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DLD-033 November 19, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2194**

MAURICE A. JACKSON, Appellant

VS.

SUPERINTENDENT DALLAS SCI; ET AL.

(E.D. Pa. Civ. No. 2-16-cv-00174)

Present: JORDAN, KRAUSE and PHIPPS, Circuit Judges

Submitted is Appellant's notice of appeal which may be construed as a request for a certificate of appealability pursuant to 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." 28 U.S.C. § 2253(c)(2). Jurists of reason could not debate that the District Court correctly denied Appellant's claim that trial counsel was ineffective for failing to meet with him prior to trial to devise a defense strategy and for failing to effectively communicate a plea offer. See Strickland v. Washington, 466 U.S. 668 (1984). Appellant has conceded that this claim, and his claim that the trial court erred in failing to grant a mistrial based on prosecutorial misconduct, are procedurally defaulted, and he has not shown cause and prejudice or a fundamental miscarriage of justice sufficient to overcome the default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Martinez v. Ryan, 566 U.S. 1, 14 (2012) ("To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."). Jurists of reason would also agree that his claim that his PCRA counsel was ineffective is non-cognizable in habeas, see 28 U.S.C. § 2254(i), and his claim that the evidence was insufficient to

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

MAURICE JACKSON,	:	
	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	
	:	**NO. 16-0174**
TOM MCGINLEY[1], et al.,	:	
	:	
Respondent.	:	

ORDER

AND NOW, this 9th day of January, 2018, upon consideration of Petitioner's Petition for Writ of Habeas Corpus (Doc. No. 1), Respondent's Response (Doc. No. 18), Petitioner's Traverse (Doc. No. 24), Petitioner's Supplemental Motion for Discovery (Doc. No. 27), the Report and Recommendation of United States Magistrate Judge Elizabeth Hey (Doc. No. 28), and Petitioner's Objections (Doc. No. 33), I find as follows:

1. On August 1, 2008, a jury found Petitioner guilty of first degree murder, firearms not to be carried without a license, and possession of an instrument of crime. The convictions arose from an incident, on May 29, 2007, during which Petitioner shot at the victim four times, as the victim fled, ultimately hitting him in the back and killing him. On October 17, 2008, Petitioner was sentenced to an aggregate term of life in prison.
2. Petitioner timely filed a direct appeal asserting that the evidence was insufficient to sustain his conviction and that the verdicts were against the weight of the evidence. The

[1] Petitioner named Lawrence P. Mahally as the Respondent in this action. However, Petitioner is currently located in State Correctional Institute ("SCI") at Coal Township, Pennsylvania, and the current superintendent of SCI-Coal Township is Tom McGinley. Therefore, pursuant to Rule 2(a) of the Rules Governing Section 2254 Cases, I have named Mr. McGinley as the respondent in this case.

5. On April 18, 2017, United States Magistrate Judge Elizabeth Hey issued a Report and Recommendation finding that Petitioner's claim of PCRA counsel ineffectiveness is not cognizable as a stand-alone claim, Petitioner's claim of ineffective assistance of trial counsel is procedurally defaulted, Petitioner's claim of insufficient evidence is meritless, and Petitioner's claim of trial court error is both procedurally defaulted and meritless.
6. Petitioner timely filed objections on June 1, 2017.

LEGAL STANDARDS

7. Under 28 U.S.C. § 636(b)(1)(B), a district court judge may refer a habeas petition to a magistrate judge for proposed findings of fact and recommendations for disposition. When objections to a Report and Recommendation have been filed, the district court must make a *de novo* review of those portions of the report to which specific objections are made. 28 U.S.C. § 636(b)(1)(C); Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In performing this review, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

DISCUSSION

8. Petitioner's objections to the Report and Recommendation challenge the Magistrate Judge's findings on all four of his habeas claims.

Claims One and Two

9. In claim one, Petitioner argues that PCRA counsel was ineffective for abandoning an ineffective assistance of trial counsel claim that Petitioner had included in his original *pro*

12. Petitioner objects to this finding and argues that his underlying trial counsel ineffectiveness claim was indeed "substantial." In support, he asserts that (1) trial counsel informed him of a plea bargain offering fifteen to thirty years in prison just hours prior to voir dire, and (2) trial counsel failed to meet face-to-face prior to trial to discuss "important aspects" of his case. (Pet.'s Objections 4.) Petitioner's Objections to the Magistrate Judge's Report go on to argue that "had it not been for trial counsel's lack of communication and delay in proposing said plea bargain, Petitioner would have had time to consider the deal and would have taken the deal." (Id.) According to Petitioner's Objections, trial counsel did not give Petitioner ample time to consider the deal and, in fact, she advised Petitioner to decline the deal "as she felt confident in winning the case and felt that 'the State did not have a strong case' for a conviction." (Id.) Finally, Petitioner's Objections assert that an evidentiary hearing regarding off-the-record conversations will disclose that Petitioner would have accepted the deal and that he lost the opportunity to take the more favorable sentence. (Id. at 5.)

13. Based on the record before me, I cannot find that Petitioner's underlying ineffective assistance of counsel claim for failure to timely communicate a plea bargain is meritless. Ineffective assistance of counsel claims are analyzed under the two-part test set forth in United States v. Strickland, 466 U.S. 668 (1984), to determine whether a defendant's constitutional rights have been violated by trial counsel's performance. Id. at 687. First, "the defendant must show that counsel's performance was deficient," *i.e.*, that it fell below "prevailing professional norms." Id. at 687–88. Second, "the defendant must show that the deficient performance prejudiced the defense," *i.e.* "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at

United States v. Giamo, 153 F. Supp. 3d 744, 755–56 (E.D. Pa. 2015) (analyzing ineffectiveness claim regarding plea offer based on evidentiary hearing testimony), aff'd, 665 F. App'x 154 (3d Cir. 2016); Boston v. Mooney, No. 14-229, 2015 WL 6674530, at *13 (E.D. Pa. Jan. 9, 2015) (addressing testimony regarding plea discussions from PCRA proceeding), report and recommendation adopted by 141 F. Supp. 3dd 352 (E.D. Pa. Oct. 29, 2015); Smith v. United States, No. 09-533, 2014 WL 4825369, at *3–10 (D. Del. Sept. 29, 2014) (holding an evidentiary hearing to address ineffective assistance of counsel claim for failure to communicate a plea agreement).

16. Here, Petitioner's ineffective assistance of trial counsel claim for failure to timely communicate a plea offer was never raised in the state court and, therefore, never addressed in any substantive fashion. Petitioner presented this claim in the federal proceedings,[2] and the Magistrate Judge appropriately framed the relevant question as whether the underlying ineffectiveness claim is "substantial"—*i.e.*, that it has some merit—such that PCRA counsel's failure to raise it was cause to excuse the procedural default. When addressing this question, however, the Magistrate Judge did not acknowledge the standards set forth in Frye and Lafler. Moreover, the Magistrate Judge did not have the benefit of a developed record from either prior state court proceedings or a federal evidentiary hearing in order to determine whether counsel failed to timely inform

[2] Specifically, in his Traverse, Petitioner argues that "[b]efore petitioner started to select his jury, the very first time, he met his trial counsel face to face was inside an attorney-client room, where trial counsel had inform[ed] petitioner of a plea bargain for 15 to 30 years. Petitioner contends that if trial counsel would have consulted pertinent aspects of his case with him prior to trial which would ha[ve] given him the appropriate amount of time to consider said guilty plea bargain for 15 to 30 years, petitioner could have expended this time consulting with his family." (Pet.'s Traverse, ECF No. 24, at p. 6.)

19. Accordingly, I decline to adopt the Report and Recommendation as to claims one and two. I will refer the case back to the Magistrate Judge for an evidentiary hearing and a supplemental report and recommendation on these issues.

Claim Three

20. Claim three of Petitioner's habeas petition alleges that the evidence was insufficient to support his conviction for first-degree murder because the government did not demonstrate that he possessed the specific intent to kill.

21. In the Report and Recommendation, the Magistrate Judge agrees with the Pennsylvania Superior Court's assessment of this issue on direct appeal. According to state court, the evidence established that Petitioner shot at the victim as the victim fled from Petitioner, and that one of the bullets entered the victim's back and penetrated multiple organs. An eyewitness, Mylan Harrison, saw Petitioner and the victim together just prior to the shooting and observed Petitioner shoot the victim in the back from a distance of fifteen feet. The Magistrate Judge concluded that, based on this evidence, the Commonwealth had met its burden of establishing that Petitioner possessed the specific intent to kill by showing that Petitioner used a deadly weapon upon a vital part of the victim's body.

22. Petitioner objects on the grounds that eyewitness Harrison was not reliable. Petitioner reasons that, at trial, Harrison stated that he witnessed the entire shooting. (N.T. 7/29/08, pp. 192–93.) When confronted with prior preliminary hearing testimony, however, Harrison admitted that he did not observe Petitioner actually shooting and, because he ran away, did not see what happened to the victim after the shooting. (N.T. 7/29/08, pp. 263–64, 268.) Petitioner now argues:

> Commonwealth witness Harrison did not know what the pair were talking about before the shooting. He did not know what the

Claim Four

25. In claim four of his petition for habeas relief, petitioner argued that the trial court erred by failing to grant Petitioner a mistrial following two alleged incidents of prosecutorial misconduct: (1) the prosecutor's opening statement where he stated that both the victim and the victim's brother had been murdered and the victim's mother was suffering as a result; and (2) the prosecutor's question on cross-examination where he asked how many times the witness had seen Petitioner with a gun, which was not a fact in evidence.

26. The Magistrate Judge concluded that this claim was procedurally defaulted because it was not presented in either his direct appeal or his PCRA appeal. Furthermore, she rejected Petitioner's attempt to establish cause for his default. Finally, the Magistrate Judge remarked that even if she were to construe the claim as one of ineffective assistance of counsel for failing to request a mistrial due to prosecutorial misconduct (a claim Petitioner had exhausted), both the Superior Court on direct appeal and the PCRA court properly found these claims meritless because the trial court gave curative and/or cautionary instructions to the jury.

27. Petitioner now objects to the R&R only to the extent it found that the prosecutor's comment regarding the murder of the victim's brother was not grossly inflammatory.[5] Petitioner contends that this comment prevented a fair trial and could not be cured by a cautionary instruction.

28. I agree with the Magistrate Judge that the prosecutor's comments did not deprive Petitioner of a fair trial. The Third Circuit maintains a presumption that juries follow the

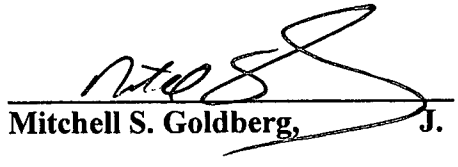
[5] Petitioner also objects to the finding that this claim is procedurally defaulted. I need not address this argument because I agree with the Magistrate Judge's finding that the claim is substantively meritless. Petitioner does not raise an objection as to the R&R's findings on the prosecutor's allegedly prejudicial cross-examination question.

brother had nothing to do with the case before it and that Petitioner had no involvement in that matter. Petitioner does not identify what prejudice remains after these curative instructions. Accordingly, I agree with the R&R and will overrule Petitioner's objection on this basis.

