DLD-100 February 18, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-3099**

CALVIN B. LYNCH, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI, et al.

(E.D. Pa. Civ. No. 5-18-cv-04924)

Present: JORDAN, KRAUSE, and PHIPPS, Circuit Judges

Submitted are:

1) By the Clerk for possible dismissal due to a jurisdictional defect;

2) Appellant's jurisdictional response;

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

4) Appellees' response; and

5) Appellant's reply

in the above-captioned case.

Respectfully,

Clerk

(continued)

APPENDIX A

ORDER

Appellant's application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would not debate that the District Court correctly dismissed his 28 U.S.C. § 2254 petition for essentially the reasons set forth in its opinion. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). We note in particular that reasonable jurists would not dispute the resolution of his claim that there was insufficient evidence in support of his witness-intimidation conviction. See Jackson v. Virginia, 443 U.S. 307, 319 (1979).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: February 24, 2021
CJG/cc: Calvin B. Lynch
Andrew J. Gonzalez, Esq.
Ronald Eisenberg, Esq.

A True Copy:

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

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

CALVIN B. LYNCH	:	CIVIL ACTION
	:	
v.	:	
	:	
SUPERINTENDENT GARMAN, et al.	:	NO. 18-4924

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. December 13, 2019

This is a pro se petition for writ of habeas corpus filed by Calvin B. Lynch ("Petitioner"), who is currently incarcerated at SCI-Rockview in Bellefonte, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

This matter arises from Petitioner's January 2011 bench trial before the Honorable Dennis E. Reinaker of the Court of Common Pleas of Lancaster County. Commonwealth v. Lynch, CP-36-CR-0005345-2009 & CP-36-CR-0005350-2009 (Lancaster C.C.P.) ("the 2009 docket conviction").[1] Judge Reinaker summarized the facts:

> On October 10, 2009, the victim in this case [Linda Romero] was brutally beaten with a baseball bat by

[1]In a trial earlier the same month on separate charges before Judge Reinaker, a jury convicted Petitioner of burglary, robbery, and theft by unlawful taking. Commonwealth v. Lynch, CP-36-CR-0003224-2010 (Lancaster C.C.P.) ("the 2010 docket conviction"). The present habeas petition raises claims challenging both the 2009 docket conviction and the 2010 docket conviction. The Honorable Timothy J. Savage severed the claims challenging the 2009 docket conviction from those challenging the 2010 docket conviction. See Civ. Action No. 18-3998, Doc. 27. Accordingly, this Report addresses the claims challenging the 2009 docket convictions, and the claims challenging the 2010 docket conviction are addressed in a separate Report at Civ. Action No. 18-3998.

APPENDIX B

> [Petitioner] who was her boyfriend and the father of her children. [N.T. 01/10/11 at 83-84.] After hitting the victim with the bat, [Petitioner] choked her until she lost consciousness. [Id. at 76.] As a result of this assault the victim sustained a large gash to her head requiring six or seven stitches, a fractured elbow requiring surgery, bruises to her neck and arm and cuts on her legs and one of her knees. [Id. at 83-92.] Just days later, [Petitioner] made two collect calls to the victim from prison asking her to drop the charges and not to show up in court to testify. [Id. at 95.] On October 17, 2009, the victim received a handwritten letter from [Petitioner] asking her to drop the charges or not show up to testify. [Id. at 99.]

Commonwealth v. Lynch, CP-36-CR-0005345-2009 & CP-36-CR-0005350-2009, Memorandum Opinion, at 1-2 (Lancaster C.C.P. June 8, 2011) (Doc. 9-2 at 112-14) ("Trial Ct. Op.").

The assault-related charges (at number 5350) and the intimidation charge (at number 5345) were handled together at all stages of the state court procedings, and are addressed together here. On January 10 and 31, 2011, Judge Reinaker conducted a bench trial. N.T. 01/10/11 & 01/31/11. Judge Reinaker found Petitioner guilty of first- and second-degree felony aggravated assault, unlawful restraint, recklessly endangering another person, possession of a controlled substance, and first-degree felony witness intimidation. N.T. 01/31/11 at 213; see also Commonwealth v. Lynch, No. 761 MDA 2011, Memorandum, at 4 (Pa. Super. Apr. 30, 2012) (Doc. 9-3 at 89-105) ("Super. Ct.-Direct"). On March 24, 2011, Judge Reinaker sentenced Petitioner to consecutive prison terms of seven and one-half to fifteen years for aggravated assault, one to three years for unlawful restraint, and six to twelve years for witness intimidation. N.T. 03/24/11 at 36-37. Petitioner filed a motion for modification of the sentence, which Judge Reinaker

denied. Commonwealth v. Lynch, CP-36-CR-0005345-2009, Post Sentence Motion (Lancaster C.C.P. Apr. 1, 2011) (Doc. 9-2 at 81-84); Commonwealth v. Lynch, CP-36-CR-0005345-2009, Order (Lancaster C.C.P. Apr. 1, 2011) (Doc. 9-2 at 95).

On appeal to the Superior Court, Petitioner argued that the evidence was insufficient to support his conviction for witness intimidation, challenging both the finding that he committed the offense and the grading of the offense. Super. Ct.-Direct at 4; Commonwealth v. Lynch, CP-36-CR-0005345-2009 & CP-36-CR-0005350-2009, Statement of Errors Complained of On Appeal (Lancaster C.C.P. May 20, 2011) (Doc. 9-2 at 104-05). On April 30, 2012, a divided three-judge panel of the Superior Court affirmed Petitioner's conviction for witness intimidation, but vacated and remanded finding that the offense should have been graded as a misdemeanor of the second degree rather than a felony of the first degree. Super. Ct.-Direct at 16.

On May 11, 2012, the Commonwealth filed an Application for Reargument, see Commonwealth v. Lynch, No. 761 MDA 2011, Appellee's Application for Reargument/Reconsideration (Pa. Super. May 11, 2012) (Doc. 9-3 at 109-19), which the Superior Court granted. Commonwealth v. Lynch, No. 761 MDA 2011, Order (Pa. Super. July 10, 2012) (Doc. 9-3 at 150). On July 29, 2013, a majority of the en banc Superior Court issued an opinion affirming the trial court and finding that the evidence supported Petitioner's conviction for witness intimidation, graded as a felony of the first degree. Commonwealth v. Lynch, No. 761 MDA 2011, Opinion (Pa. Super. July 29, 2013) (Doc. 9-4 at 6-16) ("Super. Ct.-Direct II"). Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied on February 25, 2014.

