Appendix A

ROBERT CARTER, Petitioner, v. VINCENT MOONEY, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2019 U.S. Dist. LEXIS 107910
NO. 18-2366
June 25, 2019, Decided
June 25, 2019, Filed

Editorial Information: Subsequent History

Adopted by, Request granted, Objection overruled by, Writ of habeas corpus denied, Dismissed by Carter v. Mooney, 2020 U.S. Dist. LEXIS 92977 (E.D. Pa., May 28, 2020)

Editorial Information: Prior History

Commonwealth v. Carter, 2014 Pa. Super. Unpub. LEXIS 3247 (July 15, 2014)

Counsel **{2019 U.S. Dist. LEXIS 1}ROBERT CARTER**, Petitioner, Pro se, HUNLOCK CREEK, PA.

For VINCENT MOONEY, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: BANAFSHEH AMIRZADEH, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: MARILYN HEFFLEY, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: MARILYN HEFFLEY

Opinion

REPORT AND RECOMMENDATION

MARILYN HEFFLEY, U.S.M.J.

This is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by **Robert Carter** ("Petitioner" or "Carter"), a prisoner incarcerated at the State Correctional Institution Retreat in Glen Lyon, Pennsylvania. For the following reasons, I recommend that the petition be denied.

I. FACTUAL AND PROCEDURAL HISTORY

On April 19, 2013, after a jury trial in the Philadelphia County Court of Common Pleas, Carter was convicted of third-degree murder, 18 Pa. Cons. Stat. § 2502(c); homicide by vehicle, 75 Pa. Cons. Stat. § 3732(a); causing an accident involving death while not properly licensed, id. § 3742.1(a); three counts of aggravated assault by vehicle, id. § 3732.1(a); three counts of first-degree aggravated assault, 18 Pa. Cons. Stat. § 2702(a); recklessly endangering another person, id. § 2705; and receiving stolen property, id. § 3925(a). Opinion at 1, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila.**{2019 U.S. Dist. LEXIS 2}** Cnty. Oct. 30, 2013) [hereinafter "Trial Ct. Op."]. On the same date, the trial court imposed an aggregate sentence of 25 to 50 years' incarceration. Id. The trial court summarized the facts underlying Carter's convictions as follows:

On April 5, 2011, at approximately 7 p.m., Philadelphia Police Officers Joseph Rapone and Bill Postowski were patrolling the area of Southwest Philadelphia. They were parked at the corner of 55th Street and Kingsessing Avenue when they observed a silver Acura driving down the street. As Acuras are commonly stolen vehicles in Philadelphia, Officer Rapone ran the license plate of the Acura through the patrol vehicle's computer. The computer report indicated that the Acura had been stolen in Upper Darby. Officer Rapone immediately activated the lights and sirens on his patrol car and began following the car, which was driven by [Carter]. Instead of pulling over, [Carter] ran a stop sign and accelerated. Officers Rapone and Postowski continued pursuing [Carter] for a number of blocks, during which [Carter] continued to accelerate ultimately reaching speeds of 75 to 80 miles per hour, and disobeyed traffic signals. Officer Rapone called for backup. During the**{2019 U.S. Dist. LEXIS 3}** chase, Officer Rapone observed that the car had two occupants: [Carter] who was driving, and another person, later identified as Kalil Sephes, who was sitting in the front passenger seat.

When [Carter] reached the corner of 58th Street and Chester Avenue, he ran a red light, smashing into the right passenger side of a Hyundai Sonata driven by David Gordon, Jr. Officers Rapone and Postowski, who had been approximately one block away when the crash occurred, arrived at the scene moments later. The silver Acura that [Carter] had been driving was pinned against a wall on the northwest corner of 58th Street and Chester Avenue. Mr. Sephes had been ejected from the vehicle and was lying next to the passenger side of the Acura. It was immediately apparent that he was deceased. [Carter] was trapped in the driver's seat of the vehicle.

As Officer Rapone was attempting to extract [Carter] from the vehicle, he heard a voice say "help," and discovered that an elderly woman, later identified as Henrietta Davis, was trapped underneath the Acura. Ms. Davis had been waiting for a trolley at the corner of 58th Street and Chester Avenue along with her friends, Lena Campbell and Leslie Downer. When [Carter's]**{2019 U.S. Dist. LEXIS 4}** Acura crashed into the wall on the corner, Ms. Davis and Ms. Campbell had been hit by the car and trapped. Police were able to extricate them from the wreckage of the Acura, which was mangled and burning. Mr. Downer had been hit by the Acura and was lying on the ground near the car. [Carter] was cut from the driver's seat of the Acura [by] using the jaws of life.

All of the victims were taken to area hospitals except for Kalil Sephes, who was pronounced dead at the scene by paramedics. His cause of death was a torn brain stem. Ms. Davis, who was 79 years old, had suffered a broken leg, a concussion, a broken nose, and fractured ribs. Lena Campbell, who was 82 years old, suffered a concussion and fluid in her abdomen. Leslie Downer, who was 85 years old, suffered a cranial hemorrhage, a broken jaw, a fractured rib, and soft tissue swelling. Mr. Gordon, who was 29 years old, suffered a broken leg.Opinion at 1-3, Commonwealth v. Carter, No. 2373 EDA 2013 (Pa. Super. Ct. July 15, 2014) (quoting Trial Ct. Op. at 2-4) [hereinafter "Super. Ct. Op."].

Carter filed a post-sentence motion, which was denied on August 6, 2013. Order, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com.**{2019 U.S. Dist. LEXIS 5}** Pl. Phila. Cnty. Aug. 6, 2013). On August 12, 2013, Carter filed a timely notice of appeal with the Pennsylvania Superior Court raising issues regarding: (1) the sufficiency and weight of the evidence against him; and (2) the trial court's decision to allow the admission of evidence of prior instances in which Petitioner, while operating a motorized vehicle, had fled from police. Notice of Appeal, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Aug. 12, 2013). On July 15, 2014, the Superior Court rejected each challenge and affirmed Carter's judgment of sentence. Super. Ct. Op. at 1-3.

On August 4, 2014, Carter filed a pro se petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-9546. PCRA Pet., Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Aug. 4, 2014). Stephen Seidel, Esquire was appointed as Carter's counsel on March 24, 2015, but he subsequently filed a "no merit" letter and moved to withdraw pursuant to Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d 213 (Pa. Super. Ct. 1988). Opinion at 1, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. June 20, 2016) [hereinafter "PCRA Trial Ct. Op."]. The PCRA court found Seidel's**{2019 U.S. Dist. LEXIS 6}** Finley letter inadequate, relieved him, and appointed Gary Server, Esquire to represent Carter. Id. at 2. Server also filed a "no merit" letter and moved to withdraw. Id. On February 22, 2016, the PCRA court issued notice pursuant to Pa. R. Crim. P. 907, advising the parties that it intended to dismiss Carter's PCRA petition without a hearing. Id. When no response was forthcoming, the PCRA court dismissed Carter's petition as meritless on March 24, 2016. Id.

Carter filed a timely appeal with the Pennsylvania Superior Court on April 8, 2016. See Docket at 22, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty.). On appeal, Carter argued that his trial counsel was ineffective in failing to: (1) object to the autopsy report as the medical examiner who conducted the autopsy did not testify; and (2) request that the jury be instructed on the lesser included offense of involuntary manslaughter. Notice of Appeal, Commonwealth v. Carter, CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Apr. 8, 2016). The Superior Court determined that both claims were without merit and affirmed the dismissal of Carter's PCRA petition on May 16, 2017. Commonwealth v. Carter, 170 A.3d 1220, 2017 WL 2130286, at *2-6 (Pa. Super. Ct. May 16, 2017) [hereinafter "PCRA Super. Ct. Op."]. Carter filed a petition for allowance of appeal with**{2019 U.S. Dist. LEXIS 7}** the Pennsylvania Supreme Court, which was denied on December 20, 2017. Commonwealth v. Carter, 644 Pa. 368, 176 A.3d 851 (Pa. Dec. 20, 2017) (table).

Carter filed a pro se habeas corpus petition in this Court on May 21, 2018.1 Carter seeks habeas relief on the following grounds: (1) the trial court denied him a fair trial when it admitted evidence of prior bad acts; (2) the evidence was insufficient to support a guilty verdict as to third-degree murder and aggravated assault; (3) trial counsel was ineffective in failing to object to the autopsy report introduced at trial where the coroner who performed the autopsy did not testify as to the report; (4) trial counsel was ineffective in failing to communicate with him as to the advantages and disadvantages of the plea deal before he rejected it; and (5) trial counsel was ineffective in failing to request that the jury be instructed on the lesser included offense of involuntary manslaughter. Pet. at 5-14. As discussed below, none of these claims warrant habeas relief.

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**{2019 U.S. Dist. LEXIS 8}** writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the 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 law 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 materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (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**{2019 U.S. Dist. LEXIS 9}** that the state court's analysis was "objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (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 a writ of habeas corpus . . . unless the petitioner has first exhausted the remedies available in the state courts." Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The exhaustion requirement mandates that the claim "have been 'fairly presented' to the state courts." Bronshtein v. Horn, 404 F.3d 700, 725 (3d Cir. 2005) (quoting Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)). Fair presentation requires that a petitioner have pursued his or her claim "through one 'complete round of the State's established appellate review process.'" Woodford v. Ngo, 548 U.S. 81, 92, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006) (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)). 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, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)**{2019 U.S. Dist. LEXIS 10}**. "[I]f [a] petitioner failed to exhaust state remedies and the court to which the 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 a procedural default for purposes 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, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (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." 466 U.S. at 686-88, 693-94.

To satisfy the reasonable performance prong of the analysis, a petitioner must show "'that counsel made errors so**{2019 U.S. Dist. LEXIS 11}** serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (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 assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'" Id. at 104, 106 (quoting Strickland, 466 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 a probability**{2019 U.S. Dist. LEXIS 12}** sufficient to undermine 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. Carter's Claim that the Trial Court Erred in Admitting Evidence of His Prior Bad Acts and thus Denied Him a Fair Trial is Non-Cognizable, Procedurally Defaulted, and Meritless

Carter argues that the trial court violated his due process rights under the Fourteenth Amendment in admitting evidence of his prior bad acts, thus denying him a fair trial.2 Pet. at 9. Specifically, the trial court allowed the prosecution to admit evidence showing that Carter fled from the police in a motorized vehicle on numerous previous occasions. Transcript of Record at 203-19, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Feb. 11, 2013) [hereinafter "Feb. 11 Tr."].

