing Forth his Constitutional Claims.(Hab. Pet., ECF No. 1, App'x A).[4] The Honorable Juan R. Sanchez referred this matter to me for a Report and Recommendation. (Order,{2019 U.S. Dist. LEXIS 9} ECF No. 2). On September 10, 2014, Petitioner filed a Motion for Stay and Abeyance to exhaust his claims raised in his Third PCRA Petition filed on July 11, 2014. (Mot. Stay & Abeyance, ECF No. 4; *see also* Pet'r's Third PCRA Pet., SCR No. D20). The stay was granted for Petitioner to exhaust his claims raised in this Third PCRA Petition in state court. (Order, ECF No. 9).

After Petitioner's third PCRA proceedings resolved, the stay was lifted. *Bishop*, 159 A.3d 586, 2016 WL 6778182; (Order, ECF No. 12). The Commonwealth filed a Response to the Petition, and Petitioner filed a Reply. (Resp., ECF No. 22; Pet'r's Reply, ECF No. 26). This matter is now ripe for disposition.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. . *See* 28 U.S.C. § 2254. Pursuant to AEDPA:

> 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 unless it appears that-
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there{2019 U.S. Dist. LEXIS 10} is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of applicant.28 U.S.C. § 2254(b)(1). The

exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petition must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis to the state courts). A state prisoner exhausted state remedies by giving the "state courts one fully opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The{**2019 U.S. Dist. LEXIS 11**} habeas petition bears the burden of proving exhaustion of all state remedies. *Boyd v. Waymart*, 579 F.3d 330, 367 (2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 159-60. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557-59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739-40. A state rule{**2019 U.S. Dist. LEXIS 12**} is "adequate" for procedural default purposes if it is "firmly established and regularly followed." *Johnson v. Lee*, __U.S.__, 136 S. Ct. 1802, 1804, 195 L. Ed. 2d 92 (2016) (*per curiam*) (citation omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005), and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Id.* at 708.

Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.*Edwards v. Carpenter*, 529 U.S. 446, 452-53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for{**2019 U.S. Dist. LEXIS 13**} the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman*, 501 U.S. at 750. To demonstrate cause and prejudice, the petitioner must show some objective factor external

to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

B. Merits Review

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*, 228 F.3d at 196. Pursuant to 28 U.S.C. § 2254(d), as amended by 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 unreasonably application of, "clearly established Federal law, as determined by the Supreme Court of the 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,**{2019 U.S. Dist. LEXIS 14}** 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 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 form [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 (citing *Williams*, 529 U.S. at 388-89). "In further delineating the 'unreasonable application' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and that a federal habeas court may not grant relief unless that court determines**{2019 U.S. Dist. LEXIS 15}** 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

Petitioner raises seven claims for relief. (Hab. Pet., ECF No. 1, at App'x A; Reply, ECF No. 26). I will address each in turn. I conclude that Petitioner's Grounds One, Four, Five, and Six are procedurally defaulted. I also find that the Pennsylvania courts reasonably rejected Petitioner's Ground Two and Three. Lastly, I find that Petitioner's Ground Seven is not cognizable on habeas review. Accordingly, as fully explained below, I respectfully recommend that the petition be denied.

A. Ground One: Due Process Claim Regarding Hearsay Evidence

Petitioner first contends that his due process rights were violated because the trial court prohibited hearsay evidence from his co-defendant McFadden's parents about an alleged conversation with an unavailable Commonwealth witness, Harry Gadson. (Hab. Pet., ECF No. 1, at App'x A). Gadson was the third individual in Petitioner's car with Petitioner and McFadden at the time of the shooting. (N.T., Trial, 11/06/03, at 61:19-88:7). He testified at a preliminary hearing, but the Commonwealth could not locate**{2019 U.S. Dist. LEXIS 16}** him for trial. (*Id.*; N.T., Trial, 11/05/03, at 120:19-135:2). McFadden's parents would have testified that "Gadson approached them several months after he testified at the preliminary hearing and apologized to them for testifying against their son, stating that the police forced him to do so." *Bishop*, No. 343 EDA 2004, slip op. at 3-4, SCR No. D4. The trial court precluded the evidence "because such testimony would have been hearsay not subject to an exception." (Trial Ct. Rule Op., at 8 n.7 (Phila. Cnty. Com. Pl. Mar. 11, 2004), SCR No. D3). Petitioner asserts the trial court's decision to preclude the hearsay evidence from his co-defendant's parents violated his due process rights. (Hab. Pet., ECF No. 1, at App'x A).

The Commonwealth responds that Petitioner's Ground One is unexhausted and procedurally defaulted. (Resp., ECF No. 22, at 12-13). The Commonwealth also argues that, even if Petitioner's

claim were not defaulted, it would not warrant relief because Petitioner has not shown any error by the trial court in precluding the hearsay evidence. (*Id.* at 13-14).

As noted above, a petitioner must exhaust his federal constitutional claims in state court before raising them in a federal habeas petition. 28 U.S.C. § 2254(b)(1); *Castille*, 489 U.S. at 349; *Rose*, 455 U.S. at 518.**{2019 U.S. Dist. LEXIS 17}** A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process," which in Pennsylvania includes through the Superior Court. *O'Sullivan*, 526 U.S. at 845; *Lambert*, 387 F.3d at 233-34. The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 165-66. A federal court is precluded from reviewing the merits of a procedurally defaulted claim if the state courts would rely on an independent and adequate state ground to foreclose review of the federal claim. *Beard*, 558 U.S. at 53.