WHEREFORE, it is hereby **ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation as to claims one and two of the Petition for Writ of Habeas Corpus are **SUSTAINED**;
2. Petitioner's Objections to the Report and Recommendation as to claims three and four of the Petition for Writ of Habeas Corpus are **OVERRULED**;
3. The Report and Recommendation (Doc. No. 28) is **ADOPTED IN PART and REJECTED IN PART** as set forth in this Order;
4. The Petition for Writ of Habeas Corpus is **REFERRED** back to United States Magistrate Judge Elizabeth Hey for appointment of counsel, further briefing, any necessary evidentiary hearing, and a supplemental report and recommendation on the sole issue of the merits of Petitioner's claim that trial counsel was ineffective for failing to discuss a plea bargain with him until just prior to the start of trial;
5. Petitioner's Supplemental Motion for Discovery (Doc. No. 27) is **DENIED AS MOOT**.

BY THE COURT:



Mitchell S. Goldberg, J.

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

4/19/2017

RE: JACKSON v. MCGINLEY, ET AL
CA No. 16-174

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Elizabeth T. Hey, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

KATE BARKMAN
Clerk of Court

By:/s/ P. Rosser_____
, Deputy Clerk

cc: Simran Dhillon, Esq.
Maurice A. Jackson

Courtroom Deputy to Judge Mitchell S. Goldberg

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

MAURICE JACKSON	:	CIVIL ACTION
	:	
v.	:	
	:	
TOM MCGINLEY, et. al.[1]	:	NO. 16-0174

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. April 18, 2017

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by Maurice Jackson ("Petitioner"), who is currently incarcerated at the SCI-Coal Township, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of the case were summarized by the Pennsylvania Superior Court on direct appeal:

> On August, 1, 2008, a jury found [Petitioner] guilty of first degree murder, firearms not to be carried without a license, and possession of an instrument of crime. [Petitioner's] convictions arose from an incident on May 29, 2007, during which Mylan Harrison, who knew both [Petitioner] and the victim, Keith McCorey, testified that [Petitioner] shot at

[1]Petitioner named Lawrence P. Mahally as the Respondent in this action. Doc. 1. However, Petitioner is currently located in State Correctional Institute ("SCI") at Coal Township, Pennsylvania, and the current superintendent of SCI-Coal Township is Tom McGinley. See http://www.cor/pa.gov/Facilities/StatePrisons/Pages/Coal-Twp (last visited Mar. 31, 2017). Therefore, I have named Mr. McGinley as the respondent in this case. See Rule 2(a) of the Rules Governing Section 2254 Cases (state officer with current custody to be named as respondent).

> McCorey four times, as McCorey fled from [Petitioner]. McCorey died of a gunshot wound to his back. The bullet penetrated McCorey's heart, lungs, diaphragm, spleen, and liver. McCorey also suffered a gunshot wound to his foot. Mr. Harrison waited about a week before coming forward to police. Thereafter, [Petitioner] was arrested following a high-speed vehicular chase. On October 17, 2008, [Petitioner] was sentenced to an aggregate term of life imprisonment.

Commonwealth v. Jackson, No. 814 EDA 2009 at 1-2 (Pa. Super. Mar. 17, 2011) (Response Exh. A) ("Super. Ct.-Direct") (footnote omitted).

Following the denial of post-trial motions, Petitioner timely filed a direct appeal, asserting the evidence was insufficient to sustain a verdict, and the verdicts were against the weight of the evidence. On March 17, 2011, the Superior Court affirmed, concluding that the Commonwealth proved specific intent to kill by demonstrating that Petitioner shot the victim in a vital organ, Mr. Harrison's testimony was sufficient to identify Petitioner as the shooter, and that the conviction was consistent with the weight of the evidence because Mr. Harrison's testimony was corroborated by the medical examiner's opinion and it was for the jury to evaluate the alibi witness's testimony. Super. Ct.-Direct at 2-5. The Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal on July 12, 2011. Commonwealth v. Jackson, 24 A.3d 362 (Pa. 2011) (table).

On February 21, 2012, Petitioner filed a pro se petition pursuant to the Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551, presenting claims of ineffective assistance of trial and appellate counsel and trial court error. Commonwealth v. Jackson, No. CP-51-CR-0012730-2007, PCRA Petition (Phila. C.C.P. Feb. 23, 2012). Appointed counsel filed an amended PCRA Petition on

November 27, 2013, alleging ineffectiveness of trial and appellate counsel.[2] Commonwealth v. Jackson, No. CP-51-CR-0012730-2007, Amended PCRA Petition (Phila. C.C.P. Feb. 23, 2012) ("Amended PCRA"). On July 11, 2014, the Honorable Sheila Woods-Skipper dismissed the petition without a hearing, and later issued an opinion recommending affirmance on appeal. Commonwealth v. Jackson, No. CP-51-CR-0012730-2007, Opinion (Phila. C.C.P. Oct. 31, 2014) (Response Exh. B.) ("PCRA Op.").[3]

The Superior Court affirmed on PCRA appeal. Commonwealth v. Jackson, No. 2409 EDA 2014, Memorandum (Pa. Super. Aug. 31, 2015) ("Super. Ct.-PCRA").[4] Petitioner filed an untimely petition for allowance of appeal to the Pennsylvania Supreme Court which was denied on November 13, 2015. Commonwealth v. Jackson, No. 117

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[2]Specifically, the Amended PRCA alleged ineffectiveness of trial counsel for failing to challenge a witness's ability to see at 4:30 a.m., failing to object to the jury instruction on alibi testimony, and failing to move for DNA testing of a hat found at the crime scene. See Amended PCRA ¶ 9(b),(d) & (e). The Amended PCRA also alleged ineffectiveness of appellate counsel for failing "to raise an argument on appeal that the [Petitioner] should be awarded a new trial as a result of the trial court's error in denying a motion for mistrial" concerning alleged prosecutorial misconduct, and a layered ineffectiveness claim for failing to move for a mistrial or raise the issue of prosecutorial misconduct related to the prosecutor's opening statement. Id. ¶ 9(a) & (c).

[3]Judge Woods-Skipper's order denying the petition appears to be missing from the state court record, but it is reflected on the docket and also in her later opinion. See PCRA Op. at 2. The state court record does contain Judge Woods-Skipper's June 9, 2014 Notice that the petition lacked merit and would be dismissed without further proceedings. Commonwealth v. Jackson, No. CP-51-CR-0012730-2007, Notice Pursuant to Pa. R. Cr. P. 907 (Phila. C.C.P. June 9, 2014).

[4]The District Attorney mistakenly attached the Superior Court opinion from a different matter as Exhibit C to his Response, see Doc. 18 at 3 & Exh. C., but the actual opinion is contained in the state court record.

EM 2015, Order (Pa. Nov. 13, 2015). Petitioner then filed a second PCRA petition, seeking leave to file a petition for allowance of appeal to the Pennsylvania Supreme Court nunc pro tunc, which the PCRA court granted on April 22, 2016. See Commonwealth v. Jackson, CP-51-CR-0012730-2007, Docket Sheet (Phila. C.C.P.) (entries dated April 17 & 22, 2016). The subsequent petition for allowance of appeal, filed on May 17, 2016, was denied by the Pennsylvania Supreme Court on September 13, 2016. See Commonwealth v. Jackson, No. 201 EAL 2016, 2016 WL 4769159, Order (Pa. Sept. 13, 2016).

Meanwhile, on January 4, 2016,[5] Petitioner filed a pro se federal habeas petition asserting 4 grounds for relief; (1) ineffectiveness of PCRA counsel for abandoning a claim of trial counsel's ineffectiveness for failing to meet with Petitioner prior to trial to devise a defense strategy; (2) ineffectiveness of trial counsel for failing to meet with Petitioner to discuss defense trial strategy, (3) insufficient evidence to support a first-degree murder conviction, and (4) trial court error for failing to grant a mistrial following instances of prosecutorial misconduct. Doc. 1. The District Attorney filed a response to the petition, arguing that the claims are procedurally defaulted and meritless, and Petitioner filed a reply. Docs. 18 & 24. Petitioner has also filed motions for an

[5]The pro se petition was docketed on January 13, 2016, but the federal court employs the "mailbox rule," deeming the petition filed when given to prison authorities for mailing. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1998)). The original petition was signed on January 4, 2016, and therefore, I will assume that Petitioner gave the petition to prison authorities for mailing on that date. Doc. 1 at 18 (ECF pagination).

evidentiary hearing and for discovery. Doc. 25 & 27.[6] The Honorable Mitchell S. Goldberg has referred the matter to me for a Report and Recommendation. Doc. 2.

II. LEGAL STANDARDS[7]

A. Exhaustion and Procedural Default

Before the federal court can consider the merits of a habeas claim, Petitioner must comply with the exhaustion requirement of section 2254(b), 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." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). The doctrine of procedural default is closely related to the exhaustion requirement. It is not enough that Petitioner present his claims to the state court; he must also comply with the state's procedural rules in presenting his claims, thereby giving the state courts a full and fair opportunity to address them. A failure to do so results in a procedural default. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

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[6]Plaintiff's motion for discovery is captioned as a "Supplemental Motion for Discovery," but it is the only discovery motion the court has received. Doc. 27.

[7]The petition is timely. Petitioner's conviction became final on October 10, 2011, 90 days after the Supreme Court of Pennsylvania denied Petitioner's appeal on July 12, 2011. See Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999) (conviction becomes final when time for seeking next level of appeal expires if appeal is not taken); Morris v. Horn, 187 F.3d 333, 337 n.1 (3d Cir. 1999) (conviction became final after 90 days when time for seeking certiorari expires). Petitioner filed his PCRA petition 134 days later, on February 21, 2012, and the habeas limitations period tolled from that date until September 13, 2016, when the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal following the reinstatement of his appellate rights. As Petitioner filed his habeas petition on January 4, 2016, before the limitations began running again, his petition is clearly timely.

> [A] state prisoner's habeas claims may not be entertained by a federal court "when (1) 'a state court has declined to address those claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" Walker v. Martin, 562 U.S. [307, 316] (2011) (quoting Coleman, 501 U.S. at 729-30).

Maples v. Thomas, 565 U.S. 268, 280 (2012). A decision based on a state procedural rule is considered independent if it does not rely on the merits of the federal claim or rest primarily on federal grounds. Harris v. Reed, 489 U.S. 255, 260 (1989); see also Ake v. Oklahoma, 470 U.S. 68, 75 (1985). "[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed,'" Johnson v. Mississippi, 486 U.S. 578, 587 (1988), and the rule "speaks in unmistakable terms." Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996) (abrogated on other grounds, Beard v. Kindler, 558 U.S. 53 (2009)). Thus, the procedural disposition must comport with similar decisions in other cases such that there is a firmly established rule that is applied in a consistent and regular manner "in the vast majority of cases." Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997) (quoting Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989)).

If a claim is found defaulted, the federal court may address ~~it only if Petitioner~~ establishes cause for the default and prejudice resulting therefrom, or that a failure to consider the claim will result in a fundamental miscarriage of justice. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). To meet the "cause" requirement to excuse a procedural default, a Petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). To establish

prejudice, Petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Id. at 193.

In order for a Petitioner to satisfy the fundamental miscarriage of justice exception to the rule of procedural default, the Supreme Court requires that Petitioner show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Carrier, 477 U.S. at 496). This requires that Petitioner supplement his claim with "a colorable showing of factual innocence." McCleskey v. Zant, 499 U.S. 467, 495 (1991) (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)). In other words, a Petitioner must present new, reliable evidence of factual innocence. Schlup, 513 U.S. at 324.