Generally, claims alleging state court error in the admission of evidence are not cognizable in a federal habeas proceeding. See Keller v. Larkins, 251 F.3d 408, 416 n.2 (3d Cir. 2001) ("A federal habeas court, however, cannot decide whether the evidence in question was properly allowed under the state law of evidence."). Rather, "[a] federal habeas court is limited to deciding whether the admission**{2019 U.S. Dist. LEXIS 13}** of the evidence rose to the level of a due process violation." Id. "Accordingly, a reviewing court must examine the relative probative and prejudicial value of evidence to determine whether its admission violated defendant's right to a fair trial." Lesko v. Owens, 881 F.2d 44, 51 (3d Cir. 1989). To the extent Carter alleges a state evidentiary error, rather than a due process violation, his claim is non-cognizable. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Insofar as Carter raises a federal due process claim based on a state evidentiary error, his claim is procedurally defaulted. To exhaust a claim, a petitioner must "fairly present[]" the claim to the state courts. Bronshtein, 404 F.3d at 725 (quoting Picard, 404 U.S. at 275). This means that a petitioner must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." Keller, 251 F.3d at 413 (quoting McCandless, 172 F.3d at 262). A mere "passing reference" is insufficient for exhaustion purposes. Id. at 414; Laird v. Wetzel, No. 14-1916, 2016 U.S. Dist. LEXIS 110545, 2016 WL 4417528, at *3 (E.D. Pa. Aug. 18, 2016). "In Pennsylvania, the fair presentation requirement means that a petitioner must bring the claim to the Pennsylvania Superior Court." Johnson v. Kerestes, No. 13-3574, 2014 U.S. Dist. LEXIS 38963, 2014 WL 1225682, at *3 (E.D. Pa. Mar. 25, 2014); see also Washington v. Pennsylvania, No. 10-7103, 2010 U.S. Dist. LEXIS 140961, 2010 WL 5678670, at *3 & n.8 (E.D. Pa. Dec. 20, 2010). Applied to the context of Carter's case, these requirements mean that if Carter "wishes to claim that

an evidentiary ruling at a state court trial**{2019 U.S. Dist. LEXIS 14}** denied him the due process of law guaranteed by the Fourteenth Amendment, he must [have done] so, not only in federal court, but in state court." Duncan v. Henry, 513 U.S. 364, 366, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995); see also Curry v. Brittain, No. 17-4842, 2018 U.S. Dist. LEXIS 108323, 2018 WL 5569418, at *2 (E.D. Pa. June 26, 2018), report and recommendation adopted, No. 17-4842, 2018 U.S. Dist. LEXIS 184307, 2018 WL 5454290 (E.D. Pa. Oct. 29, 2018).

On appeal from his judgment of sentence, Carter claimed that "[t]he Court erred in allowing the Commonwealth to introduce evidence that Appellant had previously operated dirt bikes/off road vehicles and a motor vehicle and that on prior occasions connected to those incidents had fled from police as evidence to prove Appellant's state of mind and absence of mistake/accident regarding his flight in this case as well as contributing to the quantum of evidence presented by the Commonwealth with regard to intent." Concise Statement of Errors Complained of on Appeal Filed Pursuant to Pa. R. App. P. 1925(b) at ¶ 3, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Oct. 9, 2013). The trial court rejected this argument, stating that "the evidence was properly admissible under [Pennsylvania] Rule [of Evidence] 404(b)." Trial Ct. Op. at 7. On direct appeal to the Pennsylvania Superior Court, Carter raised much the same claim, again in terms of an evidentiary error, arguing that "[t]he [Trial Court] err[ed] in allowing**{2019 U.S. Dist. LEXIS 15}** the Commonwealth to introduce evidence that Appellant had previously operated motor vehicles, dirt bikes, etc. on prior [occasions] and that on those prior [occasions] had fled from the police as evidence of lack of mistake and state of mind." Super. Ct. Op. at 4 (quoting Br. for Appellant at 5, Commonwealth v. Carter, No. 2373 EDA 2013 (Pa. Super. Ct. Feb. 19, 2014)). The Superior Court too rejected this argument, finding that under Rule 404(b), "the probative value of the evidence at issue outweighed any prejudice to Appellant and thus the trial court did not abuse its discretion in admitting it." Id. at 13.

Carter has thus failed to raise a federal due process claim in the state courts. Nor has he argued that the Superior Court misunderstood his argument regarding the admissibility of evidence surrounding his prior bad acts. Pet. at 9-10. Accordingly, without any reference to federal law, the Constitution, or due process, Carter's direct appeal based on state law "did not give the state courts 'fair notice' that he was asserting a federal constitutional claim rather than a claim that the trial court violated state rules of evidence." Keller, 251 F.3d at 414. Moreover, because the PCRA requires that any post-conviction petition,**{2019 U.S. Dist. LEXIS 16}** including second or subsequent petitions, be filed within one year of the date the judgment of sentence becomes final, 42 Pa. Cons. Stat. § 9545(b), and Carter does not assert that his due process claim falls within any statutory exceptions to that rule, a Pennsylvania court would find any attempt to raise the claim now through a new PCRA petition to be time-barred. Therefore, the claim is procedurally defaulted and cannot be a ground for habeas relief. Coleman, 501 U.S. at 729; McCandless, 172 F.3d at 260.

Even if this Court were able to consider Carter's due process claim on the merits, the argument would be unavailing. Carter argues that the probative value of the evidence of his prior bad acts was outweighed by its prejudicial impact on the jury, leading to a violation of due process. Pet. at 9-10. The trial court rejected this argument, finding not only that the evidence was admissible under Pa. R. Evid. 404(b), but also that it was highly probative that Carter acted with recklessness and, therefore, had the sufficient mens rea of malice for aggravated assault. Trial Ct. Op. at 5-7. During the pretrial hearing and at trial, the trial judge explained that evidence of Carter's prior bad acts was not only relevant, but essential in determining whether Carter had the requisite**{2019 U.S. Dist. LEXIS 17}** malice to establish the crime of third-degree murder, and thus had probative value that outweighed any potential prejudice.3 Transcript of Record at 23-24, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Feb. 8, 2013) [hereinafter "Feb. 8 Tr."]; Feb. 11 Tr. at 29-32; Super. Ct.

Op. at 8-10. The trial judge is given considerable deference in his or her evidentiary determinations, and this Court only reviews such determinations for federal due process violations. Keller, 251 F.3d at 416 n.2. "[I]n order to show that an evidentiary error of this type rose to the level of a due process violation," Carter must contend "that it was of such magnitude as to undermine the fundamental fair ness [sic] of the entire trial." Id. at 413 (citing McCandless, 172 F.3d at 262; Lesko, 881 F.2d at 51-52). Here, the admittance of the evidence does not rise to such a constitutional violation; Carter's prior bad acts were relevant to show both his indifference to human life, an element of the crime of third-degree murder, as well as intent, which helped to establish the requisite mens rea for Carter's convictions. See 18 Pa. Cons. Stat. § 2502(c); id. § 2702(a). Therefore, without a showing that this evidence undermined the fundamental fairness of his trial, Carter is not entitled to habeas relief**{2019 U.S. Dist. LEXIS 18}** on this claim.

B. Carter's Claim that the Evidence Did Not Support his Convictions is Meritless

Carter next contends that the evidence was insufficient to support his conviction for both third-degree murder and aggravated assault. Pet. at 10. The United States Supreme Court explained the standard of review for challenges to the sufficiency of the evidence on habeas review in Jackson v. Virginia as follows:

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt . . . . Instead, the relevant question is 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.443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (citations omitted). The AEDPA imposes an additional layer of deference onto the preexisting sufficiency inquiry. Under the statute, habeas relief may be granted for insufficiency of the evidence only if the state courts unreasonably applied the "no rational trier of fact standard" under Jackson or the state equivalent**{2019 U.S. Dist. LEXIS 19}** thereof.4 28 U.S.C. § 2254(d); Jackson, 443 U.S. at 319.

1. Carter's Claim that the Evidence did not Support his Conviction for Aggravated Assault is Procedurally Defaulted and Substantively Meritless

Here, the Pennsylvania Superior Court dismissed Carter's insufficiency claim regarding his conviction for aggravated assault, pointing out that under Pennsylvania law, because Carter did not raise such a challenge in his Rule 1925(b) statement and did not make an effort to excuse the default, it was waived. Super. Ct. Op. at 6 (citing Pa. R. App. P. 302(a)). Pursuant to Pa. R. App. P. 302(a), "issues not presented in a properly-filed Rule 1925(b) statement" in the lower court are waived. Griggs v. DiGuglielmo, No. 06-1512, 2007 U.S. Dist. LEXIS 48542, 2007 WL 2007971, at *7 (E.D. Pa. July 3, 2007). This rule is consistently applied and Pennsylvania courts decline to consider on appeal arguments not explicitly raised in a Rule 1925(b) statement. See, e.g., Burris v. Delbaso, No. 17-2161, 2018 U.S. Dist. LEXIS 149228, 2018 WL 4905373, at *7 (E.D. Pa. Aug. 30, 2018) (citing Commonwealth v. Burris, No. CP-51-CR-0000712-2008 (Pa. Ct. Com. Pl. Phila. Cnty. June 30, 2015); Commonwealth v. Burris, No. 976 EDA 2009 (Pa. Super. Ct. June 8, 2010)) (affirming the state courts' holdings that an argument first raised on appeal from the denial of petitioner's PCRA petition and not contained within his or her Rule 1925(b) statement is waived and consequently, could not serve as the basis for habeas relief), **{2019 U.S. Dist. LEXIS 20}**report and recommendation adopted sub nom. Burris v. Delbaso, No. CV 17-2161, 2018 U.S. Dist. LEXIS 173357, 2018 WL 4899407 (E.D. Pa. Oct. 9, 2018), certificate of appealability denied sub nom. Burris v. Superintendent Mahanoy SCI, No. CV 18-3422, 2019 WL 1977373 (3d Cir. Mar. 28, 2019). Therefore, Rule 302(a) qualifies as an adequate procedural ground because it is "firmly established and regularly followed." See Thomas v. Sec., Pa.

Dep't of Corr., 495 F. App'x 200, 205-06 (3d Cir. 2012); see also Harris v. Kerestes, No. 11-3093, 2014 U.S. Dist. LEXIS 173984, 2014 WL 7232358, at *15 (E.D. Pa. Dec. 17, 2014). Accordingly, the reliance of the state courts on such an independent and adequate state-law ground renders Carter's claim procedurally defaulted for purposes of federal habeas relief.5 See, e.g., Coleman, 501 U.S. at 729; Thomas, 495 F. App'x at 205-06.

