No. 21 -

In The

# Supreme Court of the United States

HAKIM BEY,
Petitioner

v.

SUPERINTENDENT HUNTINGDON SCI;
DISTRICT ATTORNEY OF PHILADELPHIA;
ATTORNEY GENERAL OF PENNSYLVANIA
Respondent(s)

On Petition For a Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood it to allow conviction without proof beyond a reasonable doubt.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner herein, who was the appellant below, is Hakim Bey. Respondents herein, which were the appellees below, are the Superintendent Huntingdon SCI a state correctional institution, the District Attorney of Philadelphia, and the Attorney General of Pennsylvania.

## RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in the United States District Court for the Eastern district of Pennsylvania and the United States Court of Appeals for the Third Circuit:

Bey v. Superintendent Huntingdon SCI, No. 20-3136 (3d Cir. July 12, 2021)

Bey v. Kauffman, No. 19-2127 (E.D. PA. Ept.28, 2020)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, that are directly related to this case.

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SCHOLARLY AUTHORITY

## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hakim Bey, respectfully Petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The Opinion/Order of the United States Court of Appeals for the Third Circuit is reproduced in the Appendix to this Petition at Pet. App. 1a. The Order of the United States District Court for the Eastern District of Pennsylvania adopting the Report and Recommendation of the United States Magistrate Judge is reproduced at Pet.App. 2a-3a. The Report and Recommendation of the United States Magistrate Judge is reproduced at Pet.App. 4a-33a.

## STATEMENT OF JURISDICTION

The Third Circuit entered Judgment on July 12, 2021, Pet.App. 1a, and denied Hakim Bey's Petition for

Rehearing En Banc on August 13, 2021, Pet.App. 34a-45a.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. V.

The Suspension Clause of the U.S. Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended. . . ." U.S. Const. Art. I, §1X.

## STATEMENT OF THE CASE

This case presents important and recurring question this Court attempted but unsuccessfully attempted to answer multiple times In Re Winship, 397 U.S. 358 (1970); Cage v. Louisiana, 498 U.S. 39 (1991); Victor v. Nebraska, 511 U.S. 1 (1994). The

question is whether a reasonable-doubt instruction results in shifting the burden to the defendant and makes the burden so high it violates the Due Process Clause of the U.S. Constitution. U.S. Const. amend. V. See Francis v. Franklin, 471 U.S. 307 (1985). The Third Circuit has revisited this issue several times with different results. Blatt v. United States, 60 F.2d 481 (3d Cir. 1932); West v. Vaughn, 204 F.3d 53 (3d Cir. 2000) (declaring instruction constitutionally adequate); United States v. Isaac, 134 F.3d 199 (3d Cir. 1998) (same); United States v. Jacobs, 44 F.3d 1219 (3d Cir. 1995) (same); Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1995) (same); United States v. Polan, 970 F.2d 1280 (3d Cir. 1992) (same); United States v. Pine, 609 F.2d 106 (3d Cir. 1979) (same); United States v. DeLazo, 497 F.2d 1168 (3d Cir. 1974) (same); United States v. Smith, 468 F.2d 381 (3d Cir. 1972) (same);

United States v. Restaino, 369 F.2d 544 (3d Cir. 1966) (same); Singer v. United States, 278 F. 415 (3d Cir. 1922) (same); Gray v. United States, 266 F. 355 (3d Cir. 1920) (same); Kulp v. United States, 210 F. 249 (3d Cir. 1914) (same). See also: United States v. Hernandez, 176 F.3d 719 (3d Cir. 1999) (striking down reasonable doubt instruction); United States v. Link, 202 F.2d 592 (3d Cir. 1953) (same); United States v. Augustine, 189 F.2d 587 (3d Cir. 1951) (same). Six of the twelve circuits that hear criminal appeals have reviewed and upheld instructions defining reasonable doubt as "substantial doubt" despite the Court's determination that the term is "somewhat problematic". See e.g., West v. Vaughn, 204 F.3d 53 (3d Cir. 2000) (upholding instruction with substantial doubt language); Tillman v. Cook, 215 F.3d 1116 (10th Cir. 2000) (same); Ramirez v. Hatcher, 136 F.3d 1209

(9th Cir. 1998) (same); Truesdale v. Moore, 142 F.3d 749 (4th Cir. 1998) (same); Harbell v. Nagle, 58 F.3d 1541 (11th Cir. 1995) (same); Bias v. Ieyoub, 36 F.3d 479 (5th Cir. 1994) (same).

## I. BACKGROUND OF THE CASE

### A. Proceedings at Trial

On September 24, 2000, Moses Williams was shot ad killed on the 2200 block of Cross Street in the City and County of Philadelphia. Bren[c]is Drew sustained gunshots to both legs during the altercation. Three (3) eyewitnesses, Omar Morris ("Morris"), Duane Clinkscales (Clinkscales"), and Chante Wright (Wright"), gave statements to police identifying [Bey] as the shooter.[1] On December 25, 2000, Morris was

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1 Both Wright and Clinkscales initially did not identify the shooter. After several statements each identified Bey. Both subsequently gave affidavits saying that Bey was not the shooter.

found dead of a gunshot wound to the head. The next day, Clinkscales was treated for multiple gunshot wounds following a drive-by shooting. Hakim Bey was identified by Clinkscales as the shooter in the December 26, 2000 shooting incident and as the person who shot Moses Williams. After a grand jury investigation during which both Wright and Clinkscales testified, [Bey] was arrested for the murder of Moses Williams and the attempted murder of Clinkscales. This matter was originally scheduled for trial on March 24, 2004, but Chante Wright failed to appear for trial, and at the Commonwealth's request, a nol[] pros without prejudice was granted. On May 9, 2007, the nol[] pros was lifted after Wright was located and placed in federal protective custody. Prior to trial, Chante Wright was murdered. On March 25, 2008, the Commonwealth filed a motion to introduce the

statements of Chante Wright at trial pursuant to the Pennsylvania Rule of Evidence 804(b)(6), governing the admission of hearsay pursuant to forfeiture by wrongdoing. A full hearing was held, which resulted in the admission of the statements and preliminary hearing testimony of Chante Wright.

At the conclusion of the trial, Judge Hughes gave the following reasonable-doubt instruction to the jury:

> I find it helpful to think about reasonable doubt in this way: Each one of you loves someone. . . A spouse, a significant other, a parent, a child, a niece, a nephew, each one of you has someone in your life who is precious.
>
> If you were advised by your loved one's physician that the loved one had a life-threatening illness and that the only protocol was a surgery, very likely you would ask for a second opinion. You'd probably get a third opinion. You'd probably start researching the illness, what is the protocol, is surgery really the only answer. You'd probably, if you're

> like me, call everybody you know in medicine: What do you know about this illness? What do you know about this surgery? Who does this surgery across the country? What is my option?
>
> At some moment, however, you're going to be called upon to make a decision: Do you allow your loved one to go forward? If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it's because you have moved beyond all reasonable doubt.

(N.T. 9/26/09 at 13-16). Mr. Bey's counsel initially objected to the instruction not specifically saying why, and Judge Hughes reinstructed using the standard charge without illustration. Mr. Bey was convicted of one count of first-degree murder, two counts of aggravated assault, one count of carrying firearms on a public street, and two counts of possession of an instrument of crime. Mr. Bey is serving a life sentence without the possibility of parole.

### B. Proceedings on Appeal and Post-Conviction

Mr. Bey appealed his conviction to the Pennsylvania Superior Court, which affirmed the Trial Court's decision. Cmwlth v. Bey, 32 A.3d 819 (Table), 211 WLS966206 (Pa.Super., Aug. 1, 2011) (affirming the judgment of sentence on direct appeal). The Pennsylvania Supreme Court denied a petition for allowance of appeal, 618 Pa. 771, 42 A.3d 299 (Table) (Pa. April 4, 2012). Mr. Bey filed a Petition for Writ of Certiorari to the United States Supreme Court which was denied, 568 U.S. 886, 133 S.Ct. 319 (Mem.) (October 1, 2012). On November 15, 2012, Bey filed a timely pro se petition pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa.Cons.Stat. Ann. §§9541-9546. PCRA Ct. Op. At 2. The PCRA Court appointed counsel for Bey. However, counsel

subsequently filed a Finley "no merit" letter,[2] seeking to withdraw from the representation. Id. In response, Bey filed a motion for a hearing pursuant to Cmwlth v. Grazier, 713 A.2d 81 (Pa. 1998), and on April 24, 2015, the PCRA court conducted a Grazier hearing and allowed Bey to proceed pro se. PCRA Ct. Op. At 2. Bey then filed a supplemental PCRA petition on July 24, 2015. Id. On July 27, 2016, the Commonwealth filed a motion to dismiss the petition and Bey filed a response thereto on August 12, 2016. Id. The PCRA court held a hearing on October 11, 2016 during which Bey was not permitted to offer any additional evidence on his PCRA claims. Opinion at 4, Cmwlth v. Bey, No. 3712 EDA 2016 (Pa.Super.Ct. Dec. 14, 2017) The PCRA court filed a notice of its intention to dismiss the

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2 See Cmwlth v. Finley, 481 U.S. 551, 558-59 (1987); Cmwlth v. Turner, 544 A.2d 927, 928-29 (Pa. 1988).

petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907 and subsequently dismissed Bey's PCRA petition on November 15, 2016. Id.

On November 28, 2016, Bey filed an appeal with the Superior Court arguing that his trial counsel was ineffective in failing: (1) to advise Bey of his right to testify; (2) to call two defense witnesses at trial; (3) to argue that Bey's trial violated double jeopardy; (4) to file a motion to dismiss his case due to an eight-year delay between the victim's death and Bey's trial; (5) to request a mistrial after learning that the trial judge was placed under protective detail; (6) to argue that the trial court violated Bey's due process rights when instructing the jury to ignore the only evidence Bey offered at trial; and (7) to object to the jury instructions on consciousness of guilt, reasonable doubt, and the

elements of criminal homicide. Bey also claimed that the PCRA court erred in failing to conduct an evidentiary hearing before dismissing his petition. On December 14, 2017, the Superior Court affirmed the dismissal of Bey's PCRA petition PCRA Cmwlth v. Bey, 2017 WL 6378814. Thereafter, the Pennsylvania Supreme Court denied Bey's petition for allowance of appeal on July 3, 2018. Cmwlth v. Bey, 2018 WL 3239763, 88 A.3d 1121.

C. Federal Habeas Proceedings

Mr. Bey timely filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 in the Eastern District of Pennsylvania on May 15, 2019. He raised the following issues:

1. The trial court violated his rights under the U.S. and Pennsylvania Constitutions by admitting the police statement, grand jury testimony, and preliminary hearing testimony of deceased witness, Wright, under Pennsylvania Rule of Evidence 804(b)(6), the forfeiture by wrongdoing

exception to the hearsay rule, in violation of Bey's right to confront witnesses;

2. The trial court violated his rights under the U.S. and Pennsylvania Constitutions by reopening the case after the start of jury deliberations to correct factual misrepresentation without giving Bey's trial counsel the opportunity to address the evidence, and trial counsel was ineffective in failing to preserve this issue for appeal;

3. Trial counsel was ineffective in failing to advise Bey of his right to testify;

4. Trial counsel was ineffective in failing to call Sharita Williams ("Williams") and Cayanna Brown ("Brown") as defense witnesses at trial;

5. Trial counsel violated Bey's rights under the U.S. and Pennsylvania Constitutions by failing to argue that Bey's trial violated double jeopardy;

6. Trial counsel violated Bey's rights under the U.S. and Pennsylvania Constitutions by failing to file a motion to dismiss his case due to an eight-year delay between the victim's death and Bey's trial;

7. Trial counsel was ineffective in failing to seek a mistrial upon learning that the trial judge was placed under protective detail; and

8. Trial counsel was ineffective in failing to object

> to the jury instructions defining consciousness of guilt, reasonable doubt and the elements of criminal homicide.