Commonwealth v. Lynch, No. 662 MAL 2013, Order (Pa. Feb. 25, 2014) (Doc. 9-4 at 97).

On January 15, 2015, Petitioner filed a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551. Commonwealth v. Lynch, CP-36-CR-0005345-2009 & CP-36-CR-0005350-2009, Motion for Post Conviction Collateral Relief (Lancaster C.C.P. filed Jan. 15, 2015) (Doc. 9-4 at 99-131). Appointed counsel filed an amended PCRA petition, claiming trial counsel was ineffective for (1) advising, inducing and coercing Petitioner to waive his right to a jury trial, (2) advising Petitioner that his version of events was unbelievable, effectively inducing him to present false testimony, (3) failing to argue that Petitioner was not guilty of aggravated assault as a felony of the first degree, and (4) failing to move to withdraw as counsel. Commonwealth v. Lynch, CP-36-CR-0005345-2009 & CP-36-CR-0005350-2009, Amended Petition for Post-Conviction Relief Under 42 Pa. C.S.A. § 9541 (Lancaster C.C.P. Apr. 17, 2015) (Doc. 9-4 at 135-42) ("Amended PCRA"). Judge Reinaker conducted a hearing concerning PCRA issues raised in both the 2009 docket conviction and 2010 docket conviction, see N.T. 07/07/15 at 3, and thereafter denied the Amended PCRA petition. Commonwealth v. Lynch, CP-36-CR-0005345-2009, CP-36-CR-0005350-2009, & CP-36-CR-3224-2010, Memorandum of Opinion (Lancaster C.C.P. Dec. 28, 2015) (Doc. 9-5 at 37-46) ("PCRA Ct. Op."); Commonwealth v. Lynch,

CP-36-CR-0005345-2009, CP-36-CR-0005350-2009, & CP-36-CR-3224-2010, Order (Lancaster C.C.P. Jan 6, 2016) (Doc. 9-5 at 48).[2]

Petitioner appealed to the Superior Court arguing, as to the 2009 docket conviction, ineffective assistance of counsel ("IAC") for (1) advising Petitioner to waive his right to a jury trial, (2) advising Petitioner that his version of events was unbelievable, effectively inducing him to present false testimony, and (3) failing to move to withdraw as counsel. Commonwealth v. Lynch, No. 98 MDA 2016, Memorandum, at 3-4 (Pa. Super. Aug. 22, 2016) (Doc. 9-6 at 77-86) ("Super. Ct.-PCRA").[3] On August 22, 2016, the Superior Court issued an opinion affirming the denial of PCRA relief. Id. at 10. Petitioner filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on January 18, 2017. Commonwealth v. Lynch, No. 620 MAL 2016, Order (Pa. Jan. 18, 2017) (Doc. 9-6 at 87).

Petitioner filed a habeas petition in the United States District Court for the Middle District of Pennsylvania on February 10, 2017, docketed in that district at Civ. Action No. 17-319, challenging the 2009 docket conviction. See E.D. Pa. Civ. Action No. 18-3998, Doc. 1.[4] After the Honorable Robert D. Mariani issued an Order explaining the

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[2]The January 6, 2016 Order corrected a prior Order that referred incorrectly to Petitioner's Amended PCRA. See Commonwealth v. Lynch, CP-36-CR-0005345-2009, CP-36-CR-0005350-2009, & CP-36-CR-3224-2010, Order (Lancaster C.C.P. Dec. 28, 2015) (Doc. 9-5 at 47).

[3]A fourth IAC claim concerned the 2010 docket conviction, see Super. Ct.-PCRA at 3, and is therefore addressed in the separate Report in Civ. Action No. 18-3998.

[4]Although Petitioner's original petition was docketed in the Middle District on February 17, 2017, the federal court employs the "mailbox rule," deeming a filing by a

strict limitations on the filing of second or subsequent habeas petitions, id. Doc. 6, Petitioner filed an amended habeas petition, challenging both the 2009 and 2010 docket convictions. Id. Doc. 7; E.D. Pa. Civ. Action No. 18-4924, Doc. 1. On September 14, 2018, the habeas petition was transferred to this judicial district because the convictions at issue arose in Lancaster County, which lies in this court's jurisdiction. See E.D. Pa. Civ. Action No. 18-3998, Docs. 12 & 13; 28 U.S.C. § 118(a).

Judge Savage referred the matter to me for a Report and Recommendation. E.D. Pa. Civ. Action No. 18-3998, Doc. 16. Petitioner subsequently made clear that his habeas petition attacked "two separate convictions deriving from two separate trials," id. Doc. 18 ¶ 4, and review of the state court docket sheets confirmed that although he was sentenced on the same day for the 2009 and 2010 docket convictions, Petitioner filed separate direct appeals and separate PCRA petitions in the state court. Also, although some of the state court rulings address both convictions, the cases were never formally consolidated. Accordingly, I recommended that claims challenging the 2009 docket conviction be severed from those challenging the 2010 docket conviction, see id. Doc. 20, and Judge Savage subsequently severed the claims, directed the clerk of court to open the present habeas petition challenging the 2009 docket conviction, and referred both petitions to me for separate Reports. Id. Doc. 27; E.D. Pa. Civ. Action No. 18-4924, Doc. 3.

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pro se petitioner filed when given to prison authorities for mailing. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1988)). Petitioner declared in his original petition that he placed it into the prison mail system on February 10, 2017, see Civil Action No. 18-3998, Doc. 1 at 15, and I accept that as his filing date.

Following referral of the newly-severed challenge to the 2009 docket conviction, Petitioner filed a memorandum of law (Doc. 8), the District Attorney filed a response arguing that the various claims are either procedurally defaulted or meritless (Doc. 9), and Petitioner filed a reply (Doc. 12).[5]

II. LEGAL STANDARDS[6]

A. Exhaustion and Procedural Default

Before the federal court can consider the merits of a habeas claim, Petitioner must comply with the exhaustion requirement of section 2254(b), by giving "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). The doctrine of procedural default is closely related to the exhaustion requirement. It is not enough that Petitioner present his claims to the state court; he must also comply with the state's procedural rules in doing so, thereby giving the state courts a

[5]Citations to the parties' filings will be to the court's ECF pagination.