2. Carter's Claim that the Evidence did not Support his Conviction for Third-Degree Murder is Meritless

Carter did raise his insufficiency claim regarding his conviction for third-degree murder in his Rule 1925(b) statement so that it is not procedurally defaulted; however, his challenge does not provide a basis for habeas relief. The Superior Court addressed Carter's insufficiency claim regarding his conviction for third-degree murder on its merits, finding that the evidence presented at trial was sufficient to support Carter's conviction for third-degree murder, which requires that the killing be performed with the mens rea of malice under Pennsylvania law. 18 Pa. Cons. Stat. § 2502(c); Super. Ct. Op. at 8-9. In making its finding, the Superior**{2019 U.S. Dist. LEXIS 21}** Court relied on the following evidence:

> Officer Rapone testified that [Carter], before running the red light and causing the accident that killed Mr. Seph[e]s and injured four other people, repeatedly accelerated and ran at least two stop signs while fleeing the police in a stolen vehicle. Officer Rapone also testified that at no point did he see [Carter] brake. Another officer who witnessed the chase, Officer John Krewer, testified that [Carter] was travelling at a speed of approximately 75 to 80 miles per hour through the residential neighborhood.
>
> In addition, the [Pa. R. Evid.] 404(b) evidence [of prior bad acts] demonstrated that [Carter] had, on three prior occasions, driven a vehicle erratically and then fled from police. Two of these incidents resulted in [Carter] crashing the vehicle that he was driving. [T]his was compelling evidence that [Carter] on the day of the incident here at issue, acted with the malice necessary for third-degree murder.Super. Ct. Op. at 8 (quoting Trial Ct. Op. at 9-10). Based upon the foregoing, the evidence clearly demonstrated that Carter was indeed the one driving the stolen Acura and established that he was driving recklessly before the accident.**{2019 U.S. Dist. LEXIS 22}** Id. Such reckless behavior supported a finding that Carter had the requisite malice to establish the crime of third-degree murder. A rational trier of fact easily could have concluded beyond a reasonable doubt that Carter was guilty of the crime charged. See Riggs, 63 A.2d at 784-85. The Superior Court's determination that the evidence was sufficient to support Carter's conviction was not contrary to, nor an unreasonable application of Jackson, see 28 U.S.C. § 2254(d), and Carter is, therefore, not entitled to habeas relief on this claim.

C. Carter's Claim that Trial Counsel was Ineffective in Failing to Object to Dr. Rosen's Testimony Regarding the Autopsy Report is Meritless

In his petition, Carter appears to argue that his counsel was ineffective in failing to object to the admission of the autopsy report. Pet. at 10. However, while the autopsy report was admitted into evidence, it was not presented at any point to the jury. PCRA Trial Ct. Op. at 9-10. Thus, the substance of Carter's claim has more to do with his counsel's alleged ineffectiveness in failing to object to Dr. Rosen's testimony on the ground that the autopsy report was the work of Dr. Hunt and not of Dr. Rosen.6

At the time of trial, Dr. Allison Hunt,**{2019 U.S. Dist. LEXIS 23}** the forensic pathologist who conducted the victim's autopsy and authored the report in question, no longer worked at the Philadelphia Medical Examiner's Office. Transcript of Record at 55, Commonwealth v. Carter, No.

CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Feb. 13, 2013) [hereinafter "Feb. 13 Tr."]. Consequently, Dr. Aaron Rosen, another forensic pathologist, testified at trial instead. Dr. Rosen testified that after reviewing all the evidence, including Dr. Hunt's report, he considered Mr. Sephes' death to be an accident caused by multiple blunt trauma impacts. Id. Carter maintains that because his counsel did not object to Dr. Rosen's testimony, his counsel was ineffective under Strickland. Pet. at. 12. This claim lacks merit.

As the PCRA court noted, "[u]nder Pennsylvania law, a medical examiner who did not perform the autopsy at issue in the case may still testify as to the cause and manner of death provided that the testifying expert is qualified and sufficiently informed so as to be able to render his or her own opinion." PCRA Trial Ct. Op. at 9-10 (citing Commonwealth v. Buford, 2014 PA Super 224, 101 A.3d 1182, 1198 (Pa. Super. Ct. 2014)). Dr. Rosen was one such qualified expert, Feb. 13 Tr. at 52, and thus, his testimony was permissible. Despite**{2019 U.S. Dist. LEXIS 24}** Carter's claim that Dr. Rosen's testimony stemmed from Dr. Hunt's autopsy report, the report was never shown to the jurors, nor were any of Dr. Hunt's opinions or conclusions shared with them. Id. at 10. Additionally, Dr. Rosen reached his own conclusions surrounding the death of Mr. Sephes. Feb. 13 Tr. at 55. Moreover, multiple witnesses testified that Carter had been driving at high speeds until he ran a red light and crashed his car. Feb. 11 Tr. at 240-48; Transcript of Record at 14-29, 74-76, 132-53, 177, 181-94; Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Feb. 12, 2013) [hereinafter "Feb. 12 Tr."]. Matthew Gavula, a paramedic responding to the collision, testified to pronouncing Mr. Sephes dead at the scene. Feb. 11 Tr. at 247. Taken together, this evidence contradicts Carter's claim that Dr. Rosen's testimony was "essential" in establishing the cause and manner of Mr. Sephes' death and a "key ingredient in the Commonwealth establishing its case-in-chief." Pet. at 12. Given the eyewitness accounts and the circumstances surrounding the crash, it cannot be said that the jury needed Dr. Rosen's testimony to find causation between Carter's reckless driving**{2019 U.S. Dist. LEXIS 25}** and Mr. Sephes' death. Commonwealth v. Green, 195 A.3d 1038, 2018 WL 4102963, at *5-6 (Pa. Super. Ct. 2018) (finding that petitioner could not prevail on a similar ineffectiveness of counsel claim because he failed to establish prejudice where additional evidence outside the testimony made it clear that the autopsy report did not independently influence the jury's decision to such an extent that there was a reasonable probability that the verdict would have been different without it).

Thus, trial counsel cannot be found ineffective because objecting to the testimony of Dr. Rosen would have been futile. Furthermore, even if counsel's representation did somehow fall below an objectively reasonable standard in not objecting to Dr. Rosen's testimony, there is no reasonable probability that but for that error, the result of the case would have been different given the aforementioned evidence. Accordingly, Carter has not met his burden under the two-pronged test of Strickland, and, therefore, has not established that he lacked effective assistance of counsel.

D. Carter's Claim that Trial Counsel was Ineffective in Failing to Sufficiently Explain to Him the Plea Offer is Defaulted and Meritless

Carter further asserts that trial counsel was ineffective in failing to adequately**{2019 U.S. Dist. LEXIS 26}** explain the plea deal offering him 15 to 30 years' imprisonment for all charges, which he subsequently rejected. Following his trial, Carter received a sentence of 25 to 50 years' imprisonment-a more severe punishment that he claims is proof of the ineffectiveness of his counsel. This claim is both procedurally defaulted and lacking in merit.

Carter admits that this claim is procedurally defaulted having not raised it in state court. Pet. at 14. He purports to rely on Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) to show cause and actual prejudice in his attempt to excuse this procedural default. In Martinez, the United

States Supreme Court noted that when a state requires a petitioner to raise an ineffective assistance claim on post-conviction review, rather than on direct appeal, a post-conviction relief hearing is the first opportunity the petitioner has to have his or her ineffective assistance claim heard.7 566 U.S. at 9-13. The Court, therefore, concluded that a habeas petitioner may establish cause and prejudice to allow a court to hear a defaulted ineffective assistance claim by showing that his or her post-conviction relief counsel was ineffective in failing to properly raise that claim in the post-conviction relief proceeding. Id. at 13-14. To pursue**{2019 U.S. Dist. LEXIS 27}** such a claim, a petitioner must show that his or her underlying ineffective assistance of counsel claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit" as defined by reference to the standard applicable to determining whether to grant certificates of appealability. Id. at 14 (citing Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)); see also Valentin-Morales v. Mooney, No. 13-3271, 2015 U.S. Dist. LEXIS 16958, 2015 WL 617316, at *4 (E.D. Pa. Feb. 11, 2015) (Miller-El standard applies to Martinez merit analysis). A claim meets that standard if "jurists of reason could disagree with the [state] court's resolution of [petitioner's] constitutional claims or [if] jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327. Carter cannot meet Martinez's requirements because his claim that trial counsel was ineffective in not sufficiently explaining to him the plea deal is baseless.

Here, at a pretrial motion hearing on February 8, 2013, the record reflects that Carter's trial counsel and the prosecutor had discussed the plea offer and that trial counsel wished to speak with Carter again to discuss the plea offer after one of the victims, Mr. Leslie Downer, recently died, potentially exposing Carter to another murder charge. Feb. 8 Tr. at 5. The court allowed trial**{2019 U.S. Dist. LEXIS 28}** counsel another opportunity to discuss the offer with Carter. Id. at 9. After the discussion between trial counsel and Carter, the trial judge explained to Carter the charges against him, convictions for which could result in a sentence of 20 years for each aggravated assault charge in addition to seven years for homicide by vehicle and four years for third-degree murder. Id. at 13. In addition, the trial judge explained that the offer conveyed by the Commonwealth for Carter to plead guilty would result in a 15 to 30-year sentence in exchange for resolving all charges against him. Id. at 11-12. The trial judge explicitly asked: "Just want to be clear that the offer has been communicated to you. Has it been?" Id. at 13. Carter answered in the affirmative. Id. When further questioned whether he had "a full opportunity to talk about your options with your lawyer," Carter replied "Not really," but failed to specifically point out his counsel's failure in explaining the deal to him, instead complaining generally that he was not receiving the best representation and inquiring about a motion which was determined to be a matter better addressed during cross-examination of a Commonwealth witness during the trial. Id. at 13-18. The trial judge**{2019 U.S. Dist. LEXIS 29}** asked Carter: "We'll pick a jury Monday, have 12 of your peers decide how this case will come out. That's what you want, right?" Carter responded: "Yes." Id. at 18-19. Trial counsel requested that the offer remain open over the weekend despite Carter's answer. Id. at 38. Before the trial began, trial counsel once more appeared to discuss the plea offer with Carter. Feb. 11 Tr. at 39. On Monday February 11, 2013, Carter pled not guilty to all charges. Id. at 197-99.

In order for a writ to be issued in such circumstances:

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.Lafler v. Cooper, 566 U.S. 156, 164, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

On the aforementioned evidence, there is no merit to Carter's claim that his trial counsel was ineffective. The record reflects trial counsel discussing with Carter the plea offer on numerous occasions,**{2019 U.S. Dist. LEXIS 30}** including after Mr. Downer died, indicating that trial counsel was both aware of the impact a victim's death might have on the length of a potential sentence and explained the change in circumstances to Carter. In addition, Carter has asserted no more than general allegations of counsel's ineffectiveness rather than specific deficiencies with counsel's explanation of the deal, which cannot entitle him to habeas relief. See Rule 2(c)(2), Rules Governing Section 2254 Cases in the United States District Courts (explaining that a petitioner must state the facts that surround the purported grounds for relief). At no point did Carter claim that he did not understand the offer, answering affirmatively when asked whether the offer had been communicated to him. Feb. 8 Tr. at 13. Furthermore, there is evidence that Carter may have changed his mind about whether to accept the offer or not. On February 8, 2013, Carter stated that he wished to go to trial, Id. at 18-19; on February 11, 2013 trial counsel expressed that Carter wished to accept the Commonwealth's offer, Feb. 11 Tr. at 191-92; and, later that same day, trial counsel indicated that Carter changed his mind again before he finally entered a not guilty plea; id. at 194. The fact that Carter changed his mind about the offer is evidence that**{2019 U.S. Dist. LEXIS 31}** he understood the repercussions of his choice. Carter's view after the fact that he may have pled unwisely cannot establish ineffective assistance of counsel.