B. Merits Review

Under the federal habeas statute, review is limited in nature and may only be granted if (1) the state court's adjudication of the claim "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or if (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, rebuttable only 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 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. 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." Id. at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

III. DISCUSSION

A. Grounds One and Two: Ineffectiveness of Counsel for Failing to Meet Prior to Trial

Grounds One and Two are related. In Ground One, Petitioner argues that PCRA counsel was ineffective for abandoning a claim that trial counsel was ineffective for failing to meet with Petitioner prior to trial to devise a defense strategy, and in Ground Two Petitioner asserts the underlying ineffectiveness of trial counsel claim. See Doc. 1 at

5, 7. As to Petitioner's ineffectiveness of PCRA counsel, such a claim is not cognizable in habeas as a stand-alone, substantive claim. See 28 U.S.C. § 2254 (i) ("The ineffectiveness . . . of counsel during . . . State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."); Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987) (no constitutional right to counsel in state post-conviction proceedings). Therefore, no relief can be granted on Ground One.

PCRA counsel's performance in this regard becomes relevant, however, in the context of the ineffectiveness of trial counsel claim asserted in Ground Two. Although Petitioner claimed in his original PCRA petition that his trial counsel was ineffective in failing to meet with him prior to trial, it was not asserted in his counseled Amended PCRA or on PCRA appeal. Under Pennsylvania law, courts are not required to review a petitioner's pro se PCRA filing if that individual is represented by counsel who subsequently amends the petition. See Commonwealth v. Purcell, 724 A.2d 293, 302 (finding courts are not required to review pro se PCRA petitions when petitioner is represented by qualified counsel) (citing Commonwealth v. Ellis, 626 A.2d 1137, 1139) (hybrid representation would overburden courts, therefore Superior Court did not need to consider an appellant's pro se brief when that appellant was represented by counsel who was filing briefs on appellant's behalf)). Furthermore, when a claim is raised only in a pro se PCRA petition but not the amended petition, the claim is procedurally defaulted in federal court because it has not been fairly presented to the state courts. See Trowery v. Walters, 45 Fed. Appx. 206, 207 (3d Cir. Aug. 28, 2002) (non-precedential) (petitioner did not exhaust state remedies when claim was mentioned in pro se but not amended

PCRA petition); Shiloh v. Wilkes, No. 14-0860, 2015 WL 5342704 at *5 (M.D. Pa. Sept. 14, 2015) ("Under Pennsylvania law, when a litigant is represented by counsel, the state court will not entertain pro se briefs, and thus any claims presented by a represented litigant exclusively in pro se filings are not 'fairly presented' to the state court."). Because the claim was not presented to the Superior Court, it is procedurally defaulted.

As previously noted, Petitioner can overcome default by showing cause and prejudice, or that a failure to consider the defaulted claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192. With regard to cause and prejudice, Petitioner argues that the default of this claim should be excused under Martinez v. Ryan, 566 U.S. 1 (2012). Doc. 24 at 7 (ECF pagination). In Martinez, the Supreme Court carved out a narrow exception to the rule that ineffective assistance of PCRA counsel does not provide cause to excuse a procedural default, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. The Court explained that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." Id. at 10-11. Thus, the Martinez exception applies only to claims of ineffective assistance of trial counsel where the errors or absence of post-conviction counsel caused a default of these claims at the initial-review post-conviction proceeding. Id. at 14; see also Norris v. Brooks, 794 F.3d 401, 405 (3d Cir. 2015) ("Martinez made very clear that its exception to the general rule . . . applies only to attorney error causing procedural default during initial-review collateral

proceedings, not collateral appeal."). In addition, to take advantage of Martinez, Petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that . . . the claim has some merit." Martinez, 566 U.S. at 14.[8]

Here, Petitioner's ineffectiveness of trial counsel claim is defaulted because counsel abandoned the claim in the Amended PCRA, and thus Martinez potentially applies to excuse the default. However, he must also establish that his underlying ineffectiveness claim is "substantial." In reviewing a claim of ineffectiveness of counsel, a court must apply a "strong presumption that counsel's representation is within the wide range of reasonable professional assistance. Harrington v. Richter, 562 U.S. 86, 104 (2011) (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)). Petitioner must demonstrate that counsel "made errors so serious that his representation fell below an objective standard of reasonableness" and this standard cannot be met "based on vague and conclusory allegations." Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) (denying habeas relief on IAC claim when petitioner failed to "set forth facts to support his contention"). Petitioner must also demonstrate that counsel's failure to meet and objective standard of reasonableness "resulted in prejudice so as to deprive the petitioner of a fair trial, that is, a trial whose result is reliable." Id. at 295.

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[8]Whether a claim has "some merit" is judged by the standard to obtain a certificate of appealability. Martinez, 566 U.S. at 14 (citing Miller-El v. Cockerell, 537 U.S. 322, 327 (2003) ("A petitioner satisfies this standard by demonstrating 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.")).

Petitioner alleges his trial counsel was ineffective for failing to meet with him before trial to discuss strategy, stating such a meeting was necessary to allow "trial counsel to asses[s] [P]etitioner's demeanor, credibility and the overall impression" he would have on the jury if he chose to take the stand. See Doc. 24 at 10 (ECF pagination). He also alleges that "trial counsel's dereliction . . . was [so] total that it [led] to a complete breakdown in the attorney-client relationship," and that as a result he did not have adequate time to evaluate an offered plea bargain. Id. at 11. Finally, he alleges that his lawyer failed to inform him until the day of trial of a tape recording of an anonymous call his office received from a person that his family identified as a former girlfriend, and that if he had been informed earlier he could have asked his counsel to interview her as there was a "strong possibility" she could strengthen his defense. Id. None of these allegations make out a colorable ineffectiveness claim under Strickland. Petitioner fails to address how the trial counsel's strategy was inadequate, what alternative strategy counsel should have chosen to pursue, what information he was unable to share as a result of trial counsel's failure to meet with him face-to-face prior to trial, and whether he would have either testified or pled guilty had counsel performed differently. See, e.g., Brown v. Lawler, No. 09-2565, 2010 WL 11463158, at *5-6 (E.D. Pa. Jan, 19, 2010) (Reuter, M.J.), approved and adopted (E.D. Pa. Oct. 13, 2016) (Surrick, J.) (ineffectiveness claim for failing to meet prior to trial fails where petitioner offered only bald allegations of ineffectiveness and record shows counsel was prepared for trial). Furthermore, the record indicates that trial counsel adhered to Petitioner's trial strategy demands, including the presentation of an alibi defense which trial counsel advised

against.[9] See N.T. 7/30/08, 162-63. Because the underlying claim of trial counsel ineffectiveness was not substantial, Petitioner is not entitled to the benefit of Martinez. Petitioner does not identify any other cause and prejudice argument to excuse the default of this claim, nor is any apparent in the record.

Similarly, Petitioner does not make a showing that the failure to consider this claim will result in a fundamental miscarriage of justice. As previously noted, this exception requires new, reliable evidence of factual innocence. See Schlup, 513 U.S. at 324. The facts underlying this ineffectiveness claim were known to Petitioner at least at the time of his PCRA petition, if not at the time of trial itself. As a result, this claim is defaulted and cannot be reviewed.

B. Ground Three: Insufficient Evidence

In his third claim, Jackson alleges that the evidence was insufficient to support his conviction for first-degree murder because the government did not demonstrate that he possessed the specific intent to kill. Doc. 1 at 9. Petitioner exhausted this claim on direct appeal, and the District attorney argues the Superior Court correctly rejected this argument as meritless. Doc. 18 at 13-15.

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[9]The District Attorney also argues that Petitioner is not entitled to the benefit of Martinez because the claim that PCRA counsel was ineffective (in failing to raise the claims of ineffectiveness of trial counsel) is itself defaulted, citing Edwards v. Carpenter, 529 U.S. 446, 451-53 (2000). The District Attorney cites no post-Martinez cases to support this proposition, and in light of my conclusion that Martinez is inapplicable on other grounds, I do not find it necessary to further consider this argument at this time.

Principles of due process dictate that a person can be convicted only upon proof of all the elements of the offense beyond a reasonable doubt. In re Winship, 397 U.Ss. 358, 364 (1970); Sullivan v. Cuyler, 723 F.2d 1077, 1083-84 (3d Cir. 1983); see also Jackson v. Virginia, 443 U.S. 307, 324 (1979) (habeas relief available only where "no rational trier of fact could have found guilt beyond a reasonable doubt"). Accordingly, in reviewing challenges to the sufficiency of the evidence, a court must determine "whether, after reviewing 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." Sullivan, 723 F.2d at 1083-84 (quoting Jackson, 443 U.S. at 319) (emphasis in original). Applying this standard under the habeas statute, a writ of habeas corpus may be issued for evidentiary insufficiency only if the state courts have unreasonably applied either the Jackson "no rational trier of fact standard," or the state equivalent of the Jackson standard. 28 U.S.C. § 2254(d)(1); see Smith v. Vaughn, No. 96-8482, 1997 WL 338851, at *7 (E.D. Pa. June 17, 1997). Pennsylvania courts follow the Jackson rule. See Commonwealth v. Trill, 543 A.2d 1106, 1112 (Pa. Super. 1988) (verdict will be upheld if, "viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt") (quoting Commonwealth v. Griscavage, 517 A.2d 1256, 1257 (Pa. 1986)).

In addressing Petitioner's case on direct appeal, the Superior Court adopted the reasoning of the trial court in concluding that the evidence was sufficient to support the conviction, including the conclusion that Jackson possessed the requisite intent to kill.

> This issue is easily resolved. Our courts have long held that the use of a deadly weapon upon a vital part of the body is sufficient to demonstrate an intent to kill. Commonwealth v. Cruz, 919 A.2d 279, 281 (Pa. Super. 2007), appeal denied, 593 Pa. 725, 928 A.2d 1289 (2007). Such an inference arises where the victim is shot in the back with a gun. [Petitioner] argues that the Commonwealth failed to show that [Petitioner] was aiming at a vital organ. Such a suggestion is utterly specious. No such showing is required. It is assumed that the gun was aimed precisely where the bullet penetrated, which in this case was the victim's heart. The evidence clearly demonstrated a specific intent to kill.

Super. Ct.-Direct, at 3. This decision is neither contrary to, nor an unreasonable application of, the Jackson sufficiency standard.

In Pennsylvania, first-degree murder is defined as a criminal homicide that is "committed by an intentional killing." 18 Pa. C.S.A. § 2502(a). A first-degree murder conviction requires the Commonwealth to demonstrate that "a human being was unlawfully killed; the defendant was the killer; and the defendant acted with malice and a specific intent to kill." See Commonwealth v. Diggs, 949 A.2d 873 (Pa. 2008). Malice is defined as "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person not be intended to be injured." Commonwealth v. McHale, 858 A.2d 1209, 1212-13 (Pa. Super. 2004) (quoting Commonwealth v. Pigg, 571 A.2d 438, 441 (Pa. Super. 1990)).

In this case, Mylan Harrison testified that he saw Petitioner and the victim engaged in conversation, and then Petitioner fired multiple shots from a semiautomatic pistol at the victim from a distance of 15 feet. N.T. 07/29/08 at 192-93. The Commonwealth corroborated this evidence with the testimony of the medical examiner,

who reported that the victim was shot in the back from a distance of over three feet. Id. at 279, 282-84. The medical examiner concluded the victim's cause of death was the bullet that entered the victim's back, penetrating the victim's heart, lungs, diaphragm, spleen and liver. Id. at 279-80.

Considering this evidence in the light most favorable to the prosecution, the Commonwealth met its burden to establish that Jackson possessed the specific intent to kill. Through the testimony of the eyewitness and the medical examiner, the Commonwealth demonstrated that Petitioner possessed specific-intent to kill by using a deadly weapon upon a vital part of the body. Cruz, 919 A.2d at 281. As such, the Superior Court reasonably concluded that the evidence was sufficient to convict Jackson of first-degree murder.