[6]The petition is timely. The District Attorney argues at one point that the petition is "patently untimely," but elsewhere concedes that it is timely, albeit based upon an erroneous calculation. Doc. 9 at 12, 14-15. Petitioner's conviction became final on Tuesday, May 27, 2014 (one day after the Memorial Day holiday), when the time expired for seeking certiorari in his direct appeal. See Gonzalez v. Thaler, 565 U.S. 134 (2012); Sup. Ct. R. 13.1 (providing 90 days to file timely petition for writ of certiorari). Petitioner filed a PCRA petition 233 days later, tolling the habeas limitations period, see 28 U.S.C. § 2244(d)(2) (excluding time during which a properly filed state post-conviction petition is pending), which resumed running on January 18, 2017, when the Pennsylvania Supreme Court denied allowance of appeal. See Stokes v. Dist. Att'y of Philadelphia, 247 F.3d 539 (3d Cir. 2001) (habeas limitations period not tolled for 90 days following state supreme court denial of post-conviction relief). With 132 days remaining, Petitioner's habeas filing 23 days later, on February 10, 2017, is timely.

full and fair opportunity to address them. A failure to do so results in a procedural default. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

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

Maples v. Thomas, 565 U.S. 268, 280 (2012); see also Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000) (where it would be futile to require petitioner to exhaust his claim because there is a procedural bar to relief in state court, the claim is subject to the procedural default rule).

The court may address a defaulted claim only if the petitioner establishes cause for the default and prejudice resulting therefrom, or that a failure to consider the claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192. To meet the "cause" requirement to excuse a procedural default, a Petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). Additionally, with respect to certain claims of ineffectiveness of trial counsel, a petitioner can rely on post-conviction counsel's ineffectiveness to establish cause to overcome a default. Martinez v. Ryan, 566 U.S. 1, 14 (2012). To establish prejudice, Petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage,

infecting his entire trial with error of constitutional dimensions.'" Werts, 228 F.3d at 193 (quoting Carrier, 477 U.S. at 494).

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

B. Merits Review

Under the federal habeas statute, review is limited in nature and may only be granted if (1) the state court's adjudication of the claim "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or if (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, rebuttable only by clear and convincing evidence. Werts, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that

reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

III. DISCUSSION

As previously noted, this case involves Petitioner's 2009 docket conviction for aggravated assault, possession of a controlled substance, unlawful restraint, recklessly endangering another person, and witness intimidation. His convictions were based largely on the testimony of the victim, who was his girlfriend, and on Petitioner's recorded telephone calls and letters to the victim. Grounds Ten through Seventeen of the petition arise from this conviction, and in these claims Petitioner alleges violations of his constitutional rights on the grounds that:

10. Counsel compelled Petitioner to be a witness against himself,

11. Counsel coerced and compelled Petitioner to give false testimony,

12. Petitioner was coerced into waiving his right to be tried by a jury,

13. Petitioner did not possess the mental state necessary for aggravated assault as a first-degree felony and counsel was ineffective for failing to raise this issue,

14. Trial counsel was ineffective for failing to withdraw due to a conflict of interest,

15. The prosecutor elicited testimony knowing it be false,

16. The evidence was insufficient to support the conviction for witness intimidation as a first-degree felony, and

17. The Superior Court accepted en banc review on direct appeal under the guise of newly discovered evidence.

Doc. 1 at 25-34.[7] I will first address the four defaulted claims, and then turn to the four exhausted claims.

A. Defaulted Claims – Grounds Ten, Thirteen, Fifteen, & Seventeen

The District Attorney contends, and Petitioner largely concedes, that four of the claims arising from the 2009 docket conviction are unexhausted and defaulted. Petitioner argues that the default of these claims should be excused, while the District Attorney argues that this court is precluded from reviewing the claims on the merits. Because the

[7]The District Attorney also addresses Grounds Five and Eighteen in his response on this docket. See Doc. 9. Because Grounds Five and Eighteen arise from the 2010 docket conviction, I will address them in my Report in Civ. Action No. 18-3998.

B

default analysis differs with respect to IAC claims and other claims, I will first address the non-IAC claims.

1. Grounds Fifteen & Seventeen – Non-IAC claims

Two of Petitioner's unexhausted claims allege violations other than ineffectiveness of trial counsel; Ground Fifteen (prosecutorial misconduct for eliciting knowingly false testimony) and Ground Seventeen (violation of constitutional rights when the Superior Court granted reargument en banc). Doc. 9 at 16-22. At this point, Petitioner has no way to obtain state court review of these claims. See 42 Pa. C.S.A. § 9545(b) (establishing one-year statute of limitations for filing PCRA petition); 9544(b) (issue waived if not presented at earliest opportunity). Thus, the claims are procedurally defaulted. See Werts, 228 F.3d at 192 ("claims deemed exhausted because of a state procedural bar are procedurally defaulted").

As previously noted, a defaulted claim can be considered if the petitioner can show cause and prejudice. As to Ground Fifteen, Petitioner states that he raised this issue on PCRA, although he concedes that he did not raise the issue on direct appeal or PCRA appeal because "appellate counsel" failed to raise it. Doc. 1 at 31-32. This argument appears to be an attempt to invoke Martinez. However, because the underlying claim does not assert ineffectiveness of trial counsel, Martinez does not apply. See Martinez, 566 U.S. at 14. Therefore, Petitioner has not overcome the default of Ground Fifteen.

Petitioner's only argument as to Ground Seventeen is that he did not learn of the factual predicate underlying the claim until after the Superior Court issued its second opinion on direct appeal, before he commenced a timely post-conviction proceeding.

Doc. 1 at 34. This argument does not excuse the default of this claim because claims relying on after-acquired evidence must also be exhausted in the state courts, which Petitioner did not do. See Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (a claim asserted as cause for procedural default of another claim can itself be procedurally defaulted). As a result, Petitioner has failed to make a showing of cause to excuse the default of Ground Seventeen.[8]

Similarly, Petitioner does not make a showing that the failure to consider these claims will result in a fundamental miscarriage of justice. As previously noted, this exception requires new, reliable evidence of factual innocence. See Schlup, 513 U.S. at 324. Petitioner does not present any such evidence, although, as to Ground Seventeen, he raises a factual argument that bears mentioning. His argument refers to recorded telephone calls and letters between himself and the victim while he was incarcerated following his arrest, which formed the basis for his conviction for witness intimidation. As will be discussed in addressing Petitioner's sufficiency claim on this count, one of the ways the Commonwealth could prove the offense was by evidence that Petitioner offered something of pecuniary value to the victim. Petitioner argues that the Commonwealth improperly sought en banc review on direct appeal by arguing that Petitioner's offer to help the victim with tax money satisfied the pecuniary element of the offense, even though the Commonwealth did not make that argument to the jury, and that he did not

[8]In his reply brief, Petitioner includes Ground Seventeen as a claim implicating Martinez, see Doc. 12 at 17, but he is incorrect because the claim does not assert ineffectiveness of trial counsel.

exhaust the claim because "[t]hese issues are after discovered where they derive from the Superior Courts [sic] judgment EN BANC." Doc. 1 at 34. The fact that the Superior Court first relied on Petitioner's statement regarding the tax money in its July 29, 2013 en banc decision, see Super. Ct-Direct II at 8-9, does not undermine its decision. Petitioner does not dispute that he mentioned tax money in his communications with the victim from prison that were admitted into evidence at trial. N.T. 01/31/11 at 124, 177; Trial Exhs. C-39, C-42 & C-43. As such, the underlying evidence does not constitute new, reliable evidence of factual innocence, nor does the Superior Court's action constitute new evidence where Petitioner could have challenged the action in a subsequent collateral proceeding.