In this matter, Carter has not met his burden under Strickland and, thus, has not established that he lacked effective trial counsel. Without ineffective trial counsel, the procedural default of this claim cannot be excused under Martinez.

E. Carter's Claim that Trial Counsel Was Ineffective in Failing to Request a Jury Instruction of Involuntary Manslaughter Lacks Merit

Carter contends that trial counsel was ineffective in failing to request a jury instruction on involuntary manslaughter, thus depriving him of a chance of being convicted for that lesser crime, which would have brought along with it a lesser sentence. Pet. at 16. Instead, the jury was instructed on homicide by vehicle. Feb. 13 Tr. at 163-65. This claim does not entitle Carter to habeas relief.

Once again, counsel cannot be considered ineffective under Strickland for failing to assert a meritless claim. Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000). The Pennsylvania Superior Court found this claim for a lesser charge to be presented to the jury to be baseless, noting that there was not, as Carter has stipulated,**{2019 U.S. Dist. LEXIS 32}** any evidence that could support a conviction of involuntary manslaughter but not homicide by vehicle:

> In order to establish that [Carter] was guilty of homicide by vehicle, the Commonwealth was required to prove that [he] caused the death of [the victim] by acting recklessly or with gross negligence, while violating any law or ordinance applying to the operation of a motor vehicle. 75 Pa. C.S. § 3732; Commonwealth v. Pedota, 2013 PA Super 27, 64 A.3d 634, 636 (Pa. Super. [Ct.] 2013). In order to establish that Appellant was guilty of involuntary manslaughter, the Commonwealth would have to prove that he caused the death of [the victim] by doing an act in a reckless or grossly negligent manner. 18 Pa. C.S. § 2504(a); Pedota, 64 A.3d at 636. Therefore, homicide by vehicle includes all the elements of involuntary manslaughter, plus the additional requirement that the death was caused while violating the [Vehicle Code]. Accordingly, trial counsel would have been entitled to request that involuntary manslaughter be submitted to the jury if a reasonable juror could have found [Carter] guilty of involuntary manslaughter but not guilty of homicide by vehicle.
>
> The evidence at trial, however, clearly established the contrary. In particular, there was

overwhelming evidence that [Carter's] reckless and grossly negligent**{2019 U.S. Dist. LEXIS 33}** conduct consisted of multiple violations of the [Vehicle Code].

[T]he evidence demonstrated that [Cater] recklessly and with gross negligence caused [the victim's] death by driving through a red light at a high rate of speed, thereby violating the laws applying to a motor vehicle. Because no reasonable juror could have found [Carter] guilty of involuntary manslaughter, but not guilty of homicide by vehicle, any request by trial counsel to submit the involuntary manslaughter charge to the jury would have been rejected.PCRA Super. Ct. Op. at 3 (quoting PCRA Trial Ct. Op. at 6-7).

Carter offers no evidence that "a reasonable probability existed that, at least, one reasonable juror would have found him guilty of involuntary manslaughter and not guilty of homicide by vehicle." Pet. at 16. Carter admits that the facts of the case support a conviction for involuntary manslaughter, but does nothing more than reach a conclusory allegation in his claim that the facts would also not support a conviction for homicide by vehicle. Id. As the Superior Court pointed out, the only difference between the two crimes is the element of violating the Vehicle Code. Speeding and running red lights and stop**{2019 U.S. Dist. LEXIS 34}** signs amount to such violations in this case. PCRA Super. Ct. Op. at 3 (quoting PCRA Trial Ct. Op. at 6-7). Because Carter has not demonstrated that he did not engage in these behaviors, he cannot overcome the deference given to the state court's adjudication. Any request by his trial counsel for a jury instruction on involuntary manslaughter would, therefore, have been rejected. See id. Thus, Carter has not shown that his trial counsel was ineffective under Strickland, and consequently, his claim cannot provide a ground for habeas relief.

IV. CONCLUSION

For the foregoing reasons, I recommend that Carter's habeas petition be denied. Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 25th day of June, 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus 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. 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

Footnotes

1

Pursuant to the prison mailbox rule, a pro se prisoner's habeas application is deemed filed on the date he or she delivers it to prison officials for mailing to the district court, not on the date the application was filed with the court. See Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). As Carter signed his habeas petition on May 21, 2018, I will use that date as the date his petition was filed. Pet. (Doc. No. 1) at 18.

2

Insofar as Carter argues that the trial court made a decision that was based on an unreasonable determination of the facts in light of the evidence presented, this claim is without substance. To succeed on such a claim, Carter must rebut the presumption of correctness of the state court's factual determinations by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). He has failed to do so, demonstrating no dispute as to the underlying facts of his claim regarding the admission of evidence of his prior bad acts. Thus, such an accusation cannot serve as the basis for habeas relief.
3

Moreover, the Superior Court held that the trial court was within its discretion in admitting such evidence after Carter failed to distinguish his case from that of Commonwealth v. Riggs, 63 A.2d 780, 784-85, 2012 PA Super 187 (Pa. Super. Ct. 2012), which found that evidence of a defendant's prior acts of fleeing from the police, running a red light, and crashing his car introduced under Rule 404(b) was compelling proof that the defendant had the requisite malice to establish the crime of aggravated assault. Super. Ct. Op. at 8-10. The Superior Court also noted that Carter's claim that the jury may have convicted him based on the allegedly erroneously admitted evidence rather than the facts of the case was dubious because the jury acquitted him for fleeing and eluding the police in this case, despite the fact that the evidence in question spoke directly to that charge. Id.
4

Pennsylvania's sufficiency standard is the same as the federal constitutional standard. Evans v. Court of Com. Pl., 959 F.2d 1227, 1233 (3d Cir. 1992).
5

Even if Carter's claim were to be assessed on its merits, his challenge would still fail. Under Pennsylvania law, a person is guilty of aggravated assault if he or she causes serious bodily injury to another "intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa. Cons. Stat. § 2702(a)(1). The jury determined that Carter injured the three victims as a result of the accident he caused while driving recklessly. Transcript of Record at 192-93, Commonwealth v. Carter, No. CP-51-CR-0007203-2011 (Pa. Ct. Com. Pl. Phila. Cnty. Feb. 12, 2013). The same evidence that supports a finding of malice as discussed below regarding the third-degree murder charge also supports the same finding with respect to the aggravated murder charge. The evidence, including Carter's conduct and his prior bad acts, clearly demonstrates that Carter was reckless and caused such injuries with indifference to the value of human life.
6

To the extent that Carter raises a Confrontation Clause issue rather than an ineffective counsel claim, he is potentially correct in that admission of an autopsy report without accompanying testimony of its author is a violation of the Confrontation Clause. Commonwealth v. Brown, 185 A.3d 316, 329 (Pa. 2018). Here, however, as in Brown, such an error was harmless because there was no reasonable possibility that the error may have contributed to the verdict. Commonwealth v. Young, 748 A.2d 166, 193, 561 Pa. 34 (Pa. 1999). Given the strength of the other evidence upon which the jury decided to convict, this conclusion is not contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. See Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (errors under the Confrontation Clause are subject to harmless error analysis). Thus, this issue cannot be grounds for habeas relief.
7

In Pennsylvania, ineffective assistance claims cannot be brought on direct appeal. Torres-Rivera v. Bickell, No. 13-3292, 2014 U.S. Dist. LEXIS 159669, 2014 WL 5843616, at *16 (E.D. Pa. Nov. 10, 2014) (citing Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726, 738 (Pa. 2002)).

Appendix B

ROBERT CARTER, Petitioner, v. VINCENT MOONEY, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2020 U.S. Dist. LEXIS 92977
CIVIL ACTION No. 18-2366
May 28, 2020, Decided
May 28, 2020, Filed

Editorial Information: Subsequent History

Appeal filed, 06/30/2020

Editorial Information: Prior History

Carter v. Mooney, 2019 U.S. Dist. LEXIS 107910 (E.D. Pa., June 25, 2019)

Counsel **{2020 U.S. Dist. LEXIS 1}ROBERT CARTER**, Petitioner, Pro se, HUNLOCK CREEK, PA.

For **ROBERT CARTER**, Petitioner: TODD M. MOSSER, LEAD ATTORNEY, MOSSER LEGAL, PLLC, PHILADELPHIA, PA.

For VINCENT MOONEY, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: BANAFSHEH AMIRZADEH, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: MITCHELL S. GOLDBERG, J.

Opinion

Opinion by: MITCHELL S. GOLDBERG

Opinion

ORDER

AND NOW, this 28th day of May, 2020, upon consideration of Petitioner Robert Carter's Petition for Writ of Habeas Corpus (ECF No. 1), Respondents Vincent Mooney, the Attorney General of the State of Pennsylvania, and the District Attorney of Philadelphia County's (collectively, "Respondents") "Response in Opposition to Petition for Writ of Habeas Corpus" (ECF No. 18), the Report and Recommendation of United States Magistrate Judge Marilyn Heffley (ECF No. 19), Petitioner's "Request for Leave to File Supplemental Petition and Response in Opposition to the Commonwealth's Response" (ECF No. 20), and Petitioner's "Request for Leave to Supplement and that this Court Treat his Response filed on 7/17/2019 as an Objection to U.S.M.J. Marilyn Heffley's Report [and] Recommendation" (ECF**{2020 U.S. Dist. LEXIS 2}** No. 26), I find the following:

FACTUAL BACKGROUND[1]

1. On April 19, 2013, Petitioner was convicted by a Philadelphia County jury on multiple counts, including third-degree murder, homicide by vehicle, causing an accident involving death while not properly licensed, aggravated assault by vehicle, first-degree aggravated assault, recklessly endangering another person, and receiving stolen property. These charges arose from an April 5,

2011 incident in which Petitioner, driving a stolen vehicle, ran a red light while evading police officers in pursuit and smashed into another driver. The collision resulted in the death of the passenger in the vehicle driven by Petitioner, injury to the driver of the other car, and injury to three pedestrians who were hit during the collision (one of whom later died).

2. On the same date as his conviction, the trial court sentenced Petitioner to an aggregate term of twenty-five to fifty years' imprisonment.

3. Petitioner filed a post-sentence motion, which was denied on August 6, 2013. Thereafter, he timely appealed to the Pennsylvania Superior Court, raising issues regarding (1) the sufficiency and weight of the evidence against him and (2) the trial court's**{2020 U.S. Dist. LEXIS 3}** decision to allow the admission of evidence of prior instances in which Petitioner, while operating a motorized vehicle, had fled from police. On July 15, 2014, the Superior Court rejected these challenges and affirmed the judgment of sentence.

4. On August 4, 2014, Petitioner filed a *pro se* petition pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541 *et seq.*, setting forth multiple claims of ineffective assistance of trial counsel. The PCRA court appointed counsel, who subsequently filed a "no merit" letter and moved to withdraw his representation. The PCRA court relieved the original PCRA counsel and appointed another attorney to represent Petitioner. That attorney also filed a "no merit" letter and moved to withdraw.