C. Ground Four: Trial Court Error

Lastly, Petitioner argues that the trial court erred by failing to grant Petitioner a mistrial following alleged prosecutorial misconduct.[10] Petitioner did not present the state

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[10]Petitioner argues there were two incidents of prosecutorial misconduct which should have given rise to a mistrial. Doc. 1 at 10-11 (ECF pagination). He does not identify the incidents, but in his reply refers to a misconduct claim raised on PCRA. Doc. 24 at 15 (ECF pagination) (citing PCRA Op. at 3). That claim relied on the prosecutor's opening statement, where he stated that both the victim and the victim's brother had been murdered and the victim's mother was suffering as a result. N.T. 07/29/08 at 50. After trial counsel objected and moved for a mistrial, the court sustained the objection and struck the statement from the record rather than granting a mistrial. Id. at 63-68. Petitioner had also argued on PCRA that, on cross-examination, the prosecutor asked a witness how many times she had seen Petitioner with a gun, assuming a fact not in evidence. PCRA Op. at 5; N.T. 07/30/08 at 235. Counsel objected and again moved for a mistrial. N.T. 07/30/08 at 235-40. The court struck the question from the record and instructed the jury to not consider it. N.T. 07/31/08 at 6. I will assume that Petitioner raises both of these allegations of misconduct here.

courts with a claim of trial court error or prosecutorial misconduct, but instead asserted ineffectiveness claims for failing to request a mistrial due to the alleged prosecutorial misconduct. An ineffectiveness of counsel claim is distinct from a trial court error claim because they implicate different legal theories. See Duncan v. Henry, 513 U.S. 364, 366 (1995) (similarity of claim raised in habeas petition to claim addressed by state court on merits is insufficient to exhaust) (citations omitted); Gattis v. Snyder, 278 F. 3d 222, 237 n.6 (3d Cir. 2002) (underlying substantive claim presented to state court as one of IAC not exhausted because underlying claim involves different legal theory); cf Willis v. Vaughn, 48 Fed. Appx. 402, 406 (3d Cir. 2002) ("[IAC] claims and underlying due process claims are distinct, and exhaustion of one does not constitute exhaustion of the other."). Accordingly, Petitioner's claim of trial court error is defaulted.

Petitioner recognizes that his claim of trial court error was not presented in his direct or PCRA appeals, but asks the Court to permit him leave to explain why his habeas petition contains a trial court error claim and not an ineffectiveness of counsel claim. Doc. 24 at 15 (ECF pagination). Petitioner then proceeds to explain the discrepancy, asserting he should be granted leeway given his pro se status and due to his limited access to the prison law library and law clerks. However, these factors do not present sufficient cause to excuse the procedural default of Petitioner's trial court error claim.

First, pro se status is insufficient itself to excuse a procedural default. See Siluk v. Beard, 395 F. App'x 817, 820 (3d Cir.2010) ("[P]ro se status, without more, cannot constitute cause sufficient to excuse the procedural default of his federal claims in state court."); Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992) (pro se status is not an

"objective factor external to the defense that will provide cause for a procedural default"). Second, limited access to a prison law library is similarly insufficient to establish cause to excuse a procedural default. See Bonilla v. Hurley, 370 F.3d 494, 498 (6th Cir. 2004) ("the fact that [petitioner's] time in the prison law library was limited to four hours per week was insufficient to establish cause to excuse his procedural default."); Sabo v. Warden, London Correctional Institution, No. 16-0536, 2017 WL 56035, at * 2 (S.D. Ohio, 2017) ("Courts have held repeatedly that a petitioner's pro se incarcerated status, limited access to the prison law library, or ignorance of the law and . . . procedural requirements do not constitute cause sufficient to excuse a procedural default."). Notably, Petitioner successfully completed and filed a timely habeas petition containing four claims, despite alleged obstacles with regard to housing and access to the prison law library access issues, thus undermining his assertion that the obstacles somehow interfered with his ability to file an accurate habeas petition. Under the circumstances, I conclude that Petitioner has failed to demonstrate cause sufficient to excuse the procedural default of the trial court error claim.

Even were I to construe this claim as one of ineffectiveness of counsel for failing to request a mistrial due to prosecutorial misconduct, a claim Petitioner did exhaust, he would not be entitled to relief on the merits. Under Strickland, a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel must first show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, a petitioner 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, meaning a trial whose result is reliable. 466 U.S. at 687. In determining prejudice, the question is whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see also Smith v. Robbins, 528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed"). The Third Circuit has held that counsel will not be considered ineffective for failing to pursue a meritless argument. Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998).

As previously noted, there were two instances of alleged prosecutorial misconduct, neither of which was found by the state courts to warrant a mistrial. As to the prosecutor's opening statements, the Superior Court stated as follows:

> Here, during his opening statement, the prosecutor referenced the murder of [the victim's] brother to explain that [Harrison] came forward because he felt that [the victim's] mother had another son who had been murdered. [Petitioner's] trial counsel immediately objected, and moved for a mistrial. The court sustained the objection, struck the statement from the record, and gave a cautionary instruction to the jury, but denied the motion for a mistrial. . . . See Commonwealth v. Jones, 668 A.2d 491, 504 (Pa. 1995) (stating juries are presumed to follow cautionary instructions). In addition to giving the cautionary instruction, the trial court instructed the jury that the arguments of counsel are not evidence. . . . See Commonwealth v. Stokes, 839 A.2d 226, 233 (Pa. 2003) (stating that a court's instruction that a prosecutor's comments do not constitute evidence was sufficient to remove any prejudice). Thus, because trial counsel objected and moved for a mistrial, and secured a cautionary instruction from the trial court, Jackson's first ineffectiveness claim is without merit.

Super. Ct.-PCRA at 4-5. The second instance of prosecutorial misconduct occurred during cross examination of an alibi witness, when the witness was asked "how many times have you seen [Petitioner] in possession of a gun?" N.T. 07/30/08 at 235. Counsel again objected and moved for a mistrial, see id., and ultimately Judge Woods-Skipper struck the question, instructing the jurors that they could not consider the prosecutor's question in their deliberations and that questions are not evidence. N.T. 07/31/08 at 6. As the trial court noted:

> Juries are presumed to follow the instructions of a trial court to disregard inadmissible evidence. Therefore, the Court cured any potential prejudice by immediately sustaining the defense objection and instructing the jurors that they could not consider the question. Accordingly, counsel cannot be deemed ineffective for failing to raise a meritless claim.

PCRA Op. at 6 (state law citations omitted).[11]

The reasoning of the state courts is neither contrary to, nor an unreasonable application of, Strickland. In response to the prosecutor's opening statement, counsel objected and moved for a mistrial, and therefore did what Petitioner argues he should have done. N.T. 07/29/08 at 50. As to the prosecutor's statement during cross-examination of the alibi witness, counsel objected and again moved for a mistrial. N.T. 07/30/08 at 235. Judge Woods-Skipper struck the prosecutor's question and instructed the jurors that they could not consider the question because it was not evidence. N.T.

[11]It appears that Petitioner did not pursue this second ground for the prosecutor's misconduct as part of his PCRA appeal, which is an additional reason for default of this portion of the claim. Super. Ct.-PCRA at 4 & n.2 (Petitioner did not identify which prosecutorial statements were improper, but referenced comments regarding victim's brother in Statement of Questions).

07/31/08 at 6. Under these circumstances, counsel's actions cannot be deemed deficient, and in any event there is no evidence that the prosecutor's statement deprived Petitioner of a fair trial. Therefore, even were I to construe this as an ineffectiveness claim, I would find it to be without merit.[12]

IV. MOTIONS

Petitioner has moved the court for an evidentiary hearing and discovery. Doc. 25 & 27. Both motions should be denied.

Petitioner is not entitled to an evidentiary hearing on his claims. Federal courts are constrained in their authority to hold such hearings. Under the habeas statute, "a determination of a factual issue made by a State court" is presumed correct, rebuttable by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). If an "applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant" shows two elements. First, he must show that the claim relies on either a new and retroactive rule of constitutional law or that a factual predicate for the claim could not have been previously discovered by the exercise of due diligence, and second he must show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty." Id. § 2254(e)(2)(A) & (B); see also Palmer v. Hendricks, 592 F.3d 386, 393 (3d Cir. 2010)

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[12]Petitioner had also claimed on PCRA that direct appellate counsel was ineffective for failing to raise prosecutorial misconduct, but the Superior Court found the claim waived on PCRA appeal for failure to address it in his brief. Super. Ct.-PCRA at 4 n.1. Petitioner does not raise that claim here.

(in determining propriety of an evidentiary hearing, court should "consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief") (quoting Schirro v. Landrigan, 550 U.S. 465, 474 (2007)). For purposes of applying this section, an applicant will not be considered to have failed to develop the record in state court unless "there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Taylor v. Horn, 504 F.3d 416, 436 (3d Cir. 2007) (quoting Thomas v. Barner, 428 F.3d 491, 498 (3d Cir. 2005)). Here, the facts Petitioner alleges were clearly known to him at the time of trial and/or on PCRA appeal. In addition, Petitioner's claims are not complicated and can be resolved on the record without the need for an evidentiary hearing.

Similarly, Petitioner's motion for discovery should be denied. Discovery in a habeas proceeding is not automatic. Rule 6(a) of the Rules Governing Section 2254 Cases states that "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of such discovery." The Supreme Court has interpreted good cause to mean that discovery will be permitted "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." Peterkin v. Horn, 30 F. Supp.2d 513, 516 (E.D. Pa. 1998) (quoting Bracy v. Gramley, 520 U.S. 899, 908-09 (1997)). For the reasons set forth in this Report, I find that Petitioner has failed to meet this threshold. Accordingly, Petitioner's motion for discovery should be denied.

V. CONCLUSION

Petitioner's habeas petition is timely, and raises 4 grounds for relief. Ground One, which asserts ineffectiveness of PCRA counsel, is non-cognizable. Ground Two, raising ineffectiveness of trial counsel for failing to meet with Petitioner prior to trial, is procedurally defaulted. Ground Three, challenging the sufficiency of the evidence, is exhausted and meritless. Ground Four, related to trial court error for failing to grant a mistrial, is procedurally defaulted and, if construed as an exhausted ineffectiveness claim, is meritless. Plaintiff's motion for an evidentiary hearing and motion for discovery should be denied.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 18th day of April 2017, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED, and that Plaintiff's motion for an evidentiary hearing and motion for discovery be DENIED. There has been no substantial showing of the denial of a constitutional right requiring 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.

ELIZABETH T. HEY, U.S.M.J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAURICE JACKSON	:	CIVIL ACTION
	:	
v.	:	
	:	
LAWRENCE P. MAHALLY, et al.	:	NO. 16-0174

ORDER

AND NOW, this day of , 201 , upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED AND ADOPTED;

2. The petition for a writ of habeas corpus is DENIED.

3. Plaintiff's motion for an evidentiary hearing and motion for discovery are DENIED.

4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

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MITCHELL S. GOLDBERG, J.