The Magistrate Judge issued a Report and Recommendation to the District Court, recommending that the Petition be denied with prejudice and a certificate of appealability should not issue. (Pet.App. 5a-89a)

D. Third Circuit proceedings

Mr. Bey appealed to the Third Circuit and filed an application for certificate of appealability on January 29, 2021. The Third Circuit denied the Application. (Pet.App. 1a)

REASONS FOR GRANTING THE PETITION

This Court should revisit and clarify its precedent that has resulted in a split of the Circuits as to when a jury instruction unconstitutionally shifts the burden of proof to the Defendant in violation of the Due Process

Clause of the U.S. Constitution.

The "reasonable doubt" standard is the most fundamental part of our criminal justice system. In re Winship, 397 U.S. 358 (1970). This standard represents society's belief that it is better that 10 guilty persons escape conviction than 1 innocent person suffer. See e.g. Coffin v. United States, 156 U.S. 432 (1895); In re Winship, supra.

Although this fundamental standard does not appear in the text of the Constitution, this Court has found that the Due Process guarantees of the Fifth and Fourteenth Amendments "protect [] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. at 364. Any interaction between the defendant's right to acquittal on evidence that leaves

a reasonable doubt of guilt, and the defendant's right to a trial by jury, necessitates that jurors comprehend and apply the reasonable doubt standard fairly and properly. See Robert C. Power, Reasonable and Other Doubts: The problem of jury instructions, 67 Tenn. L.Rev. 45-46 (1999); Note, reasonable doubt: an Argument Against Definition, 108 Harv.L.Rev. 1955 (1995).

Despite the vital role this standard plays in the American scheme of criminal procedure, this Court has provided little guidance regarding the propriety of instructing the jury on the meaning of the term reasonable doubt. See e.g. Victor v. Nebraska, 511 U.S. 1 (1994). Due to this lack of guidance, the United States Courts of Appeals and the highest state courts remain divided in their approaches to defining the standard. See e.g. United States v. Taylor, 997 F.2d

1551 (D.C. Cir. 1993); United States v. Pepe, 501 F.2d 1142 (10th Cir. 1974); Freedman v. United States, 381 F.2d 155 (8th Cir. 1967); Blatt v. United States, 60 F.2d 481 (3d Cir. 1932). Some states require that trial courts must provide a definition. See, e.g. State v. Aubert, 421 A.2d 124 (N.H. 1980) (holding that despite difficulty inherent in task of defining reasonable doubt, jury must be given some assistance and understanding of the concept); Cmwlth v. Young, 317 A.2d 258 (Pa. 1972) ("our cases require that the jury be given a positive instruction fully and accurately defining reasonable doubt . . . in an absence of a proper reasonable doubt charge, an accused is denied his right to a fair trial."); State v. Desrosiers, 559 A.2d 641 (R.I. 1989) ("in charging the jury a trial justice must explain the definition of proof beyond a reasonable doubt."); State v. Coe, 684 P.2d 668 (Wash. 1984) (stressing that

Washington law requires court to define standard of reasonable doubt by specific instruction). Other states do not require trial courts to define the standard, but nonetheless favor definition over silence. See e.g., McKinley v. State, 379 N.E.2d 968 (Ind. 1978) (stating that trial courts should consider pattern criminal instructions that are available to all courts); State v. Uffelman, 626 A.2d 340 (Me. 1993) (affirming previously stated preference towards definition); State v. Olkon, 299 N.W.2d 89 (Minn. 1980) (asserting that defining reasonable doubt instruction is "tendered"). Furthermore, there are some states that have refused to define the standard all together. See e.g., Chase v. State, 645 So.2d 829 (Miss. 1994) (maintaining that "reasonable doubt defines itself and needs no further definition by the court"); State v. Johnson, 445 S.E.2d 637 (S.C. 1994) (upholding trial court's refusal to

define reasonable doubt and commenting that expression "without an explanation of its legal significance is much more favorable to a defendant"); State v. McMahon, 603 A.2d 1128 (Dt. 1992) ("we have never held that a defendant is entitled to an explanation of 'reasonable doubt'. . . ."). The inconsistent decisions on this subject, handed down by this Court over the past 20 years, have not made the task of the circuit courts and the state courts any less challenging. Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam); Victor v. Nebraska, 511 U.S. 1 (1994).

It is essential and important that this Court clarify its precedent in Cage v. Louisiana, supra., and Victor v. Nebraska, supra., and give guidance to both the Circuit Courts and the state courts to resolve the disparate decisions.

## CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Enid W. Harris
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Counsel for Petitioner

Date: January 11, 2022

# APPENDIX

APPENDIX A

ALD-194 June 10, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 20-3136

HAKIM BEY, Appellant

v.

SUPERINTENDENT HUNTINGDON SCI; ET AL.

(E.D. Pa. No. 2:19-cv-02127)

Present: McKEE, GREENAWAY, JR., and BIBAS, Circuit Judges

Submitted is Appellant's application for a certificate of appealability under 27 U.S.C. §2253(c(1) in the aboved-captioned cases.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because he has not "made a

substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Jurists of reason would not debate the conclusion that Appellant's claims lack merit, for substantially the reasons provided by the Magistrate Judge. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see also Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

By the Court,

S/Stephanos Bibas
Circuit Judge

Dated: July 12, 2021
Sb/cc: Hakim Bey
All Counsel of Record

A True Copy:
Patricia S. Didwzuweit
Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

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

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| HAKIM BEY, Petitioner, | : | CIVIL ACTION |
| v. | : | |
| KEVIN KAUFFMAN, et al., Respondents. | : | NO. 19-2127 |

ORDER

AND NOW, this 28th day of September, 2020, upon consideration of Petitioner's Petition for a Writ of Habeas Corpus (Doc. No. 1), the Response thereto (Doc. No. 13), Petitioner's Motions to Stay Federal Proceedings (Doc. Nos. 6, 14), and the Report and Recommendation of United States Magistrate Judge Marilyn Heffley (Doc. No. 15), and the Petitioner's Objections thereto (Document No. 17), it is ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

2. The Petition for a Writ of Habeas Corpus is DENIED and DISMISSED WITH PREJUDICE;

3. Petitioner's Motions to Stay Federal Proceedings are DENIED;

4. There is no probable cause to issue a certificate of appealability; and

5. The Clerk of Court shall mark this case CLOSED.

BY THE COURT:

s/J. Curtis Joyner

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J. CURTIS JOYNER, J.

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

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| HAKIM BEY, Petitioner, | : | CIVIL ACTION |
| v. | : | |
| KEVIN KAUFFMAN, et al., Respondents. | : | NO. 19-2127 |

REPORT AND RECOMMENDATION

MARILYN HEFFLEY, U.S.M.J. July 15, 2020

This is a counseled petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2254 by Hakim Bey ("Petitioner" or "Bey"), a prisoner incarcerated at the State Correctional Institution in Huntingdon, Pennsylvania. Bey also seeks a stay of this action to exhaust state-law claims. For the following reasons, I recommend that Bey's habeas petition and stay motions be denied.

## I. FACTUAL AND PROCEDURAL HISTORY

On September 30, 2008, Bey was convicted by a

jury in the Philadelphia County Court of Common Pleas of one count of first-degree murder, two counts of aggravated assault, one count of carrying firearms on a public street, and two counts of possession of an instrument of crime. Opinion at 2, Commonwealth v. Bey, No. 922 EDA 2009 (Pa.Super.Ct. Aug. 1, 2011) (reproduced in Resp'ts' Br. (Doc. No. 13) Ex. A) [hereinafter "Super.Ct.Op."]. On October 1, 2008, Bey was sentenced to life without parole for first-degree murder, a consecutive term of 10 to 20 years' imprisonment for one count of aggravated assault, a concurrent term of 10 to 20 years for an additional count of aggravated assault, and concurrent terms of two and one-half to five years' imprisonment each for carrying firearms on a public street and for possession of an instrument of crime. Id. at 2-3.

The trial court summarized the facts underlying

Bey's conviction as follows:

> On September 24, 2000, Moses Williams was shot and killed on the 2200 block of Cross Street in the City and County of Philadelphia. Bren[c]is Drew sustained gunshots to both legs during the altercation. Three (3) eyewitnesses, Omar Morris ("Morris") Duane Clinkscales (Clinkscales"), and Chante Wright (Wright"), gave statements to police identifying [Bey] as the shooter. On December 25, 2000, Morris was found dead of a gunshot wound to the head. The next day, Clinkscales was treated for multiple gunshot wounds following a drive-by shooting. Hakim Bey was identified by Clinkscales as the shooter in the December 26, 2000 shooting incident and as the person who shot Moses Williams. After a grand jury investigation during which both Wright and Clinkscales testified, [Bey] was arrested for the murder of Moses Williams and the attempted murder of Clinkscales. This matter was originally scheduled for trial on March 24, 2004, but Chante Wright failed to appear for trial, and at the Commonwealth's request, a nol[] pros without prejudice was granted. On May 9, 2007, the nol[] pros was lifted after Wright was located and placed in federal protective custody. Prior to trial, Chante Wright was murdered. On March 25, 2008, the Commonwealth filed a motion to introduce the statements of Chante Wright at trial pursuant to the Pennsylvania Rule of Evidence 804(b)(6), governing the admission of hearsay pursuant to forfeiture by

> wrongdoing. A full hearing was held, which resulted in the admission of the statements and preliminary hearing testimony of Chante Wright.

Id. at 1-2 (alterations in original) (citations to the record omitted).

Bey's post-sentence motions were denied without a hearing on March 10, 2009. Opinion at 1, Commonwealth v. Bey, Nos. CP-51-CR-1100021-2002, CP-51-CR-1100031-2002 (Pa. Ct. Com. Pl. Phila. Cnty. Feb. 1, 2017) (reproduced in Pet. (Doc. No. 1) #x. C) [hereinafter "PCRA Ct. Op."]. Bey then filed a timely notice of appeal with the Pennsylvania Superior Court alleging that the trial court erred by: (1) admitting Change Wright's ("Wright") prior statements and testimony pursuant to Pennsylvania Rule of Evidence 804(b)(6); and (2) reopening the case to admit new evidence after the jury had begun its deliberations. Super. Ct. Op. at 3. On August 1, 2011, the Superior

Court affirmed the judgment of sentence Id. at 1. On April 4, 2012, the Pennsylvania Supreme Court denied Bey's petition for allowance of appeal, and on October 1, 2012, the United States Supreme Court denied Bey's petition for a writ of certiorari. PCRA Ct. Op. at 2.