5. On February 22, 2016, the PCRA court issued notice pursuant to Pennsylvania Rule of Criminal Procedure 907, advising the parties that it intended to dismiss Petitioner's PCRA petition without a hearing. On March 24, 2015, when no response was filed, the PCRA court dismissed the petition as meritless.

6. Petitioner filed a timely appeal to the Pennsylvania Superior Court. On appeal, Petitioner argued that his trial counsel was ineffective in failing to (1) object**{2020 U.S. Dist. LEXIS 4}** to the autopsy report because the medical examiner who conducted the autopsy did not testify and (2) request that the jury be instructed on involuntary manslaughter as a lesser included offense to homicide by vehicle. On May 26, 2017, the Superior Court found both claims to be meritless and affirmed the dismissal of Petitioner's PCRA petition. On December 20, 2017, Petitioner's petition for allowance of appeal with the Pennsylvania Supreme Court was denied.

7. On June 6, 2018, Petitioner filed a *pro se* petition for writ of habeas corpus in this Court. He seeks habeas relief based on the following: (1) the trial court denied him a fair trial when it admitted evidence of prior bad acts; (2) the evidence was insufficient to support a guilty verdict as to third-degree murder and aggravated assault; (3) trial counsel was ineffective in failing to object to the autopsy report introduced at trial where the coroner who performed the autopsy did not testify as to the report; (4) trial counsel was ineffective in failing to communicate with him as to the advantages and disadvantages of the plea deal before he rejected it; and (5) trial counsel was ineffective in failing to request that the jury**{2020 U.S. Dist. LEXIS 5}** be instructed on involuntary manslaughter as a lesser included offense of homicide by vehicle.

8. I referred the habeas petition to United States Magistrate Judge Marilyn Heffley for a Report and Recommendation ("R&R"). Judge Heffley issued an R&R recommending that (1) Petitioner's claim that the trial court erred in admitting evidence of prior bad acts and thus denied him a fair trial is non-cognizable, procedurally defaulted, and meritless; (2) Petitioner's claim that the evidence did not support his conviction for aggravated assault is procedurally defaulted and meritless and Petitioner's claim that the evidence did not support his conviction for third-degree murder is meritless; (3) Petitioner's claim that trial counsel was ineffective in failing to object to testimony regarding the

autopsy report is meritless; (4) Petitioner's claim that trial counsel was ineffective in failing to sufficiently explain to him the plea offer is procedurally defaulted and meritless; and (5) Petitioner's claim that trial counsel was ineffective in failing to request a jury instruction of involuntary manslaughter as a lesser included offense of homicide by vehicle is meritless.

9. On July 10, 2019, Petitioner**{2020 U.S. Dist. LEXIS 6}** filed a request for leave to file a supplemental petition and response in opposition to the Commonwealth's response to the petition. On July 15, 2019, Judge Heffley dismissed that request as moot, informing Petitioner that he may seek to present any additional arguments in support of his petition to me in the form of objections to the R&R.

10. Over two months later, on September 25, 2019, Petitioner filed a request for leave to supplement his petition and treat his response "filed on 7/17/2019" as an objection to Judge Heffley's R&R.

11. Upon consideration of this request, I construe the arguments raised in Petitioner's July 10, 2019 as objections to the R&R.2

STANDARD OF REVIEW

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

13. Although**{2020 U.S. Dist. LEXIS 7}** courts must give liberal construction to *pro se* habeas petitions, "[o]bjections which merely rehash an argument presented to and considered by a magistrate judge are not entitled to *de novo* review." Gray v. Delbiaso, No. 14-4902, 2017 U.S. Dist. LEXIS 101835, 2017 WL 2834361, at *4 (E.D. Pa. June 30, 2017), appeal dismissed No 17-2569, 2017 U.S. App. LEXIS 28200, 2017 WL 6988717 (3d Cir. 2017); see also Tucker v. Commonwealth, No. 18-201, 2020 U.S. Dist. LEXIS 46568, 2020 WL 1289181, at *1 (E.D. Pa. Mar. 18, 2020). "Where objections do not respond to the Magistrate's recommendation, but rather restate conclusory statements from the original petition, the objections should be overruled." Prout v. Giroux, No. 14-3816, 2016 U.S. Dist. LEXIS 57085, 2016 WL 1720414, at *11 (E.D. Pa. Apr. 29, 2016); see also Luckett v. Folino, No. 09-0378, 2010 U.S. Dist. LEXIS 100055, 2010 WL 3812329, at *1 (M.D. Pa. Aug. 18, 2010) (denying objections to R&R because "[e]ach of these objections seeks to re-litigate issues already considered and rejected by [the] Magistrate Judge . . . .").

DISCUSSION

Objections to Recommendation on First and Third Habeas Claims

14. Petitioner's objections to the recommendation on his first and third habeas claims, identified in Paragraphs 7 and 8 *supra*, are both verbatim statements of the arguments raised in his petition and rejected by Judge Heffley in the R&R. (Pet., ECF No. 1, at 9-12; Pet. Objs., ECF No. 20, at 1-3, 8-9.) These objections seek to re-litigate issues already considered by Judge Heffley and are not entitled to my *de novo* review. Even if these objections were subject to my review, I find no clear error in Judge Heffley's recommendation on these claims.**{2020 U.S. Dist. LEXIS 8}** Therefore, Petitioner's first and third objections are overruled.

Objection to Recommendation on Fourth Habeas Claim

15. Petitioner's objection to the recommendation on his fourth habeas claim, identified in Paragraphs 7 and 8 *supra*, although near-verbatim to the arguments in his petition, responds directly to arguments

relied on by Judge Heffley in the R&R. Petitioner contends that, although it is true that this claim is procedurally defaulted, it meets the exception to default set forth in Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), because the underlying ineffective assistance of trial counsel claim is "substantial" or "has some merit."3 Petitioner argues that the state court record, which allegedly belies Petitioner's claim that trial counsel did not explain the plea offer, does not reflect what actually transpired. Petitioner explains that trial counsel never informed him of the chances of winning at trial or what evidence the Commonwealth would produce to prove its case. He further asserts that "[t]he evidence in the case against Petitioner was very overwhelming and any chance of him getting an acquittal was futile. . . . Had he been aware that he stood no chance at winning this case he would have accepted the Commonwealth's**{2020 U.S. Dist. LEXIS 9}** plea-offer." (Pet. Objs., ECF No. 20, at 4.)

16. Judge Heffley concluded that there was no merit to this claim. Judge Heffley's recommendation is based on the following facts in the state court record:

> At a pretrial motion hearing on February 8, 2013, trial counsel specifically requested that the trial court provide her with an opportunity to speak with Petitioner again regarding the plea offer after a second victim had died.
>
> After this discussion between trial counsel and Petitioner, the trial judge explained to Petitioner the charges against him, convictions for which could result in a sentence of 20 years for each aggravated assault charge in addition to seven years for homicide by vehicle and four years for third-degree murder.
>
> The trial judge also explained that the plea offer conveyed by the Commonwealth for Petitioner would result in a 15 to 30-year sentence in exchange for resolving all charges against him.
>
> When asked by the trial judge whether the plea offer had been communicated to him, Petitioner answered in the affirmative.
>
> The trial judge questioned Petitioner further, asking whether Petitioner had a full opportunity to talk about his options with his trial**{2020 U.S. Dist. LEXIS 10}** counsel. Petitioner replied, "Not really," but, in his explanation of what was meant by this statement, Petitioner failed to point out deficiencies in what his counsel had explained to him regarding the deal. Instead, he complained generally about his dissatisfaction with trial counsel's representation. Plaintiff also never claimed that he did not understand the plea offer.
>
> After Petitioner expressed to the trial judge that he was not receiving the best representation, the trial judge informed Petitioner that a jury would be selected the Monday after the pretrial hearing to decide his case. The trial judge explicitly asked Petitioner if that was what he wanted, which Petitioner answered in the affirmative.
>
> Trial counsel requested that the plea offer remain open over the weekend despite Petitioner's response, and, before trial began, trial counsel once more appeared to discuss the plea offer with Petitioner.
>
> Petitioner pled not guilty to all charges on Monday, February 11, 2013.

17. Judge Heffley also points out evidence in the record showing that Petitioner changed his mind about whether to accept the plea offer. On February 8, 2013, Petitioner said that he wished to go to trial;**{2020 U.S. Dist. LEXIS 11}** on February 11, 2013, trial counsel explained that Petitioner wished to accept the Commonwealth's offer, and later that same day, trial counsel stated that Petitioner had changed his mind again before Petitioner finally entered a not guilty plea. Judge Heffley concludes that the fact that Petitioner changed his mind further demonstrates that he understood the

repercussions of his choice and that Petitioner's concern, after the fact, that he may have pled unwisely cannot establish an ineffective assistance of counsel claim.

18. Petitioner responds that his allegations of ineffective assistance of trial counsel "versus the allegations of the Commonwealth create[] 'disputed factual issue' [sic] warranting an evidentiary hearing." (Pet. Objs., ECF No. 20, at 7.)

19. Ineffective assistance of counsel claims are analyzed under the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to determine whether a defendant's constitutional rights have been violated by trial counsel's performance. Id. at 687. First, "the defendant must show that counsel's performance was deficient," i.e., that it fell below "prevailing professional norms." Id. at 687-88. Second, "the defendant must show that the deficient performance prejudiced the defense," i.e.**{2020 U.S. Dist. LEXIS 12}** "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. To prove an unfair trial, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

20. The standard for assessing counsel's performance under the first prong of Strickland is whether counsel's representation fell below an objective standard of reasonableness:

> Courts must be highly deferential to counsel's reasonable strategic decisions . . . . Thus, the court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel. . . . the mere existence of alternative-even preferable or more effective-strategies does not satisfy the requirements of demonstrating ineffectiveness under [Strickland].Enright v. U.S., 347 F. Supp. 2d 159, 166 (D.N.J. 2004) (internal quotation marks omitted) (citing Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002)).

21. In a recent pair of cases, the Supreme Court held that defense counsel has a duty to communicate formal plea offers to the defendant and that failure to properly communicate**{2020 U.S. Dist. LEXIS 13}** an offer may constitute ineffective assistance of counsel. Missouri v. Frye, 566 U.S. 134, 145, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). In order to effectively assist their clients in the plea-bargaining process, counsel must provide a criminal defendant "enough information 'to make a reasonably informed decision whether to accept a plea offer.'" U.S. v. Bui, 795 F.3d 363, 366 (3d Cir. 2015) (quoting Shotts v. Wetzel, 724 F.3d 364, 376 (3d Cir. 2013)). To establish that counsel's improper communication of a plea offer constitutes ineffective assistance, a defendant must show that, "but for [counsel's failure,] there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or the sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler v. Cooper, 566 U.S. 156, 164, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

22. The United States Court of Appeals for the Third Circuit has stated that "a habeas petitioner states a claim under the Sixth Amendment when he contends that the advice he received from counsel regarding a plea bargain was so insufficient or incorrect as to undermine his ability to make an intelligent decision whether to accept the plea offer." Enright, 347 F. Supp. 2d at 164 (citing U.S. v. Day, 969 F.2d 39, 43 (3d Cir. 1992)).