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

MAURICE JACKSON,	:	
	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	
	:	**NO. 16-0174**
TOM MCGINLEY, et al.,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this 15th day of May, 2020, upon consideration of Petitioner's Petition for Writ of Habeas Corpus (Doc. No. 1), the Supplemental Report and Recommendation (R&R) of United States Magistrate Judge Elizabeth Hey (Doc. No. 61), Petitioner's Objections to the Supplemental R&R (Doc. No. 65), and Respondents' Response (Doc. No. 66) I find as follows:

1. On August 1, 2008, a jury found Petitioner guilty of first-degree murder, firearms not to be carried without a license, and possession of an instrument of crime. The convictions arose from an incident on May 29, 2007, during which Petitioner shot at the victim four times, as the victim fled, ultimately hitting him in the back and killing him. On October 17, 2008, Petitioner was sentenced to an aggregate term of life in prison.
2. Petitioner timely filed a direct appeal asserting that the evidence was insufficient to sustain his conviction and that the verdicts were against the weight of the evidence. The Pennsylvania Superior Court affirmed the verdict on March 17, 2011, finding sufficient evidence of Petitioner's intent to kill. On July 12, 2011, the Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal.
3. Petitioner filed a timely *pro se* petition pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541–9551, setting forth claims of ineffective assistance

of both trial and appellate counsel, as well as claims of trial court error. On November 27, 2013, the court appointed counsel who filed an amended PCRA petition alleging modified claims of ineffective assistance of trial and appellate counsel. The PCRA court dismissed the petition without a hearing. The Superior Court affirmed on August 31, 2015. Although Petitioner's first request for allowance of appeal to the Pennsylvania Supreme Court was denied as untimely, he filed a second PCRA petition seeking leave to petition for allowance of appeal *nunc pro tunc*. That petition was granted and Petitioner filed his subsequent petition for allowance of appeal, which the Pennsylvania Supreme Court denied on September 13, 2016.

4. On January 4, 2016, during the pendency of his second PCRA petition, Petitioner filed the present *pro se* federal habeas petition setting forth four grounds for relief: (1) ineffective assistance of PCRA counsel for abandoning an ineffectiveness claim premised on trial counsel's failure to meet with Petitioner prior to trial to devise a defense strategy; (2) ineffective assistance of trial counsel for failing to meet with Petitioner prior to trial to discuss defense trial strategy; (3) insufficient evidence to support a first-degree murder conviction; and (4) trial court error for failing to grant a mistrial following instances of prosecutorial misconduct.

5. On April 18, 2017, United States Magistrate Judge Elizabeth Hey issued an R&R finding that: (a) Petitioner's claim of PCRA counsel ineffectiveness is not cognizable as a stand-alone claim; (b) Petitioner's claim of ineffective assistance of trial counsel is procedurally defaulted; (c) Petitioner's claim of insufficient evidence is meritless; and (d) Petitioner's claim of trial court error is both procedurally defaulted and meritless.

6. Petitioner timely filed objections on June 1, 2017. I sustained Petitioner's objection on his claim of ineffective assistance of trial counsel for failing to discuss a plea bargain with him

until just hours prior to trial. Specifically, I noted that there was an insufficient record on which to determine whether trial counsel had provided Petitioner with "enough information 'to make a reasonably informed decision whether to accept a plea offer.'" Jackson, 2018 WL 347573, at *3 (citing U.S. v. Bui, 795 F.3d 363, 366 (3d Cir. 2015) (quoting Shotts v. Wetzel, 724 F.3d 364, 376 (3d Cir. 2013)). Although I remanded to Judge Hey for further proceedings on this issue, I denied his objections on all other grounds.

7. On remand, Judge Hey appointed counsel, received additional briefing from the parties, and conducted an evidentiary hearing on this sole remaining claim.

8. On May 31, 2019, Judge Hey filed a Supplemental Report and Recommendation ("Supplemental R&R") denying Petitioner's claim that trial counsel was ineffective for failing to timely discuss a plea bargain with him. She remarked that the claim was procedurally defaulted and that the default was not excused under Martinez v. Ryan, 566 U.S. 1 (2012) because neither PCRA counsel nor trial counsel were ineffective.

9. Petitioner filed new objections, and Respondents filed a response.

LEGAL STANDARDS

10. Under 28 U.S.C. § 636(b)(1)(B), a district court judge may refer a habeas petition to a magistrate judge for proposed findings of fact and recommendations for disposition. When objections to a Report and Recommendation have been filed, the district court must make a *de novo* review of those portions of the report to which specific objections are made. 28 U.S.C. § 636(b)(1)(C); Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In performing this review, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

DISCUSSION

11. Without disputing that his claim of trial counsel ineffectiveness is procedurally defaulted, Petitioner contends that he has established cause to excuse default under Martinez because the Supplemental R&R erred in finding that trial counsel was not ineffective for failing to meet with Petitioner prior to trial to discuss strategy. Specifically, Petitioner argues that: (1) Judge Hey reached an incorrect factual conclusion that trial counsel met with Petitioner at least twice before trial; (2) Judge Hey incorrectly concluded that, even assuming that trial counsel did not meet with Petitioner until Friday, July 25, 2008—the Friday before his Monday trial start date—such a late meeting did not constitute deficient performance; and (3) Judge Hey incorrectly found that no prejudice resulted from any trial counsel action/inaction, and improperly discredited Petitioner's testimony that he would have accepted the Commonwealth's plea offer if he understood that a conviction would result in a mandatory life sentence.

A. Whether Judge Hey Incorrectly Found that Trial Counsel Met with Petitioner Twice Before Trial

12. Petitioner's first objection asserts that the evidence presented at the evidentiary hearing contradicts Judge Hey's conclusion that trial counsel met with Petitioner on the Friday before the trial and on at least one other occasion. Petitioner contends that (a) he testified at the evidentiary hearing that trial counsel never visited him in prison; (b) visitor logs from the Philadelphia Prison System and the Pennsylvania Department of Corrections corroborated that testimony; and (c) trial counsel herself had no specific memory of Plaintiff's case, but simply testified that her general practice was to visit clients in the prison and would not have proceeded to trial without several pre-trial meetings with her

clients. Given this evidence, Petitioner now asserts that it was an abuse of discretion for Judge Hey to find that trial counsel met with Petitioner prior to July 25, 2008.

13. This factual determination has no relevance to the question at issue here. The sole issue for resolution in the Supplemental R&R concerned Petitioner's representation that trial counsel informed him of the Commonwealth's plea bargain just hours prior to voir dire. See Jackson v. McGinley, No. 16-174, 2018 WL 3477573, at *6 (E.D. Pa. Jan. 9, 2018) (remanding "on the sole issue of the merits of Petitioner's claim that trial counsel was ineffective for failing to discuss a plea bargain with him until just prior to the start of trial).) I held that if, after an evidentiary hearing, testimony established that trial counsel knew of the plea offer prior to that time and never told Petitioner about it, trial counsel could be deemed to have rendered a deficient performance. Id. at *4. Moreover, I determined that Petitioner had plausibly alleged prejudice in that the plea bargain allegedly offered fifteen to thirty years' imprisonment, and Petitioner ultimately received a life sentence after trial. Id.

14. But following an evidentiary hearing on this issue, Judge Hey found that it was not "just hours" prior to voir dire when trial counsel communicated the plea deal. Rather, she concluded that "the Commonwealth did not make the plea offer until July 24, and . . . counsel conveyed it to Petitioner the next day, in her meeting with Petitioner prior to the ex parte hearing." (Supp. R&R 14.) Judge Hey opined that "[i]n light of the July 25 transcript showing that counsel conveyed the offer the day after receiving it from the prosecutor, PCRA counsel had no basis to complain of counsel's ineffectiveness in this respect." (Id.)

15. To the extent Judge Hey found that trial counsel had met with Petitioner to discuss trial strategy on at least one occasion prior to July 25th, that factual finding has no bearing on the issue before me. Accordingly, I will overrule this objection.

B. Whether Judge Hey Incorrectly Concluded that the Last Minute July 25, 2008 Meeting Did Not Constitute Ineffective Assistance

16. Petitioner next contends that Judge Hey improperly concluded that, even assuming trial counsel did not meet with Petitioner until July 25, 2008, such a late meeting did not constitute ineffective assistance. Petitioner posits that "because of the serious nature of the charge against him (first degree murder with a mandatory life sentence upon conviction) and because of his age and education level (he was then 21 years old, had only reached the 8th grade, and was assigned to special education classes . . . it was unreasonable for trial counsel to fail to meet with him until the Friday before a Monday trial date" to "discuss the evidence and defense strategy." (Pet'r's Objections 3.)

17. Again, however, this objection attempts to expand the scope of the issue before me. As noted above, I already approved and adopted the original R&R's recommendation that the claim of trial counsel ineffectiveness for failing to meet and discuss trial strategy with Petitioner was procedurally defaulted. The sole issue on which the matter was remanded back to Judge Hey was whether trial counsel failed to communicate to Petitioner an earlier-offered plea deal until just hours prior to the start of trial.

18. In consideration of this issue, Judge Hey reviewed a transcript from an *ex parte* hearing held by the state trial judge on Friday, July 25, 2008, the same day that trial counsel met with Petitioner and communicated the plea offer. In that transcript, Petitioner expressed to the trial court that he had just received an offer from the Commonwealth of fifteen to thirty years for third degree murder, he had considered that offer, and he rejected the offer and

wished to proceed to trial. (Supp. R&R 16 (citing N.T. 7/25/08, at 10–11).) Petitioner further indicated that he was satisfied with his counsel's performance up to that point. (Id.)

19. Based on this evidence, Judge Hey correctly concluded that, under the controlling case of Missouri v. Frye, 566 U.S. 133, 145 (2012), counsel did not violate his constitutional duty to timely and properly communicate a formal plea offer to Petitioner. Indeed, she cogently noted that "[w]hile Petitioner's situation is indeed compelling, as he had to make a difficult decision under difficult circumstances, the Constitution does not guarantee him a specific amount of time or a specific quality of attorney-client relationship in considering whether to accept a plea offer." (Supp. R&R 16.)

20. Petitioner cites no cases, and I find none, supporting the notion that communication of a plea deal three days prior to the start of trial—particularly when the prosecution just presented that plea deal—constitutes ineffective assistance of trial counsel. As such, I will overrule this objection as well.

C. Whether Judge Hey Incorrectly Concluded that Trial Counsel's Deficient Performance was Not Prejudicial

21. Petitioner's final objection challenges Judge Hey's conclusion that counsel's performance was not prejudicial. He notes that Judge Hey found Petitioner not credible when he testified that he did not understand that a conviction would result in a mandatory life sentence. Petitioner asserts that because there was no contrary evidence to contradict his testimony, it was an abuse of discretion for Judge Hey to reject it outright.

22. I find no merit to this objection on three grounds. First, a district court "may not reject a finding of fact by a magistrate judge without an evidentiary hearing, where the finding is based on the credibility of a witness testifying before the magistrate judge." Haas v. Warden, SCI Somerset, 760 F. Supp. 2d 484, 487 (E.D. Pa. 2010) (quoting Hill v.

Beyer, 62 F.3d 474, 482 (3d Cir. 1995)). "Our judicial system affords deference to the finder of fact who hears the live testimony of witnesses because of the opportunity to judge the credibility of those witnesses." Hill, 62 F.3d at 482.

23. Second, contrary to Petitioner's argument, Judge Hey had ample basis for discrediting Petitioner's testimony that he did not realize he was facing a mandatory life sentence. Specifically, she noted that:

    - "Regardless of whether counsel advised Petitioner to accept or reject the plea offer, it is implausible that counsel discussed the plea offer with Petitioner without discussing the penalty for a first-degree murder conviction, and illogical for petitioner to suggest that he did not know the penalty for first-degree murder would not be substantially more than the offer of 15-to-30 years' imprisonment contained in the plea offer for third-degree murder." (Supp. R&R 18.)