On November 15, 2012, Bey filed a timely pro se petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§9541-9546. PCRA Ct. Op. at 2. The PCRA court appointed counsel for Bey. However, counsel subsequently filed a Finley "no merit" letter,[3] seeking t withdraw from the representation. Id. In response, Bey filed a motion for a hearing pursuant to Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998), and on April 24, 2015, the PCRA court conducted a Grazier hearing and allowed Beyt to

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See Commonwealth v. Finley, 481 U.S. 551, 558-59 (1987); Commonwealth v. Turner, 544 A.2d 927, 92829 (Pa. 1988).

proceed pro se. PCRA Ct. Op. at 2. Bey then filed a supplemental PCRA petition on July 24, 2015. Id. On July 27, 2016, the Commonwealth filed a motion to dismiss the petition and Bey filed a response thereto on August 12, 2016. Id. The PCRA court held a hearing on October 11, 2016 during which Bey was not permitted to offer any additional evidence on his PCDRA claims. Opinion at 4, Commonwealth v. Bey, No. 3712 EDA 2016 (Pa. Super. Ct. Dec. 14, 2017) (reproduced in Resp'ts' Br. Ex. B) [hereinafter 'CRA Super. Ct. Op."]. The PCRA court filed a notice of its intention to dismiss the petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907 and subsequently dismissed Bey's PCRA petition on November 15, 2016. Id.

On November 28, 2016, Bey filed an appeal with the Superior Court arguing that his trial counsel was

ineffective in failing: (1) to advise Bey of his right to testify; (2) to call two defense witnesses at trial; (3) to argue that Bey's trial violated double jeopardy; (4) to file a motion to dismiss his case due to an eight-year delay between the victim's death and Bey's trial; (5) to request a mistrial after learning that the trial judge was placed under protective detail; (6) to argue that the trial court violated Bey's due process rihts when instructing the jury to ignore the only evidence Bey offered at trial; and (7) to object to the jury instructions on consciousness of guilt, reasonable doubt, and the elements of criminal homicide. Pet'r's PCRA App. Br. At *5-6, Commonwealth v. Bey, No. 3712 EDA 2016 (Pa.Super.Ct. Apr. 19, 2017) (reproduced in Resp'ts' Br. Ex. D) [hereinafter "Pet'r's PCRA App. Br."] Bey also claimed that the PCRA court erred in failing to conduct an evidentiary hearing before dismissing his petition.

Id. at 6. On December 14, 2017, the Superior Court affirmed the dismissal of Bey's PCRA petition. PCRDA Super. Ct. Op. at 1. Thereafter, the Pennsylvania Supreme Court denied Bey's petition for allowance of appeal on July 3, 2018. Docket at 4, Commonwealth v. Bey, 3712 EDA 2016 (Pa.Super.Ct.) [hereinafter "Docket"].

On July 11, 2018, Bey filed a second PCRA petition alleging the discovery of new evidence and a change in the law premised on the decision in Brooks v. Gilmore, No. CV 15-5659, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017). Pet'r's Mot. for Leave to Stay Federal Proceedings (Doc. No. 6) at 4, ¶4. This petition was supplemented by Bey on November 5, 2018 and is currently pending in state court. Id.

Bey filed the present counseled petition for a writ of habeas corpus on May 15, 2019. Pet. (Doc. No.

1) at 1. In his habeas petition and supporting brief, Bey seeks habeas relief on the following grounds:

1. Trial court violated his rights under the United States and Pennsylvania Constitutions by admitting the police statement, grand jury testimony, and preliminary hearing testimony of deceased witness, Wright, under Pennsylvania Rule of Evidence 804(b)(6), the forfeiture by wrongdoing exception to the hearsay rule, in violation of Bey's right to confront witness;[4]

2. The trial court violated his rights under the United States and Pennsylvania Constitutions be reopening the case after the start of jury deliberations to correct a factual misrepresentation without giving Bey's trial counsel the opportunity to address the evidence, and trial counsel was ineffective in failing to preserve this issue for appeal;[5]

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4 Pennsylvania state-law errors are not cognizable on habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Accordingly, this Court will only address alleged errors of state law to the extent they may implicate a federal constitutional claim.

5 Bey raises these claims as two separate issues in his habeas petition. See Pet'r's Br. (Attached to Pet.) at 40-58, 78-82. These claims will be addressed collectively in Section III(B),

3. Trial counsel was ineffective in failing to advise Bey of his right to testify;

4. Trial counsel was ineffective in failing to call Sharita Williams ("Williams") and Cayanna Brown ("Brown") as defense witnesses at trial;

5. Trial counsel violated Bey's rights under the United States and Pennsylvania Constitutions by failing to argue that Bey's trial violated double jeopardy;

6. Trial counsel violated Bey's rights under the United States and Pennsylvania Constitutions by failing to file a motion to dismiss his case due to an eight-year delay between the victim's death and Bey's trial;

7. Trial counsel was ineffective in failing to seek a mistrial upon learning that the trial judge was placed under protective detail; and

8. Trial counsel was ineffective in failing to object to the jury instructions defining consciousness of guilt, reasonable doubt, and the elements of criminal homicide.

Pet'r's Br. at 1-171. Subsequent to the filing of his

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infra.

habeas petition, Bey filed a motion to stay this proceeding to allow him to exhaust state-law claims raised in his second PCRA petition. Pet'r's Mot. for Leave to Stay Federal Proceedings at 1, 4-6. On July 6, 2020, Bey filed a second motion to stay, asserting substantially identical claims. Pet'r's Second Mot. for Leave to Stay Federal Proceedings (Doc. No. 14) at 1, 4-6.[6]

## II. APPLICABLE LEGAL STANDARDS

### A. Standard for Issuance of a Writ of Habeas Corpus

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly limited the federal courts' power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the

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[6] Because Bey's two stay motions are virtually indistinguishable, they will be cited to collectively as "Stay Motion".

merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

> 1. Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> 2. Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. §2254(d)

The United States Supreme Court has made clear that a writ may issue under the "contrary to" clause of §2254(d)(1) only if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of material indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable

application" clause only where there has been a correct identification of a legal principle from the Supreme Court, but the state court "unreasonably applies it to the facts of the particular case." Id. This requires a petitioner to demonstrate that the state court's analysis was "objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

State court factual determinations are also given considerable deference under the AEDPA. Palmer v. Hendricks, 592 F.3d 386, 391-92 (3d Cir. 2010). A petitioner must establish that the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254(d)(2).

B. Exhaustion and Procedural Default

"[A] federal habeas court may not grant a

petition for writ of habeas corpus unless the petitioner has first exhausted the remedies available in the state courts." Lambert v. United States, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. §2254(b)(1)(A)). The procedural default barrier, in the context of habeas corpus, also precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his [or her] claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . . ." Id. at 735 n.1; McCandless v. Vaughn,

172 F.3d 255, 260 (3d Cir. 1999).

To survive procedural default in the federal courts, a petitioner must either "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

C. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 686-88, 693-94.

To satisfy the reasonable performance prong of the analysis, a petitioner must show "'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,'" Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 687). In evaluating counsel's performance, the reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance" and that there are "'countless ways to provide effective ssistance in anyt given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'" Id. at 106 (quoting Strickland, 46u6 U.S.

at 689). The reviewing court must "'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from counsel's perspective at the time.'" Id. at 107 (quoting Strickland, 466 U.S. at 689). "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Id. at 111.

To satisfy the prejudice prong of the analysis, a petitioner must demonstrate that counsel's errors were "'so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable.'" Id. at 104 (quoting Strickland, 466 U.S. at 687). Thus, a petitioner must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficiet to underine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694). This

determination must be made in light of "the totality of the evidence before the judge or jury." Strickland, 466 U.S. at 695.

## III. DISCUSSION

### A. Bey's Claim that the Trial Court Erred in Admitting Change Wright's Statement and Testimony is Procedurally Defaulted and Meritless

Bey contends that the trial court erred when it ruled that three separate, consistent statements made by deceased witness Wright were admissible under Pennsylvania Rule of Evidence 804(b)(6), the forfeiture by wrongdoing exception to the hearsay rule, in violation of his Sixth Amendment right to confront the witnesses against him. Pet'r's Br. At 30-40. The three statements at issue are Wright's police statement, grand jury testimony, and preliminary hearing testimony. Id. Bey sets forth two arguments in support of his claim of trial court error, namely: (1) the

Commonwealth did not meet its burden of proving by a preponderance of the evidence that Bey was connected to Wright's murder; and (2) he had no opportunity to confront Wright regarding her police statement and grand jury testimony, and a limited opportunity to confront her with regard to her preliminary hearing testimony. Id. at 32.

1. Bey's Claim that the Commonwealth Did Not Meet its Burden of Proving by a Preponderance of the Evidence that Bey was Connected to Wright's Murder is Not Cognizable on Habeas Review

To the extent Bey challenges the trial court's finding that the Commonwealth proved by a preponderance of the evidence that Bey was connected to Wright's murder, this claim is not cognizable on habeas review. During a hearing to determine whether the Commonwealth had met its burden, the trial court described the evidence surrounding Wright's

murder as follows:

> Chante Wright was placed in federal witness protection. She returned to Philadelphia in January, 2008 to visit an ill family member. [Bey], through the use of a cell phone he had smuggled into the prison, initiated a series of phone calls ordering Wright's murder. [Bey] knew that Wright had identified him as the shooter and planned her murder to prevent her from testifying at trial. Cell phone records established an unequivocal link between [Bey]; Laquaille Bryant[], and Chante Wright. The timing of the phone calls between [Bey] and Bryant indicated that [Bey] and Bryant maintained a constant dialogue from the time Change Wright arrived in Philadelphia up to the moments immediately prior to and immediately after she was gunned down on the street.

Super.Ct.Op. At 7 (alteration in original) (footnote omitted) (citations to the record omitted) (quoting Opinion at 11-12, Commonwealth v. Bey, Nos. CP-51-CR-1100021-2002, CP-51-CR-1100031-2002 (Pa.Ct.Comm.Pl. Phil. Cnty. Apr. 22, 2010) (reproduced in Pet. Ex. A) [hereinafter "Trial Ct. Op."]). Based on this evidence, the trial court found that "[t]he

Commonwealth established, for purposes of [Pennsylvania Rule o Evidence] 804(b)(6), that [Bey] knowingly conspired with others to prevent Chante Wright from testifying against him" and allowed Wright's prior statement and testimony to be admitted at trial. Super. Ct. Op. At 7 (quotign Trial Ct Op. At 12) (internal quotation marks omitted). The Superior Court affirmed, finding that the trial court's application of Rule 804(b)(6) was not in error. Id. at 8.

It is not the province of a federal court on habeas review to determine whether state courts have properly applied their own rules of evidence. Estelle, 502 U.S. at 67-68; see also Keller v. Larkins, 251 F.3d 408, 416 n.2 (3d Cir. 2001) (a federal habeas court cannot decide whether the evidence in question was properly allowed under the state law of evidence). Claims regarding the admission of evidence only rise to

the level of a federal constitutional violation if the challenged ruling "so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)) (internal quotation marks omitted). Here, Bey has failed to assert any plausible argument that would support the conclusion that the Pennsylvania courts' evidentiary rulings violated his right to due process. Therefore, the state courts' determination that the Commonwealth met its burden of proof will not be disturbed on habeas review.

