No. _____

IN THE

Supreme Court of the United States

LOUIS RODERICK OGDEN,

Petitioner,

—v.—

SUPERINTENDENT ERIC TICE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 27, 2020

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit Court of Appeals erred in denying the Petitioner's Certificate of Appealability?
2. Whether the District Court should have granted the Petitioner's Petition for Writ of Habeas Corpus?

PARTIES TO THE PROCEEDINGS

Louis Roderick Ogden, Petitioner

Superintendent Eric Tice, Pennsylvania State Correctional Institution at Somerset

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On January 28, 2020, the Third Circuit Court of Appeals entered its Notice of Judgment and Order in this matter denying the Petitioner's request for a Certificate of Appealability stating:

> "Petitioner's request for a certificate of appealability is denied because he has not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253 (c). Petitioner's claim that he was denied ineffective assistance of counsel lacks merit. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To the extent Petitioner raised independent claims of error in the state court PCRA proceedings, those claims are not cognizable. *See Lambert v. Blackwell*, 387 F.3d 210, 247 (3rd Cir. 2004). To the extent Petitioner raised other cognizable claims that are predicted on the ineffective assistance of counsel, those claims lack merit, as the District Court concluded. Finally, we note that Petitioner has presented new claims in his application for a certificate of appealability. To the extent that he thus requests permission to file a second or successive § 2254 petition pursuant to 28 U.S.C. § 2244, *see generally United States v. Santarelli*, 929 F.3d 95, 105-06 (3d Cir. 2019), we decline to grant permission because he does not meet the requirements of 28 U.S.C. § 2244 (b)(2)."

See Appendix 1.

The September 24, 2019 Order of Chief United States Magistrate Judge Susan E. Schwab of the United States District Court for the Middle District of Pennsylvania denying the Petitioner's request for a Certificate of Appealability is attached hereto as Appendix 2.

The August 20, 2019 Order and Memorandum April 11, 2017 Report and Recommendation of Chief United States Magistrate Judge Susan E. Schwab of the United States District Court for the Middle District of Pennsylvania denying the Petitioner's Petition for a Writ of Habeas Corpus is attached hereto as Appendix 3.

JURISDICTION

This Honorable Court has jurisdiction of this petition to review the judgment of United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254 (1).

On January 28, 2020, the Third Circuit Court of Appeals entered its Notice of Judgment in this matter denying the Petitioner's request for a Certificate of Appealability.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Constitution – Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution – Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Constitution – Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim–

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Louis Roderick Ogden is the Petitioner in the above matter. Mr. Ogden filed a Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a person in State Custody.

On August 20, 2019, Chief United States Magistrate Judge Susan E. Schwab of the United States District Court for the Middle District of Pennsylvania issued an Order denying the Petitioner's Petition for a Writ of Habeas Corpus. On September 24, 2019, Chief United States Magistrate Judge Susan E. Schwab issued an Order denying the Petitioner's request for a Certificate of Appealability.

On January 28, 2020, the United States Court of Appeals for the Third Circuit entered its Notice of Judgment and Order in this matter denying the Petitioner's request for a Certificate of Appealability.

The Petitioner Ogden was found guilty in State Court in Wayne County, Pennsylvania of Murder in the First Degree. He was sentenced to life imprisonment without the possibility of parole. The instant Petition involves Ogden's filing of a Petition for Writ of *Habeas Corpus* in the District Court, claiming errors of law committed by the trial court and that the Petitioner was denied the effective assistance of counsel, as guaranteed by Art. I, § 9 of the Pennsylvania Constitution and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

At the time of filing of the Habeas Corpus in the District Court and continuing to the present

date, the Petitioner has been a prisoner in custody in the Pennsylvania State Correctional Institution at Somerset, Pennsylvania.

The pertinent facts of Ogden's conviction are as follows. On June 20, 2014, the Petitioner was arrested and charged with homicide. Steven E. Burlein, Esquire, of the Wayne County Public Defender's Office, was appointed as counsel for Ogden and a jury trial was held on September 21, 2015 before the then President Judge, the Honorable Raymond Hamill (now Senior status). On September 22, 2015, the Petitioner, Louis Roderick Ogden, was convicted of First Degree Murder. Ogden, after the finding of guilty and conviction for the hereinbefore mentioned offense under the laws of Pennsylvania, was sentenced to undergo a term of "Life Imprisonment without the possibility of parole".

After the denial of the Petitioner's Motion for Post-Sentence Relief filed by Mr. Ogden's public defender, a direct appeal to the Superior Court was timely filed by the Petitioner/Defendant's instant private counsel, Andrew J. Katsock, III, Esquire, who was not retained by the Petitioner's family until after the conviction and sentencing of Mr. Ogden, and the lower Court's denial of the Defendant's Motion for Post-Sentence Relief. The Pennsylvania Superior Court affirmed the trial court's judgment of sentence on October 11, 2016. Ogden then filed a Petition in State Court pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"). Ogden's Petition under the PCRA was made within one (1) year of the denial of the Petitioner's final direct appeal. The Petition was first denied by the Trial Judge,

which denial was affirmed by both the Pennsylvania Superior and Supreme Courts.

The underlying facts in this case involve the scourge of heroin, the effects of which destroy families not only in urban areas, but even in those living among the farms and mountains of rural Wayne County. Not only were two (2) lives lost, 1) the victim, 20 year old Rebecca Pisell, *the niece of the Defendant*, and 2) Louis R. Ogden, the Defendant, who was sentenced to life in prison without the possibility of parole, but the entire family in this intra-family tragedy has been destroyed.