    - "Petitioner's testimony that he wanted to take the plea deal . . . but rejected it because his counsel advised him to go to trial in light of her confidence that she could 'beat my case,' . . . does not square with . . . [Petitioner's insistence] on proceeding with an alibi defense over counsel's express advice to the contrary." (Id.) Indeed, Petitioner testified that he really did not talk too much about the plea deal after he told trial counsel that he thought the alibi witness was his best option. (Id. at 19.)

    - "Petitioner has continuously asserted his innocence, as he conceded during the evidentiary hearing . . . Petitioner testified that he would have agreed with the facts underlying the conviction in the course of a guilty plea colloquy, but that the facts would not be true . . . Protestations of innocence are relevant to determine whether a petitioner would have plead guilty for purposes of establishing prejudice." (Id. at 19 (citing Wheeler v. Rozum, 410 F. App'x 453, 458 (3d Cir. 2010)).

24. Given that Judge Hey set forth abundant reasons for her credibility determination, I have no basis on which to disturb her factual finding that Petitioner was not prejudiced by the timing of the plea deal disclosure. I will therefore overrule this objection as well.

WHEREFORE, it is hereby **ORDERED** that:

1. Petitioner's Objections to the Supplemental Report and Recommendation are **OVERRULED**;

3. The Supplemental Report and Recommendation (Doc. No. 61) is **APPROVED AND ADOPTED**;

4. The Petition for Writ of Habeas Corpus (Doc. No. 1) is **DENIED**.

5. There is no basis for the issuance of a certificate of appealability.

6. The Clerk of Court shall mark this case **CLOSED**.

BY THE COURT:

/s/ Mitchell S. Goldberg
MITCHELL S. GOLDBERG, J.

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

MAURICE JACKSON	:	CIVIL ACTION
	:	
v.	:	
	:	
TOM MCGINLEY, et. al.	:	NO. 16-0174

SUPPLEMENTAL REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. May 30, 2019

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by Maurice Jackson ("Petitioner"), who is currently incarcerated at SCI-Coal Township, Pennsylvania. I previously issued a Report and Recommendation ("R&R") recommending that the petition be denied. After Petitioner filed objections, the Honorable Mitchell S. Goldberg recommitted the matter to me for a supplemental R&R. For the reasons that follow, I again recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY[1]

Petitioner is serving a sentence that followed a 2008 trial before the Honorable Sheila Woods-Skipper in the Philadelphia Court of Common Pleas. The facts and procedural history of the case were later summarized by the Pennsylvania Superior Court on direct appeal:

> On August 1, 2008, a jury found [Petitioner] guilty of first degree murder, firearms not to be carried without a license, and possession of an instrument of crime. [Petitioner's] convictions arose from an incident on May 29, 2007, during

[1]The procedural history set forth in my original R&R is largely repeated here for purposes of context.

> which Mylan Harrison, who knew both [Petitioner] and the victim, Keith McCorey, testified that [Petitioner] shot at McCorey four times, as McCorey fled from [Petitioner]. McCorey died of a gunshot wound to his back. The bullet penetrated McCorey's heart, lungs, diaphragm, spleen, and liver. McCorey also suffered a gunshot wound to his foot. Mr. Harrison waited about a week before coming forward to police. Thereafter, [Petitioner] was arrested following a high-speed vehicular chase. On October 17, 2008, [Petitioner] was sentenced to an aggregate term of life imprisonment.

Commonwealth v. Jackson, No. 814 EDA 2009 at 1-2 (Pa. Super. Mar. 17, 2011) (Doc. 18 Exh. A) ("Super. Ct.-Direct") (footnote omitted).

Following the denial of post-trial motions, Petitioner timely filed a direct appeal, arguing that the verdict was based on insufficient evidence and was against the weight of the evidence. On March 17, 2011, the Superior Court affirmed, concluding that the Commonwealth proved specific intent to kill by demonstrating that Petitioner shot the victim in a vital organ, that Mr. Harrison's testimony was sufficient to identify Petitioner as the shooter, and that the conviction was consistent with the weight of the evidence because Mr. Harrison's testimony was corroborated by the medical examiner's opinion and it was for the jury to evaluate the alibi witness's testimony. Super. Ct.-Direct at 2-5. The Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal on July 12, 2011. Commonwealth v. Jackson, 24 A.3d 362 (Pa. 2011) (table).

On February 23, 2012, Petitioner filed a pro se petition pursuant to the Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551, presenting claims of trial court error and ineffective assistance of counsel ("IAC") at trial and appeal, including a claim that his trial counsel failed to meet with him prior to trial to

discuss defense strategy. Commonwealth v. Jackson, No. CP-51-CR-0012730-2007, PCRA Petition, at 3 (Phila. C.C.P. Feb. 23, 2012). Appointed counsel filed an amended petition alleging IAC at both trial and appeal, but did not raise the IAC claim with respect to trial counsel's failure to meet with him prior to trial. Commonwealth v. Jackson, No. CP-51-CR-0012730-2007, Amended PCRA Petition, ¶ 9 (Phila. C.C.P. Nov. 27, 2013).[2] On July 11, 2014, Judge Woods-Skipper dismissed the petition without a hearing, and later issued an opinion recommending affirmance on appeal. Commonwealth v. Jackson, No. CP-51-CR-0012730-2007, Opinion (Phila. C.C.P. Oct. 31, 2014) (Doc. 18 Exh. B.).

The Superior Court affirmed on PCRA appeal. Commonwealth v. Jackson, No. 2409 EDA 2014, Memorandum (Pa. Super. Aug. 31, 2015). Petitioner filed an untimely petition for allowance of appeal which the Pennsylvania Supreme Court denied. Commonwealth v. Jackson, No. 117 EM 2015, Order (Pa. Nov. 13, 2015). After Petitioner obtained leave to file a petition for allowance of appeal nunc pro tunc, see Commonwealth v. Jackson, CP-51-CR-0012730-2007, Docket Sheet (Phila. C.C.P.) (entries dated April 17 & 22, 2016), the Pennsylvania Supreme Court denied review on September 13, 2016. See Commonwealth v. Jackson, No. 201 EAL 2016, 2016 WL 4769159, Order (Pa. Sept. 13, 2016).

[2]The amended petition alleged IAC at trial and appeal for not pursuing motions for mistrial based on prosecutorial misconduct in the opening statement and questioning of a witness, and IAC at trial for failing to challenge a witness's ability to see at 4:30 a.m., failing to object to the jury instruction on alibi testimony, and failing to move for DNA testing of a hat found at the crime scene. See Amended PCRA ¶ 9.

Meanwhile, on January 4, 2016,[3] Petitioner filed his present pro se federal habeas petition asserting four grounds for relief; (1) ineffectiveness of PCRA counsel for abandoning a claim of trial counsel's ineffectiveness for failing to meet with Petitioner prior to trial to devise a defense strategy, (2) ineffectiveness of trial counsel for failing to meet with Petitioner to discuss defense trial strategy, (3) insufficient evidence to support a first-degree murder conviction, and (4) trial court error for failing to grant a mistrial following instances of prosecutorial misconduct. Doc. 1. The District Attorney filed a response to the petition, arguing that the claims are procedurally defaulted and meritless, and Petitioner filed a reply. Docs. 18 & 24.

Judge Goldberg referred the matter to me for an R&R, Doc. 2, and I previously recommended that the petition be denied, concluding that claim one was not cognizable, claim three lacked merit as it was reasonably rejected by the state courts, and claim four was defaulted and lacked merit. Doc. 28 at 9, 14, 21. With respect to claim two, I concluded that the claim was unexhausted and procedurally defaulted and that Petitioner had not overcome the default, and that even if his PCRA counsel was ineffective in failing to raise the issue, Petitioner failed to show that he was prejudiced by his trial counsel's failure to prepare. Id. at 12-13. Petitioner filed objections to the R&R, arguing in the context of claim two that, among other things, just hours before voir dire his counsel told him there was a plea offer of 15 -to- 30 years, and "had it not been for trial

[3]As noted in the original R&R, I deemed the petition filed on the date Petitioner signed it and found it timely. Doc. 28 at 4 n.5, 5 n.7.

counsel's lack of communication and delay in proposing said plea bargain, Petitioner would have had time to consider the deal and would have taken the deal." Doc. 33 at 4.

By Order dated January 9, 2018, Judge Goldberg adopted the R&R as to claims three and four, and rejected it as to claims one and two. Doc. 34 at 9, 13 ¶¶ 1-2.[4] Judge Goldberg referred the matter back to me "for appointment of counsel, further briefing, any necessary evidentiary hearing, and a supplemental [R&R] on the sole issue of the merits of Petitioner's claim that trial counsel was ineffective for failing to discuss a plea bargain with him until just prior to the start of trial." Id. at 13 ¶ 4. I appointed counsel, Doc. at 46, and the parties filed additional briefing on the sole remaining claim. Docs. 43, 52 & 54. On May 6, 2019, I conducted an evidentiary hearing. Docs. 57-59.

II. DISCUSSION

The sole issue is whether Petitioner's trial counsel provided ineffective assistance in failing to discuss a plea bargain with him until just prior to trial. This was part of his second claim, which asserted IAC for counsel's failure to met with him to discuss trial strategy.

For the reasons set forth in my original R&R, claim two is defaulted. Doc. 28 at 9-10; see also Doc. 34 at 4 ¶ 10 ("The Magistrate Judge . . . correctly noted that this claim is procedurally defaulted."). Petitioner relies on Martinez v. Ryan, 566 U.S. 1 (2012), to overcome his default. In Martinez, the Supreme Court carved out a narrow exception to the rule that ineffective assistance of PCRA counsel does not provide cause to excuse a

[4]Judge Goldberg agreed that claim one (ineffectiveness of PCRA counsel) is non-cognizable, but sustained the objection because Petitioner relied on PCRA counsel's ineffectiveness to excuse his default of claim two. Doc. 34 at 3-4, 13.

procedural default, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 9. Here, Petitioner's ineffectiveness of trial counsel claim is defaulted because counsel abandoned the claim in the Amended PCRA, and thus Martinez potentially applies to excuse the default.

The Martinez analysis requires the court to determine whether PCRA counsel was ineffective utilizing the familiar analysis enunciated in Strickland v. Washington, 466 U.S. 668, 688 (1984), but evaluating prejudice by determining whether the underlying claim of ineffectiveness of trial counsel is "substantial" utilizing the standard for granting a certificate of appealability. Martinez, 566 U.S. at 14 (citing Miller-El v. Cockerell, 537 U.S. 322, 327 (2003) ("A petitioner satisfies this standard by demonstrating 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."); Workman v. Sup't Albion SCI, 915 F.3d 928, 937-38 (Cir. Feb. 12, 2019); Preston v. Sup't Graterford SCI, 902 F.3d 365, 376-77 (3d Cir. 2018). If the court finds that PCRA counsel was ineffective utilizing this analysis, then the court proceeds to address the merits of the underlying ineffective assistance of trial counsel claim, utilizing the full Strickland analysis. Thus, Petitioner will only be entitled to relief on this claim if PCRA counsel and trial counsel are found ineffective.

A. PCRA Counsel's Performance

Petitioner's first hurdle under Martinez is to establish PCRA counsel's deficient performance. Because PCRA counsel's performance is inextricably tied up with trial

counsel's performance, I begin by reviewing the evidence with respect to communications between counsel and Petitioner leading up to his rejection of the plea offer.