2. Bey's claim that the Trial Court's Admission of Wright's Statement and Testimony Violated the Confrontation Clause is Procedurally Defaulted and Meritless

Bey challenges the admission of Wright's statement and testimony on Confrontation Clause grounds. On direct appeal, Bey contended "that the

trial court erred in admitting the prior statements and testimony of Wright pursuant to [Pennsylvania Rule of Evidence] 804(b)(6)." Super. Ct. Op. At 2. Bey did not argue on appeal, however, that his Confrontation Clause rights were violated. As a result, this claim is procedurally defaulted and not subject to habeas review.

Absent procedural default, Bey's claim is unavailing. The Confrontation Clause provides a criminal defendant with the right "to be confronted with the witnesses against him [or her]." U.S. Const. Amend. VI. Pursuant to Crawford v. Washington, 541 U.S. 36 (2004) and it progeny, "evidence may be inadmissible under the Confrontation Clause where it is (1) hearsay, (2) by an unavailable declarant not previously subject to cross-examination by the defendant, and (3) a 'testimonial' statement." See

Aponte v. Eckard, No. CV 15-561, 2016 WL 8201308, at *16 (E.D. Pa. June 3, 2016) (citing United States v. Price, 458 F.3d 202, 209 n.2 (3d Cir. 2006)), report and recommendation adopted, No. CV 15-561, 2017 WL 467633 (E.D. Pa. Feb. 3, 2017). Hearsay evidence, however, may be admissible for Confrontation Clause purposes under the forfeiture by wrongdoing rule. Giles v. California, 554 U.S. 353, 374 (2008); Davis v. Washington, 547 U.S. 813, 833 (2006).

Here, the Superior Court summarized the forfeiture by wrongdoing rule as follows:

> Under the forfeiture by wrongdoing rule, a defendant forfeits his [or her] confrontation rights when he [or she] intentionally procures the unavailability of a witness.
> The logic of this conclusion can be distilled from the synopsis set forth in [United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001). Cert. denied, 534 U.S. 897 (2001)]: (1) the essential purpose of confrontation is to secure a criminal defendant's fundamental right to cross-examination; (2) the constitutional right of confrontation, however, is not absolute and may

> be waived under certain circumstances; and (3) a defendant who engages in willful misconduct that renders the declarant unavailable waives his [or her] confrontation right. Id. at 651. All Circuit Courts of Appeals considering the matter of a defendant who has removed an adverse witness have similarly concluded that "simple equity" and "common sense" support a forfeiture principle so that "a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness." Id. at 652 (quoting United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997) [cert. denied, 522 U.S. 960 (1997)]).

Super. Ct. Op. At 5. State-court determinations regarding whether a defendant orchestrated a witness' death to prevent his or her appearance at trial are entitled to AEDPA deference. Palmer, 592 F.3d at 391-92. Thus, to qualify for habeas relief, Bey must demonstrate that the state courts' determination that he wrongfully procured the absence of Wright at trial was contrary to or an unreasonable application of United States Supreme Court precedent, or was an unreasonable determination of the facts based on the

evidence presented. 18 U.S.C. §2254(d). As the Supreme Court has noted: "'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on esssentially equitable grounds'. . . . That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." Davis, 547i U.S. at 833 (quoting Crawford, 541 U.S. at 62). In t his case, the evidence unequivocally suggests that Bey wrongfully arranged for the absence of Wright at trial. As a result, the trial court's decision to admit Wright's prior statement and testimony was entirely appropriate and not violative of Bey's confrontation rights. For this reason, Bey's claim does not qualify for habeas relief.

B. Bey's Claims that the Trial Court Errid in Reopening the Case After the Start of Jury Deliberations and that his Trial Counsel was ineffective in Failing to Preserve this Issue for Appeal are Meritless

Bey next asserts that the trial court erred be reopening the case after the start of jury deliberations to correct a factual misrepresentation without giving Bey's trial counsel the opportunity to address the evidence. Pet'r's Br. at 40-61. He also claims that his trial counsel was ineffective in failing to preserve this issue for appeal. Id. at 78-82. The evidence in question is an undated photograph of Bey and Wright that was taken at the prison where he was incarcerated. Id. at 41. In describing this evidence, the trial court stated:

> [Bey] offered an undated photograph of Chante Wright which purported to memorialize a visit to [Bey] while he was in custody. It was asserted that the photograph was taken on December 3, 2007, while Chante Wright was in federal witness protection. It was the sole evidence offered by [Bey] and its only objective was to undermine the credibility to be accorded Chante Wright's testimony. After the record was closed and the jury began deliberations, the trial court was advised that the photograph in fact was not taken on December 3, 2007. The

> prison records reveal that Wright only visited [Bey] on April 14, 2003 and April 27, 2005; both visits were long before her cooperation with law enforcement and her entry into federal witness protection.

Super. Ct. Op. at 9-10 (quoting Trial Ct. Op. At 13). After discovering that the photograph was not taken on the date Bey had represented, the trial court halted jury deliberations and reopened the case to correct this factual misrepresentation. Id. at 10. Thereafter, the Commonwealth called the custodian of records for the Philadelphia prison system, Dorothy Harris, to testify "that Wright did not visit [Bey] in 2007." Id. Bey's trial counsel cross-examined Ms. Harris but elected not to call a rebuttal witness. Id.

In support of its decision to reopen the case, the trial court stated that "[t]he sole purpose for re-opening the case was to ensure the jury was not misled by false or inaccurate evidence produced by [Bey]. The trial

court, in the exercise of its discretion, was justified in re-opening the record to avoid a miscarriage of justice. No error exists." Trial Ct. Op. at 21. The Superior Court agreed, holding:

> We find that the trial court did not abuse its discretion in reopening the case to present the testimony of Harris. The parties had entered into a stipulation that the photograph depicted Wright visiting [Bey] in prison on December 3, 2007. This photograph was admitted into evidence and submitted to the jury. Subsequently, during deliberations, the trial court discovered that the photograph was a misrepresentation of fact because Wright did not visit [Bey] in 2007. Her last visit was in 2005, before she agreed to cooperate with authorities and entered the federal witness protection program. At this point, the trial court was well within its discretion to reopen the case and inform the jury that the photograph was false, particularly where the parties had stipulated to its genuineness and the jury was required to accept as fact that Wright had visited [Bey] on December 3, 2007. [Bey] relied on the photograph to attack Wright's credibility, and the trial court had to reopen the case to correct the record and to prevent a miscarriage of justice.

Super. Ct. Op. at 11-12 (citations omitted). In so

holding, the Superior Court cited Pennsylvania law which provides that a trial court may exercise its discretion in reopening a case to present new evidence in order to correct the record and "prevent a failure or miscarriage of justice." Commonwealth v. Tharp, 575 A.2d 557, 558-59 (Pa. 1990); see also Commonwealth v. Mathis, 463 A.2d 1167, 1171 (Pa.Super.Ct. 1983). A decision to reopen will not be overturned unless it is clearly erroneous. Comonwealth v. Baldwin, 8 A.3d 901, 903-04 (Pa.Super.Ct. 2010); Commonwealth v. Bango, 742 A.2d1070, 1072 (Pa. 1999). Here, Bey submitted false evidence with the intention of deceiving the jury. Under these circumstances, the trial court's decision to reopen the case was warranted and necessary to avoid a miscarriage of justice. Accordingly, Bey cannot prevail on this claim.

Bey also maintains that his trial counsel was

ineffective in failing to preserve for appeal the claim that the trial court violated his constitutional rights by telling the jury to disregard the photograph, the only evidence Bey offered at trial. Pet'r's Br. at 78-82. This argument must fail because as previously discussed, Bey's underlying claim lacks any arguable merit. Thus, Bey's trial counsel cannot be deemed ineffective for failing to raise an unmeritorious claim. Real v. Shannon, 600 F.3d 302, 310 (3d Cir 2010).

C. Bey's Claim that his trial Counsel Was Ineffective in Failing to Advise Him of his Right to Testify is Meritless

Bey accuses his trial counsel of having been ineffective in failing to advise him of his right to testify on his own behalf. Pet'r's Br. at 58-61. In support of this contention, Bey claims that he "believed that the decision of whether or not to testify was his attorney's decision, not his." Id. Bey's belief, however, is belied

by the following waiver colloquy conducted by the trial court:

> The Court: Have you discussed the pros and cons of whether you should in fact testify?
>
> Now, Mr. Bey, you do not have to testify. . . . There is no obligation on you to do anything. ... Did you and [trial counsel] talk about that?
>
> [Bey:] Yes.
>
> The Court: Have you made a decision? You know I want you to consider [trial counsel's] position, but have you made a personal decision about whether you wish to testify or not?
>
> [Bey:] No.
>
> The Court: No, you didn't make a decision or no, you don't want to testify?
>
> [Bey:] I don't want to testify.
>
> The Court: You don't want to testify.
>
> That's absolutely fine. Are you satisfied with [trial counsel's] representation of you?
>
> [Bey:] Yes.
>
> The Court: Is there anything at all that was not

> done that you would have wanted [trial counsel] to do for you?
>
> [Bey:] No

PCRA Super. Ct. Op. at 8-9 (quoting Transcript of Record at 14-16, Commonwealth v. Bey, Nos. CP-51-CR-1100021-2002, CP-51-CR-1100031-2002 (Pa.Ct.Com.Pl. Phila. Cnty. Sept. 25, 2008) [hereinafter "Sept. 25, 2008 Tr."]) As the colloquy makes clear, although the trial court advised Bey to consider his counsel's advice, it explicitly asked him whether he "made a personal decision about whether [he] wish[ed] to testify or not," to which he replied "I don't want to testify." Sept. 25, 2008 Tr. at 14-16 (emphasis added). The PCRA court found that Bey's decision not to testify was a "knowing, intelligent and voluntary waive." Transcript of Record at 6, Commonwealth v. Bey, Nos. CP-51-CR-1100021-2002, CP-51-CR-1100031-2002 (Pa.Ct.Com.Pl. Phila. Cnty.

Oct 11, 2016) (reproduced in PCRA Ct. Op. Ex. A) [hereinafter "Oct. 11, 2016 Tr."]. This finding was affirmed by the Superior Court. PCRA Super. Ct. Op. at 9.

Here, it is indisputable that Bey made a personal decision under oath to voluntarily waive his right to testify. Consequently, Bey's ineffective assistance of counsel claim must fail.

D. Bey's Claim that Trial Counsel Was Ineffective in Failing to Call Sharita Williams and Cayanna Brown as Defense Witnesses is Not Entitled to Habeas Relief

Bey contends that his trial counsel was ineffective in failing to call Williams and Brown as defense witnesses at trial. Pet'r's Br. at 61-66. He alleges that both witnesses' testimony would have exonerated him as the shooter and thus, discredited Wright's eyewitness statement and testimony to the

contrary. Id. at 61-62.