For all the foregoing reasons, the claims raised in Grounds Fifteen and Seventeen are defaulted and cannot be reviewed.

2. Ground Ten – IAC for compelling Petitioner to be a witness against himself

In Ground Ten, Petitioner claims that counsel was ineffective because he "compelled defendant to be a witness against himself." Doc. 1 at 25. The precise factual predicate of this claim is somewhat difficult to decipher. In the supporting facts, Petitioner explains that between his conviction on the 2010 docket charges, in which he represented himself, and his pending trial on the 2009 charges, counsel visited him in prison and "stated that if [I] agree to proceed to trial with him as my attorney, take the stand and testify as well as plead guilty to an unrelated drug offen[s]e[,] that the Judge would go easy on me at sentencing. . . ." Id. In his supporting memorandum, Petitioner

avers that he "never intended to take the stand" in the second trial, but that counsel essentially coerced him into doing so by saying that Petitioner faced the likelihood of a "long sentence" if he did not do so, and a "light sentence" if he did. Doc 8 at 16. Petitioner also suggests that he bargained away his fundamental rights without receiving anything in return, and invokes the Fifth Amendment privilege against self-incrimination. Id. at 16-17.

This claim resembles but is not identical to other of Petitioner's claims, and first I will construe the claim to prevent overlap. To the extent this claim alleges IAC for inducing Petitioner to take the stand and provide testimony that damaged his own case, the claim is qualitatively indistinguishable from Ground Eleven (IAC for advising Petitioner that his version of that assault was not believable, thus inducing him to falsely testify), which is addressed on the merits in section B below.[9] To the extent this claim alleges IAC for inducing Petitioner to waive his right to a jury trial, the claim is identical to Ground Twelve which is also addressed on the merits in section B. What remains unique to this claim is Petitioner's assertion that his lawyer was ineffective in compelling him to "to be a witness against himself" by lying to him about the sentence he was likely to receive, and as such the claim is unexhausted and defaulted. Petitioner concedes that Ground Ten was not previously raised, arguing that PCRA counsel failed to preserve the

[9]The District Attorney appears to construe the claim as IAC for inducing Petitioner to take the take the stand, and therefore subsumes its discussion of Ground Ten into the merits discussion pertaining to Ground Eleven, which is addressed on the merits in the next section of this Report. See Doc. 9 at 21.

claim before the PCRA court. Doc. 1 at 26. This argument, in the context of an underlying IAC claim, implicates the exception to the rule of procedural default found in Martinez.[10]

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

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[10]In Ground Ten, Petitioner also asserts violations of his due process and equal protection rights. See Doc. 1 at 25. Because Petitioner never placed the state courts on notice of claims under the due process and equal protection clauses, those aspects of the claim are patently unexhausted and defaulted, and not subject to Martinez. Petitioner makes no cause and prejudice argument to excuse the default of these aspects of the claim, nor can he make a showing of actual innocence. Accordingly, those aspects of the claim are procedurally defaulted and cannot be reviewed by this court.

Nevertheless, rather than proceed through each step of the Martinez analysis, I will address the underlying claim of ineffectiveness. See 28 U.S.C. § 2254(b)(2) (an application may be denied on the merits notwithstanding the failure to exhaust state court remedies).[11]

IAC claims are governed by Strickland, in which the Supreme Court set forth a two-pronged test. First, the petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Id. at 687. Second, the petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair and reliable trial. Id. In determining prejudice, the question is whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see also Smith v. Robbins, 528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed"). Counsel will not be considered ineffective for failing to pursue a meritless argument. Real v. Shannon, 600 F.3d 302, 309 (3d Cir. 2010); McAleese v. Mazurkiewicz, 1 F.3d 159, 169 (3d Cir. 1993).

[11]Because the state courts did not address this claim, the federal court applies de novo review. See Bey v. Sup't Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017) (once procedural default is excused, review is de novo because state court did not consider claim on the merits).

Petitioner was represented by the same assistant public defender at both his jury and bench trials before Judge Reinaker. Trial counsel testified at the PCRA hearing that Petitioner was granted the right to represent himself in the jury trial (the 2010 docket conviction), with counsel as stand-by, because he was dissatisfied with counsel's representation. N.T. 07/07/15 at 17-18. Counsel testified that he had been able to get a charge dismissed in that case, after which his relationship with Petitioner got better. Id. at 18-19.[12] After the jury trial, counsel took it upon himself to visit Petitioner in prison and "see whether he -- if he wanted representation, needed representation" in the upcoming trial for assault and witness intimidation (the 2009 docket conviction at issue here). Id. at 25. They discussed the evidence, including that an assault obviously occurred and that Petitioner had made calls to the victim from prison, and Petitioner explained his version of events, including that he was on a drug binge and became "very physical" but did not intend to hurt the victim. Id. at 20-21. Counsel explained to Petitioner that they could not argue that drug use negated mens rea under state law, but rather should argue that he did not have the necessary mens rea -- "that he was not intending to cause serious bodily injury or [had] the intention to cause serious bodily injury." Id. at 21-22. Counsel also testified that, prior to Petitioner's decision to waive a jury trial, he did not have any discussion with Petitioner concerning the sentence he

[12]Judge Reinaker granted defense counsel's motion to sever three charges relating to a Turkey Hill robbery during a suppression hearing held on the 2010 docket conviction, see N.T. 01/04/11 at 52-53 (Civ. Action No. 18-3998, Doc. 33-1 at 75), and the three charges were subsequently dismissed as memorialized on the March 24, 2011 Sentencing Order. See Commonwealth v. Lynch, CP-36-CR-0003224-2010, Sentencing Order (Lancaster C.C.P. Mar. 24, 2011) (Civ. Action No. 18-3998, Doc. 33-4 at 9-10).

would receive, or what sentence he would receive in relation to whether he waived his rights to a jury trial or not. Id. at 22. He did not tell Petitioner to lie on the stand, but rather to tell the truth, "to tell his side of the story." Id. at 30-31.