The Petitioner, Louis Roderick Ogden, then 51 years of age, was charged with homicide after the shooting death of his own niece, Rebecca Pisall, age 20, on June 20, 2014 at his South Canaan Township, Wayne County home. Both Ogden and Pisell were heroin drug addicts, with Ogden allegedly sometimes selling the drug to Pisell. The incident in question occurred after Pisell came into Ogden's home on the morning of June 20, 2014, having him awakened and ultimately confronting Ogden about an empty bag of heroin which she had purchased at Ogden's home from another person for a mere $60.00. Upon his awakening, Pisell demanded the return of the $60.00 that she had paid for the drugs while he was holding a .38 caliber revolver he kept under his couch cushion as he slept. One witness told police that Ogden told her he only meant to scare his niece by pointing the hand-gun at her but it "just went off". Ogden also told law enforcement he had only meant to scare his niece. Pisell was shot once in the head when the hand-gun was discharged, and the victim was hospitalized after

the shooting, but having shown no brain activity, and was taken off life support the following day.

On September 21, 2015, a Jury Trial was commenced in the Court of Common Pleas of Wayne County before the then President Judge Raymond L. Hamill, wherein seven (7) witnesses testified, only one (1) of whom witnessed the incident that resulted in Pisell's death, namely, Mary Langendorfer. No witnesses were called by defense counsel to testify in anyway on behalf of the Petitioner, Ogden.

Trooper Sharon Palmer, of the Pennsylvania State Police at Honesdale, testified at trial that Ogden told her that "he had gone to Philadelphia the night before for heroin and he had used 20 bags of heroin prior to coming home".

After the Commonwealth rested its case in chief, after consultation with his court-appointed attorney, Ogden informed the Court not only that he would not testify in his own defense, but that the defense would present no evidence. The Court conducted a short colloquy with the Defendant, on the record.

At the conclusion of the Trial, on September 22, 2015, *after deliberating for only 10 or 11 minutes, the jury returned a verdict of finding Louis Ogden guilty of first degree murder.* Wayne County former President Judge Raymond L. Hamill then sentenced the Petitioner to life in a state prison without parole immediately following the verdict.

On November 10, 2016, the Petitioner Ogden filed his Petition for Relief under Pennsylvania's Post-Conviction Relief Act. (R.R. p. 36a). On

April 21, 2017, the Wayne County Court of Common Pleas took testimony at an evidentiary hearing on Ogden's PCRA Petition. The first to testify was Steven E. Burlein, Esquire, the Chief Public Defender for Wayne County, who was an Assistant Public Defender at the time of Trial. Prior to the instant case, Attorney Burlein had never before tried a murder case. Other than the cross-examination of the Commonwealth's witnesses, Attorney Burlein did not present any testimony on behalf of Ogden at the time of Trial. Questioned as to why he did not present any testimony on behalf of Ogden, Attorney Burlein testified that "...our main witness would have been Louis Ogden and we had a concern as to how he would testify....(because)... he gave a quote to the effect that he would come off the stand and bite the prosecutor on her neck. So, we decided that would be inappropriate on the stand if he wasn't going to handle himself any better than that." Burlein admitted that he did not intend on calling any witnesses on behalf of the defense. Prior to Trial, Attorney Burlein received Court approval to hire Dr. Carla Rodgers in her capacity as a Psychiatrist on behalf of the defense regarding a possible intoxication defense. After Dr. Rodgers would not testify at Trial regarding her opinion as to a possible intoxication defense, Attorney Burlein was asked why he did not seek Court approval to appoint another psychiatrist on behalf of the defense; his response was that "I certainly considered that, but I figured we'd gone the road with a, a psychiatrist who had already given expert testimony in a triple homicide and was very well qualified and it just, it wasn't going to

get better if I asked for more funding for a different doctor". Even though he knew that the Commonwealth was calling a toxicologist to testify as to the lack of negative effects of narcotics in Ogden's system at the time of the shooting, Attorney Burlein admitted that he did not seek the appointment of a toxicologist "because I had, I had the psychiatrist." Attorney Burlein testified that he also received Court approval to hire James Sulima as a criminal investigator on behalf of the defense. In explaining not calling Sulima as a witness on behalf of the defense, Attorney Burlein testified that "...the sum total of the investigation produced negligible results. There was nothing positive that would help Mr. Ogden, or we would have used it."

Even though Ogden told Attorney Burlein that he had heavily ingested drugs the night before the shooting that occurred the following morning, which was corroborated by other witnesses, Attorney Burlein testified that "Actually, I would have liked to have him testify to, if nothing else, to humanize him for the jury, if I may use that term, but, it didn't seem that his testimony was going to go over well, with what he said to us in the back of the courtroom." Both Attorney Burlein and James Sulima admitted that Mr. Ogden told them that at the time of his confession/admissions to the State Police that he had ingested drugs that he had on his person in the bathroom of the State Police Barracks.

Asked why he did not call any character witnesses on behalf of Mr. Ogden, Attorney Burlein testified that "we didn't know of any after the investigation. We simply didn't know of

any." As to why he did not even call Ogden's parents as character witnesses, Attorney Burlein's response was "...I just didn't think they added anything to the case that would have helped, helped our client, other than he's our son, which I understand their feelings for him. But in terms of working in this case, as testimony, I didn't see it helping us." Asked as to his defenses to trying to get the first degree murder charge dropped to a lower degree of homicide, Attorney Burlein testified that "[m]y thinking was to show the jury that it was a split second reaction. That he was angered. That he jumped up off the couch and it happened. And that would have made it third degree murder which, in my mind, that's really what it is, but that's not the way the jury saw it." Attorney Burlein admitted that he did seek to secure a ballistics expert, even after Ogden told both him and the Court-Appointed Investigator Sulima, that the discharge of the weapon was an accident. When asked if he rendered competent representation to Mr. Ogden, Attorney Burlein testified: "I do, yes. I found this case extremely difficult simply because there was little, if nothing, of a defense to put forward".