To establish ineffective assistance of counsel for failure to call a witness, a petitioner must show that: "(1) the witness existed; (2) the witness was available; (3) counsel was informed of the witness's existence or counsel should otherwise have known of the witness; (4) the witness was prepared to cooperate and testify for the defendant at trial; and (5) the absence of the testimony prejudiced defendant so as to den him [or he] a fair trial." Harris v. Mahally, No. 14-CV-2879, 2015 WL 11794543, at *5 (E.D. Pa. Aug. 31, 2015), report and recommendation adopted, No. 14-2879, 2016 WL 4440337 (E.D. Pa. Aug. 22, 2015); accord Kelly v. Rozum, No. CIV.A. 08-1073, 2009 WL 3245565, at *17 (E.D. Pa. Oct. 6, 2009).

With respect to Williams, the Superior Court rejected Bey's claim of ineffectiveness on PCRA appeal

on the merits. The Superior Court determined that:

> the PCRA court . . . found tht [Bey]
>
> > voluntarily waived his riht on the record to call Sharita Williams as a witness during a colloquy at trial . . . . In fact, [Bey] stated during the colloquy that he wanted to call Sharita Williams but she refused to come. Additionally, [t]rial [c]ounsel told the [c]ourt that Miss Williams would not cooperate with the Defense and was not willing to testify and [Bey] makes no offer of proof as to what she would testify to.
>
> The PCRA court thus opined that [Bey]'s claim of ineffectiveness failed because "the witness was not willing to testify' and [Bey] failed to establish prejudice." Our review confirms that the court's findings are supported in the record, and we discern no legal error in the court's legal conclusions.

PCRA Super. Ct. Op. at 11-12 (quoting Oct. 11, 2016 Tr. At 7-8).

With respect to Brown, the Superior Court found that Bey had waived his claim of ineffectiveness. Specifically, in his amended PCRA petition, Bey argued that his counsel was ineffective for failing to

call Brown as a witness because Brown would have been available to testify that Wright visited Bey in prison in November or December of 2007. See id. at 12 (citing Pet'r's PCRA App. Br. at 36). On PCRA appeal, Bey presented a new theory, arguing that Brown would have testified that Wright could not identify him as the shooter. Id. The Superior Court, however, held that Bey waived his argument regarding counsel's ineffectiveness for failing to call Brown as a witness because he presented a new theory of relief for the first time on appeal. Id. (relying on Pennsylvania Rule of Appellate Procedure 302(a) ("issues not raised in the lower court are waived and cannot be raised for the first time on appeal.")). Accordingly, Pennsylvania's waiver rule is an independent and adequate state ground precluding habeas review. See Thomas v. Sec'y, Pa. Dep't of Corr., 495 F.App'x 200, 205-06 (3d

Cir. 2012). Nor does Bey successfully assert any grounds to overcome this procedural default.

Ultimately, however, Bey's claim of ineffectiveness for failing to call either Williams or Brown lacks merit. Although Bey now asserts that both witnesses' testimony would have exonerated him as the shooter, Pet'r's Br. at 61-62, he has provided no affidavit or statement of any kind to show that Williams or Brown were available, prepared to cooperate, and willing to testify to the facts as he asserts them to be. See, e.g., Gutierrez v. Folino, No. CIV.3:CV060384, 2006 WL 1722392, at *7 (E.D. Pa. June 22, 2006) (citing Cvommonwealth v. Khalil, 806 A.2d 415, 422 (Pa.Super.Ct. 2002)) ("[I]neffective assistance of counsel for failure to call witnesses will not be found where a defendant fails to provide affidavits from alleged witnesses indicating their

availability and willingness to cooperate with the defense."). Accordingly, Bey's trial counsel's failure to call these two witnesses did not fall below an objective standard of reasonableness.

Nor has Bey demonstrated there was a reasonable probability that, but for trial counsel's alleged errors, the result of the proceeding would have been different, see Strickland, 466 U.S. at 694, particularly where the credibility of both witnesses is of concern. Williams was a "close friend of Chante Wright," Pet'r's Br. at 61, and thus the jury could have reasonably found that she only testified on Bey's behalf to protect her friend from the witness-intimidation tactics Bey used against Wright. Brown's credibility is also in question because alibi testimony from a loved one – Bey's girlfriend and mother to his child, in this case, Oct. 11, 2016 Tr. at 8 – is often less credible than

the testimony of a more objective witness, due to the potential for bias. See Hess v Mazurkiewicz, 135 F.3d 905, 909 (3d Cir. 1998) (citing Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995)) (recognizing that alibi testimony by defendant's family members is less credible than testimony of an objective witness). As the foregoing leaves no doubt, Bey has failed to demonstrate that his claim of ineffectiveness based on trial counsel's failure to call either Williams or Brown as defense witnesses entitles him to habeas relief.

### E. Bey's Claim that his Trial Counsel Was Ineffective in Failing to Argue that his Double Jeopardy Rights were Violated is Meritless

Bey contends that his trial counsel was ineffective in failing to argue that his double jeopardy rights were violated. Pet'r's Br. at 66-68. On PCRA appeal, the Superior Court found that Bey, who was proceeding pro se, had waived this claim because the

certified record transmitted on appeal did not include the notes of testimony from a April 6, 2004 hearing which were necessary to evaluate his double jeopardy claim. PCRA Super. Ct. Op. at 13. In so holding, the Superior Court cited to Pennsylvania law which provides that, as the appellant, it was Bey's burden to "ensure the record certified on appeal [was] complete in the sense that it contain[ed] all of the materials necessary for the reviewing court to perform its duty." Commonwealth v. B.D.G., 959 A.2d 362, 372 (Pa. Super. St. 2008). Thus, because Bey waived this claim, it is procedurally defaulted and ineligible for habeas review. Coleman, 501 U.S. at 735 n.1.

By's procedurally defaulted claim also lacks substance. The Fifth Amendment of the United States Constitution forbids a person from being subject to the same offense twice. U.S. Const. Amend. V. Our

judiciary "has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the t rier of facts, whether the trier be a jury or a judge.'" Serfass v. United States, 420 U.S. 377, 388 (1975) (citing United States v. Jorn, 400 U.S. 470, 479 (1971)). In a jury trial, which applies here, jeopardy does not attach until the jury is empaneled and sworn in. See Martinez v. Illinois, 572 U.S. 833, 839 (2014); Crist v. Bretz, 437 U.S. 28, 37-38 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 569-70 (1977); Serfass, 420 U.S. at 388; Jorn, 400 U.S. at 479; Downum v. United States, 372 U.S. 734, 73-38 (1963); Wade v. Hunter, 336 U.S. 684, 688 (1949).

Withy respect to Bey's double jeopardy claim, the PCRA court fond it lacking in merit, noting that:

> The jury was not sworn and the Commonwealth withdrew prosecution without prejudice since they were able to procure eyewitness, Chante Wright, for trial and that was done on April 6, 2004
>
> During the hearing to reopen in front of Judge Hughes, to reopen the nol[]pros, [Counsel] indicates that the jury was not sworn at that time and that is on the record from the motion to reopen. It is actually the Commonwealth's motion to vacate the entry of nol[]pros.
>
> The notes are April 20, 2007, pages 1 and 2. [Counsel] basically starts off with that the jury was not sworn in at that time. So there is no double jeopardy issue.
>
> In order for there to be double jeopardy, the jury would have had to have been sworn in at that time. This was a nol[]pros and it was a nol[]pros without prejudice. So no jeopardy attached in this case. So that claim is meritless.

Oct. 11, 2016 Tr. 11-12. The Superior Court affirmed the PCRA court's determination. PCRA Super. Ct. Op. at 13-14. Nonetheless, Bey attempts to dispute the PCRA court's finding by arguing that it is his "recollection that the jury <u>was</u> sworn and jeopardy

attached on April 1, 2004." Pet'r's Br. at 67. Bey's recollection, however, cannot supersede the trial record, which unambiguously shows that the jury had not been sworn in before his was was nol prossed:

> MR. VEGA: ... So, your Honor – and I thank the Court for allowing me the 24 hours to attempt to locate them, but I think it would be appropriate, and I informed the Court that I will make the appropriate motion which is to – initially I would ask for a continuance. I don't think the Court would grant that, and I would move to nol pros.
>
> THE COURT: Very good. Mr. Santaguida.
>
> MR. VEGA: Is that okay with you, Mr .Santaguida, or do you want a trial?
>
> MR. SANTAGUIDA: Uh-huh.
>
> THE COURT: Mr. Bey was not brought in today.

Transcript of Record at 3-4, Commonwealth v. Bey, Nos. CP-51-CR-1100021-2002, CP-51-CR-1100031-2002 (Pa.Ct.Com.Pl. Phila. Cnty. Apr. 6, 2014) (reproduced in Resp'ts' Br. Ex. D) [hereinafter "Apr. 6,

2014 Tr."]. As the foregoing makes clear, Bey's double jeopardy rights were not violated and his trial counsel was not ineffective for failing to raise a meritless claim.

F. Bey's Claim that his Trial Counsel Was Ineffective in Failing to File a Motion to Dismiss Based on an Eight-Year Delay Between the Victim's Death and Trial is Meritless

In his next claim for relief, Bey argues that his trial counsel was ineffective in failing to file a motion to dismiss his case due to an eight-year delay between the victim's death and Bey's trial in violation of his federal constitutional right to a speedy trial. Pet'r's Br. at 68-75. In his PCRA petition Bey asserted "that the delay from his initial arrest on July 18, 2002, until the nol pros of April 6, 2004 and the delay between the nol pros and the refiling of the charges in 2007, were the product of intentional, bad faith, or reckless conduct by

the prosecution in order to bolster its case." Pet'r's PCRA App. Br. at *28. The PCRA court determined that this claim lacked merit and the Superior Court affirmed, stating that:

> [A]s set forth by the PCRA court, the Commonwealth acted with due diligence and Chante Wright's unwillingness to testify presents a valid reason for the delay. Thus, the Commonwealth set forth a reasonable explanation for the delay, and [Bey] has not set forth any cogent allegation to rebut that conclusion. We acknowledge [that Bey] now asserts that a possible alibi witness died during the pretrial delay. However, he does not allege, nor does the record support any conclusion that [Bey] had informed trial counsel of the existence of this alleged witness. Accordingly, we agree with the PCRA court that trial [counsel] cannot be deemed ineffective for failing to file a motion to dismiss the charges for the pretrial delay in this case.

PCRA Super. Ct. Op. at 18-19.

In determining whether a violation of a defendant's federal constitutional right to a speedy trial has occurred, courts employ a balancing test,

considering the "length of the delay, the reason for the delay, the defendant's assertion of his [or her] right, and prejudice to the defendant." Woods v. Lamas, 631 Fed.Appx. 96, 101 (3d Cir. 2015) (quoting Barker v. Wingo, 407 U.S. 514, 530 (1972)) (internal quotation marks omitted). "The first factor acts as a triggering mechanism." Id. (internal quotation marks omitted). Here, the approximately 20-month delay between Bey's arrest on July 18, 2002 and the nol pros hearing on April 6, 2004, and the nearly 53 months between the nol pros hearing to the start of his trial on September 15, 2008 triggers a speedy trial inquiry. See Doggett v. United States, 505 U.S.647, 652 n.1 (1992) (noting that "the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year," and this "marks the point at which courts deem the delay unreasonable

enough to trigger the Barker enquiry").