The PCRA court credited counsel's testimony, and the United States Supreme Court has cautioned that state court credibility findings may not be redetermined on habeas review. See Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court").[13] Therefore, Petitioner cannot show that counsel acted deficiently in advising Petitioner about how to proceed in the bench trial, particularly given the difficult facts of the case and the strong likelihood that Petitioner would be found guilty, and there is no evidence that counsel coerced Petitioner by telling him that proceeding with a bench trial and/or taking the stand in his own defense would result in a more lenient sentence. Moreover, as the state courts made clear in addressing other claims, Petitioner cannot show that counsel's actions caused prejudice where Petitioner conceded that he attacked the victim with a baseball bat while she slept, causing injuries to her head and body. See PCRA Ct. Op. at 9-10; Super. Ct. Op.-PCRA at 7-8. Therefore, Petitioner is not entitled to relief on the merits of this IAC claim.

[13]Judge Reinaker relied on counsel's testimony throughout his opinion, including when it conflicted with Petitioner's. PCRA Ct. Op. at 5-6, 6-7, 7-8, 9.

3. Ground Thirteen: IAC for failing to argue that evidence was insufficient to support first-degree felony aggravated assault

In Ground Thirteen, Petitioner argues that he did not possess the reckless indifference to human life and the malicious intent necessary to support a conviction of aggravated assault as a felony of the first degree, and that counsel was ineffective in failing to litigate the issue. Doc. 1 at 29; Doc. 8 at 8, 26-30.[14]

Although Petitioner avers that he exhausted Ground Thirteen on PCRA appeal, see Doc. 1 at 29, he is incorrect. Appointed counsel asserted the claim in the Amended PCRA, see Amended PCRA at ¶ 13, and the claim was rejected by the PCRA court on the merits. See PCRA Ct. Op. at 9-10. Appointed counsel thereafter failed to include the claim in his brief to the Superior Court, which did not address the claim on PCRA appeal. See Super. Ct.-PCRA at 3-4. Accordingly, the claim is defaulted,[15] and the ineffectiveness of counsel on PCRA appeal does not excuse the default. See Norris v. Brooks, 794 F.3d 401, 405 (3d Cir. 2015) ("Martinez made very clear that its exception to the general rule . . . applies only to attorney error causing procedural default during

[14]To the extent that Petitioner asserts violations of his due process and equal protection rights in connection with this claim, Doc. 1 at 29, for the reasons discussed earlier in this section as to Ground Ten, see supra at 16 n.10, he has failed to overcome the default of these aspects of the claims by a showing of cause and prejudice, or that the failure to address the claims will result in a fundamental miscarriage of justice.

[15]Courts within this district have consistently held that the failure to develop a claim in the Superior Court or to comply with state-law requirements for argument in an appellate brief are adequate to support a finding that a claim is procedurally defaulted. See, e.g., Rhoades v. Sup't, Civ. No. 14-4321, 2015 WL 4976745, at *5 (E.D. Pa. Aug. 19, 2015) (Stengel, J., approving and adopting Report & Recommendation, Caracappa, M.J.) (issues procedurally defaulted where they were not properly developed with citation to authority or legal discussion).

initial-review collateral proceedings, not collateral appeal."); see also Cox v. Horn, 757 F.3d 113, 118 (3d Cir. 2014) (Martinez comes into play if "no court – state or federal – would ever review the defendant's ineffective assistance claims").[16] Petitioner has not presented any other cause to excuse the default of this claim, nor has he presented evidence of factual evidence of actual innocence. Therefore, Ground Thirteen is procedurally defaulted and cannot be considered by this court.

B. Merits – IAC (Grounds Eleven, Twelve & Fourteen)

Three of Petitioner's four exhausted claims are IAC claims, and the fourth is a sufficiency claim. As explained in the previous section, IAC claims are governed by Strickland.

1. Ground Eleven – IAC for inducing false testimony

Petitioner argues that trial counsel was ineffective for advising Petitioner to testify falsely. Doc. 1 at 27; Doc. 8 at 18-22, 30; Doc. 12 at 19-21. According to Petitioner, he told counsel that after the victim went to sleep he got high and later woke up by the train tracks, and that he did not recall assaulting the victim, but that counsel persuaded him to testify that the victim attacked him because otherwise the jury would not believe him.

[16]Even were I to reach the merits of this claim, Petitioner would not be entitled to relief. Despite facts showing that Petitioner attacked the victim with a bat while she was sleeping, causing injuries to her head and body, trial counsel nevertheless attempted to argue that Petitioner did not intend to cause seriously bodily injury. N.T. 01/31/11 at 203-07. Thus, Petitioner cannot show that counsel acted deficiently in trying to fashion a defense in light of difficult facts. Moreover, given the nature of the assault and the victim's injuries, Petitioner cannot show that he was prejudiced.

N.T. 07/07/15 at 42-43 (Pet.'s PCRA testimony); see also N.T. 01/31/11 at 187-88 (Pet.'s trial testimony). Respondent counters that the claim is meritless. Doc. 9 at 26-27.

In rejecting this claim on PCRA appeal, the Superior Court stated:

> Trial counsel testified at the PCRA hearing that he never advised [Petitioner] that his story was incredible. [N.T. 7/7/15 at 21.] Trial counsel testified that he explained to [Petitioner] that they could not argue that his cocaine use negated his *mens rea*, but instead would have to argue that he simply did not intend to hurt the victim. ***Id.*** at 21-22. Again, this advice explained counsel's reasonable, strategic basis for pursing the advised defense of lack of *mens rea*. Further, contrary to [Petitioner's] claim that counsel advised him to perjure himself, counsel expressly testified that he did not tell [Petitioner] to lie. ***Id.*** at 30. The PCRA court viewed counsel's testimony as credible. The PCRA court did not err in finding [Petitioner's] [IAC] claim lacked merit.

Pa. Super. Ct.-PCRA at 8.