23. The Third Circuit has not defined a precise standard of performance of defense counsel in the plea-bargaining**{2020 U.S. Dist. LEXIS 14}** context. See Day, 969 F.2d at 43.4 But it has stated that "'[k]knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.'" U.S. v. Booth, 432 F.3d 542, 549 (3d

Cir. 2005) (quoting Day, 969 F.2d at 44).

24. Here, although Petitioner's ineffective assistance of trial counsel claim regarding the plea offer was never raised in state court, Judge Heffley's analysis on the merits of this habeas claim was based on the trial court record.

25. I find the trial court record to reflect that: (1) trial counsel met with Petitioner several times to discuss the plea offer, asking the trial judge on at least three occasions to either give trial counsel another opportunity to speak with Petitioner about the plea offer or leave the plea offer open in order to provide Petitioner with more time to consider it; (2) trial counsel understood the impact of the second victim's death and requested that the trial judge allow her an opportunity to discuss the consequences of that death with Petitioner (Petitioner acknowledges that trial counsel did, in fact, inform him of the plea offer and the consequences of the second victim's death (Pet. Objs., ECF No. 20, at 6)); (3) the trial**{2020 U.S. Dist. LEXIS 15}** judge explained to Petitioner the charges against him and the sentence that could result from each charge-20 years for each aggravated assault charge, seven years for homicide by vehicle, and four years for third-degree murder; (4) the trial judge informed Petitioner that the Commonwealth's offer would result in a sentence of 15 to 30 years in exchange for resolving all charges against him; (4) the trial judge explicitly questioned Petitioner about the plea offer and whether he understood his options; (5) although Petitioner expressed general dissatisfaction with trial counsel's representation, Petitioner did not raise any specific deficiencies with trial counsel's explanation of the plea offer (5) Petitioner affirmed to the trial judge that the plea offer was communicated to him and that he wanted to proceed to trial; (6) and Petitioner changed his mind regarding the plea at least twice on the eve of trial before ultimately entering a plea of not guilty. Based on this evidence, I conclude that Petitioner's trial counsel provided constitutionally competent representation during the plea-bargaining process.

26. The only deficiencies that Petitioner now raises are trial counsel's alleged**{2020 U.S. Dist. LEXIS 16}** failure to inform him of his chances of winning at trial and what evidence the Commonwealth had to produce in order to prove its case against him.5

27. Taking these alleged deficiencies as true, I find no clear error in Judge Heffley's conclusion that, based on the standard set forth in Lafler, Petitioner's claim is meritless and, therefore, does not excuse procedural default under Martinez. Petitioner baldly states that, if he had known that he had no chance of winning at trial, then he would have accepted the plea offer. However, I find that holding trial counsel to such a standard of performance is not reasonable under Strickland. See Lee v. U.S., 137 S. Ct. 1958, 1966, 198 L. Ed. 2d 476 (2017) ("[C]ommon sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty involves assessing the respective consequences of a conviction after trial and by plea."); Boston v. Mooney, No. 14-229, 2015 U.S. Dist. LEXIS 148106, 2015 WL 6674530, at *19 (E.D. Pa. Jan. 9, 2015) ("[I]t must be held that a competent defense attorney may reasonably decline to give a probability estimate . . . . In that regard, a defendant of ordinary intelligence can reasonably infer the probabilities of success on that information alone."); see also Boston v. Mooney, 141 F. Supp. 3d 352, 362 (E.D. Pa. Oct. 29, 2015) (recognizing the proposition**{2020 U.S. Dist. LEXIS 17}** that "no specific estimate of the trial outcome is required" and that the defense attorney's refusal to quantify any probability of success at trial was reasonable).

28. Although Petitioner considers it preferable or even more effective, trial counsel was not reasonably required to tell Petitioner that he had no chance of winning at trial based on the Commonwealth's evidence in order to provide effective assistance in the plea-bargaining context. I cannot engage in a *post hoc* exercise in order to guarantee Petitioner a perfect trial with optimally proficient counsel. See Marshall, 307 F.3d at 85. Rather, I can only guarantee that Petitioner received a fair trial with

constitutionally competent counsel, and I conclude that Petitioner received constitutionally competent representation regarding the plea offer.

29. The state court record shows that Petitioner was aware of the comparative sentence exposure of standing trial and accepting the plea offer. This information, crucial to Petitioner's decision regarding the plea, was explicitly communicated to Petitioner by the trial judge. See U.S. v. Booth, 432 F.3d at 549. And Petitioner admits that his trial counsel communicated the plea offer to him and that she discussed with him the consequences**{2020 U.S. Dist. LEXIS 18}** of the second victim's death. The record also reflects that trial counsel made repeated efforts to discuss the plea offer with Petitioner and provide him with more time to consider it. Finally, the state court record suggests that Petitioner understood the advantages and disadvantages of the plea offer because, after he rejected the offer and his counsel's efforts provided him with more time to consider the offer over the weekend, Petitioner changed his mind and agreed to accept the offer before ultimately changing his mind again and pleading not guilty.

30. I therefore conclude that Petitioner has not established that trial counsel's alleged failure to inform him that he had no chance of winning at trial was so insufficient or incorrect that it undermined his ability to make an intelligent decision on whether to accept the plea offer. See Day, 969 F.2d at 43.

31. I also find that the alleged deficiencies relied on by Petitioner fail to establish that but for the ineffective advice of counsel there was a reasonable probability that the plea offer would have been presented to the trial court. Petitioner was aware of the comparative sentencing exposure between standing trial and accepting the plea offer,**{2020 U.S. Dist. LEXIS 19}** and he twice changed his mind before entering a plea of not guilty. Apart from Petitioner's bare allegation that he would have accepted the plea offer if he had known that he had no chance of winning, Petitioner states no facts to support that assertion or to undermine the evidence in the record belying that argument. See Lee, 137 S. Ct. at 1966 (reasoning that, even when the consequences of a conviction after trial and by plea are, "from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive.")

WHEREFORE, for the foregoing reasons, it is hereby **ORDERED** that:

1. Petitioner's "Request for Leave to Supplement and that this Court Treat His Response Filed on 7/17/19 as an Objection to U.S.M.J. Marilyn Heffley's Report [and] Recommendation" (ECF No. 26) is **GRANTED** as to the request to construe Petitioner's response filed in July 2019 as an objection to the R&R. The request is **DENIED** in all other respects.

2. Petitioner's Objections (ECF No. 20) are **OVERRULED**.

3. The Report and Recommendation (ECF No. 19) is **APPROVED** and **ADOPTED**.

4. The Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED** with prejudice and **DISMISSED** without a hearing.

5. There is no basis for**{2020 U.S. Dist. LEXIS 20}** the issuance of a certificate of appealability.

6. The Clerk of Court is directed to mark this case **CLOSED**.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

Footnotes

1

In lieu of engaging in a lengthy discussion of the factual background of Petitioner's state conviction and resulting sentence, I incorporate by reference the factual and procedural history as set forth in the Report and Recommendation.

2

In his September 25, 2019 filing, Petitioner also requests that he be permitted to supplement his petition to raise one additional claim that he "uncovered" with the assistance of a "fellow inmate/paralegal." (Pet. Req. to Suppl., ECF No. 26, at 2.) Petitioner claims that his trial counsel was ineffective for failing to request that the jury be instructed on involuntary manslaughter as a lesser included offense of third-degree murder. First, I do not construe Petitioner's request to add this habeas claim as an application for a second or successive habeas petition because no final judgment has been rendered on the merits of any of the claims in Petitioner's pending habeas petition. See 28 U.S.C. § 2244(a) ("No circuit or district judge shall be required to entertain an application for writ of habeas corpus . . . if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus . . . .").

Yet, I do conclude that Petitioner's request is time-barred. Petitioner submitted his request to supplement the habeas petition long after the one-year period of limitation had lapsed. See 28 U.S.C. § 2244(d)(1). The United States Court of Appeals for the Third Circuit has explained that, "allowing a habeas petitioner to amend a habeas petition in order to raise a new claim or theory of relief would frustrate Congress' intent under the AEDPA. But . . . insofar as a petitioner seeks to amend his petition to 'provide factual clarification or amplification after the expiration of the one-year period of limitations, then Fed. R. Civ. P. 15(c)[(1)]-describing when an amendment relates back to an original pleading-governs.'" Peterson v. Brennan, 196 F. App'x 135, 140-1 (3d Cir. Sept. 26, 2006) (quoting U.S. v. Thomas, 221 F.3d 430 (3d Cir. 2000)). Here, Petitioner does not seek to provide factual clarification or amplification of one of his current habeas claims. Instead, he explicitly seeks to supplement his petition to add "one additional claim for relief that warrants federal habeas review." (Pet. Req. to Suppl., ECF No. 26, at 2.) Petitioner currently argues in his petition that his trial counsel was ineffective for failing to request that the jury be instructed on involuntary manslaughter as a lesser included offense of homicide by vehicle. Now, he seeks to add an ineffective assistance of trial counsel claim based on how the jury was instructed as to a different charge, third degree murder, which, as Petitioner acknowledges, states an independent ground for habeas relief. For this reason, I conclude that Petitioner's new habeas claim is time-barred and will deny his request to supplement the habeas petition.

3

In Martinez, the United States Supreme Court noted that when a state requires a petitioner to raise an ineffective assistance claim on post-conviction review, rather than on direct appeal, a post-conviction relief hearing is the first opportunity the petitioner has to have his or her ineffective assistance claim heard. 566 U.S. at 9-13. The Court, therefore, concluded that a habeas petitioner may establish cause and prejudice to allow a court to hear a defaulted ineffective assistance claim by showing that his or her post-conviction relief counsel was ineffective in failing to properly raise that claim in the post-conviction relief proceeding. Id. at 13-14. To pursue such a claim, a petitioner must show that his or her underlying ineffective assistance of counsel claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit" as defined by reference to the standard

applicable to determining whether to grant certificates of appealability. Id. at 14.
4

Providing incorrect advice regarding a possible plea is not *per se* deficient. See, e.g., Hill v. Lockhart, 474 U.S. 52, 60, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (reserving the issue of whether incorrect advice regarding parole eligibility could be deemed deficient performance); Day, 969 F.2d at 43; United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989) (reserving the issue of whether counsel's performance was deficient in light of holding that petitioner was not prejudiced by counsel's failure to inform him of deportation consequences of guilty plea).
5

I note that trial counsel's alleged failure to explain to Petitioner what evidence the Commonwealth had to produce in order to prove its case against him was not raised in the habeas petition and was, therefore, not before Judge Heffley. Petitioner's attempt to raise new facts in his objections to Judge Heffley's R&R that he failed to previously raise in his petition or at any point before the R&R was issued does not form a sufficient basis to challenge the R&R's recommendation that this request for habeas relief be denied. "A habeas petition must 'specify all grounds for relief available to the petitioner and state the facts supporting each ground.'" Castillo v. Fisher, No. 14-0418, 2018 U.S. Dist. LEXIS 17677, 2018 WL 701857, at *1 (M.D. Pa. Feb. 2, 2018) (quoting Mayle v. Felix, 545 U.S. 644, 655, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)).