When evaluating the reason for a delay in bringing a defendant to trial, the courts examine several factors, including whether the delay was intentional to gain an advantage over or harass the defense, was the result of court congestion, or was due to a missing witness. Barker, 407 U.S. at 531 (citing United States v. Marion, 404 U.S. 307, 325 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957)). In this matter, only a small portion of the delay in bringing Bey to trial was attributable to the Commonwealth and court congestion.[7] Indeed, an overwhelming amount of the delat was caused almost

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The PCRA court found that "there [were] only about two months up to the time [Bey's first trial was scheduled] that [could] be attributable to the Commonwealth." Oct. 11, 2016 Tr. at 14. The PCRA court also noted that some portion of the delay was attributable to other factors, including defense counsel's requests to continue a preliminary hearing and a pretrial conference, joint requests to continue the trial, and court congestion. Id. at 13-14.

exclusively by Bey's witness-intimidation tactics. See Trial Ct. Op. at 1-2. Despite Bey's systematic efforts to stifle any eyewitness testimony against him, the Commonwealth acted diligently in attempting to locate and present its key witness, Wright. As the trial court noted, "the first time the case was nol prossed was because the eyewitness could not be located. There could be no case without Miss Wright. The other eyewitnesses were killed and there was evidence that they were killed by the Defendant or at the Defendant's behest." Oct. 11, 2016 T. at 19. Although Wright was located shortly after Bey's case was nol prossed, she refused to testify against Bey because she feared for her life, which rendered herr unavailable for trial purposes. Id. at 19-20. After being placed in the federal witness protection program, Wright agreed to testify against Bey and the Commonwealth moved to

life the nol pros. Id. at 20-21. As the foregoing makes clear, the delay factor does not weigh in Bey's favor.

Furthermore, Bey cannot show that he was prejudiced by a delay that was overwhelmingly his fault. To determine whether a defendant suffered prejudice, courts evaluate the effect on the three interests the right to a speedy trial aims to protect: "(I) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532 (citing United States v. Ewell, 383 U.S. 116, 120 (1966); Smith v. Hooey, 393 U.S. 374, 377-78 (1969)). Here, Bey's claim of prejudice is spurious given that a significant portion of the delay in bringing his case to trial was the product of his own intentional conduct. Accordingly, Bey's tiral counsel cannot be deemed ineffective for

failing to raise a meritless claim and thus, his claim must fail.

G. Bey's Claim that his Trial Counsel was Ineffective in Failing to Request a Mistrial Upon Learning that the Trial Judge was Placed Under Protective Detail is Procedurally Defaulted and Meritless

Bey avers that his trial counsel was ineffective in failing to request a mistrial upon learning that the trial judge, the Honorable Renee Cardwell Hughes, was placed under protective detail. Pet'r's Br. at 75-78. On PCRA appeal, the Superior Court determined, however, that Bey waived this claim given his failure to cite to supporting legal authority.[8] PCRA Super.

[8] Bey also alleges that the PCRA court erred in deying him an evidentiary hearing on his PCRA petition. Pet'r's Br. at 72 n.7. He maintains that "[i]f [he] was given an evidentiary hearing, he would have shown that the jury was likely aware that the Judge and her family were under protective detail. Regardless, because state courts are not required to provide state collateral review, see Finley, 481 U.S. at 557, a post-conviction elief court's decision not to hold an evidentiary hearing does not raise a federal constitutional clim. See Lambert v. Blackwell,

Cgt. Op. at 19 (citing B.D.G., 959 A.2d at 371-72); see, e.g., Leake v. Dillman, 594 F. App'x 756, 759 (3d Cir. 2014) (concluding that the failure to meaningfully develop arguments on appeal and cite to appropriate authorities was an independent and adequate Pennsylvania state-law ground); Thomas, 495 F. App'x at 207. Consequently, Bey's claim is procedurally defaulted.

Aside from being procedurally defaulted, Bey's claim is plainly meritless. Jury deliberations began on September 26, 2008. Et'r's Br. at 75. On September 29, 2008, while jury deliberations were underway and

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387 F.3d 210, 247 (3d Cir. 2004) ("[H]abeas proceedings are not the appropriate forum for [a defendant] to pursue claims of error at the PCDRA proceeding"); see also Garmon v. Wenerowicz, No. CV 09-1844, 2017 SL 8218996, at *6 (E.D. Pa. July 13, 2017) ("[P]etitioner's claim that the PCRA court erred in failing to conduct an evidentiary hearing is not a cognizable habeas claim."), report and recommendation adopted sub nom. Garmon v. Diguglielmo, No. CV 09-1844, 2018 WL 1251727 (E.D. Pa. Mar 12, 2018). Therefore, this claim is nt cognizable on habeas review. See Estelle, 502 U.S. at 68.

outside the presence of the jury, Judge Hughes remarked that she and her family had been assigned a police protective detail. Id. In his habeas petition, Bey offers no plausible argument supporting his contention that he was prejudiced by his trial counsel's failure to request a mistrial upon learning that Judge Hughes was placed under protective detail. Instead he baldly alleges that "there [was] no way to know whether the jury was aware the Judge was under protective custody." Id. at 76. As the PCRA court noted, however, Bey's trial was not a bench trial and there was no indication that the jury was remotely aware of the protective detail. Oct. 11, 2016 Tr. at 22. Thus, in the absence of evidence that the jury was aware of the protective detail, and that this knowledge somehow influenced the outcome of the trial, Bey's trial counsel cannot be found ineffective for failing to raise a

meritless claim

H. Bey's Claim that His Trial Counsel was Ineffective in Failing to Object to Jury Instructions is Procedurally Defaulted and Meritless

Bey maintains that his trial counsel was ineffective in failing to object to the trial court's jury instructions on consciousness of guilt, reasonable doubt, and the elements of criminal homicide, which he argues were inaccurate and confusing. Pet'r's Br. at 82-92. On PCRA appeal, the Superior Court found that Bey's "brief [was] devoid of any citations to legal authority" to support his contention that the "instructions were inaccurate and confusing in defining consciousness of guilt, reasonable doubt, and the elements of the crime(s) of criminal homicide." PCRA Super. Ct. Op. at 22. For this reason, the Superior Court held that Bey's failure to cite to legal authority

resulted in a waiver of his claim. Id.; see B.D.G., 959 A.2d at 371-72; see also Pa. R.App.P. 2119(a)-(b) This waiver constitutes an independent and adequate state-law ground for precluding federal habeas review. Thus, Bey's ineffective assistance of counsel claim is procedurally defaulted.

Additionally, Beyy cannot pevail on his challenge to the jury instructions on the merits. "[A] habeas corpus petitioner faces a heavy burden in challenging allegedly defective jury instructions. The petitioner must show that the offending instruction is so oppressive as to render a trial fundamentally unfair." Gov't of Virgin Islands v. Smith, 99 F.2d 677, 684 n.7 (3d Cir. 1991) (citations omitted) (internal quotation marks omitted); see also Smith v. Horn, 120 F.3d 400, 411 (3d Cir. 1997) ("The proper inquiry is whether there is a reasonable likelihood that the jury

has applied the challenged instructions in a way that violates the Constitution." (citations omitted) (internal quotation marks omitted)). In general, challenges to the correctness of jury instructions raise purely state-law issues, see Engle v. Isaac, 456 U.S. 107, 119 (1982), unless the jury instructions are so defective that they violate thye defendant's fundamental due process rights, see Geschwendt v. Ryan, 967 F.2d 877, 883 (3d Cir. 1992).

1. Consciousness of Guilt

Bey contends that his trial counsel was ineffective in failing to object to the trial court's jury instructions on consciousness of guilt. Pet'r's Br. at 82-85. He argues that the charge was improper because it "suggested tat the evidence linking Bey to the death of Chante Wright should be considered as consciousness of guilt for the aggravated assaults of

Duane Clinkscales." Id. at 85.

On September 26, 2008, in instructing the jury on consciousness of guilt, the trial court stated:

> You also heard testimony concerning the death of Chante Wright. Hakeem Bey is not charged with the death of Chante Wright. The matter before you arises from the facts and circumstances that gave rise to the death of Moses Williams on September 24 of the year 2000 and the injuries to Brencis Drew sustained on that same day and the injuries sustained by Duane Clinkscales on December 26, 2000.. That is what is before you. The testimony that was presented to you concerning the death of Chante Wright is offered for a narrow purpose.
>
> If you accept the evidence linking Hakeem Bey to the death of Chante Wright, you may regard that evidence as tending to prove Hakeem Bey's consciousness of guilt as it relates to the charges that are before you; the death of Moses Williams, the shooting of Brencis Drew, and the shooting of Duane Clinkscales.
>
> Now, you are not required to do so. You should consider and weigh the evidence about the death of Chante Wright along with all of the evidence that has been presented in this proceedng. It was the basis for allowing the record that had been created of Chante Wright's statements and her testimony to other sworn proceedings to e

provided to you.

Pet'r's Br. at 82-83, Commonwealth v. Bey, Nos. CP-51-CR-1100021-2002, CP-51-CR-1100031-2002 (Pa.Com.Pl. Phila Cnty. Sept. 26, 2008) [hereinafter "Sept 26, 2008 Tr."]. Bey's counsel objected to this instruction and engaged in the following exchange with the trial court:

> Mr. Santaguida: Also Chante Wright's death is not consciousness of g uilt of Clinkscales' assautlt.
>
> The Court: I didn't say it was.
>
> Mr. Santaguida: Yes, you did.
>
> The Court: I said it was in the shooting of Moses Williams.
>
> Mr. Santaguida: And the shooting --
>
> The Court: No, I did't .
>
> Mr. Santaguida: Okay.
>
> The Court: I didn't. I said Clinkscales. I am sorry. You wrote it wrong just like -

> Mr. Santaguida: Yes, you did. You said Clinkscales' aggravated assault.
>
> The Court: I didn't say that, I said two separate charges, and you can see it because I wrote it down that it was in the whooting.
>
> Mr Santaguida: I wrote it too.
>
> The Court: You wrote it wrong.
>
> Mr. Santaguida: Okay.

Id. at 57-58. Three days later, the trial court reinstructed the jury on consciousness of guilt as follows:

> You heard testimony concerning the death of Chante Wright. Hakeem Bey was not charged with the death of Chante Wright. The matter before you arises from the death of Moses Williams on September 24 of the year 2000. The testimony presented to you concerning the death of Chante Wright is offered for a very narrow purpose. F you accept the evidence linking Hakeem Bey to the death of Chante Wright, you may regard that as evidence tending to prove Hakim Bey's consciousness of guilt in the murder of Moses Williams - in the death of Moses Williams. You are not required to do so. You should consider and weigh the evidence along with all other evidence in the

> case.
>
> Likewise, there was testimony t hat Duane Clinkscales that he was shot at various times between September 24, 2000 and Decemb er 26, 2000, the date he was actually shot. This evidence was for two purposes. Hakeem Bey as been charged with aggravated assault against Duane Clinkscales. Clearly Duane Clinkscales' testimony is relevant in your deliberations on that charge. It also may be relevant in your deliberations on the death of Moses Williams. If you accept the testimony of Duane Clinkscales, that evidence may also be used by you to prove Hakim Bey's consciousness of guilt. Again, you are not required to use this evidence as consciousness of guilt, but you should consider and weigh it along with all of the evidence in this proceeding.