James Sulima, the Criminal Investigator appointed for the defense, testified next, and admitted that Mr. Ogden told him "...that the gun accidently went off". Sulima also testified that Ogden told him that he was using heroin the night before the crime was committed. James Sulima further testified that Mr. Ogden told him that at the time of his confession/admissions to the State Police, that he had ingested drugs that he had on his person in the bathroom of the State

Police Barracks and that he could have testified at Trial regarding the Petitioner's statement. Sulima also admitted that witness, David Einsig, also told him that he used heroin the night before the crime with Mr. Ogden, and that he could have testified at Trial regarding the Einsig's statement.

The last witness to testify was Ashley Zimmerman, Esquire, an Assistant Public Defender who assisted Attorney Burlein in this Trial. Regarding the decision not to call Mr. Ogden to testify in his own defense at Trial, Attorney Zimmerman testified that: "After the Commonwealth had rested, we had a discussion with Mr. Ogden in the back room about whether he would be testifying, or not, whether he wished to testify. His statement was to ask if the District Attorney would be able to question him. We did advise him that the District Attorney would be able to question him, and at that time he said that if she did, he would rip her effing throat out. And so we decided that that was probably not a good idea, and he decided not to testify." When reminded that Ogden's ability to attack the District Attorney would be impossible in Court because of Court Security, Attorney Zimmerman stated: "I'm sure it would be impossible, but I don't think it would help his case if he was agitated with the District Attorney."

On June 26, 2017, the Court of Common Pleas of Wayne County, acting as the PCRA Court denied Ogden's Petition for Post-Conviction Relief. After appeal, the Pennsylvania Superior Court in *Commonwealth of Pennsylvania v. Louis Roderick Ogden,* 2315 EDA 2017 denied the

Petitioner's PCRA Appeal. Thereafter, on August 29, 2018, the Pennsylvania Supreme Court denied Ogden's timely-filed Petition for Writ of Allocatur.

REASONS FOR GRANTING THE PETITION

In the instant matter, the Petitioner sought the Third Circuit Court of Appeals to grant his application for a certificate of appealability under 28 U.S.C. § 2253 (c) (1). The Petitioner is a victim of the "life without parole" system—also known as death by incarceration—in Pennsylvania.

In *Slack v. McDaniel*, this Honorable Court held that where a habeas petitioner seeks to initiate an appeal of the dismissal of his petition, the right to appeal is governed by the requirements now found at 28 U.S.C. § 2253(c) which provides, *inter alia,* that such an appeal may not be taken unless a circuit Justice or judge issues a certificate of appealability (COA), § 2253(c)(1), and that the COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right. In the instant case, the District Court found, inter alia, that Mr. Ogden did not make a substantial showing of the denial of a constitutional right.

The Petitioner, Louis Roderick Ogden, states that the following points of law or fact were overlooked or misapprehended in the Court's denial of his application for a certificate of appealability:

(A) The Petitioner asserts that he has adequately proven his custodial status, as he

remains incarcerated in a Pennsylvania State Correctional Facility;

(B) The Petitioner asserts that he has adequately proven that he has exhausted the claims raised in the petition in State Court, through an appeal of the denial of his Post-Conviction Relief Act petition by the Pennsylvania Supreme Court;

(C) The Petitioner asserts that he has made a substantial showing of the denial of his constitutional rights and has raised of record, in both State and Federal Court.

28 U.S.C. 2254(d)(1) reads, in pertinent part, as follows:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States."

Where the Pennsylvania state court system makes findings of fact, and conclusions of law, the findings and conclusions will not be overturned unless they are "unreasonable." The term "unreasonable" means "some increment of incorrectness beyond error is required…however, the increment need not be great; otherwise habeas relief would be limited to state court decisions so far off the mark as to suggest

judicial incompetence." *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir. 2000).

Where, as here, the Pennsylvania state court system relies on "FACTS" not supported by the record, the district court should simply disregard the State court system and start from scratch. *Everett vs. Beard,* 290 F.3d 500, 508 (3d Cir. 2002). "When, as here, AEDPA does not apply for that reason, the pre-AEDPA standards of review apply."

Under that standard, a federal habeas court owes no deference to a state court's resolution of mixed questions of constitutional law and fact." *Id*. at 508 citing *Williams vs. Taylor,* 529 U.S. 362, 400, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Williams,* Justice O'Connor stated, "we have always held that federal courts, even on habeas, have an independent obligation to say what the law is" citing *Wright vs. West,* 505 U.S. 277, 305, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992). Here, the State court system's findings of fact are not supported by the record; as such, the state court's conclusions of law are not entitled to deferential review.

Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) established a two-pronged-test for evaluating claims of ineffective assistance based on inadequate legal assistance.

First, the petitioner must plead and eventually prove that the defense attorney made an error or errors. *Kimmehnan v. Morrison,* 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) states, "a single serious error may support a claim of ineffective assistance of counsel." The

Court added that "this single serious error" could cause counsel's performance to fall "below the level of reasonable professional assistance" even where "counsel's performance at trial was generally creditable enough," and even where counsel made "vigorous cross-examination, attempts to discredit witnesses, and an effort to establish a different version of the facts." *Id*. 477 U.S. at 386. *Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 791-92, 178 L.Ed.2d 624 (2011), *Murray vs. Carrier,* 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Second, the petitioner must show that the deficient performance prejudiced some aspect of the case. Prejudice requires the petitioner to show a "reasonable probability" of a different outcome, or a probability sufficient to undermine confidence in the outcome.