Petitioner's due process claim regarding the hearsay evidence is unexhausted and procedurally defaulted. I therefore respectfully recommend his request for relief on this basis be denied. His claim is unexhausted because he never presented it to the state courts. He appealed his judgment of sentence. (Notice of Appeal, SCR No. D2). He raised four claims on appeal, but none asserted that his due process rights were violated because of the trial court's decision to exclude his co-defendant's parent's hearsay testimony. (*Bishop*, No. 343 EDA 2004, slip op. at 3, SCR No. D4 (quoting Pet'r's Appellant's Brief)). Because Petitioner**{2019 U.S. Dist. LEXIS 18}** did not present his claim to the state courts, it is unexhausted. *See, e.g., O'Sullivan*, 526 U.S. at 845; *Einhorn v. Cameron*, No. 15-2139, 2017 U.S. Dist. LEXIS 115016, 2017 WL 7052177, at *9 (E.D. Pa. July 20, 2017) ("[Petitioner] did not present this claim to the state courts and consequently, it is unexhausted.").

Petitioner's claim is procedurally defaulted because he would now be precluded by Pennsylvania's waiver rule, 42 Pa.C.S. § 9544(b),[5] from exhausting his claim. The waiver rule codified at § 9544(b) is an independent and adequate state rule which bars federal habeas review. *See, e.g., Williams v. DelBaso*, No. 18-2452, 2018 U.S. Dist. LEXIS 176780, 2018 WL 7683672, at *10 (E.D. Pa. Oct. 12, 2018) ("The Third Circuit has found the waiver rule in § 9544(b) to be an independent and adequate state ground for the purposes of the procedural default doctrine." (citing *Patton v. Sup't Graterford SCI*, 2017 U.S. App. LEXIS 23928, 2017 WL 5624266, at *1 (3d Cir. 2017) ("[T]he state court's reliance on 42 Pa. Cons. Stat. § 9544(b) provides an independent and adequate ground to support the judgment."))); *Reeve v. Luther*, No. 17-4220, 2018 U.S. Dist. LEXIS 82577, 2018 WL 3750973, at *4 (E.D. Pa. May 15, 2018) ("Waiver under § 9544(b) has been found to constitute an independent and adequate procedural ground which bars federal habeas review." (citing *Williams v. Sauers*, No. 12-102, 2014 U.S. Dist. LEXIS 182386, 2015 WL 787275, at *14 (E.D. Pa. Feb. 25, 2015), *Holloway v. Horn*, 161 F. Supp. 2d 452, 476 (E.D. Pa. 2001))); *Ferguson v. Cameron*, No. 14-3257, 2017 U.S. Dist. LEXIS 64892, 2017 WL 2273183, at *4 (E.D. Pa. Apr. 27, 2017), *report and recommendation approved*, No. 14-3257, 2017 U.S. Dist. LEXIS 79426, 2017 WL 2264676 (E.D. Pa. May 24, 2017) (due process claim defaulted under 42 Pa. Cons. Stat. § 9544(b) when it was available, but not presented, on direct review).[6]

Because Petitioner's claim is procedurally defaulted, the Court may not review the merits unless Petitioner has established cause and prejudice, or a fundamental miscarriage of justice, to excuse the**{2019 U.S. Dist. LEXIS 19}** procedural default. *Edwards*, 529 U.S. at 451; *Coleman*, 501 U.S. at 750. Petitioner does not argue either exception, thus he has failed to make the requisite showing.[7] I conclude that Petitioner has not demonstrated an exception to excuse the procedural default on his Ground One, and I respectfully recommend his request for relief on this basis be denied.

B. Ground Two: Confrontation Clause Claim Regarding Gadson Testimony

Petitioner next argues his rights under the Sixth Amendment's Confrontation Clause were violated. (Hab. Pet., ECF No. 1, at App'x A). Specifically, he contends Gadson's "preliminary hearing testimony was allowed to be read into the record at trial in violation of Petitioner's right to confrontation. The State never displayed a good faith effort in attempting to secure Mr. Gadson's presence at trial." (*Id.*). The Commonwealth responds that the Pennsylvania courts "reasonably rejected this claim as meritless." (Resp., ECF No. 22, at 14-15).

The Sixth Amendment's Confrontation Clause provides that a defendant shall be "confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause prevents the "admission

of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

The Pennsylvania{**2019 U.S. Dist. LEXIS 20**} state court provided the following summary of Gadson's unavailability hearing and adjudication of Petitioner's Confrontation Clause claim:

> The prosecution requested an unavailability hearing, outside of the jury's presence, to establish the considerable efforts made to locate Mr. Gadson for trial. The Commonwealth called three witnesses, each testifying that they had made substantial efforts to locate Mr. Gadson.
>
> At the unavailability hearing, Detective Pirrone testified that he had been attempting to locate Mr. Gadson for over a month, but was unable to do so. He explained that he had spoken with Mr. Gadson on the telephone and Mr. Gadson said he was living in Norristown. Detective Pirrone was able to speak with Faith Norris, the grandmother of Cierra Hernandez, Mr. Gadson's girlfriend. She explained that she threw Cierra out of her house several months ago and had not seen her or Mr. Gadson since.
>
> Detective Pirrone also spoke with the Norristown Police, but they were unable to help him locate Mr. Gadson. Bidia Hayman, [Petitioner's] sister, also told Detective Pirrone she had not seen him in some time. On November 3, 2003, Detective Pirrone spoke on the telephone with Mr. Gadson. At that time, Mr. Gadson{**2019 U.S. Dist. LEXIS 21**} agreed that he would give Detective Pirrone an address where he could pick him up for the trial, but Mr. Gadson never called back with the information.
>
> Detective Centeno and Officer Abadie also testified at the unavailability hearing that they tried to locate Mr. Gadson for the trial. Detective Centeno explained that on November 5, 2003, he went to 11 different motels in Northeast . Philadelphia looking for Mr. Gadson, but was unable to find him. Officer Abadie explained that on November 5, 2003, he went to the Days Inn on Roosevelt Boulevard in Northeast Philadelphia. Officer Abadie spoke with the general manager and cleaning people at the Days Inn who said they had seen Mr. Gadson, but that Mr. Gadson left the hotel before Officer Abadie arrived. This credible evidence supports the Court's determination that Mr. Gadson was unavailable for trial.
>
> Further, this Court's determination of Mr. Gadson's unavailability and that his earlier testimony could be admitted was proper pursuant to *Commonwealth v. Bazemore*, 531 Pa. 582, 614 A.2d 684 ([Pa.] 1992).
>
> "[I]t is well established that an unavailable witness' prior recorded testimony from a preliminary hearing is admissible at trial and will not offend the right of confrontation, provided the defendant had{**2019 U.S. Dist. LEXIS 22**} counsel and a full opportunity to cross-examine that witness at the prior proceeding."*Id.* at 585, 586.
>
> Here, permitting Mr. Gadson's testimony from the preliminary hearing to be read was proper because (1) Mr. Gadson was under oath when he testified about Mr. Davis' murder and (2) both defendants were represented by counsel who each had a full and fair opportunity to cross-examine Mr. Gadson at the preliminary hearing. Therefore, it was well within this Court's discretion to allow the Commonwealth to have Mr. Gadson's preliminary hearing testimony read to the jury.(*Bishop*, Trial Ct. Op. at 8-10 (Phila. Cnty. Com. Pl. Mar. 11, 2004), SCR No. D3) (internal citations and footnote omitted).[8]

I find no error with the state court's adjudication of Petitioner's Confrontation Clause claim, and I thus respectfully recommend relief on this basis be denied. The Pennsylvania court's adjudication was neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). The Sixth Amendment's Confrontation Clause prohibits "the introduction of testimonial statements by a non-testifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Ohio v. Clark*, 135 S. Ct. 2173, 2179, 192 L. Ed. 2d 306 (2015) (quoting *Crawford*, 541 U.S. at 54). Here, as the state courts{**2019 U.S. Dist. LEXIS 23**} found, Gadson was unavailable to testify, and Petitioner had an opportunity to cross-examine Gadson at the preliminary hearing. Thus, his prior testimony was permissibly read into the record. The Pennsylvania courts' adjudication of Petitioner's claim falls squarely within clearly established federal law, and I recommend relief on this basis be denied. *See, e.g., Kelly v. Wenerowicz*, No. 13-4317, 2015 U.S. Dist. LEXIS 170259, 2015 WL 11618244, at *11 (E.D. Pa. Dec. 18, 2015), *report and*

recommendation adopted, No. 13-4317, 2016 U.S. Dist. LEXIS 108162, 2016 WL 4386083 (E.D. Pa. Aug. 15, 2016) ("T]he Supreme Court in *Crawford* accepted the notion that prior testimony subjected to cross-examination at a preliminary hearing 'provides substantial compliance with the purposes behind the confrontation requirement[.]'"); *see also Richardson v. Kerestes*, No. 15-4687, 2017 U.S. Dist. LEXIS 84972, 2017 WL 6626731, at *11-12 (E.D. Pa. May 31, 2017) (finding state court reasonably denied Confrontation Clause claim regarding preliminary hearing testimony where individual was unavailable and petitioner had opportunity to cross-examine); *Saget v. Bickell*, No. 12-2047, 2014 U.S. Dist. LEXIS 142348, 2014 WL 4992572, at *18 (E.D. Pa. Oct. 6, 2014) (collecting cases and noting "[a]round the country, courts exercising habeas review under *Crawford* have permitted admission of preliminary hearing testimony of a witness unavailable to testify at trial if there was an adequate opportunity to cross-examination during that proceeding").

C. Ground Three: Sufficiency of the Evidence Claim

Petitioner next contends his due process rights were violated**{2019 U.S. Dist. LEXIS 24}** because the Commonwealth presented insufficient evidence to sustain his convictions. (Hab. Pet., ECF No. 1, at App'x A). The Commonwealth responds that the Pennsylvania courts reasonably rejected this claim because the evidence "was more than sufficient to support the jury's verdict." (Resp., ECF No. 22 at 17).

The established federal law governing this claim was determined in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). When a habeas petitioner challenges the sufficiency of evidence underlying a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). The habeas court must examine the evidence "with reference to 'the substantive elements of the criminal offense as defined by state law.'" *Eley v. Erickson*, 712 F.3d 837, 848 (3d Cir. 2013) (quoting *Jackson*, 443 U.S. at 324). However, "the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 651, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012). A reviewing court may not substitute its judgment for that of the jury. *Jackson*, 443 U.S. at 318-19. The court must defer to the jury's findings regarding witness credibility, resolving conflicts of evidence, and drawing reasonable inferences**{2019 U.S. Dist. LEXIS 25}** from the evidence. *Id.* at 319. If, upon review of the evidence, the court finds that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," then habeas relief is appropriate. *Id.* at 324.