The determination by the state courts is neither contrary to, nor an unreasonable application of, Strickland. Counsel testified that he could not rely on Petitioner's intoxication to negate mens rea under state law. N.T. 07/07/15 at 21, 33-34; see also 18 Pa. C.S.A. § 308 ("Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative [sic] the element of intent of the offense, except . . . if it is relevant to reduce murder from a higher degree to a lower degree of murder."). In light of the uncontested evidence that Petitioner struck the victim with a baseball bat, counsel's advice to Petitioner to argue that he did not intend to hurt the victim constituted a reasonable defense strategy. This alone negates a finding that counsel acted deficiently in this

regard.[17] Moreover, although Petitioner avers that counsel knew Petitioner lied on the witness stand, counsel testified at the PCRA hearing that he did not tell Petitioner to lie. N.T. 07/07/15 at 30-31. As previously noted, the PCRA court found counsel's testimony to be credible, and a federal habeas court is bound by such credibility determinations. See Marshall, 459 U.S. at 434. Accordingly, Petitioner is not entitled to relief on this claim.

2. Ground Twelve – IAC for waiving Petitioner's right to jury trial

Petitioner next argues that trial counsel was ineffective for coercing Petitioner into waiving his right to a jury trial. Doc. 1 at 28-29; Doc. 8 at 23-25, 30-31; Doc. 12 at 22-25. Respondent counters that the claim is meritless. Doc. 9 at 27-29.

The Superior Court addressed this claim on collateral appeal:

> [Petitioner] admitted he signed the waiver of his right to a jury trial, that he understood the waiver, and that he would not have lied to the trial court regarding that waiver. [N.T. 07/07/15 at 48.]
>
> Further, at the PCRA hearing, trial counsel testified that, based on the technical defense to be proffered at trial,[13] he advised [Petitioner] that a bench trial, opposed to a jury trial, may benefit [Petitioner's] case. [N.T. 07/07/15 at 20-24]. This advice represents a reasonable strategic decision taken by trial counsel.
>
> [13][Petitioner's] version of events . . . was that he injured the victim while on a binge of crack cocaine use, but that he did not mean to injure the victim. [N.T. 07/07/15 at 21.] Counsel

[17]The court need not "address both components of the inquiry if the [petitioner] makes an insufficient showing on one." Strickland, 466 U.S. at 697. Nevertheless, it is worth noting that Petitioner has never contested the fact that he assaulted Ms. Romero and, as noted, counsel argued to the jury that Petitioner did not intend to injure her, and therefore Petitioner cannot show how he was prejudiced by counsel's actions.

> felt that the court would be better equipped than a jury to process the subtle differences between arguing a lack of *mens rea* while [Petitioner] was intoxicated by cocaine as opposed to a negation of *mens rea* by the use of cocaine, which cannot negate specific intent in non-homicide crimes in Pennsylvania. [See id.]
>
> ---
>
> Additionally, no reasonable probability of a different outcome exists based on [Petitioner's] waiver of a jury trial. The fact that [Petitioner] struck the victim with a baseball bat was never in contention. [Petitioner] himself explained that he "never really claimed to be – to be innocent of attacking [his] girlfriend." [N.T. 07/07/15 at 41.] Instead, [Petitioner's] tactics were designed to get him a lesser sentence upon conviction. ***Id.*** at 41-42. Accordingly, the trial verdict would have been guilty whether delivered by a judge or a jury.

Pa. Super. Ct.-PCRA at 7-8.

The determination of the state courts is neither contrary to, nor an unreasonable application of, Strickland. In support of his claim that counsel wronged him regarding the decision to waive a jury trial, Petitioner relies on counsel's allegedly inconsistent testimony at the PCRA hearing. See Doc. 12 at 22. At the hearing, counsel first testified that he and Petitioner discussed waiving a jury without identifying who proposed the idea, N.T. 07/07/15 at 18-19, and later stated, "I think it probably would have been [Petitioner's] idea, because that's not -- it was not going to be something that I was going to convince him of doing." Id. at 28. Petitioner asks the court to consider how counsel "can one moment not know who[se] idea it was, then later say it must have been his client's," and then implies that counsel's allegedly inconsistent testimony masks some nefarious intent. Doc. 12 at 24-25. No such intent can be gleaned from counsel's

testimony, which as noted previously the PCRA court found to be credible. In light of the PCRA court's fact finding, it cannot be said that the state courts unreasonably disposed of this claim.[18]

3. Ground Fourteen – IAC for failing to withdraw over a conflict

Petitioner next argues that trial counsel was ineffective for failing to withdraw as counsel despite irreconcilable differences and a breakdown in communication. Doc. 1 at 31; Doc. 8 at 9-14, 30; Doc. 12 at 25. Respondent counters that the claim is meritless. Doc. 9 at 29-30.

The Superior Court rejected this claim on collateral appeal:

> Simply stated, the attorney-client relationship in the instant matter, while strained, does not rise to the level of irreconcilable differences that would have required counsel to remove himself from representation. As the PCRA court noted:
>
> > There is no question that [[Petitioner]] and [t]rial [c]ounsel did not have an ideal attorney-client relationship. At one point, their relationship deteriorated to the point that they did not speak much[,] and [[Petitioner]] chose to represent himself. After that [first] trial, in which he was convicted on all charges,[19] [t]rial [c]ounsel took it upon himself to

[18]In any event, to show that counsel's deficient performance caused prejudice in this scenario, Petitioner must "demonstrate a reasonable probability that, but for counsel's ineffectiveness, he would have opted to exercise" his right to a jury trial. See Vickers v. Sup't Graterford SCI, 858 F.3d 841, 857 (3d Cir. 2017). As the Superior Court noted, Petitioner conceded at the PCRA hearing that he signed the waiver of his right to a jury trial, he understood the waiver, and he would not have lied to the trial court regarding the waiver. Pa. Super. Ct-PCRA at 7. Thus, Petitioner cannot show prejudice.

[19]As previously explained, Petitioner was first convicted of burglary and related charges in a jury trial conducted in early January 2011 (the 2010 docket conviction), a few weeks before the bench trial at issue there. Judge Reinaker permitted Petitioner to represent himself in the jury trial, with trial counsel as stand-by.

> contact [[Petitioner]] to reconsider him as an attorney. From there, [t]rial [c]ounsel was able to obtain a dismissal of the convenience store robbery charges,[20] which impressed [[Petitioner]] to the point that he agreed to have [t]rial [c]ounsel represent him in the non-jury trial. Further, [t]rial [c]ounsel testified that it is not unusual for there to be cycles of good and bad periods throughout a typical attorney-client relationship. After considering this, it is clear that the relationship between [t]rial [c]ounsel and [[Petitioner]] does not rise to the level of irreconcilable differences warranting withdraw[al] of counsel.
>
> [PCRA Ct. Op. at 8.] This was not error.