Petitioner testified at the recent evidentiary hearing that he first met his trial counsel, Barbara McDermott,[5] on Friday, July 25, 2008, three days before the start of his trial, at the Criminal Justice Center ("CJC"). N.T. 05/06/19 at 12-13.[6] Judge McDermott had been appointed in late 2007 to represent him, and he was incarcerated awaiting trial. Id. at 7. Prior to their first meeting, the only communications he received from counsel consisted of four letters, one of which included discovery, but none of which discussed potential trial strategy. Id. at 12. Petitioner further testified that he and counsel never communicated via telephone. Id. at 11-12. Instead, Petitioner described three visits made to him by counsel's investigator, the first of which Petitioner declined because he

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[5]Petitioner's trial counsel is now a judge of the Philadelphia Court of Common Pleas.

[6]Jury selection took place on Monday, July 28, and trial began on Tuesday, July 29. N.T. 07/28/08; 07/29/08 at 27. In his prior pro se filings in the state courts and in this court, Petitioner stated that he did not meet with counsel until the morning of jury selection. See, e.g., Doc. 24 at 6 (Petitioner's pro se "Traverse to Response to Order to Show Cause"); Doc. Doc. 25 at 3 ("Petitioner's Request for an Evidentiary Hearing with his Suggestion in Support"); Doc. 33 at 4 (Objections to R&R). In Petitioner's supplemental memorandum of law, appointed counsel alerted this court to a sealed ex parte hearing which occurred before Judge Woods-Skipper on July 25, 2008. Doc. 24 at 2 n.3. I ordered that the hearing transcript be filed, see Doc. 50, and it revealed that Petitioner met with trial counsel on July 25, 2008. N.T. 07/25/08 (Doc. 51). At the evidentiary hearing, Petitioner acknowledged that he made an error. N.T. 05/06/19 at 46 ("I always thought [the first time meeting counsel] was the day I was brought to court to select my jury, but just recently, I was confronted with the record that it was actually three days prior to me selecting my jury."). All of the above filings were made a part of the record at the hearing.

did not realize the investigator worked for his lawyer, followed by a February 2008 visit when Petitioner was housed in the Philadelphia Prison System and a third some time later while Petitioner was housed in Graterford, a state prison. Id. at 9-11. Petitioner informed the investigator of a potential alibi, but the investigator told him nothing about trial strategy. Id at 10-11.

Petitioner testified that at his July 25, 2008 meeting with Judge McDermott, which lasted about fifteen to twenty minutes, she informed him that the alibi witness was refusing to come to court and that there was a "15 to 30 plea offer." N.T. 05/06/19 at 13. "We went back and forth whether or not to . . . put my witness on the stand. We didn't really . . . talk too much about the deal." Id. at 14. Petitioner wanted to call the alibi witness but his counsel "didn't feel comfortable putting it on." Id. However, counsel told him the Commonwealth's case was not strong, and she "felt confident enough that she can beat my case." Id. at 14, 18. Petitioner explained that he felt rushed to decide whether to accept the plea, and that he rejected it on counsel's advice because she did not think the Commonwealth had a strong case. Id. at 18, 38.[7] He testified that if counsel had met with him earlier to discuss evidence and trial strategy, and if he had been given time to consult with his family, he would have accepted the plea offer. Id. at 17, 61.

Petitioner admitted into evidence the relevant computer inmate visitor logs from the Philadelphia and State prisons, see Evidentiary Hearing Exhs. D-1 (Pennsylvania Department of Corrections ["DOC"] Inmate Visitor Log for November 2007 through

[7]The record is silent as to how long the plea offer remained open. N.T. 05/06/19 at 72. Petitioner testified that his counsel told him he had to make a decision that day and once it was rejected "there was no going back." Id. at 15.

August 1, 2008) & D-3 (Philadelphia Prison System Visitor Log for November 2007 through August 2008). Petitioner also admitted into evidence a letter setting forth the Pennsylvania DOC policy on recording inmate visitors into a computer log (Exh. D-2), a letter regarding the Philadelphia Prison System policy on recording inmate visitors (Exh. D-4), and a stipulation regarding the Philadelphia Prison System Visitor Policy (Exh. D-5). There is no dispute that the name of trial counsel's investigator appears in four entries in the visitor logs, see N.T. 05/06/19 at 68, and that trial counsel's name does not appear on the visitor logs.

Neither side presented evidence from PCRA counsel at the evidentiary hearing. Respondents submitted into evidence a stipulation as to the testimony of Petitioner's trial counsel, Judge McDermott. See Stipulation Regarding Testimony by Judge Barbara McDermott (Evidentiary Hearing Exh. C-7) ("McDermott Stipulation"). The parties stipulated that former counsel has no independent recollection of Petitioner's case, and that she disposed of her criminal files as required by Pennsylvania Rule of Professional Conduct 1.15. Id. ¶ 3. She would testify that her "general practice was to visit clients in prison, spend time with them at the [CJC], exchange letters, and speak with [them] on a secured telephone line." Id. ¶ 4a. She would "always send my investigator to the prison to meet with clients" and informed them "that they could always call me either early in the morning or late in the afternoon, on a non-recorded line, if they wanted to discuss their case." Id. If there was an urgent issue in a case, she would request that a client be brought to the CJC to further discuss the case in person, and "[t]he notes of testimony indicate that I did this in [Petitioner's] case." Id. ¶ 4b. Further, "I never would have

proceeded to trial without first spending time and reviewing the file with my client on several occasions," and that if she was not prepared for trial, she would have requested a continuance. Id. ¶ 4c-d. When she would spend a full day at the prison to meet with numerous clients, she would write "interviews" in the visitor log rather than individually list each client with whom she was meeting. Id. ¶ 4e. The Commonwealth "routinely did not make plea offers until a day or so before trial," id. ¶ 4g, and "a plea offer of third-degree murder and 15-to-30 years of incarceration was a 'good' offer for a first-degree-murder defendant" such that, if the Commonwealth could prove the elements of first-degree murder, "I would not have advised a first-degree-murder defendant to reject that offer." Id. ¶ 4h.

The transcript of the ex parte hearing that took place on the Friday before trial does not answer the question whether former counsel met with Petitioner prior to that date to discuss the case, but it provides important context. Consistent with former counsel's practice of requesting that a client be brought to the CJC if there was an "urgent issue," counsel began the hearing by stating, "I asked the Court to schedule this ex parte proceeding . . . for two reasons." N.T. 07/25/08 at 3. First, counsel stated that "in the course of our investigation many months ago [Petitioner] had provided me with the name" of an alibi witness. Id. Because the witness was refusing to come to court, counsel advised Petitioner against presenting an alibi defense, but Petitioner disagreed and counsel stated that she would therefore subpoena the witness. Id. at 3-8. Second, counsel stated that the prosecutor "call[ed] me yesterday with an offer of third degree, 15 to 30 years, which I also wanted to pass to my client. . . . We have had a thorough

discussion of the issues and as I understand it, he is rejecting the offer." Id. at 7-8. In answer to the court's questions, Petitioner confirmed that he received the offer, that he thought about whether to accept it but was rejecting it, that there was nothing else he wanted his attorney to do before trial on Monday, and that he was satisfied with counsel's representation. Id. at 10-11.

Petitioner urges the court to make a factual finding that counsel did not visit Petitioner until Friday, July 25, 2008. N.T. 05/06/19 at 58, 59-60. The available evidence does not allow me to make that determination. Petitioner testified that he did not meet counsel face-to-face until that date, and that he never spoke to counsel by telephone prior to that time. In contrast, according to the parties' stipulation, former counsel, although she has no specific recollection of Petitioner's case, would testify that she never would have proceeded to trial without reviewing the file with her client on several occasions.

The absence of trial counsel's name from the prison logs is not determinative. The letter from the Pennsylvania DOC provides in relevant part; "If an attorney visited an inmate . . . there would be a record of that attorney's visit in the computer system unless there were an error, human or technological, which would prevent such a record." Evidentiary Hearing Exh. D-2 at 1. The Philadelphia Prison System similarly records visits but is subject to error as reflected in the parties' stipulation; "In the event of a computer system outage or employee error, a visiting attorney's name may only appear in the visitor logbook, and not in the computer system. Such computer system outages have

happened in the past." Evidentiary Hearing Exhs. D-4, D-5 ¶ 5.[8] Also, despite the prison systems' policy of logging all inmate names "no matter how many individual inmates that attorney may be visiting," Evidentiary Hearing Exhs. D-2 at 1 & D-4 at 1, former counsel's stipulated testimony is that she sometimes wrote "interviews" in the visitor log rather than individually listing each client with whom she was meeting. McDermott Stipulation ¶ 4e. In other words, it is possible that counsel visited Petitioner prior to July 25, 2008, but that such a visit is not memorialized in a visitor log. Nor do the visitor logs record telephone calls which may have occurred.

Notes of testimony from Petitioner's trial strongly suggest that trial counsel discussed trial strategy with Petitioner several months before July 25, 2008, particularly regarding the presentation of a potential alibi witness. On July 30, 2008, the following exchange occurred between trial counsel and Petitioner, outside the hearing of the jury, concerning the alibi defense:[9]

> MS. McDERMOTT: Mr. Jackson, as early as February of this past year, you and I have discussed the alibi defense; is that correct?
> [PETITIONER]: Yes.
> MS. McDERMOTT: And at that point, based on our conversation and the information we had we -- I did not on your behalf and at your direction file the alibi notice; is that correct?

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[8]There are no physical logbooks for the Philadelphia prison for 2007 and 2008. Stipulation Regarding Philadelphia Prison System Visitor Policy ¶ 4 (Exh. D-5).

[9]As noted, during the ex parte hearing on the Friday prior to trial, former counsel told Judge Woods-Skipper that she advised Petitioner against presenting an alibi defense, but that he wanted her to present that defense. N.T. 07/25/08 at 10. Petitioner changed his mind mid-trial, N.T. 07/30/08 at 161, but changed it again, and the defense did call the alibi witness to testify. Id. at 171, 172.

> [PETITIONER]: Yes.
> MS. McDERMOTT: And then we had more recent conversations and, in fact, I asked you be brought to the courtroom on Friday [July 25, 2008] because once again I advised you not to file an alibi defense. But you were instructing me to do that; is that correct?
> [PETITIONER]: Yes.
> MS. McDERMOTT: I just want the record clear that, in fact, on Monday morning [July 28, 2008] I spoke to you one more time before I opened suggesting or giving you my advice one more time, not to present the alibi defense and to let me withdraw it and not open to the jury; is that true?
> [PETITIONER]: That's correct.
> MS. McDERMOTT: And that morning, I'm going to use the word carefully, I want to make sure you understand it, you instructed me to do so.
> [PETITIONER]: Yes.
> MS. McDERMOTT: You said, specifically, that you appreciated my advice, but you wanted to proceed in this matter; is that correct?
> [PETITIONER]: Yes.

N.T. 07/30/08 at 162-62 (emphasis added).

Petitioner testified that when he responded in the affirmative to his counsel's question -- "as early as February of this past year, you and I have discussed the alibi defense; is that correct?" -- he assumed counsel was referring to the February visit by counsel's investigator. N.T. 05/06/19 at 46. I am not persuaded by this testimony. The record certainly suggests that Petitioner told the investigator about the alibi witness, which makes sense so that the investigator could locate and interview the witness, but it does not make sense that the investigator would discuss with Petitioner strategic issues relating to "the alibi defense." But more fundamentally, based simply on common usage, it is far more plausible that counsel's reference to "you and I" meant precisely that -- that in February counsel and Petitioner discussed whether to assert an alibi defense.