The Pennsylvania courts applied the following standard in addressing Petitioner's claim:

> In reviewing the sufficiency of the evidence, this Court must determine whether all evidence and reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, were sufficient to establish all elements of a crime beyond a reasonable doubt. Circumstantial evidence can itself be sufficient to prove any element, or all the elements of a crime.(*Bishop*, Trial Ct. Op. at 5 (Phila. Cnty. Com. Pl. Mar. 11, 2004), SCR No. D3) (citing *Commonwealth v. Hagan*, 539 Pa. 609, 654 A.2d 541, 543 (Pa. 1995)). The Third Circuit has explained that the Pennsylvania sufficiency of the evidence standard is consistent with the federal standard in *Jackson. See Eley*, 712 F.3d at 848. Therefore, the state court did not apply a standard "contrary to" clearly established federal law. 28 U.S.C. § 2254(d)(1). Accordingly, habeas relief is appropriate only if Petitioner demonstrates the state court's decision was based on an unreasonable application of *Jackson* or involved an unreasonable**{2019 U.S. Dist. LEXIS 26}** determination of the facts. *Id.* § 2254(d)(1)-(2).

The state court provided the following adjudication of Petitioner's sufficiency claim:

> In the case at bar, the evidence admitted at trial was clearly sufficient to support a verdict of murder in the first degree. To obtain a conviction for first degree murder, the Commonwealth must prove beyond a reasonable doubt that the defendant acted with a specific intent to kill, that a human being was unlawfully killed, that the defendant did the killing and that the killing was done with deliberation. The Pennsylvania Supreme Court has held that the use of a deadly weapon on a vital part of the body sufficiently establishes a specific intent to kill.
>
> The evidence here shows that this was an intentional and planned murder. The post mortem medical exam established that the

> decedent was shot several times in the face, neck and chest. The testimony established that it was, in fact, defendant McFadden who shot and killed the decedent and [Petitioner] who drove the car to locate and follow Mr. Davis. There was testimony indicating that defendant McFadden had been paid to kill Mr. Davis, thus showing McFadden's intention to do so. Further, the testimony indicated that{2019 U.S. Dist. LEXIS 27} defendant McFadden expressed his desire to kill Mr. Davis shortly before shooting him, and [Petitioner], after hearing this, continued driving defendant McFadden around to find, and eventually shoot Mr. Davis. This evidence shows that the defendants intended to kill Mr. Davis.
>
> In the case at bar, the evidence admitted at trial was also sufficient to support a conviction of criminal conspiracy. The record, as stated above, indicates that the defendants actively participated in criminal conduct together. "The least degree of concert of collusion is sufficient to sustain a finding of responsibility as an accomplice."
>
> Officer Yolanda Bunch, an officer assigned to the 4th District of Philadelphia for ten years, testified that she was very familiar with the community where defendants McFadden and [Petitioner] lived and that she had seen the two defendants together in the past. The testimony was that [Petitioner] drove defendant McFadden pursuing Mr. Davis and that [Petitioner] was well aware that defendant McFadden got out of the car with the stated intention to kill Mr. Davis. Further, [Petitioner] drove defendant McFadden away from the scene of the crime. This evidence indicates that the{2019 U.S. Dist. LEXIS 28} defendants acted in concert and that both actively participated in killing the decedent.(*Bishop*, Trial Ct. Op. at 5-8 (Phila. Cnty. Com. Pl. Mar. 11, 2004), SCR No. D3) (internal citations omitted).

The state court's decision reasonably applied *Jackson* and did not involve an unreasonable determination of the facts. I respectfully recommend Petitioner's request for relief on this basis be denied. 28 U.S.C. § 2254(d). The state court reasonably determined that the Commonwealth presented sufficient evidence at trial to sustain the convictions for first degree murder, 18 Pa.C.S. § 2502;[9] and criminal conspiracy, 18 Pa.C.S. § 903.[10] The evidence presented at trial showed that, on the night in question, Petitioner drove co-defendant McFadden around looking for the decedent Davis, knowing that McFadden intended to kill Davis. (N.T., Trial, 11/06/03, at 63:9-64:22, 65:5-16). Upon seeing Davis, McFadden instructed Petitioner to follow him, which Petitioner did for multiple blocks. (*Id.* at 66:6-20, 67:5-11). Once Davis parked his car, McFadden told Petitioner to park up the street, and McFadden exited the car. (*Id.* at 67:12-18). After McFadden exited the car, Petitioner informed Gadson that McFadden was going to murder Davis. (*Id.* at 71:9-17). Multiple{2019 U.S. Dist. LEXIS 29} shots were fired, McFadden returned to Petitioner's car, and showed his empty gun. (*Id.* at 67:19-69:6). Petitioner drove away and continued driving with McFadden and Gadson for approximately fifteen minutes after the shooting. (*Id.* at 69:7-21).