A reasonable probability is a standard a less demanding standard than "more likely than not." *Strickland,* 466 U.S. at 693-94, 104 S.Ct. at 2052 ["A defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."]. It is not a stringent standard. *Branch v. Sweeney,* 758 F3d 226 (3d Cir. 2014), See, for example, *Thomas v. Varner,* 428 F3d 491, 501 (3d Cir. 2005). In fact, it is less demanding that the preponderance standard. *Termyn v. Horn,* 266 F3d 257, 282 (3d Cir. 2001). See also: *Woodford v. Viscotti,* 537 U.S. 19, 22, 123 S.Ct. 357, 359, 154 L.Ed.2d 279 (2002). (observing that *Strickland* "specifically rejected the proposition that the defendant had to prove it more likely than not that the result had been altered.")

Strickland recognized that an attorney's duty to provide reasonably effective assistance includes "the duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2052; see also ABA Standards for Criminal Justice: Prosecution Function and the Defense Function 4-4.1(a) (3d Edition 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case..."). See also: *Rompilla v. Beard,* 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)(finding ABA standards useful guides to determining what is reasonable" quoting *Wiggins,* 539 U.S. at 524, 123 S.Ct. 2527).

In his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a person in State Custody, Louis Roderick Ogden alleged that his conviction resulted from one or more errors of his appointed counsel resulting in the Petitioner suffering from "ineffective assistance of counsel", thereby denying him effective assistance of counsel, as guaranteed by Art. I, § 9 of the Pennsylvania Constitution and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Specifically, Ogden alleged that:

(a) Appointed counsel failed to adequately investigate and prepare the defense of this case;

(b) Appointed counsel failed to file and litigate viable pre-trial motions, including the seeking of the appointment of expert witnesses for the defense of (1) a psychiatrist

and (2) a toxicologist to testify of the effect of drugs on the Petitioner as the voluntariness of his confession to the police and on his lack of specific intent to commit first degree murder and (3) a ballistics expert to examine the weapon involved in the shooting and testify as to whether the firearm could have discharged as described by the Petitioner;

(c) Appointed counsel did not present any witnesses, evidence or adequate argument in defense of the Commonwealth's charges against the Petitioner, including the Petitioner and other witnesses who were available to the defense;

(d) Appointed counsel did not present any witnesses, evidence or adequate argument of the Petitioner's diminished capacity or that the Petitioner lacked the mental capacity required to form a specific intent to kill, or otherwise presenting a defense that would reduce the charge from first degree murder to a lower degree of criminal homicide;

(e) Appointed counsel did not present any witnesses, evidence or adequate argument of the Petitioner's voluntary impairment or otherwise presenting a defense that would reduce the charge from first degree murder to a lower degree of criminal homicide;

(f) Appointed counsel did not present any witnesses, evidence or adequate argument evidencing that the Commonwealth failed to prove that the Petitioner acted with express malice or that the Petitioner committed a premeditated killing of the victim;

(g) Appointed counsel did not present any witnesses, evidence or adequate argument evidencing that the killing was committed spontaneously and that the Petitioner could only be convicted of one of the other homicide crimes established by Pennsylvania law;

(h) Appointed counsel did not present any witnesses, evidence, adequate cross-examination or argument that established that the Petitioner had used many bags of heroin late into the night and morning of the fatal shooting, and that the Petitioner even used heroin while at the State Police barracks after he was taken into custody;

(i) Appointed counsel failed to adequately investigate and prepare for sentencing in this case;

(j) Appointed counsel did not present any witnesses, evidence or adequate argument that this Honorable Court did not possess statutory authorization to impose the sentence of "Life Imprisonment without the possibility of parole" and that the sentence was illegal and must be vacated;

(k) Appointed counsel failed to timely object to improper computation of the Petitioner's sentence in the above-captioned case.

In order to obtain a Certificate of Appealability, the Petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This generally requires a "showing that reasonable jurists could debate whether … the petition should have been resolved in a different manner

or that the issues presented were adequate to deserve encouragement to proceed further." 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). However, the Petitioner need not show that he should prevail on the merits. *See e.g., Lambright v. Stewart*, 220 F.3d 1022, 1025, ["... [O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor"]. Rather, the Petitioner is merely required to make the "modest" showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As explained in *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002), the substantial showing standard required for a Certificate of Appealability is "relatively low." *Id.,* at 1011, citing *Slack*, *supra*.

Hence, a Certificate of Appealability must issue if any of the following apply: (1) the issues are debatable among reasonable jurists; (2) another court could resolve the issues differently; or (3) the questions raised are adequate enough to encourage the petitioner to proceed further. *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Finally, "The court must resolve doubts about the propriety of a Certificate of Appealability in the petitioner's favor." *Jennings*, *supra*, citing *Lambright*, *supra*, at 1025."

In the present case, reasonable Jurists could differ as to whether Counsel was ineffective. In the present case, reasonable Jurists could differ as to whether the Trial Court erred and abused

its discretion, or denied the Petitioner due process, in denying the Petitioner's request for a jury charge regarding the Petitioner's Voluntary Intoxication (8.308B), which would have instructed the jury of the possibility of a finding of Third Degree Murder or Voluntary Manslaughter in this case, based upon the level of drugs consumed by the Petitioner prior to the shooting of the victim.

In the present case, reasonable Jurists could differ as to whether the Trial Court erred and abused its discretion, as well as denied the Petitioner due process, in denying the Petitioner's Motion for Post Trial Relief pursuant to Pennsylvania Rule of Criminal Procedure 606 seeking a judgment of acquittal and/or for a new trial with regard to the sufficiency of the evidence presented at trial, as the Commonwealth did not meet its burden of proof that the Petitioner acted with premeditation, and the evidence was insufficient to prove specific intent to kill and/or malice, beyond a reasonable doubt, as required to permit a conviction of First Degree Murder.