Considering all of the evidence, I conclude that counsel and Petitioner conferred on at least one occasion prior to the date of the July 25, 2008 hearing to discuss Petitioner's alibi defense. Further, I conclude, based upon the July 25 transcript, that the Commonwealth did not make the plea offer until July 24, and that counsel conveyed it to Petitioner the next day, in her meeting with Petitioner prior to the ex parte hearing.

Having reviewed the evidence, I return to the question at hand, namely whether PCRA counsel was ineffective for failing to pursue the claim of trial counsel's ineffectiveness in failing to discuss the offered plea bargain until just prior to trial. The answer to the question is in the negative. In light of the July 25 transcript showing that counsel conveyed the offer the day after receiving it from the prosecutor, PCRA counsel had no basis to complain of counsel's ineffectiveness in this respect.

Petitioner attempts to broaden the issue beyond communication of the plea offer itself, arguing that counsel's failure to meet with him in prison before the eve of trial meant that he did not have sufficient time or information to reasonably consider the plea offer. Doc. 43 at 6. This is essentially an argument that it was per se unreasonable not to meet in person more than once prior to trial. However, even assuming that counsel did not meet face-to-face with Petitioner until three days before his trial, counsel's failure to do so would not be per se unreasonable. Both parties concede that there is no case law, precedential or otherwise, holding that counsel's failure to meet face-to-face with a defendant until the Friday before a Monday trial constitutes per se ineffectiveness, N.T. 05//06/19 at 78, and I decline to so find. Petitioner cites Commonwealth v. Brooks, 839 A.2d 245 (Pa. 2003), for the proposition that a lawyer is ineffective for failing to meet

face-to-face with his client before the first day of trial. Doc. 43 at 6. However, Brooks is not applicable because it is a Pennsylvania decision and is therefore not binding on a federal habeas court. It is also easily distinguishable. Brooks is limited to capital cases, whereas the Commonwealth did not seek the death penalty in Petitioner's case. See Brooks, 839 A.2d at 249 ("[T]he very nature of a capital case . . . clearly necessitates at least one in-person meeting between a lawyer and his client before trial begins."). Also, trial counsel in Brooks never met his client in person until the first day of trial, whereas here counsel investigated Petitioner's alibi defense prior to trial and met with Petitioner three days prior to trial.

United States Supreme Court and Third Circuit precedent similarly do not support a finding that counsel acted unreasonably when she met face-to-face with Petitioner three days before trial, in part to communicate a plea offer. In Missouri v. Frye, the Supreme Court held that defense counsel has a duty to communicate a formal plea offer to the defendant and that failure to properly do so may constitute ineffective assistance of counsel. 566 U.S. 133, 145 (2012). As noted, the prosecutor did not make the plea offer until Thursday, July 24, 2008, and counsel conveyed it to Petitioner the next day. N.T. 07/25/08 at 7-8; N.T. 05/06/19 at 32, 64-65.

The Third Circuit has held that in order to effectively assist defendants in the plea-bargaining process, counsel must provide a defendant with "enough information 'to make a reasonably informed decision whether to accept the plea offer.'" United States v. Bui, 795 F.3d 363, 366 (3d Cir., 2015) (quoting Shotts v. Wetzel, 724 F.3d 364, 376 (3d Cir. 2013) (internal quotations and citations omitted). Here, as previously discussed,

counsel's investigator met with Petitioner to gather alibi information, and Petitioner and counsel had substantive discussions about the case at least once, on July 25, 2008, regarding the plea offer and Petitioner's insistence on an alibi defense over counsel's advice to the contrary. As alluded to above, Petitioner told Judge Woods-Skipper that he was satisfied with his counsel's representation, including during the following exchange during the ex parte hearing held on Friday July 25, 2008:

> THE COURT: Additionally for the record, you did receive the offer from the Commonwealth of 15 to 30 years for third degree murder?
> [PETITIONER]: Yes.
> THE COURT: And you have considered that offer. You thought about whether or not you want to accept that?
> [PETITIONER]: Yes.
> THE COURT: Are you rejecting that offer at this time?
> [PETITIONER]: Yes.
> THE COURT: Is there anything else you want your lawyer to do at this point in preparation for your trial that will begin on Monday?
> [PETITIONER]: Not at all.
> THE COURT: You are therefore satisfied with her representation and how she is proceeding at this point?
> [PETITIONER]: Yes.

N.T. 07/25/08 at 10-11. Petitioner reiterated his satisfaction with counsel's performance during trial. See N.T. 07/28/08 at 153; N.T. 07/30/08 at 161. While Petitioner's situation is indeed compelling, as he had to make a difficult decision under difficult circumstances, the Constitution does not guarantee him a specific amount of time or a specific quality of attorney-client relationship in considering whether to accept a plea offer. [10]

[10]Petitioner also argued at the evidentiary hearing that counsel's failure to meet more frequently with him was unreasonable in light of the fact that he was 21 years old and reached only the eighth grade in special education classes. N.T. 05/06/19 at 60.

For all these reasons, I conclude that PCRA counsel did not perform deficiently when he abandoned a claim of trial counsel's ineffectiveness for failing to meet with Petitioner sufficiently in advance of trial to allow him to make a reasonably informed decision regarding the plea offer.

B. Prejudice Resulting from PCRA Counsel's Performance (Is the Underlying Claim Substantial)

Even were I to conclude that PCRA counsel was deficient in not asserting ineffectiveness of trial counsel, Petitioner has failed to show prejudice attributable to the plea-bargaining process. As previously explained, a federal court evaluates prejudice at this stage by determining whether the underlying claim of ineffectiveness of trial counsel was "substantial" utilizing the standard for granting a certificate of appealability. Martinez, 566 U.S. at 14 (citing Miller-El, 537 U.S. at 327). To show prejudice where defendant rejected a plea offer, defendant must show that, but for counsel's incorrect legal advice, "there is a reasonable probability that the plea offer would have been presented to the court . . . , that the court would have accepted its terms, and the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler v. Cooper, 566 U.S. 156, 164 (2012).

There is no evidence in the record that Petitioner suffers from an intellectual or emotional disability that would make him unable to understand the proceedings or the plea offer, nor were any discernible at the evidentiary hearing. Indeed, Judge Woods-Skipper's colloquies of him during the trial indicate her acceptance of his understanding of the proceeding and his choices. N.T. 07/25/08 at 11; 07/28/08 at 152-54 (including questions about Petitioner's age and education); 07/30/08 at 165.

In addressing prejudice at the evidentiary hearing, Petitioner argues that because counsel failed to spend adequate time with him in reviewing discovery and failed to properly inform him of the consequences of a first-degree murder conviction, he rejected the Commonwealth's plea offer, resulting in a life sentence. N.T. 05/06/19 at 61-62. Petitioner's prejudice argument fails. First, Petitioner's testimony that he did not understand that a first-degree murder conviction carried a mandatory life sentence until he received the sentence, N.T. 05/06/19 at 16, is not credible. Regardless of whether counsel advised Petitioner to accept or reject the plea offer, it is implausible that counsel discussed the plea offer with Petitioner without discussing the penalty for a first-degree murder conviction, and illogical for Petitioner to suggest that he did not know the penalty for first-degree murder would not be substantially more than the offer of 15 -to- 30 years' imprisonment contained in the plea offer for third-degree murder.

Second, Petitioner's testimony that he wanted to take the plea deal, N.T. 05/06/19 at 37-38, but rejected it because his counsel advised him to go to trial in light of her confidence that she could "beat my case," id. at 14, 37-38, does not square with the evidence. Most significantly, Petitioner testified that he insisted on proceeding with an alibi defense over counsel's express advice to the contrary, id. at 14, 38, which is corroborated by the events at trial in which counsel followed Petitioner's instructions to present an alibi defense despite her advice. N.T. 07/25/08 at 9-10; N.T. 07/30/08 at 162-63. Petitioner clearly was able to make a decision about his desires and communicate it to counsel and the court, and if he had an interest in discussing the plea offer he would have communicated that interest to counsel. All of the evidence points to the conclusion

that Petitioner was interested only in a trial that presented his alibi defense. N.T. 05/06/19 at 14 ("[W]e didn't really talk too much about the deal because after I told Ms. McDermott how I felt about my alibi witness and I felt like that that was probably the best option for me. . . ."). ✱ I felt like going the deal was [illegible] and [illegible].

Third, Petitioner has continuously asserted his innocence, as he conceded during the evidentiary hearing. N.T. 05/06/19 at 50. Petitioner testified that he would have agreed with the facts underlying the conviction in the course of a guilty plea colloquy, but that the facts would not be true. Id. at 51. Protestations of innocence are relevant to determining whether a petitioner would have pled guilty for purposes of establishing prejudice. See Wheeler v. Rozum, 410 F. App'x 453, 458 (3d Cir. 2010) ("Those Courts of Appeals that have considered the question have recognized that protestations of innocence are relevant to the Strickland prejudice inquiry."). In sum, in light of Petitioner's immediate and unequivocal rejection of the plea offer made at the July 25, 2008 ex parte hearing, and his continued protestations of innocence, he cannot demonstrate a reasonable probability that he would have accepted a plea deal but for counsel's allegedly deficient performance. See Lafler, 566 U.S. at 164. I therefore conclude that Petitioner has not established that his underlying IAC claim is "substantial."

For all of the aforementioned reasons, I conclude that PCRA counsel was not ineffective for abandoning a claim of trial counsel's ineffectiveness for failing to meet with Petitioner prior to trial to devise a defense strategy, and that the underlying claim of

ineffectiveness was not "substantial" for purposes of Martinez. Therefore, Petitioner is not entitled to the benefit of Martinez and claim two remains defaulted.[11]

III. CONCLUSION

In the portion of his second claim that was recommitted to me for this supplemental R&R, Petitioner argues that trial counsel was ineffective for failing to discuss a plea bargain until just prior to the start of trial. Upon reconsideration of this claim in light of further briefing and an evidentiary hearing, I again conclude that the claim is unexhausted and procedurally defaulted, and that Petitioner cannot rely on post-conviction counsel's ineffectiveness to overcome the default pursuant to Martinez.

Accordingly, I make the following:

[11]As stated in my original R&R, Doc. 28 at 13, Petitioner does not identify any other cause and prejudice argument to excuse the default of this claim, nor does he make a showing that the failure to consider this claim will result in a fundamental miscarriage of justice.

RECOMMENDATION

AND NOW, this 30th day of May 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. Petitioner may file objections to this Supplemental 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/ELIZABETH T. HEY

ELIZABETH T. HEY, U.S.M.J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAURICE JACKSON	:	CIVIL ACTION
	:	
v.	:	
	:	
LAWRENCE P. MAHALLY, et al.	:	NO. 16-0174

ORDER

AND NOW, this day of , 201 , upon careful and independent consideration of the petition for writ of habeas corpus, the responsive briefs, and the notes of testimony from the May 6, 2019 evidentiary hearing, and after review of the Supplemental Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Supplemental Report and Recommendation is APPROVED AND ADOPTED;

2. The petition for a writ of habeas corpus is DENIED; and

4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
MITCHELL S. GOLDBERG, J.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2194**

MAURICE A. JACKSON, Appellant

VS.

SUPERINTENDENT DALLAS SCI; ET AL.

(E.D. Pa. Civ. No. 2-16-cv-00174)

SUR PETITION FOR REHEARING

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

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

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: March 3, 2021
Tmm/cc: Maurice A. Jackson
Michael R. Scalera, Esq.

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