Appendix C

DLD-121 March 18, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2348**

ROBERT CARTER,
Appellant

v.

SUPERINTENDENT RETREAT SCI; ET AL.

(E.D. Pa. Civ. No. 2-18-cv-02366)

Present: JORDAN, KRAUSE, and PHIPPS, Circuit Judges

Submitted is Appellant's document titled, "Applicant-Appellant's Brief in Support of Application for Certificate of Appealability," which the Court may wish to construe as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). The District Court ruled that Carter's claim (4) asserting ineffective assistance of trial counsel during the plea process was procedurally defaulted, but not excused under Martinez v. Ryan, 566 U.S. 1, 11 (2012) (holding that cause for the default of an ineffective assistance of trial counsel claim may be established where post-conviction counsel was ineffective and claim has "some merit"). Under these circumstances, "a COA may issue only if the petitioner shows that: (1) 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling;' and (2) 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.'" Pabon v. Superintendent, SCI-Mahanoy, 654 F.3d 385, 392 (3d Cir. 2011) (quoting Slack v. McDaniel, 529 U.S. 473, 478 (2000)). For essentially the same reasons given by the District Court, Carter cannot meet that standard. See Lafler v.

Cooper, 566 U.S. 156, 163 (2012); United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992) (noting that the advice petitioner received was "so insufficient or incorrect as to undermine his ability to make an intelligent decision whether to accept the plea offer"). The District Court did not err by declining to hold an evidentiary hearing on this claim. See 28 U.S.C. § 2254(e)(2); see also Palmer v. Hendricks, 592 F.3d 386, 394 (3d Cir. 2010) (ruling there was no abuse of discretion to deny evidentiary hearing where petitioner failed to make a prima facie showing of prejudice); Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

A True Copy:

Patricia A. Dodszuweit

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

Dated: March 24, 2021
CLW/cc: Todd Mosser, Esq.

PATRICIA S. DODSZUWEIT

CLERK

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
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TELEPHONE
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March 25, 2021

District Attorney Philadelphia
Philadelphia County Office of District Attorney
3 South Penn Square
Philadelphia, PA 19107

Todd M. Mosser, Esq.
448 North 10th Street
Suite 502
Philadelphia, PA 19123

RE: Robert Carter v. Superintendent Retreat SCI, et al
Case Number: 20-2348
District Court Case Number: 2-18-cv-02366

ENTRY OF JUDGMENT

Today, **March 25, 2021** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

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

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

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

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

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

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

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Carmella
Case Manager
267-299-4928

cc: Ms. Kate Barkman

Appendix D

COMMONWEALTH OF PENNSYLVANIA v. ROBERT CARTER, Appellant
SUPERIOR COURT OF PENNSYLVANIA
2017 Pa. Super. Unpub. LEXIS 1827; 170 A.3d 1220
No. 1195 EDA 2016
May 16, 2017, Decided
May 16, 2017, Filed

Notice:

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Editorial Information: Subsequent History

Appeal denied by Commonwealth v. Carter, 176 A.3d 851, 2017 Pa. LEXIS 3783 (Pa., Dec. 20, 2017)

Editorial Information: Prior History

Appeal from the PCRA Order entered March 24, 2016, in the Court of Common Pleas of Philadelphia County, Criminal Division, at No(s): CP-51-CR-0007203-2011.Commonwealth v. Carter, 105 A.3d 791, 2014 Pa. Super. LEXIS 3441 (Pa. Super. Ct., July 15, 2014)
Judges: BEFORE: MOULTON, RANSOM, and FITZGERALD,* JJ. MEMORANDUM BY RANSOM, J.

Opinion

Opinion by: RANSOM

Opinion

MEMORANDUM BY RANSOM, J.:

Appellant, **Robert Carter**, appeals *pro se* from the March 24, 2016 order denying his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

The pertinent facts and procedural history, as gleaned from our review of the certified record, are as follows. On April 5, 2011, police observed Appellant operating a stolen car, activated their lights and sirens, and began following the vehicle. Instead of pulling over, Appellant ran a stop sign and accelerated. A high speed-chase ensued, which ultimately ended when Appellant hit another car and crashed into a building. Appellant's passenger, who was his good friend, was ejected upon impact and died at the scene. The person in the other car also suffered serious injury, as well as three pedestrians who were standing on the sidewalk waiting for a bus.

On February 13, 2013, a jury convicted Appellant of third-degree murder, homicide by vehicle, and related charges. On April 19, 2013, the trial court sentenced Appellant to an aggregate term of twenty-five to fifty years of imprisonment. Appellant filed a post-sentence motion, which the trial court denied on August 6, 2013. Appellant timely filed an appeal to this Court, in which he challenged the sufficiency and weight of the evidence supporting his convictions, as well as a claim that the trial court abused its discretion in allowing the Commonwealth to introduce evidence that, on three prior occasions, he had fled from police while operating a motor vehicle or ATV. In an unpublished

memorandum filed on July 15, 2014, we rejected Appellant's claims and, therefore, affirmed his judgment of sentence. ***Commonwealth v. Carter***, 105 A.3d 791 (Pa. Super. 2014) (unpublished memorandum).

Appellant timely filed a PCRA petition in which he raised certain claims of ineffective assistance of trial counsel. After a change of appointed-counsel, PCRA counsel ultimately filed a "no-merit" letter and petition to withdraw pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 379 Pa. Super. 390, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).1 On February 22, 2016, the PCRA court issued Pa.R.Crim.P. 907 notice of intent to dismiss Appellant's PCRA petition without a hearing. Appellant did not file a response. By order entered March 24, 2016, the PCRA court dismissed Appellant's PCRA petition. This appeal follows. Both Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Within his brief, Appellant asserts that the PCRA court erred in denying his PCRA petition without first holding an evidentiary hearing because he raised a genuine issue of material fact as to whether trial counsel was ineffective for failing to: 1) object to the *nolle prosequi* of the involuntary manslaughter charge and request that the jury be instructed on this lesser-included offense; 2) investigate and present witnesses on his behalf; 3) object to his removal from the courtroom without the trial court conducting a colloquy to ensure that the waiver of his presence was knowing and intelligent; 4) object to the autopsy report when the coroner who conducted the autopsy did not testify at trial; 5) object when inadmissible hearsay was introduced at trial and submitted to the jury to consider in establishing malice; 6) object when evidence of prior bad acts was admitted where such bad acts were actually dismissed and therefore inadmissible; and 7) to file a pre-trial motion asserting the violation of his speedy trial rights. ***See*** Appellant's Brief at 4. We will address these claims in the order presented.

When examining a post-conviction court's grant or denial of relief, we are limited to determining whether the court's findings were supported by the record and whether the court's order is otherwise free of legal error. ***Commonwealth v. Quaranibal***, 2000 PA Super 371, 763 A.2d 941, 942 (Pa. Super. 2000). We will not disturb findings that are supported in the record. ***Id.*** The PCRA provides no absolute right to a hearing, and the post-conviction court may elect to dismiss a petition after thoroughly reviewing the claims presented and determining that they are utterly without support in the record. ***Id.***

Because Appellant's claims challenge the stewardship of trial counsel, we apply the following principles. The law presumes counsel has rendered effective assistance. ***Commonwealth v. Rivera***, 2010 PA Super 237, 10 A.3d 1276, 1279 (Pa. Super. 2010). The burden of demonstrating ineffectiveness rests on Appellant. ***Id.*** To satisfy this burden, Appellant must plead and prove by a preponderance of the evidence that: "(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonably probability that the outcome of the challenged proceedings would have been different." ***Commonwealth v. Fulton***, 574 Pa. 282, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the appellant's ineffective assistance of counsel claim. ***Commonwealth v. Jones***, 571 Pa. 112, 811 A.2d 994, 1002 (Pa. 2002).

In assessing a claim of ineffectiveness, when it is clear that appellant has failed to meet the prejudice prong, the court may dispose of the claim on that basis alone, without a determination of whether the first two prongs have been met. ***Commonwealth v. Travaglia***, 541 Pa. 108, 661 A.2d 352, 357 (Pa. 1995). Counsel will not be deemed ineffective if any reasonable basis exists for counsel's actions. ***Commonwealth v. Douglas***, 537 Pa. 588, 645 A.2d 226, 231 (Pa. 1994). Even if counsel had no reasonable basis for the course of conduct pursued, however, an appellant is not entitled to relief if he

fails to demonstrate the requisite prejudice which is necessary under Pennsylvania's ineffectiveness standard. ***Douglas***, 645 A.2d at 232.

Appellant first claims that trial counsel was ineffective for failing to object to the withdrawal of the involuntary manslaughter charge and for failing to request that the jury be instructed on that crime because it is a lesser included offense of homicide by vehicle.

This Court has summarized:

> There is no requirement for the trial judge to instruct the jury pursuant to every request made to the court. In deciding whether a trial court erred in refusing to give a jury instruction, we must determine whether the court abused its discretion or committed an error of law.
>
> A defendant is entitled to a [jury] charge on a lesser-included offense only where the evidence has been made an issue in the case **and the evidence would reasonably support such a verdict**. Instructions regarding matters which are not before the court or which are not supported by the evidence serve no purpose other than to confuse the jury.***Commonwealth v. Phillips***, 2008 PA Super 30, 946 A.2d 103, 110 (Pa. Super. 2008) (citations omitted). "An offense may be considered a lesser included offense if each and every element of the lesser offense is necessarily an element of the greater offense." ***Commonwealth v. Brandon***, 2013 PA Super 285, 79 A.3d 1192, 1194 (Pa. Super. 2013).