In light of this evidence presented at trial, a rational trier of fact could find that Petitioner knew McFadden intended to murder Davis and agreed to facilitate the murder by driving, locating, and following Davis. The state court reasonably concluded that sufficient evidence was presented to support each element of the crimes. Because Petitioner has not demonstrated the state court unreasonably applied *Jackson* or unreasonably determined the facts, I respectfully recommend his request for relief on this basis be denied. 28 U.S.C. § 2254(d)(1)-(2).

D. Grounds Four, Five, and Six: Ineffective Assistance of Counsel Claims

In Petitioner's Grounds Four, Five, and Six, he contends his counsel was ineffective for failing to object to, and request mistrials following, the introduction of various pieces of evidence at trial. (Hab. Pet., ECF No. 1, at App'x A). The Commonwealth responds that Petitioner's ineffectiveness claims are procedurally defaulted and meritless. (Resp.,{2019 U.S. Dist. LEXIS 30} ECF No. 22, at 17-22). I conclude Petitioner's ineffectiveness claims are procedurally defaulted. He asserts the procedural default is excused due to PCRA counsel's ineffectiveness under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). I find that Petitioner has not shown the procedural default is excused on his Grounds Four, Five, and Six under *Martinez*. Therefore, I respectfully recommend his request for relief on these grounds be denied.

Petitioner's Grounds Four, Five, and Six are unexhausted because Petitioner never presented these ineffectiveness claims to the state courts. *O'Sullivan*, 526 U.S. at 845; *Lambert*, 387 F.3d at 233-34. The claims are now procedurally defaulted because Petitioner would be barred by

Pennsylvania's waiver rule and the one-year PCRA statute of limitations from filing a PCRA petition and exhausting the claims in state court. 42 Pa.C.S. § 9544(b); 42 Pa.C.S. § 9545(b). Pennsylvania's waiver rule and the PCRA statute of limitations are independent and adequate state ground precluding federal habeas relief, *see, e.g., Whitney*, 280 F.3d at 251; *Williams*, 2018 U.S. Dist. LEXIS 176780, 2018 WL 7683672, at *10, unless Petitioner can establish an exception to excuse the procedural default.

Petitioner argues cause and prejudice to excuse the procedural default under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). He contends "[c]laims four (4), five (5), six (6) . . . were not presented to the state court due to post conviction relief{**2019 U.S. Dist. LEXIS 31**} act counsel's ineffectiveness." (Hab. Pet., ECF No. 1, at App'x A; *see also* Reply, ECF No. 26, at 7-23). I address each in turn and conclude Petitioner has failed to show the procedural default on Grounds Four, Five, and Six is excused under *Martinez*. Accordingly, I respectfully recommend his request for relief on these grounds be denied.

Martinez recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. To successfully invoke the *Martinez* exception, a petitioner must satisfy two factors: that the underlying, otherwise defaulted, claim of ineffective assistance of trial counsel is "substantial," meaning that it has "some merit," *id.* at 14; and that petitioner had "no counsel" or "ineffective" counsel during the initial phase of the state collateral review proceeding. *Id.* at 17; *see also Glenn v. Wynder*, 743 F.3d 402, 410 (3d Cir. 2014).

1. Ground Four's Procedural Default is not Excused under *Martinez*

The procedural default on Petitioner's Ground Four is not excused under{**2019 U.S. Dist. LEXIS 32**} *Martinez* because the underlying, procedurally defaulted, ineffectiveness claim is not "substantial." In Ground Four, Petitioner argues his trial counsel was ineffective for failing to object and request a mistrial during the testimony of Rahjai Black due to an alleged violation of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).[11] (Hab. Pet., ECF No. 1, App'x A). Black testified that McFadden bragged to him about killing Davis. (N.T., Trial, 11/04/03, at 161:2-163-14). Before Black testified, counsel and the trial court discussed limiting Black's testimony in accordance with *Bruton*. Specifically, Black's testimony was limited to what McFadden told Black about McFadden-he was not to mention McFadden's statements regarding Petitioner's involvement. (*Id.* at 10:2-11:12). On direct testimony, Black once referenced Petitioner:

> Q: Once Mr. McFadden saw the white car, what, if anything, did Mr. McFadden do? What did he tell you he did once he saw the car with Mr. Davis?
>
> A: He didn't do nothing. [Petitioner] drove.
>
> [Petitioner's Counsel]: Objection, Judge. Sidebar.
>
> [Sidebar conference:]
>
> [Petitioner's Counsel]: I would ask for a mistrial, Judge. He already said what happened. The guy told him he killed him. Now what did you see when you saw him{**2019 U.S. Dist. LEXIS 33**} in a car? There is no reason for him to be asked any questions about that, Judge.
>
> The Court: I thought you had cautioned him on that about [Petitioner], Ms. Ruiz?
>
> Ms. Ruiz: I did tell him that. He is not a lawyer, Judge. The point of the matter is, Judge, you tell a witness not to say something, they take that literally. He didn't follow him meaning because he wasn't driving. So all I ask is that you give a curative instruction.
>
> The Court: There will be other evidence, at least in Gadson's testimony, that [Petitioner] was driving?
>
> Ms. Ruiz: Absolutely.
>
> The Court: I will certainly caution the jury at this point. I will not grant a mistrial because there will be other testimony about that.
>
> . . .
>
> [Sidebar concludes:]
>
> The Court: Jurors, I want to caution you, what Mr. Black testifies what Mr. McFadden told him about himself, Mr. McFadden, you can take as evidence; however, anything that Mr. Black says that Mr. McFadden told him about anybody else, including [Petitioner], is not evidence in this case.
>
> It is strictly hearsay and is to be disregarded by you. There is no evidence as to [Petitioner] at this point from this witness at all. Keep that in

mind.