In the present case, reasonable Jurists could differ as to whether the Trial Court erred and abused its discretion, or denied the Petitioner due process, in denying the Petitioner's Motion for Post-Trial Relief seeking a new trial, in light of the fact that the jury only deliberated for 10 or 11 minutes before returning a verdict of guilty, and in such time could not have chosen a foreperson, reviewed the evidence, considered the Court's instructions, discussed the presumption of innocence and the need to find the Petitioner guilty beyond a reasonable doubt, discussed the

elements of First Degree Murder required to find the Petitioner guilty, voted to convict and then inform the Court's tipstaff of its decision, making it clear that the jury's verdict was the product of prejudicial influence and/or based on insufficient deliberation by the Jury on the evidence.

The state courts' decisions rejecting Mr. Ogden's claims are contrary to, and unreasonable applications of, clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Therefore, the Petitioner, Louis Ogden, has made the required substantial showing of the denial of a constitutional right. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Dated: April __, 2020

Respectfully submitted,

ANDREW J. KATSOCK, III
Counsel of Record
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Wilkes-Barre, Pennsylvania 18705
Telephone: (570) 829-5884
e-mail: ajkesq@comcast.net

Attorney for the Petitioner,
Louis Roderick Ogden

APPENDIX

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OFFICE OF THE CLERK
[LETTERHEAD]

January 28, 2020

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

Andrew J. Katsock III
15 Sunrise Drive
Wilkes-Barre, PA 18705

Shelley L. Robinson
Wayne County Office of District Attorney
925 Court Street
Wayne County Court House
Honesdale, PA 18431

RE: LOUIS OGDEN V.
SUPERINTENDENT SOMERSET SCI, ET AL

Case Number: 19-3157
District Court Case Number: l-19-cv-00609

ENTRY OF JUDGMENT

Today, **January 28, 2020** 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/ Caitlyn
Case Manager
267-299-4956

Cc: Mr. Peter J. Welsh

DLD 072 **December 19, 2019**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. NO. **19-3157**

LOUIS RODERICK OGDEN,
Appellant

—v.—

SUPERINTENDENT SOMERSET SCI; ET AL

(M.D. Pa. Civ. No. l-19-cv-00609)

Present: RESTREPO, PORTER and NYGAARD, Circuit Judges

Submitted is Appellant's motion for a certificate of appealability in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because he has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Appellant's claim that he was denied ineffective assistance of counsel lacks merit. See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). To the extent Appellant raised independent claims of error in the state court PCRA proceedings, those claims are not cognizable. See Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004). To the extent Appellant raised other cognizable claims that are predicated on the ineffective assistance of counsel, those claims lack merit, as the District Court concluded. Finally, we note that Appellant has presented new claims in his application for a certificate of appealability. To the extent that he thus requests permission to file a second or successive § 2254 petition pursuant to 28 U.S.C. § 2244, see generally United States v. Santarelli, 929 F.3d 95, 105-06 (3d Cir. 2019), we decline to grant permission because he does not meet the requirements of 28 U.S.C. §§ 2244(b)(2)

By the Court,

s/ David J. Porter
Circuit Judge

Dated: January 28, 2020

CJG/cc: Andrew J. Katsock, III, Esq.
Shelley L. Robinson, Esq
Ronald Eisenberg, Esq.

[SEAL]

A true copy

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

Appendix 2

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

CIVIL NO. l:19-CV-00609

(Chief Magistrate Judge Schwab)

LOUIS RODERICK OGDEN,
Petitioner,

—v.—

SUPERINTENDENT ERIC TICE,
Respondent.

ORDER

September 24, 2019

On August 20, 2019, we issued a memorandum and implementing order denying the petition for writ of habeas corpus filed by the petitioner, Louis Roderick Ogden ("Ogden"). The case is now before us on an application for issuance of a certificate of appealability ("COA") under 28 U.S.C. § 2253. For the reasons that follow, we will deny the application.

"As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition." *Miller-El v. Cockrell,* 537 U.S. 322, 335 (2003) (citing 28 U.S.C. § 2253). "Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge."[1] *Id.* at 335-36. "[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* at 336.

Under 28 U.S.C. § 2253(c)(2), "a certificate of appealability shall issue only where 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Romansky v. Superintendent Greene SCI,* 933 F.3d 293, 297 (3d Cir. 2019) (quoting 28 U.S.C. § 2253(c)(2)). This requires the petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Id.* (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)).

The analysis required to determine whether a COA should be issued "is not coextensive with a merits analysis." *Buck v. Davis,* 137 S. Ct. 759, 773 (2017). "At the COA stage, the only question is whether the

---

[1] Although 28 U.S.C. § 2253 requires a certificate of appealability to issue from "a circuit justice or judge," case law establishes that this language allows certificates of appealability to be issued by district courts as well as circuit judges. *See Gonzalez v. Thaler*, 565 U.S. 134, 143 n.5 (2012); *United States v. Eyer*, 113 F.3d 470, 473 (3d Cir. 1997). United States magistrate judges may also issue certificates of appealability when the parties have consented to the jurisdiction of a magistrate judge. *Hanson v. Mahoney*, 433 F.3d 1107, 1112 (9th Cir. 2006).

applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El,* 537 U.S. at 336). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 774 (quoting *Miller-El,* 537 U.S. at 338).

Ogden has not made a substantial showing of the denial of a constitutional right. As we noted in our memorandum addressing the merits of his petition, all of Ogden's claims for habeas corpus relief "arise from a predicate assertion that his trial counsel provided ineffective assistance of counsel." *Doc. 9* at 9. Nevertheless, despite ineffective assistance of counsel being the basis for all his claims, Ogden does not develop any arguments as to that issue other than the conclusory assertion that "reasonable Jurists could differ as to whether Counsel was ineffective." *Doc. 11* at 4. We find this does not establish a substantial showing of the denial of a constitutional right.