Here, the PCRA court determined that the evidence presented would not support an involuntary manslaughter conviction:

> In order to establish that [Appellant] was guilty of homicide by vehicle, the Commonwealth was required to prove that [he] caused the death of [the victim] by acting recklessly or with gross negligence, while violating any law or ordinance applying to the operation of a motor vehicle. 75 Pa.C.S. § 3732; ***Commonwealth v. Pedota***, 2013 PA Super 27, 64 A.3d 634 636 (Pa. Super. 2013). In order to establish that [Appellant] was guilty of involuntary manslaughter, the Commonwealth would have to prove that [he] caused the death of [the victim] by doing an act in a reckless or grossly negligent manner. 18 Pa.C.S. § 2504(a); ***Pedota***, 64 A.3d at 636. Therefore, homicide by vehicle includes all the elements of involuntary manslaughter, plus the additional requirement that the death was caused while violating the [Vehicle Code]. Accordingly, trial counsel would have been entitled to request that involuntary manslaughter be submitted to the jury if a reasonable juror could have found [Appellant] guilty of involuntary manslaughter but not guilty of homicide by vehicle.
>
> The evidence at trial, however, clearly established the contrary. In particular, there was overwhelming evidence that [Appellant's] reckless and grossly negligent conduct consisted of multiple violations of the [Vehicle Code].
>
> ***
>
> [T]he evidence demonstrated that [Appellant] recklessly and with gross negligence caused [the victim's] death by driving through a red light at a high rate of speed, thereby violating the laws applying to a motor vehicle. Because no reasonable juror could have found [Appellant] guilty of involuntary manslaughter, but not guilty of homicide by vehicle, any request by trial counsel to submit the involuntary manslaughter charge to the jury would have been rejected.PCRA Court Opinion, 6/20/16, at 6-7.

Our review of the evidence presented at trial supports the PCRA court's conclusions. Trial counsel cannot be found ineffective for pursuing a meritless claim. ***Commonwealth v. Loner***, 2003 PA Super 393, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*). Thus, Appellant's first issue fails.

In his second issue, Appellant claims that trial counsel was ineffective for failing to call the victim's sister to testify on his behalf. ***See*** Appellant's Brief at 15. In order to establish that trial counsel was ineffective for failing to investigate and/or call a witness at trial, a PCRA petitioner must demonstrate that:

> (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced appellant.***Commonwealth v. Hall***, 2005 PA Super 33, 867 A.2d 619, 629 (Pa. Super. 2005).

During the final day of the proceedings, trial counsel informed the court that she had been approached by members of the victim's family, and that the victim's sister "has requested to testify during the trial regarding the relationship between the two." N.T., 2/13/13, at 82. The trial court agreed with trial counsel's assessment that such testimony was "inappropriate" and more relevant as a victim impact statement at sentencing. ***Id.*** The trial court then informed the victim's sister that she had no relevant evidence for trial, but that she could testify at sentencing. ***See id.*** at 83. Given these circumstances, the only ***Hall*** factor at issue is whether the absence of testimony from the victim's sister prejudiced Appellant. According to Appellant, "[h]ad the jury been provided the opportunity to consider [his] friendship with the [victim] coming from a victim herself, a reasonable probability exists that the results would have been different." Appellant's Brief at 15.

The PCRA court found no merit to Appellant's claim:

> [A]ny evidence regarding [Appellant's] relationship with the [victim] would have been irrelevant. The [victim] was a passenger in a car being recklessly driven by [Appellant] at the time of the crash that led to the charges in this case. There was never any contention that [Appellant] intended to harm the [victim]. Therefore, evidence of a close relationship between [Appellant] and the [victim] would not, in any manner, have refuted the Commonwealth's case.PCRA Court Opinion, 6/20/16, at 8. We agree. Moreover, after reading the trial transcripts, it is clear that the jury was aware, via arguments made by both the prosecutor and trial counsel, that Appellant and the victim were good friends. ***See, e.g.***, N.T., 2/11/13, at 223 (in opening to the jury, the prosecutor asserts the circumstances ultimately resulting in the victim's death "started out for [Appellant] and his friend as a joy ride in a stolen vehicle"); N.T., 2/13/13 at 90 (in closing to the jury, trial counsel states that "two young guys out in a fancy Acura, driving around for a joy ride" ends up in a tragic accident where "one of the people in the car, who is good friends with [Appellant], is deceased"). Once again, trial counsel cannot be faulted for failing to pursue this meritless claim. ***Loner, supra***.

In his third issue, Appellant asserts that trial counsel was ineffective for failing to object when he was removed from the courtroom without the trial court first conducting a waiver colloquy. We agree with the PCRA court's conclusion that this claim is waived because it does not appear in Appellant's *pro se* petition, or in a Pa.R.Crim.P. 907 response, and is thus inappropriately raised for the first time on appeal. ***See generally***, Pa.R.A.P. 302(a); ***Commonwealth v. Rigg***, 2014 PA Super 11, 84 A.3d 1080, 1084-85 (Pa. Super. 2014). Appellant's attempt to circumvent waiver by alleging a "layered ineffectiveness claim" with regard to his first-court appointed post-conviction counsel, ***see*** n.1, is unavailing. ***See*** Appellant's Brief at 16. The fault for failing to raise this claim via his original petition, or in response to the PCRA court's Pa.R.Crim.P. 907 notice, lies wholly upon Appellant himself.

Moreover, Appellant's claim is specious. A review of the record reveals that the only reason no colloquy was conducted was because Appellant refused to respond to the trial court's attempt to

provide him with one. ***See*** N.T., 2/13/13, at 41-42. Nevertheless, the record also establishes that Appellant was moved to the back of the courtroom where he could hear the proceedings, and that he decided to return to the courtroom prior to the court's charge to the jury. ***See id.***, at 45-47; 142-143. Thus, Appellant's third issue fails.

In his fourth issue, Appellant argues that trial counsel was ineffective for failing to object to the admission of the autopsy report introduced through the testimony of a forensic pathologist, because the report was introduced to establish an element of the crimes charged, but the author of the report did not testify. According to Appellant, his inability to cross-examine the coroner who conducted the autopsy violated his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. ***See*** Appellant's Brief at 17-19.

The PCRA court found Appellant's ineffectiveness claim to lack arguable merit:

> Under Pennsylvania law, a medical examiner who did not perform the autopsy at issue in the case may still testify as to the cause and manner of death provided that the testifying expert is qualified and sufficiently informed so as to be able to render his or her own opinion. ***Commonwealth v. Buford***, 2014 PA Super 224, 101 A.3d 1182, 1198 (Pa. Super. 2014) (*citing* ***Commonwealth v. Ali***, 608 Pa. 71, 10 A.3d 282, 306-307 (Pa. 2010)). Here, Dr. Allison Hunt, performed [the victim's] autopsy, but was no longer employed by the Philadelphia Medical Examiner's Office by the time of [Appellant's] trial. N.T., 2/13/13 at 55. As a result, Dr. Aaron Rosen reviewed Dr. Hunt's report, as well as autopsy photos and toxicology reports. N.T., 2/13/13 at 54-55. Dr. Rosen testified that, after reviewing these materials, he formed his own, independent opinions and conclusions regarding [the victim's] death. N.T., 2/13/13 at 55. Although Dr. Hunt's report was reviewed by Dr. Rosen and admitted into evidence, Dr. Rosen never revealed any of Dr. Hunt's opinions or conclusions and the report was never presented to the jury. Because Dr. Rosen reached his own independent conclusions regarding cause and manner of death after reviewing the materials in the file, his opinions were properly admitted even though Dr. Hunt had performed the autopsy. ***Buford***, 101 A.3d at 1198.PCRA Court's Opinion, at 9-10. We agree with the PCRA court's conclusions that Appellant's underlying claim regarding the autopsy report is meritless. Thus, trial counsel cannot be deemed to be ineffective for failing to object to this admissible evidence. ***Loner, supra***.

In his fifth issue, Appellant argues that trial counsel was ineffective for failing to object when inadmissible hearsay was introduced to the jury to consider in establishing malice. According to Appellant:

> [He] has a 5th Amendment Right to remain silent and not be a witness against himself. This right was stripped when the Commonwealth called Matthew Gavula to testify. Gavula testified to a statement purportedly made by Appellant which the jury was instructed to consider in determining the mens rea of Appellant on the most serious offense, third degree murder. Trial counsel failed to object and thus, prejudiced Appellant as he was convicted on inadmissible hearsay.Appellant's Brief at 19.

Matthew Gavula was one of the first responders that spoke with Appellant upon arriving at the crash scene. Mr. Gavula was the first witness called by the Commonwealth and testified that when he asked Appellant what happened, a "[t]ypical question on an accident scene," Appellant responded, "They were chasing me." N.T., 2/11/13, at 268. Mr. Gavula then asked Appellant to whom he was referring, and Appellant stated "[t]he police." ***Id.*** Trial counsel did not object to this testimony, and she did not question Mr. Gavula further regarding Appellant's statement.

The PCRA court found no merit to Appellant's claim because Mr. Gavula's testimony was not

inadmissible:

> Out-of-court statements made by a party offered against that party at trial are admissible under an exception to the hearsay rule. Pa.R.E. 803(25). As the statement at issue was made by [Appellant], and offered by the Commonwealth, its admission did not contravene the hearsay rule. ***Id.***PCRA Court Opinion, 6/20/16, at 10-11. We agree with the PCRA court's conclusion. Appellant's statement to Mr. Gavula qualified as an "admission of a party opponent" under the exception to the hearsay rule. ***See*** Pa.R.E. 803(25); ***Commonwealth v. Weiss***, 622 Pa. 663, 81 A.3d 767, 800 (Pa. 2013) (explaining witness's testimony that the defendant threatened to shoot the police if they knocked at his door was admissible under Pa.R.E. 803(25)). Thus, because trial counsel cannot be deemed ineffective for failing to raise a meritless objection, ***Loner, supra***, Appellant's fifth issue fails.

In his sixth issue, Appellant argues that trial counsel was ineffective for failing to object to the Commonwealth's admission of evidence of a prior bad act committed by Appellant in 2007 because that proceeding was dismissed in its entirety. ***See*** Appellant's Brief at 20. Our review of the record supports the PCRA court's conclusion that this claim is waived because it was not raised in Appellant's *pro se* petition or in response to the PCRA court's Pa.R.Crim.P. 907 notice. ***See*** PCRA Court Opinion, 6/20/16, at 11 (citing ***Rigg, supra***). Nevertheless, we note that this Court rejected Appellant's challenge to the admissibility of these prior incidents into evidence. ***See Carter, supra***, memorandum opinion at 10-13. Thus, the claim has been previously litigated under the PCRA, ***see*** 42 Pa.C.S.A. § 9544(a), and Appellant's sixth claim fails.

In his final issue, Appellant asserts that trial counsel was ineffective for failing to file a pretrial motion asserting that his right to a speedy trial under Pa.R.Crim.P. 600 was violated. Once again, our review of the record supports the PCRA's court's conclusion that this claim was not preserved below and, therefore, is inappropriately being raised for the first time on appeal. ***See*** PCRA Court Opinion, 6/20/16, at 11 (citing ***Rigg, supra***).

In sum, Appellant's seven claims of trial court's ineffectiveness are either without merit, refuted by the record, or waived. Thus, the PCRA court did not err or abuse its discretion in failing to schedule an evidentiary hearing. We therefore affirm the PCRA court's order dismissing Appellant's PCRA petition.

Order affirmed.

Judgment Entered.

Date: 5/16/2017

Footnotes

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Originally-appointed counsel filed a ***Turner/Finley*** letter, that the PCRA court deemed inadequate. The PCRA court permitted that counsel to withdraw and appointed PCRA counsel. ***See*** PCRA Court Opinion, 6/20/16, at 1-2.