Pa. Super. Ct.-PCRA at 8-9.

The Superior Court's determination is neither contrary to, nor an unreasonable application of, Strickland, nor does it constitute an unreasonable determination of the facts. Werts, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)). As the PCRA court explained, the relationship between Petitioner and counsel deteriorated to the point that Petitioner elected to represent himself in the jury trial on the 2010 charges, but when counsel re-contacted him following the jury trial, and having succeeded in having certain of the 2010 charges dismissed, Petitioner agreed to have counsel represent him in the non-jury trial on the 2009 charges. N.T. 07/07/15 at 34-36. The PCRA court reasonably relied on counsel's testimony regarding good and bad periods in a typical attorney-client relationship, and it is clear from the trial transcript that counsel actively represented Petitioner in the suppression motion and subsequent bench trial before Judge Reinaker.

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[20]As previously explained, see supra at 18 n.12, the convenience store robbery charges also related to the 2010 docket conviction but were severed on defense counsel's motion and later dismissed.

N.T. 01/10/11 & 01/31/11. Moreover, for the reasons previously explained, Petitioner cannot show that counsel's failure to withdraw prejudiced him at trial. Accordingly, Petitioner is not entitled to relief on this ineffectiveness claim.

C. Merits – Sufficiency of Evidence (Ground Sixteen)

In Ground Sixteen, Petitioner argues that the evidence was insufficient to support his conviction for witness intimidation as a felony of the first degree because the content of his communications with the witness did not contain a threat or an offer of any pecuniary or other benefit. Doc. 1 at 31-32; Doc. 8 at 37-43; Doc. 12 at 26-33. Defendant counters that this claim, which Petitioner exhausted on direct appeal, is meritless. Doc. 9 at 30-33.

Principles of due process dictate that a person can be convicted of a crime only if, "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); see also In re Winship, 397 U.S. 358, 364 (1970); Sullivan v. Cuyler, 723 F.2d 1077, 1083-84 (3d Cir. 1983). Accordingly, in reviewing challenges to the sufficiency of the evidence, a court must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Sullivan, 723 F.2d at 1083-84 (quoting Jackson, 443 U.S. at 319) (emphasis in original). Pennsylvania courts follow the same rule. See Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (review of sufficiency claims requires evaluation of record "in the light most favorable to the verdict winner giving the

prosecution the benefit of all reasonable inferences to be drawn from the evidence."); Commonwealth v. Brewer, 876 A.2d 1181, 1185 (Pa. Super. 2000) ("Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission therefore by the accused, beyond a reasonable doubt.").

As explained in the procedural history, the Superior Court twice considered this claim on direct appeal. In a first opinion dated April 30, 2012, a three-judge panel unanimously affirmed Petitioner's conviction for witness intimidation, but divided on the question of grading, with the majority concluding that the evidence was not sufficient to grade the offense a felony of the first degree. Super. Ct.-Direct at 16. After agreeing to rehear the matter en banc, the Superior Court issued a second opinion dated July 29, 2013, in which the majority affirmed the trial court and found that the evidence supported Petitioner's conviction for witness intimidation graded as a felony of the first degree. Super. Ct.-Direct II at 10. In doing so, the majority first set forth the witness intimidation provision found at 18 Pa. C.S.A. § 4952:

> (a) Offense defined.--A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:
>
> (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime.
>
> (2) Give any false or misleading information or testimony relating to the commission of any crime

to any law enforcement officer, prosecuting official or judge.

(3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge.

(4) Give any false or misleading information or testimony or refrain from giving any testimony, information, document or thing, relating to the commission of a crime, to an attorney representing a criminal defendant.

(5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence.

(6) Absent himself from any proceeding or investigation to which he has been legally summoned.

(b) Grading.-

(1) The offense is a felony of the degree indicated in paragraphs (2) through (4) if:

(i) The actor employs force, violence or deception, or threatens to employ force or violence, upon the witness or victim or, with the requisite intent or knowledge upon any other person.

(ii) The actor offers any pecuniary or other benefit to the witness or victim or, with the requisite intent or knowledge, to any other person.

(iii) The actor's conduct is in furtherance of a conspiracy to intimidate a witness or victim.

(iv) The actor accepts, agrees or solicits another to accept any pecuniary or other benefit to intimidate a witness or victim.

(v) The actor has suffered any prior conviction for any violation of this section or any predecessor law hereto, or has been convicted, under any Federal statute or statute of any other state, of an act which would be a violation of this section if committed in this State.

(2) The offense is a felony of the first degree if a felony of the first degree . . . was charged in the case in which the actor sought to influence or intimate a witness or victim as specified in this subsection. [21]

Pa. Super. Ct.-Direct II at 3-5. The en banc majority then rejected Petitioner's sufficiency claim, with reference to the reasoning of the trial court:

> The mere act of repeatedly asking a closely-related assault victim, likely still vulnerable in the wake of the brutal beating he administered to her just days earlier, to refrain from testifying against him manifested an intent to intimidate for purposes of Section 4952(a)(1), the [trial] court reasoned. Specifically, it found that:
>
> > The record in this case clearly demonstrates that there was sufficient evidence to support the guilty verdict for [18 Pa. C.S. § 4952]. In this case, [[Petitioner]] made two phone calls to his victim just days after beating her with a baseball bat and choking her. In those phone calls from prison [[Petitioner]] specifically asked his victim to drop the charges and not testify against him in court. Additionally, [[Petitioner]] sent a letter to his victim again pressing her not to testify against him. Through this letter, [[Petitioner]] made it clear to his

[21]Petitioner's aggravated assault conviction was graded a first-degree felony. N.T. 01/31/11 at 214.

> victim that she was the key to him being released from prison. After listening to the evidence presented by the Commonwealth regarding the brutal beating of the victim by [[Petitioner]] and the phone calls and letter from prison, the Court inferred from the surrounding circumstances that [[Petitioner]] intended to intimidate his victim so she would not testify against him.

[Trial Ct. Op.] at 2-3.

[Petitioner] counters that neither an intent nor an attempt to intimidate may be inferred from communications showing only that he prostrated himself in asking and even begging his girlfriend not to testify. . . . [T]he facts of each case and the history between the actor and the witness will determine whether such communications, without more, qualify as "intimidation."

Here, however, we need not make such a determination, as the record includes additional instances in which [Petitioner] communicates a clear offer of pecuniary and other benefits as prohibited by the witness intimidation statute. . . .