Moreover, we find that reasonable jurists could not disagree with our decision to deny Ogden's habeas corpus petition. As we noted in our memorandum addressing the merits of Ogden's petition, the Pennsylvania Superior Court found no merit to Ogden's ineffective assistance of counsel claims because they were based on evidence or testimony that his trial counsel failed to present, but he did not produce any evidence to show that the evidence or

testimony actually could have been presented at trial. *See doc. 9* at 13-14. Accordingly, **IT IS ORDERED** that Ogden's application for issuance of a certificate of appealability *(doc. 11)* is **DENIED.**

S/Susan E. Schwab
Susan E. Schwab
Chief United States Magistrate Judge

Appendix 3

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

CIVIL NO. 1:19-CV-00609

(Chief Magistrate Judge Schwab)

LOUIS RODERICK OGDEN,
Petitioner,

—v.—

SUPERINTENDENT ERIC TICE, *et al.*,
Respondents.

ORDER

August 20, 2019

For the reasons set forth in the accompanying memorandum (*doc. 9*), **IT IS ORDERED** that the petition for writ of habeas corpus is **DENIED** and the Clerk of Court is directed to close this case. **IT IS FURTHER ORDERED** that the Pennsylvania Attorney General and Patrick L. Robinson are dismissed as respondents.

S/Susan E. Schwab
Susan E. Schwab
Chief United States Magistrate Judge

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

CIVIL NO. 1:19-CV-00609

(Chief Magistrate Judge Schwab)

LOUIS RODERICK OGDEN,
Petitioner,

—v.—

SUPERINTENDENT ERIC TICE, *et al.*,
Respondents.

MEMORANDUM

I. Introduction.

This is a habeas corpus case filed under 28 U.S.C. § 2254 in which the petitioner, Louis Roderick Ogden ("Ogden"), argues that his conviction should be overturned because he received ineffective assistance of counsel and because the state court did not overturn his conviction on the grounds of his trial counsel's alleged ineffectiveness. The merits of Ogden's claims were previously considered and denied by the Pennsylvania Superior Court. Because we find that the Superior Court's decision was not

contrary to clearly established federal law and did not involve an unreasonable application of clearly established federal law, we will deny Ogden's petition.

II. Background and Procedural History.

On September 22, 2015, Ogden was convicted of first-degree murder in the Wayne County Court of Common Pleas and sentenced to life in prison for the killing of his niece, Rebecca Pisall ("Pisall"). *Commonwealth v. Ogden,* No. 3148 EDA 2015, 2016 WL 5923026, at *1 (Pa. Super. Ct. Oct. 11, 2016). The killing occurred on June 20, 2014, when Pisall came to Ogden's home to purchase heroin from him. *Id.* Ogden was not awake at the time that Pisall arrived, so Pisall spoke briefly with Ogden's daughter, Mary Langendorfer ("Langendorfer"). *Id.* Langendorfer woke Ogden up and told him that Pisall wanted to buy heroin. *Id.* Ogden gave Langendorfer a small bag of heroin and told her to "take care of it." *Id.* Langendorfer then gave the bag of heroin to Pisall in exchange for $60 and brought the money to Ogden. *Id.* When Langendorfer returned to the kitchen, Pisall claimed that the bag had been empty and demanded her money back. *Id.* Langendorfer told Ogden about Pisall's complaint, at which point Ogden pulled out a loaded gun, walked into the kitchen, and shot Pisall in the head "from 4-8 inches away." *Id.* Ogden then pointed the gun at Langendorfer and said, "it just went off." *Id.* Shortly after Pisall was killed, Ogden called 911 and told police that he had shot Pisall. *Id.* He was then read his *Miranda* rights, after which he provided a statement to the police on Pisall's killing. *Id.*

Ogden was tried for murder in the Wayne County Court of Common Pleas. *Id.* The Commonwealth relied on, among other evidence, testimony from Langendorfer and Ogden's statement to the police. *Id.* After trial, Ogden was convicted of first-degree murder and sentenced to life in prison. *Id.* Ogden appealed his conviction to the Pennsylvania Superior Court, arguing (1) that the trial court erred by not instructing the jury on a defense of voluntary intoxication even though Ogden had consumed a substantial amount of heroin in the hours leading up to Pisall's killing; (2) that the Commonwealth had presented insufficient evidence to convict him of first-degree murder; (3) that the trial court erred in denying his motion for a new trial even though the jury deliberated for only 10-11 minutes before reaching a verdict; and (4) that the trial court erred by not striking the jury despite a venire person allegedly saying "if he made it this far, I'd figure he'd have to be guilty." *Id.* at *2. The Superior Court found that the trial court properly exercised its discretion and that there were no merits to the issues Ogden raised, and accordingly affirmed his conviction. *Id.* at *6. Ogden did not appeal the Superior Court's decision to the Pennsylvania Supreme Court. *Doc. 1* at 2.