Pet'r's Br. at 84 (quoting Transcript of Record at 122-24, Commonwealth v. Bey, Nos. CP-51-CR-1100021-2002, CP-51-CR-1100031-2002 (Pa. Ct. Com. Pl. Phila. Cnty. September 29, 2008) [hereinafter "Sept. 29, 2008 Tr."]. Bey's trial counsel did not object to this charge. Id.

With respect to the first instruction on

consciousness of guilt, the PCRA court held that Bey's trial counsel was not ineffective because he objected to the court's instruction. Oct. 11, 2016 Tr. at 24-25. This determination was not contrary to, or an un reasonable application of Strickland.

As to the second instruction on consciousness of guilt, the PCRA court found Bey's claim meritless because "[t]he Judge corrected her mistake in saying that the jury could use Chante Wight's death in any way in the matter of the aggravated assault of Duane Clinkscales." Id. at 25-26. This instruction was not contrary to, or an unreasonable application of Strickland. Moreover, Pennsylvania's Suggested Standard Criminal Jury Instructions contain a virtually identical instruction on the consciousness of guilt standard. See Pa. SSJI (Crim) §3.15. Here, trial counsel cannot be deemed ineffective for failing to

object to the second jury instruction which accurately reflected Pennsylvania law. Accordingly, Bey is not entitled to habeas relief on this claim.

2. Reasonable Doubt

Bey argues that his trial counsel was ineffective in failing to object to the trial court's jury instructions defining reasonable doubt. In particular, Bey challenges is trial counsel's failure to object to a portion of the jury instructions wherein the trial court analogized reasonable doubt to making a decision about life-saving medical treatment for a loved one when only a single option exists.[9] Bey's claim of

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[9] Specifically, the trial judge instructed the jury on reasonable doubt, in relevant part, as follows:

> I find it helpful to think about areasonable doubt in this way. Because I was blessed to speak to each and every one of you individually, I know that each and every one of you has someone in your life that you love. Each one of you has a precious one; a spouse, a sibling, you have children, you have grandchildren. Each one of you has someone who is dear to you.

ineffectiveness, however, lacks merit.

Contrary to Bey's assertion, Pet'r's Br. at 86, his trial counsel did in fact object to the trial court's

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> What if you were told that your precious one had a life-threatening medical condition and that the only protocol for this life-threatening medical condition was a surgery that's not done very often. Now, if you're like me, you're probably going to ask for a second opinion, probably going to ask for a third opinion. You probably are going to read everything you can possible find out about this medical condition, about is surgery really necessary, is this particular surgery really necessary. You are probably going to call up all of your friends who work in medicine, tell me what you know, but at some point the question will be called, do you go forward with the surgery or not.
>
> Ladies and gentlemen, if you go forward with the surgery, it's not because you have moved beyond all doubt. There are no guaranties. If you go forward, it is because you have moved beyond all reasonable doubt. A Reasonable doubt must be a real doubt, ladies and gentlemen. It may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. You may not find Hakeem Bey guilty based upon a mere suspicion of guilt. The Commonwealth bears the burden of proving Hakeem Bey guilty beyond a reasonable doubt. If the Commonwealth has met that burden, then Hakeem Bey is no longer presumed to be innocent and you should find him guilty. On the other hand, if the Commonwealth has not met its burden, you must find Hakeem Bey not guilty.

Sept. 26, 2008 Tr. at 13-16

instruction on reasonable doubt after the first jury charge:

> Mr. Santaguida: And I have somewhat of a problem with your example.
>
> The Court: Of what?
>
> Mr. Santaguida: You know, about the person being sick, because then it looks like they have a reasonable doubt -
>
> The Court: That has been appealed too, but I use that example. It has been appealed, and I have been affirmed on that, and I have used that since 2000 in a capital case for a boy who is on death row, and they don't have a problem with that either.
>
> Mr. Santaguida: Okay.
>
> The Court: Because his jury needs to understand that it ain't about buying a house or not buying a house because you can buy another house. Reasonable doubt is a higher standard than that, but I am not changing that.
>
> Mr Santaguida: But then you should have said if you have that kind of doubt then you stop.
>
> The Court: Joe, I said that you have to stop, pause, hesitate. You don't go forward if you have that kind o doubt. I said that.

Mr. Santaguida: Okay.

Sept. 26, 2008 Tr. at 56-57.[10] In rejecting Beys claim of ineffectiveness, the PCRA court explained:

> The second part of the jury instruction that the defendant is claiming Counsel was ineffective for not objecting to is that Trial Counsel was ineffective when he failed to object to the Judge's example of reasonable doubt because it was confusing and because she never stated that if you have any reasonable doubt, then you stop right there. Once again, as the Court stated before, you look at the charge under the totality of the circumstances.
>
> The Judge's first charge on reasonable doubt did indicate that it is a doubt that if you pause, hesitate or refrain from acting. That is contained within the charge. The Judge gives an example. She said some other things but overall she gives the charge on reasonable doubt that is the standard charge in between the rest

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10 The trial court re-instructed the jury three days later, after it had reopened the record to allow for additional testimony to correct a factual misrepresentation related to a photograph introduced by the defense. Ee supra. Section III(B). In the second set of instructions, the trial court provided the same life-threatening illness hypothetical to the jury when discussing reasonable doubt. See Sept. 29, 2008 Tr. at 114-16. Trial counsel, however, did not renew his objection after objecting to those same instructions in the first charge to the jury.

> of the language that she uses and then, once again, the Judge reinstructs on reasonable doubt after the jury is taken out, hears more evidence before they are sent back to deliberate anew. The second time, Judge Hughes repeats the exact same language taken verbatim from the standard suggested jury instructions.
>
> So, therefore, one, Counsel, he objected and then, two, the Judge reinstructed with the standard charge. So taken as a whole, the instructions adequately apprise the jury of the Commonwealth's burden of proof in this case and certainly Counsel was not ineffective because Counsel did what Counsel was supposed to do.

Oct. 11, 2016 Tr. at 26-27. Accordingly, Bey's claim that his counsel was ineffective for failing to object to these instructions is unsupported by the record.

Despite his counsel's objection, Bey nevertheless argues that he is entitled to habeas relief based on Brooks, which held, in the context of an ineffective assistance of counsel claim, that virtually indistinguishable reasonable doubt instructions by the same trial judge containing the use of the same life-

threatening illness illustration were unconstitutional. 2017 WL 3475475, at *3 - 6. Nearly identical reasonable doubt jury instructions have been challenged since Brooks in other habeas proceedings, leading to a split in this district on the constitutionality of the use of the life-threatening illness illustration to define reasonable doubt. See e.g, Brown v. Kauffman, 425 F.Supp. 3d 395, 404 (E.D. Pa. 2019) (Slomsky, J.) (Opining that "[b]y explaining reasonable doubt in such a fashion, a reasonable juror could misapply the standard and resolve inferences in favor of the Commonwealth because, '[o]bjectively speaking, any person of decency and morals would strive to put aside doubt when faced with a single life-saving option for a loved one'"); McDowell v. DelBalso, No. CV 18-1466, 2019 WL 7484699 at *2 (E.D. Pa. Jan. 23, 2019) (Wells, Mag.J.), report and recommendation

adopted, No. 2:18-CV-01466-AB, 2020 WL 61162 (E.D. Pa. Jan. 3, 2020) (Brody, J.) ("[T]his particular instruction violates due process, because it allows conviction on a lesser degree of proof than the reasonable doubt standard; the instruction characterizes a reasonable doubt as one which would ot prevent the juror from acting, instead of one which would cause him or her to hesitate."); but see, e.g., Baxter v. McGinley, No. CV 18-0046, 2019 WL 7606222, at *6 (E.D. Pa. Dec. 5, 2019) (Rice, Mag. J.), report and recommendation adopted, No. CV 18-46, 2020 WL 299517 (E.D. Pa. Jan. 17, 2020) (Joyner, J.) ("Although the contested instruction is inartful and its illustration inapt, it does not violate due process because there is no 'reasonable likelihood that the jury applied it unconstitutionally.'"); Corbin v. Tice, No. 16-4527, Supp. Report & Recommendation at 14 (E.D. Pa.

Jan. 15, 2019) (Reuter, Mag. J.) ("Judge Hughes' illustration of reasonable doubt does not violate due process of law. There is not a reasonable likelihood that, after hearing the reasonable doubt instruction as a whole, the jury would have thought it could return a guilty verdict on anything less than proof beyond a reasonable doubt.").

It is well established that no particular words are required when instructing a jury on the reasonable doubt standard. Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("[T]he Constitution neither prohibits trial courts from defining reasonable doubt nor reqires them to do so as a matter of course."). Together, the instructions must impart to the jury the concept of proof beyond a reasonable doubt. Id. Such an inclusive approach embraces "the well[-]established proposition that a single instruction to a jury may not be judged in

artificial isolation, but must be viewed in the context of the overall charge." Cupp, 414 U.S. at 146-47 (citing Body v. United States, 271 U.S. 104, 107 (1926)). Here, the trial judge began and ended her instructions by explicitly stating that it was the Commonwealth's burden of proving its case beyond a reasonable doubt and by defining the reasonable doubt standard. Sept. 26, 2008 Tr. at 13-16; Sept. 29, 2008 Tr. at 114-16. Moreover, she repeatedly stressed the Commonwealth's burden and the reasonable doubt standard in other sections of her instructions. Accordingly, when taken as a whole, the contested instructions did not violate Bey's due process rights and counsel was not ineffective for filing to renew his objection to those instructions.

3. The Elements of Criminal Homicide

Bey maintains that his trial counsel was

ineffective in failing to object to the t rial court's jury instructions on the elements of criminal homicide. Pet'r's Br. at 87-89. He claims that "[t]he instructions on the crimes told the jury it was their job to determine the elements of the crime and suggested that they needn't find that the defendant committed the crimes." Id. at 89.

On September 26, 2008, the trial judge gave the following instruction on the elements of criminal homicide:

> Now, ladies and gentlemen, akeem Bey is charged with taking the life of Brencis Drew by criminal homicide, and I shared with you when we first met that that's the term I actually use, and I use that term because there are varying degrees of murder. In this case there are four possible verdicts that you might reach in ths case. You could come back not guilty of first[-]degree murder, not guilty of third[-]degree murder, or you could come back guilty. If you come back guilty, you may onlyo come back guilty of one degree.
>
> In other words, if you find that Moses Williams'

death was a murder and you find that the murder was committed by Hakeem Bey, you have to tell me which degree of murder it was. I don't get to tell you. You must tell me. So we need to talk about the different definitions of murder, first versus third, but before we do that it's important to understand the concept of malice, because you must find that malice was present to find any degree of murder. There cannot be a murder unless there was malice.

Now, ladies and gentlemen, malice is a special legal word. It does not simply mean hatred or spite or ill-will. That's not enough. Malice is a shorthand way of referring to any of the different mental states that the law regards as being bad enough to take a killing and raise it to murder.