. . . .

. . . . In both phone calls and letters in which he persistently asked and even begged his girlfriend not to show at trial, [Petitioner] offered a more stable and rewarding family life for her and their children in exchange for her refusal to testify:

. . . .

> I propose that when I do get out (if you don't come to court) I could stay at my mom's and still help with the kids; do whatever I gotta do and then maybe we can move with the income tax money & start fresh. . . .
> So it's a win-win situation for you & me & our kids. . . .
> . . . .
> And I swear whatever you want me to do, whatever you tell me to do, I will do, no questions asked. . . . So please Lynda don't let this system swallow me up away from you & specially my kids. If not for me, please do it for

> them. They need me out there & I need to be there for them.
>
> [Petitioner's] letter, authored 10/17/09. . . .
>
> . . . .
>
> As made, [Petitioner's] offer was neither too speculative nor vague to come within the ambit of Section 4952. . . . [Petitioner] and his girlfriend had a family, and his offer of providing improved household stability and financial support for her and their children in the event she withdrew from the case specifically targeted a parent's basic drive to meet core childcare needs. Though it ultimately rang hollow with his exasperated girlfriend, his proposal was not, under the circumstances, so preposterous that it failed to constitute a valid offer.
>
> Furthermore, there can be no reasonable question . . . that [Petitioner's] promise of a tax return was both wholly dependent upon the girlfriend's inaction – "(if you don't come to court)" – and an offering of funds not belonging to the girlfriend. . . . As such, this portion of the offer represented a legitimate offer of pecuniary benefits as contemplated by the statute.
>
> We conclude, therefore, that the legislature intended Section 4952 to address the very conduct at issue here. [Petitioner] sought to frustrate the administration of justice by offering to give the Commonwealth's chief witness pecuniary and other benefits if she agreed to refrain from testifying against him. . . .

Id. at 5-10. Accordingly, the Superior Court found that Petitioner violated section 4952, and affirmed the judgment of sentence. Id. at 10.

The determination of the state courts is neither contrary to, nor an unreasonable application of, Jackson. Seven of twelve members of the Superior Court found the evidence to be sufficient,[22] supporting the notion that when the evidence is viewed most

[22]In the panel decision, one judge concluded that the evidence was sufficient to grade the offense a first-degree felony, whereas two did not. In the en banc opinion, six judges found the evidence sufficient, whereas three did not. None of the judges involved in the panel decision participated in the en banc decision.

favorably for the prosecution, "any rational trier of fact" could have found the essential elements of first-degree felony witness intimidation beyond a reasonable doubt. Sullivan, 723 F.2d at 1083-84; Jackson, 443 U.S. at 319. Certainly, to the extent the discussion reflects an interpretation of the offense under state law, it cannot be disturbed by a federal habeas court. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Moreover, the state courts' decision constitutes a reasonable determination of the facts. Petitioner argues that neither intent nor an attempt to intimidate may be inferred from the communications with his girlfriend, in which he pleaded with her not to testify, and that he made no pecuniary or other offer in return for her non-appearance at trial. However, the evidence establishes that only days after he brutally beat his girlfriend with a baseball bat and choked her, Petitioner made two collect calls from prison asking her to drop the charges and not to show up in court to testify, N.T. 01/10/11 at 92-95, and he subsequently sent her a handwritten letter making it clear that she was the key to him being released from prison. Id. at 99. The state courts reasonably concluded that the mere act of a perpetrator repeatedly asking an intimately-known assault victim to refrain from testifying against him -- and doing so in the immediate wake of a brutal beating, when the victim remains vulnerable -- manifests an intent to intimidate. Additionally, in both the phone calls and the letter, Petitioner offered her a more stable and rewarding family life for her and their children, including financial support in the form of a tax return. Thus, the state courts reasonably concluded that such language constituted an

offer of "pecuniary or other benefit" in exchange for her refusal to testify. Therefore, Petitioner's sufficiency claim fails.

IV. CONCLUSION

Petitioner's habeas petition is timely and raises eight grounds that arise from the 2009 docket conviction presently at issue. Grounds Thirteen (IAC for failing to argue that the evidence was insufficient to support Petitioner's conviction for first-degree felony aggravated assault), Fifteen (prosecutorial misconduct for eliciting knowingly false testimony), and Seventeen (violation of constitutional rights when the Superior Court granted reargument en banc) are procedurally defaulted and Petitioner has failed to overcome the default.

Ground Ten (IAC for compelling Petitioner to be a witness against himself) is defaulted, but I nonetheless conclude on the merits that Petitioner is not entitled to relief on this claim because he has failed to establish that his trial counsel's representation fell below an objective standard of reasonableness or that he was prejudiced.

Grounds Eleven (IAC for inducing false testimony), Twelve (IAC for waiving Petitioner's right to jury trial), Fourteen (IAC for failing to withdraw over a conflict) and Sixteen (insufficient evidence to support Petitioner's conviction for first-degree felony witness intimidation) do not entitle Petitioner to habeas relief and should be denied on the merits.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 13th day of December 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ELIZABETH T. HEY

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

B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3099

CALVIN B. LYNCH,
Appellant

v.

SUPERINTENDENT ROCKVIEW SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY LANCASTER COUNTY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-18-cv-04924)
District Judge: Honorable Timothy J. Savage

SUR PETITION FOR REHEARING

Present: JORDAN, KRAUSE, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing by the panel is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Date: May 5, 2021
CJG/cc: Andrew J. Gonzalez, Esq.
Ronald Eisenberg, Esq.
Calvin B. Lynch

APPENDIX C

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

CALVIN B. LYNCH	:	**CIVIL ACTION**
v.	:	
SUPERINTENDENT GARMAN and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	**NO. 18-4924**

ORDER

NOW, this 11th day of August, 2020, upon consideration of the Petition Under 28 U.S.C. § 2254 for Writ of *Habeas Corpus* by a Person in State Custody (Document No. 1), the response to the Petition for Writ of *Habeas Corpus*, the Report and Recommendation filed by United States Magistrate Judge Elizabeth T. Hey (Document No. 13), and the petitioner's objections to the Report and Recommendation, and after a thorough and independent review of the record, it is **ORDERED** that:

1. The petitioner's objections are **OVERRULED**;

2. The Report and Recommendation of Magistrate Judge Elizabeth T. Hey is **APPROVED** and **ADOPTED**;

3. The Petition for Writ of *Habeas Corpus* is **DISMISSED**; and,

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

/s/ TIMOTHY J. SAVAGE J.

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