On November 10, 2016, Ogden filed a petition in the Court of Common Pleas challenging his conviction under the PCRA. *See doc. 3-7* at 1; *Commonwealth v. Ogden,* No. CP-64-CR-0000319-2014 (Wayne Cty. Ct. Com. Pl. Nov. 10, 2016). Ogden argued that his trial counsel provided ineffective assistance of counsel because he failed to adequately investigate and prepare Ogden's defense, failed to file and litigate pre-trial motions, failed to present

witnesses or evidence on Ogden's behalf, failed to adequately prepare for sentencing, and failed to object at sentencing. *Doc. 3-7* at 2-4. Ogden further argued that the trial court erred because trial counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Id.* at 5. The court denied Ogden's PCRA petition on June 26, 2017, and he appealed the denial to the Superior Court. *Commonwealth v. Ogden,* No. 2315 EDA 2017, 2018 WL 700650, *1 (Pa. Super. Ct. Feb. 5, 2018). The Superior Court affirmed the denial of Ogden's PCRA petition, noting that Ogden "failed to satisfy his burdens of production and persuasion on his ineffectiveness of counsel claims" and finding that Ogden's trial counsel did not provide ineffective assistance of counsel. *Id.* at *4. Following the Superior Court's decision, Ogden filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which denied the petition on August 29, 2018. *Commonwealth v. Ogden,* 192 A.3d 1109, 1110 (Pa. 2018).

Ogden filed the petition that initiated this case on April 9, 2019 and raised four claims of error. *Doc. 1.* First, Ogden argues that his trial counsel provided ineffective assistance of counsel because (1) he failed to adequately investigate or prepare Ogden's defense, (2) he failed to file pretrial motions seeking the appointment of a psychiatrist or a toxicologist to testify on a voluntary intoxication defense and (3) he failed to file a pretrial motion seeking the appointment of a ballistics expert to testify that the gun discharged accidentally when Ogden shot Pisall. *Id.* at 5. Second, Ogden argues that the trial court erred "in not finding that the failure of the

Defendant's appointed counsel to present any witnesses, evidence or adequate argument of the Petitioner's impairment violated the Defendant's Eighth Amendment rights under the United States Constitution in that the jury must be able to consider and give full effect to all relevant mitigating evidence." *Id.* at 7. Third, Ogden argues that the trial court erred because his trial counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Id.* at 8. Finally, Ogden argues that the state courts erred in not finding that the failure to raise his claims earlier stemmed from his trial counsel's ineffectiveness. *Id.* at 10.

The respondents filed a response to Ogden's petition and a brief on May 1, 2019. *Docs. 3-4.* The respondents argue that the petition should be denied because the state courts that considered Ogden's claims during his PCRA proceedings "made an exhaustive examination" of Ogden's ineffective assistance of counsel claim "and specifically found that there was no basis for that claim." *Doc. 4* at 6. The respondents further argue that the state court decision denying Ogden's PCRA petition was not contrary to clearly established federal law. *Id.*

On May 15, 2019, Ogden filed a largely irrelevant reply brief in which he discusses this district's recent overturning of the conviction of Graham Spanier. *See doc. 7* at 2-3; *see also Spanier v. Libby,* No. 3:19-CV-00523 (M.D. Pa. Apr. 30, 2019). Ogden acknowledges that the *Spanier* case and this case "are different," but cites the case "to illustrate that the mere fact that Ogden's conviction was upheld in the State court system is not evidence that the Petitioner's rights were not violated, and, ignored by the State Court

system." *id.* at 3. Ogden then argues that "[t]he state courts' decisions rejecting Mr. Ogden's claims are contrary to, and unreasonable applications of, clearly established Supreme Court precedent," but does not cite any Supreme Court precedents in support of this statement. *Id.*

On May 23, 2019, the parties consented to the jurisdiction of a United States Magistrate Judge and the undersigned became the presiding judge in this case. We consider Ogden's claims for relief below.

III. Discussion.

A. The Only Proper Respondent in This Case Is Eric Tice.

Ogden's petition names as respondents the Superintendent of SCI Somerset, Eric Tice; Pennsylvania Attorney General Josh Shapiro; and Wayne County District Attorney Patrick L. Robinson. Pursuant to 28 U.S.C. § 2243, the writ of habeas corpus, or order to show cause, shall be directed to the petitioner's custodian. The warden of the prison where the petitioner is held is considered the custodian for purposes of a habeas action. *Rumsfeld v. Padilla,* 542 U.S. 426, 442 (2004). Ogden is incarcerated at SCI Somerset, so Tice is the proper respondent as the warden of that prison. Shapiro and Robinson are not Ogden's custodian. Accordingly, we will dismiss Shapiro and Robinson as respondents.

B. Habeas Corpus Review Under AEDPA.

"The Antiterrorism and Effective Death Penalty Act ["AEDPA"] limits the power of a federal court to grant habeas relief to a person in custody pursuant to a state court judgment." *Han Tak Lee v. Glunt,* 667 F.3d 397, 402 (3d Cir. 2012). A federal court may not

grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication:

> (i) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (ii) 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.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, § 104 (codified as amended at 28 U.S.C. § 2254(d)).

AEDPA imposes a "highly deferential standard [which] 'reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.'" *Dennis v. Sec'y, Pa. Dep't of Corrs.,* 834 F.3d 263, 281 (3d Cir. 2016) (quoting *Harrington v. Richter,* 562 U.S. 86, 102-03 (2011)). "[H]abeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Dellavecchia v. Sec'y Pa. Dep't of Corrs.,* 819 F.3d 682, 692 (3d Cir. 2016) (quoting *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000)).

"A state court decision is 'contrary to' clearly established federal law if the state court (1) 'applies a rule that contradicts the governing law' set forth in Supreme Court precedent or (2) 'confronts a set of

facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different' from that reached by the Supreme Court." *Dennis,* 834 F.3d at 280 (quoting *Williams,* 529 U.S. at 405-06).

"A state court decision is an 'unreasonable application of federal law' if the state court 'identifies the correct governing legal principle,' but 'unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* at 281 (quoting *Williams,* 529 U.S. at 413). "Habeas relief may not be granted on the basis that the state court applied clearly established law incorrectly; rather, the inquiry is 'whether the state court's application of clearly established federal law was objectively unreasonable.'" *Id*. (internal emphasis omitted) (quoting *Williams,* 529 U.S. at 409).