> Mr. Black's testimony is only relevant to Mr.{2019 U.S. Dist. LEXIS 34} McFadden. It is not relevant in any way, shape or form to [Petitioner]. It has nothing to do with [Petitioner.](N.T., Trial, 11/04/03, at 172:17-175:24).

I conclude Petitioner's procedurally defaulted Ground Four asserting ineffectiveness for failure to object and request a mistrial is not "substantial" under *Martinez*. Petitioner's counsel *did* object and *did* request a mistrial. (*Id.*). Petitioner has not demonstrated how trial counsel was ineffective for failing to do something that counsel did, in fact, do. *E.g., Swainson v. Varner*, No. 99-6480, 2002 U.S. Dist. LEXIS 2694, 2002 WL 241024, at *11 (E.D. Pa. Feb. 19, 2002) ("[B]ecause counsel did in fact object to the alleged hearsay statements, Petitioner cannot claim his counsel was ineffective for failing to do something which in fact he did do."). Accordingly, I conclude that Petitioner's underlying Ground Four is not "substantial" under *Martinez*, and the procedural default is not excused. Therefore, I respectfully recommend his request for relief on this basis be denied. *Harrison v. Wenerowicz*, No. 14-2114, 2017 U.S. Dist. LEXIS 126200, 2017 WL 8794941, at *14 (E.D. Pa. Aug. 8, 2017) (concluding procedurally defaulted ineffectiveness claim for alleged failure to object not "substantial" under *Martinez* because "trial counsel *did* object and *did* move for a mistrial."), *report and recommendation approved* 2018 U.S. Dist. LEXIS 63420, 2018 WL 1794535 (E.D. Pa. Apr. 16, 2018) (appeal docketed).

2. Ground Five's Procedural{2019 U.S. Dist. LEXIS 35} Default is not Excused under *Martinez*

Petitioner's procedurally defaulted ineffectiveness claim raised in Ground Five is not "substantial" within *Martinez*, thus the procedural default is not excused. In Ground Five, Petitioner contends his trial counsel was ineffective for deficient performance during the prosecutor's closing remarks. (Hab. Pet., ECF No. 1, App'x A). Petitioner contends that the prosecutor "vouched for the state's witnesses credibility and argued evidence not in the record" during closing arguments. (*Id.*) (Capitalizations omitted). He recognizes that "[c]ounsel objected" but argues that counsel was ineffective for "fail[ing] to request any remedial measure to dispel this assurance that the witnesses were truthful." (*Id.*).

Petitioner's underlying procedurally defaulted ineffectiveness claim is not "substantial" because counsel's performance did not fall below an "objective standard of reasonableness." *See Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 377 (3d Cir. 2018) ("In considering whether [petitioner's] claim is substantial, we are guided by the two-part *Strickland* analysis"); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (stating "the defendant must show that counsel's representation fell below an objective standard of reasonableness."). As Petitioner recognizes, counsel{2019 U.S. Dist. LEXIS 36} objected to the prosecutor's remarks. (N.T., Trial, 11/10/03, at 55:18-56:2, 56:25-58:12). The trial judge sustained each objection, and instructed the jury "[t]here is no evidence of that." (*Id.* at 55:25-56:2, 57:4-19, 58:12). Counsel did not perform deficiently in this regard.[12] *See, e.g., Lister v. Mooney*, No. 14-1915, 2017 U.S. Dist. LEXIS 163651, 2017 WL 5180829, at *4 (M.D. Pa. Oct. 2, 2017) (concluding that petitioner "has not established that his trial counsel's performance fell below an objective standard of reasonableness. As evinced by the record itself, trial counsel *did* object to the prosecutor's comment."). Because counsel did not perform unreasonably, Petitioner's Ground Five claim is not "substantial" within the meaning of *Martinez*. Accordingly, I respectfully recommend relief on this basis be denied.

3. Ground Six's Procedural Default is not Excused under *Martinez*

The procedural default on Petitioner's Ground Six is not excused under *Martinez* because his underlying claim is not "substantial." He argues counsel was ineffective "when trial counsel failed to object to the testimony of Officer Bunch as it violated Pennsylvania Rules of Criminal Procedure 573, and Pennsylvania Rule of Evidence 403." (Hab. Pet., ECF No. 1, App'x A).

Officer Bunch testified at trial in two respects. (N.T., Trial, 11/05/03, at{2019 U.S. Dist. LEXIS 37} 75:4-87:11). She first testified that she worked a case involving the shooting of Amir Hutchings, the son of Omar Hutchings. (*Id.* at 76:6-77:9, 78:2-18). McFadden claimed Omar Hutchings paid him $10,000 to kill Davis. (N.T., Trial, 11/04/03, at 162:9-163:6; N.T., Trial, 11/06/03, at 71:3-17). Officer Bunch also testified that, in the ten years she worked in Philadelphia's 4th Police District, she had observed Petitioner and McFadden together "[e]very so often," and had observed Petitioner, McFadden, and Omar Hutchings together. (N.T., Trial, 11/05/03, at 77:10-78:7).