Malice differs for each of the forms of murder . ... ....
,,,, For murder of the third[-]degree, a killing is with malice if the perpetrator's actions show a wanton and wilful disregard of an unjustified and extremely high risk taht the perpetrator's conduct would result in death or serious bodily injury. In this form of malice the Commonwealth must prove that the perpetrator took the action while consciously, knowingly disregarding the most serious risk the perpetrator was creating, and by disregarding the most serious risk the perpetrator was creating, and by disregarding that risk they demonstrated an extreme indifference to the

value of human life. The Commonwealth must prove specific intent.

Now, let's talk about first[-]degree murder in a little more detail, because Hakeem Bey is charged with first[-]degree murder. First[-]degree murder is a murder in which the perpetrator has the specific intent to kill. To find Hakeem Bey guilty of this offense, you must find the following three elements have been proven beyond a reasonable doubt.

First, that Moses Williams is dead; second, that Hakeem Bey killed him; and third, that Hakeem Bey did so with the specific intent to kill. A person has a specific intent to kill if the person has a fully formed intent to kill and they are conscious of that intention. Ladies and gentlemen, if a person has a specific intent to kill, they have malice. A killing with specific intent is a killing with malice.

Now, ladies and gentlemen, a killing is with specific intent to ill if it is willful, deliberate, or premeditated. Now, premeditation is likewise a special legal term. Premeditation does not mean I thought about this for weeks, days and months. It can occur quickly. All that is necessary, ladies and gentlemen, is that there be enough planning or previous thought so that the defendant can and does fully form an intent to kill and is conscious of that intention. Whether it's instantaneous or took months of planning, it's still premeditated.

Now, ladies and gentlemen, when deciding whether Hakeem Bey had the specific intent to kill consider all of the evidence regarding his words, his conduct and the attending circumstances that show his state of mind, including if you deem it proper, if you determine that Hakeem Bey intentionally used a deadly weapon on a vital part of Moses Williams' body, you may regard that as an item of circumstantial evidence from which you may if you deem it proper infer that Hakeem Bey had the specific intent to kill.

Now, third[-]degree murder is a killing with malice. It is not first or second. The difference really is specific intent. If there is malice, it's third degree, but if there is specific intent to kill, it's first degree.

The elements of third[-]degree murder are; first, that you must find beyond a reasonable doubt that Moses Williams is dead; and second, you must find that Hakeem Bey killed him; and third, that Hakeem Bey did so with malice. And again, I need to remind you that malice exists for purposes of third[-]degree murder if a person's actions show a wanton and willful disregard for an unjustified and extremely high risk that the person's conduct would result in death or serious bodily injury to another.

To find first[-]degree murder the Commonwealth must prove specific intent to kill. To find third[-]degree murder the

> Commonwealth is not required ot prove specific intent to kill, but the Commonwealth must prove that the perpetrator took the action while knowingly disregarding the most serious risk the perpetrator was creating, and by the disregard of that risk the perpetrator demonstrated an extreme indifference to the value of human life.
>
> Now, ladies and gentleman, these are the degrees of homicide t hat are before you. It might help you to remember them if you understand them in order of seriousness. First[-]degree murder requires specific intent to kill. Third[-]degree murder is any other murder.
>
> Now, you have the right to bring in a verdict finding Hakeem Bey not guilty of both degrees of murder, but if you determine that Moses Williams' death was a murder, then you must tell me which degree of murder is applicable based on the facts before you.

Sept. 26, 2008 Tr. at 33-39. Bey's counsel objected to this instruction and engaged in the following exchange with the trial court:

> Mr. Santaguida: Judge, respectfully, you started out a number of times telling the jury that their role was to determine the elements of the crime.
>
> The Court: No, I didn't. I told them to

determine the facts and to determine if the elements of the crime had been proven -

Mr. Santaguida: If the elements had been made out.

The Court: - beyond a reasonable doubt.

Mr. Santaguida: Right, but you didn't say, though, and whether or not this is the person who committed them.

The Court: Joe, I don't charge in that fashion. I have been charging the same way since 1997 when I did my first jury trial, and I have been affirmed in all but one case. I charge the same way. If the crimes are - I think my instruction is exceedingly clear that if these - that if they find that his death was a murder and they do not find, and I said this more than once, that if they do not find that the murder was committed by Hakeem Bey, they have to come back not guilty. I have said that repeatedly, that they must find that it was Hakeem Bey who committed it.

Mr. Santaguida: I took it wrong then, because even at the end when you're talking about murder, you said if you find that it's murder, then you have to tell me what kind of murder it is.

The Court: In an abundance of caution, because I have to clean up something on the date, I will

> clean that up again too, but I said it repeatedly.
>
> Mr. Santaguida: Oh, okay.
>
> The Court: No, I did say it repeatedly, but I will say it again.

Id. at 54-56. After this exchange, the trial judge reinstructed the jury as follows:

> The other thing that I need to make really clear. I hope that I did, but just again in an abundance of caution. If Moses Williams' deaeth was a murder, then tell me what kind of murder, but only if it was committed by Hakeem Bey. If you find that Moses' death was a murder but it was not committed by Hakeem Bey, then your verdict must be not guilty, but if Moses' death was a murder and it was committed by Hakeem Bey, then you must tell me what degree of murder. Do you see what I mean?

Id. at 60-61. On September 29, 2008, the trial court again instructed the jury on the elements of criminal homicide, and Bey's trial counsel did not object. Sept. 29, 2008 Tr. at 124-32.

Here, Bey's trial counsel did object to the trial court's September 26, 2008 instructions. Moreover, all

of the trial court's instructions fully comported with Pennsylvania law and contained the language recommended in Pennsylvania's Suggested Standard Criminal Instructions. See Pa. SSJI (Crim) §§ 15.2501A, 15.2501B, 15.2502A, 15.2502C. Accordingly, because Bey's trial counsel cannot be deemed ineffective for failing to raise a meritless claim, Bey is not entitled to habeas relief on this claim.

I. Bey's Motions to Stay Should be Denied

Bey asks the Court to stay and abey his habeas petition, pursuant to Rhines v. Weber, 544 U.S. 269 (2005), to allow him to exhaust his state-law claims that newly-discovered evidence and a change in the law – the Brooks decision – require that he be granted a new trial.

In Rhines, the United States Supreme Court approved the use of a "stay and abey" procedure for

habeas petitions that include an unexhausted claim. 544 U.S. at 275-77. The Court recognized that the interaction between the one-year deadline for filing habeas corpus petitions imposed under the AEDPA and the requirement that petitioners exhaust their claims in the state courts prior to presenting them for habeas review creates, in some circumstances, a procedural trap for petitioners. Id. at 275. If a petitioner presents timely, but unexhausted habeas claims, and the court dismisses the habeas petition without prejudice to allow for exhaustion of the issues through a post-conviction proceeding in state court, the one-year AEDPA deadline from the time the judgment of sentence becomes final on direct review in state court could expire before the state court issues a final ruling on the post-conviction petition. Id. To address such circumstances, the Court approved the use of the stay

and abey procedure under which a district court may stay a habeas petition to allow for the exhaustion of unexhausted claims in state court. Id. at 275-76. In recognition of Congress' intention in enacting the AEDPA to reduce delay in the execution of criminal sentences, the Court imposed the following conditions for granting such a stay: that there is good cause for the petitioner's failure to exhaust his or her claim previously in state court; that the unexhausted claim not be "plainly meritless"; and that there is no indication that the petitioner has engaged in abusive litigation tactics or intentional delay. Id. at 276-78. If a petitioner satisfies those requirements, "it would likely be an abuse of discretion for a district court to deny a stay." Id. at 278. In contrast, "the district court would abuse its discretion if it were to grant [a habeas petitioner] a stay when his [or her] unexhausted claims

are plainly meritless." Id. at 277.

Here, there is no basis for the issuance of a stay because Bey's second PCRA petition is untimely. The PCRA requires that any petition, including second and subsequent petitions, be filed within one year of the date on which the underlying judgment became final. 42 Pa.Cons.Stat. Ann. §9545(b). That deadline "is jurisdictional in nature, and the courts lack jurisdiction to grant PCRA relief u less the petitioner can plead and prove that one of the exceptions to the time[-]bar applies." Commonwealth v. Gallman, 838 A.2d 768, 774-75 (Pa.Super.Ct. 2003). Bey did not file his second PCRA petition until more than four years after his judgment of sentence became final.[11]

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11 As previously mentioned, the Supreme Court denied Bey's petition for a writ of certiorari on October 12, 2012. PCRA Super. Ct. Op. At 3. Bey filed his second PCRA petition on July 11, 2018. Stay Motion at 4, ¶4.

Bey nonetheless argues that he is eligible for relief pursuant to two exceptions to the PCRA filing deadline for petitions under 42 Pa.Cons.Stat. Ann §9545(b)(1). First, he asserts that his second PCRA petition is timely because of newly discovery evidence. Stay Motion at 4, ¶4. Pursuant to Section 9545(b)(1)(ii), an otherwise untimely petition may be filed if F"the petition alleges and the petition proves that: ... (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." 42 Pa.Cons.Stat. Ann §9545(b)(1)(ii). Bey's stay motions, however, do not identify the alleged newly-discovered evidence. Thus, because Bey has failed to advise this Court of the basis for his claim of newly-discovered evidence, he is not entitled to a stay of this habeas proceeding. To the extent Bey argues that the decision

in Brooks is the newly-discovered evidence, his claim must fail. Stay Motion at 4, ¶4. "[J]udicial decisions do not constitute new 'facts' for purposes of the newly-discovered evidence exception set forth in Section 9545(b)(1)(ii)." Commonwealth v. Kretchmar, 189 A.3d 459, 467 (Pa.Super.Ct. 2018) (citing Commonwealth v. Watts, 23 A.3d 980, 986-87 (Pa.Super.Ct. 2011)).

Bey's second argument, that Brooks constitutes a change in the law requiring a new trial of his case under Section 9545(b)(1)(iii), see Stay Motion at 4, ¶4, is similarly misplaced. This exception to the time-bar applies where "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." 42 Pa.Cons.Stat. Ann §9545(b)(1)(iii). Brooks, however, is

a decision issued by a federal district court, rather than the Supreme Court of the United States or the Supreme Court of Pennsylvania, that neither announces a new constitutional right nor states that it should be applied retroactively. Accordingly, Bey has failed to satisfy this exception to the PCRA's time-bar and his stay motions should be denied.

## IV. CONCLUSION

For the foregoing reasons, I recommend that Bey's habeas petition and stay motions be denied and dismissed. Therefore, I make the following:

### recommendation

AND NOW, this 15th day of July, 2020, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of habe3as corpus and motions for leave to stay habeas corpus proceedings be DENIED and DISMISSED. There has been no substantial showing

of the denial of a constitutional right requiring the issuance of a certificate of appealability as to any of those issues. The 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.

/s/ Marilyn Heffley
MARILYN HEFFLEY
UNITED STATES MAGISTRATE
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 20-3136

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HAKIM BEY
Appellant
v.

SUPERINTENDENT HUNTINGDON SCI;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

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(E.D. Pa. No. 2-19-cv-02127)

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SUR PETITION FOR REHERING

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Present: SMITH, Chief Judge, and 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-captioned 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/Stephanos Bibas
Circuit Judge

Dated August 13, 2021
Sb/cc: All Counsel of Record