"[A] state court decision is based on an 'unreasonable determination of the facts' if the state court's factual findings are 'objectively unreasonable in light of the evidence presented in the state-court proceeding,' which requires review of whether there was sufficient evidence to support the state court's factual findings." *Id.* at 281 (quoting *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003)).

C. Ogden's Trial Counsel Did Not Provide Ineffective Assistance of Counsel.

While Ogden raises four claims of error in his petition for writ of habeas corpus, all four claims arise from a predicate assertion that his trial counsel provided ineffective assistance of counsel. *See doc. 1* at 5 (arguing ineffective assistance of counsel); *id.* at 7 (arguing that trial court erred by not finding that

trial counsel's ineffective assistance led to insufficient consideration of mitigating evidence by the jury); *id.* at 8 (arguing that trial court erred by not finding that trial counsel's ineffective assistance undermined the truth-determining process); *id.* at 10 (arguing that state court erred by not finding that trial counsel was ineffective for failing to raise arguments at earlier stage of litigation). Accordingly, we begin our analysis with the legal standards governing ineffective assistance of counsel claims.

"[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

Under *Strickland,* a showing of ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the

> adversary process that renders the result unreliable.

Id. at 687.

Under the first component of the *Strickland* test, a petitioner must establish that his counsel's performance was deficient, which requires a showing "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. In addition, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Under the second component of the *Strickland* test, a petitioner must establish prejudice, which requires the petitioner to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. A showing of such a reasonable probability "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster,* 563 U.S. 170, 189 (2011) (quoting *Richter,* 562 U.S. at 112).

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. 356, 371 (2010). "Even under *de nova* review, the standard for judging counsel's representation is a most deferential one." *Richter,* 562 U.S. at 105. "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Id.*

"The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is 'doubly' so." *Id.* (internal quotation marks omitted) (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 123 (2009)).

Here, the Pennsylvania Superior Court considered Ogden's ineffective assistance of counsel claims on appeal from the denial of his PCRA petition. *Ogden,* 2018 WL 700650, at *2-4. The court noted that two witnesses testified at Ogden's PCRA petition: his trial counsel, Steven E. Burlein ("Burlein"), and James Sulima ("Sulima"), a private investigator who had conducted an investigation of the case for Burlein. *Id.* at *2. According to Beurlein's testimony, Ogden chose not to testify at trial because of concerns over how he would conduct himself on cross-examination by the Commonwealth's attorney. *Id.* Beurlein testified that he consulted with a psychiatrist, Dr. Carla Rogers ("Rogers"), about the possibility of a voluntary intoxication defense at trial, but that Rogers refused to testify on Ogden's behalf because she believed that Ogden was "a world class B.S. artist" and she could not believe the information that he told her. *Id.* Beurlein testified that he chose not to have Sulima testify at trial because "the sum total of the investigation produced negligible results." *Id.* Beurlein also testified that he chose to not call a ballistics expert at trial because "there was really no question as to how ... the incident occurred. There was no question as to what weapon was used or the bullet that pierced the skull. There was no question as to any of that." *Id.* (omission in original). Sulima testified that in conducting his investigation, he had interviewed Ogden and other witnesses, none of

whom would have helped Ogden's case "in any way." *Id.* at *3.

In denying Ogden's claim, the court noted that it did not need to discuss Ogden's arguments at length because he "produced limited evidence during the PCRA hearing and, in so doing, failed to satisfy his burdens of production and persuasion on his ineffectiveness of counsel claims." *Id.* at *4. The court found that there was no arguable merit to Ogden's claim that his trial counsel was ineffective for failing to call an expert witness to testify on his voluntary intoxication. *Id.* The court noted that Ogden did not call a toxicologist or introduce any other evidence at the PCRA hearing to establish that he was intoxicated on the night of the murder, and thus there was no merit to a claim that his trial counsel had erred by failing to press a voluntary intoxication defense. *Id.* The court similarly concluded there was no merit to the claim that trial counsel erred by failing to introduce a ballistics expert since Ogden did not present a ballistics expert at the PCRA hearing to testify that his gun discharged accidentally. *Id.* Finally, the court found that trial counsel was not unreasonable in failing to present any witnesses or evidence on Ogden's behalf. *Id.* The court noted there was no indication that Ogden or any character witnesses were willing to testify at his trial and noted that any testimony from Sulima would have been inadmissible hearsay. *Id.*

The Superior Court's decision finding that Ogden's trial counsel was not ineffective was not contrary to clearly established federal law, nor did it involve an unreasonable application of clearly established federal law. The court found no merit to Ogden's claims because they were based on evidence or

testimony that trial counsel did not present at trial, but Ogden produced no evidence or testimony at the PCRA hearing to show that trial counsel even could have presented the evidence or testimony at trial. *See id.* at *4. The court's decision was therefore in line with Supreme Court precedent under *Strickland* because there was no merit to the claim that trial counsel's conduct "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. Thus, because the Superior Court did not err in denying Ogden's ineffective assistance of counsel claims and because all of Ogden's claims for habeas corpus relief are based on a predicate assertion of ineffective assistance of counsel, we will deny Ogden's petition.

IV. Conclusion.

The Superior Court's decision that Ogden's trial counsel was not ineffective was neither contrary to, nor involved an unreasonable application of, clearly established federal law. Ogden's petition for writ of habeas corpus is therefore denied because all of the claims in his petition are based on a predicate assertion of ineffective assistance of counsel. An appropriate implementing order follows.

S/Susan E. Schwab
Susan E. Schwab
Chief United States Magistrate Judge