Before Officer Bunch's testimony, Petitioner's

counsel requested an offer of proof and contended Officer Bunch's testimony should prohibited because of its prejudicial value. (*Id.* at 70:17-73:25). He argued:

> First of all, the connotation this woman knows them is that she knows them because she got her eye on them, I guess, for some criminal activity. That prejudice certainly overrides any value that they know each other.
>
> It has already been on the record that they know each other. The first guy who testified said they know each other. To have a police officer say I ride around, I always see them, it is like she is watching{**2019 U.S. Dist. LEXIS 38**} them. I don't think it is necessary. I think it is too highly prejudicial.(*Id.* at 71:24-72:12). The trial court disagreed, and permitted Officer Bunch's testimony. (*Id.* at 73:17-18; *see also id.* 75:4-87:6).

The procedural default on Petitioner's Ground Six is not a "substantial" claim of ineffectiveness. Thus, the procedural default is not excused under *Martinez*. Petitioner argues "trial counsel failed to object on the proper grounds," but, does not indicate what those proper grounds are. (Hab. Pet., ECF No. 1, App'x A). Further, as the trial record shows, Petitioner's counsel contested Officer Bunch's testimony and argued it should be barred as prejudicial. (*Id.*). "It is not ineffective assistance of counsel if counsel did raise the objection but it is overruled by the court." *United States v. Brown*, 2003 U.S. Dist. LEXIS 1928, 2003 WL 277256, at *4 (D. Del. 2003) (citing *Strickland*, 466 U.S. at 676-77). Petitioner has not shown his Ground Six-ineffectiveness for failure to object to Officer Bunch's testimony-is "substantial" because counsel in fact objected to the complained-of testimony.[13] *See, e.g., Hartey v. Vaughn*, 186 F.3d 367, 373-74 (3d Cir. 1999) (concluding counsel was not ineffective for alleged failure to object because "the trial transcript shows that [petitioner's] counsel did object."); *Wyatt v. Diguglielmo*, No. 04-148, 2005 U.S. Dist. LEXIS 8581, 2005 WL 1114350, at *7 n.14 (E.D. Pa. May 10, 2005) (discussing argument that counsel was ineffective{**2019 U.S. Dist. LEXIS 39**} for failing to object to admission of evidence and concluding "trial counsel was not ineffective, because he did object to the letter's admission.").

Accordingly, I conclude the procedural default on Ground Six is not excused under *Martinez*, and respectfully recommend relief on this basis be denied.

E. Ground Seven: PCRA Counsel's Ineffectiveness

In his last claim, Petitioner contends his due process and equal protection rights were violated because of his PCRA counsel's alleged ineffective representation. (Hab. Pet., ECF No. 1, App'x A). The Commonwealth responds that this claim is procedurally defaulted because it was never presented in the state courts, and further contends that the claim is noncognizable on habeas review. (Resp., ECF No. 22, at 23-24).

To the extent Petitioner raises a freestanding claim of PCRA counsel's ineffectiveness, I respectfully recommend relief on that basis be denied.[14] The habeas statute specifically provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Accordingly, claims of PCRA counsel ineffectiveness are not cognizable{**2019 U.S. Dist. LEXIS 40**} on federal habeas review. *See Martel v. Clair*, 565 U.S. 648, 662 n.3, 132 S. Ct. 1276, 182 L. Ed. 2d 135 (2012) ("[M]ost naturally read, § 2254(i) prohibits a court from granting substantive habeas relief on the basis of lawyer's ineffectiveness in post-conviction proceedings . . . ."); *Jordan v. Superintendent Somerset SCI*, No. 16-4091, 2017 U.S. App. LEXIS 27045, 2017 WL 5564555, at *1 (3d Cir. Feb. 15, 2017) ("[C]laims alleging ineffective assistance of PCRA counsel are non-cognizable in federal habeas, 28 U.S.C. § 2254(i).").

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that the petition for writ of habeas corpus be denied. I conclude that Petitioner's Grounds One, Four, Five, and Six are procedurally defaulted. I also conclude that the state court reasonably rejected Petitioner's Ground Two and Three. Lastly, I conclude that Petitioner's Ground Seven is not cognizable on habeas review.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW this 5th day of June, 2019, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without an evidentiary hearing and 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{2019 U.S. Dist. LEXIS 41} JUDGE

UNITED STATES DISTRICT COURT OF THE THIRD CIRCUIT / 2019 / 2019 U.S. Dist. LEXIS 95986::Bishop v. Luther::June 5, 2019 / Footnotes

Footnotes

1 Rule 2(a) of the Rules Governing Section 2254 cases requires that "if the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody." Petitioner named "Jon Fisher" as Respondent, the Superintendent of SCI Smithfield at the time he filed the petition. Since that time, Superintendent Jamey Luther has taken over as Superintendent of SCI Smithfield. As Petitioner is proceeding pro se, I will construe his petition liberally and direct the Clerk of Court to revise the caption with Jamey Luther, Superintendent, SCI Smithfield.
2

Respondents have submitted the state court record ("SCR") in hard-copy format. Documents contained in the SCR will be cited as "SCR No. D __." The Court has also consulted the Philadelphia Court of Common Pleas criminal docket sheets for Petitioner's underlying criminal case in *Commonwealth v. Bishop*, No. CP-51-CR-1208991-2002, (Phila. Cnty. Com. Pl.), *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-1208991-2002&dnh=Vv0GLnGloFZEeLC1PpPv5A%3d%3d (last visited June 5, 2019) [hereinafter "Crim. Docket"].
3

As noted *infra*, the Court stayed Petitioner's habeas for him to exhaust his claims raised in this July 11, 2014 PCRA Petition. (Pet'r's Mot. Stay, ECF No. 4; Order, ECF No. 9).
4

Petitioner submitted an attached "Appendix A" to the standard form § 2254 Habeas Petition where he listed his Grounds for Relief and facts supporting his claims.
5

42 PA. CONS. STAT. § 9544(b) provides: "For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."
6

Petitioner would also now be barred by the one-year PCRA statute of limitations from exhausting this claim in state court, which is an independent and adequate state rule precluding federal habeas review of his claim. *See, e.g., Roman v. Nish*, 08-3351, 2009 U.S. Dist. LEXIS 128048, 2009 WL 1117285, at *8 n.14 (E.D. Pa. Apr. 24, 2009) (noting that "the PCRA's one-year statute of limitations . . . constitutes an 'independent and adequate state procedural rule' which precludes habeas relief.") (citing *Veal v. Myers*, 326 F. Supp. 2d 612, 618 (E.D. Pa. 2004)); *see also Whitney v. Horn*, 280 F.3d 240, 251 (3d Cir. 2002) ("It is now clear that this one-year [PCRA] limitation is a jurisdictional rule that precludes consideration of the merits of any untimely PCRA petition.").
7

Assuming *arguendo* Petitioner's Ground One was not procedurally defaulted, he has not shown how his due process rights were violated. McFadden's mother testified at trial that Gadson approached her and "said if I could get him [McFadden's] lawyer's number. He wanted to talk to the lawyer, so he could straighten out the information that was given at the preliminary hearing." (N.T., Trial, 11/06/03, at 124:7-10; *see also id.* at 120:10-127:23). The prosecutor objected on hearsay grounds when she sought to testify about the contents of the conversation. (*Id.* at 122:22-123:5 ("He approached me and said -- . . . Objection to what he said.")). Petitioner has not shown how his due process rights were violated by the trial court's decision to sustain a proper hearsay objection. Accordingly, even if his Ground One were not procedurally defaulted, relief would not be warranted.
8

Federal habeas courts review the "'last reasoned decision' of the state courts in the AEDPA context." *Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008). The Pennsylvania Superior Court adopted the trial court's opinion in adjudicating this claim, so I will review the reasoning of the trial court. (*Bishop*, No. 343 EDA 2004, slip op. at 5 (Pa. Super. Ct. July 22, 2005), SCR No. D4 (adopting trial court's reasoning on Confrontation Clause claim)).
9

The statute provides "[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 "[k]illing by means of poison, lying in wait, or by any other kind of willful, deliberate, and premeditated killing." *Id.* § 2502(d).
10

A person is guilty of criminal conspiracy if, with the intent of promoting or facilitating its commission, he "agrees with such other person . . . that they or one or more of them will engage in conduct which constitutes such crime . . . ; or [] agrees to aid such other person . . . in the planning or commission of such crime." 18 PA. CONS. STAT. § 903(a)(1)-(2).
11

In *Bruton*, the Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's confession that incriminates the other co-defendant violates the second co-defendant's right to confrontation. 391 U.S. at 135-36.
12

Petitioner contends trial counsel was ineffective for not taking action beyond his sustained objections. He argues "trial counsel failed to request [a] curative instruction and or a mistrial" and that he "failed to request any remedial measure to dispel this assurance that the witnesses were truthful." (Hab. Pet., ECF No. 1, App'x A). In fact, the trial judge did dispel any assurances, instructing the jury "[t]here is no evidence" supporting the prosecutor's remarks. (N.T., Trial, 11/10/03, at 55:25-56:2). To the extent Petitioner claims counsel was ineffective for failing to request a mistrial, a mistrial is properly granted under Pennsylvania law when "the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial." *Commonwealth v. Jones*, 542 Pa. 464, 668 A.2d 491, 503 (Pa. 1995) (citing *Commonwealth v. Brinkley*, 505 Pa. 442, 480 A.2d 980, 986 (Pa. 1984)). The prosecutor's remarks did not rise to such a level, especially in light of trial counsel's objections and the trial court's instructions. Thus, trial counsel was not ineffective for failing to request a mistrial. *See United States v. Sanders*, 165 F.3d 248, 252 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument.").
13

Petitioner's counsel also requested a cautionary instruction after Officer Bunch's testimony. (*See* N.T., Trial, 11/05/03, at 86:17-18). The trial court instructed the jury that "the fact that it is Officer Bunch, a police officer who is called as someone from that community, who happens to work in that community, who knows the Defendants, doesn't mean they have done anything wrong and I just want to caution you about that. It just happens to be that she works there." (*Id.* at 86:23-87:6).
14

Petitioner lists this claim as his Ground Seven; however, he argues "Petitioner did not have the benefit of effective representation at the post conviction relief act stage which resulted in several of the claims asserted within the instant habeas petition to not have been exhausted in state court." (Hab. Pet., ECF No. 1, App'x A). He notes "[c]laims four (4), five (5), six (6), and seven (7) were not presented to the state court due to post conviction relief act counsel's ineffectiveness." (*Id.*). I have analyzed Petitioner's Ground Seven as asserting cause and prejudice under *Martinez* to excuse the procedural default on Grounds Four, Five, and Six-addressed *supra* Parts III.D.1-3-and as a freestanding claim here.