APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2356**

CHRISTOPHER COKER, Appellant

VS.

SUPERINTENDENT MAHANOY SCI, ET AL.

(E.D. Pa. Civ. No. 2:18-cv-03385)

SUR PETITION FOR REHEARING

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

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

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge

ALD-021 October 29, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2356**

CHRISTOPHER COKER, Appellant

VS.

SUPERINTENDENT MAHANOY SCI, ET AL.

(E.D. Pa. Civ. No. 2:18-cv-03385)

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

Submitted are:

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

(2) Appellant's request for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

The District Court entered judgment in this habeas case on April 10, 2020. Appellant Christopher Coker had thirty days to timely appeal. See Fed. R. App. P. 4(a)(1)(A). He failed to do so. Because the deadline for filing a notice of appeal in a civil case is mandatory and jurisdictional, see Bowles v. Russell, 551 U.S. 205, 207-09 (2007), we dismiss the appeal for lack of appellate jurisdiction. In the absence of such jurisdiction, we are unable to consider Coker's request for a certificate of appealability.

By the Court,

s/Theodore A. McKee
Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER COKER, Petitioner,	:	
v.	:	No. 2:18-cv-3385
THERESA DELBASO, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	:	

OPINION

Report and Recommendation, ECF No. 11—APPROVED and ADOPTED
Habeas Corpus Petition, ECF No. 2—DENIED and DISMISSED

Joseph F. Leeson, Jr.
United States District Judge

April 10, 2020

I. INTRODUCTION

In this habeas corpus matter, petitioner Christopher Coker challenges the constitutionality of his conviction and sentence for voluntary manslaughter and possessing an instrument of a crime stemming from a 2003 shooting. In 2005, following a jury trial in the Court of Common Pleas for Philadelphia County, Coker was sentenced to a term of six to twelve years imprisonment for manslaughter, and one to two years imprisonment for possessing an instrument of a crime, to run concurrently. Coker's conviction and sentence were subsequently upheld by the Superior Court, and his petition for allowance of appeal to the Pennsylvania Supreme Court was denied. Thereafter, Coker unsuccessfully moved for collateral relief under the PCRA[1] in

[1] "PCRA" refers to the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-9546. *See Commonwealth v. Haag*, 809 A.2d 271, 284 (Pa. 2002) ("The purpose of the PCRA is to provide an action for persons convicted of crimes they did not commit and persons

Pennsylvania state court before filing the instant habeas corpus petition pursuant to 28 U.S.C. § 2254.

Coker's habeas petition, which purports to assert myriad grounds for relief, was referred to Magistrate Judge Elizabeth T. Hey for a Report and Recommendation ("R&R") as to whether it should be granted. In her R&R, Judge Hey has organized Coker's purported bases for relief into seventeen distinct claims, none of which, Judge Hey ultimately concludes, warrant habeas relief. Coker subsequently filed *pro se* objections, in which he purports to assert objections to the R&R's conclusions as to six of the seventeen claims in his habeas petition.

After review of the habeas petition, the R&R, and Coker's objections, for the reasons set forth below, this Court overrules the objections, adopts the R&R, and dismisses Coker's petition.

II. RELEVANT BACKGROUND[2]

A. Coker's conviction, sentence, and subsequent challenges

On July 19, 2005, after a jury trial, Coker was convicted of voluntary manslaughter and possessing an instrument of a crime, arising from the 2003 shooting death of Jermane Morgan. *See Commonwealth v. Coker*, CP-51-CR-1200411-2003, at 1.[3] On August 30, 2005, Coker was sentenced to consecutive terms of imprisonment of six to twelve years for manslaughter, and one to two years for possessing an instrument of a crime. *See id.* at 4.

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serving illegal sentences to obtain relief. The prisoner initiates the proceedings and bears the burden of proving, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the PCRA's specifically enumerated errors and that the error has not been waived or previously litigated.").

[2] The Court writes for the parties and assumes their familiarity with the procedural history of this case, and, as such, gives only a basic summary here. There does not appear to be any dispute as to the case's procedural history. Similarly, the Court assumes the parties' familiarity with the factual background of this case and does not summarize it here.

[3] This citation refers to the state court docket sheet.

Although Coker did not immediately challenge his sentence, his direct appeal rights were reinstated *nunc pro tunc*,[4] after which Coker "filed post sentence motions on April 30, 2007 challenging the weight and sufficiency of the evidence, and various aspects of his sentence." *Commonwealth v. Coker*, No. 2539 EDA 2007 (Pa. Super., filed 12/15/09) (unpublished memorandum), at *4.[5] On August 30, 2007, the trial court denied Coker's motion "by operation of law." *Id.* Coker filed an appeal alleging his "constitutional right to have counsel present at a critical stage of trial" was violated when the trial court "received a question from the deliberating jury and communicated an answer without the knowledge or presence of counsel." *Id.* (footnote omitted). The Superior Court found no reversible error and affirmed Coker's conviction and sentence. *See id.* at *6. On June 15, 2010, the Pennsylvania Supreme Court denied allowance of appeal. *See Commonwealth v. Coker*, 996 A.2d 1067 (Pa. 2010) (table).

Coker filed a *pro se* PCRA petition on November 12, 2010. *See Commonwealth v. Coker*, CP-51-CR-1200411-2003, at 12. In review of the petition on appeal, the Superior Court gave the following account of the procedural history following this filing:

> On November 12, 2010, Appellant filed the instant PCRA petition, alleging the ineffectiveness of both trial counsel, Todd Henry, Esquire, and appellate counsel,

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[4] His direct appeal was not immediate. In later ruling on his PCRA petition, the Superior Court summarized this delay in the filing of his direct appeal as follows:

> On August 30, 2005, the trial court sentenced Appellant to an aggregate term of seven to fourteen years' incarceration followed by a ten-year probation term. Appellant did not file a direct appeal, but later filed a timely PCRA petition seeking the reinstatement of his direct appeal rights. The PCRA court reinstated Appellant's appeal rights and appointed Richard Brown, Jr., Esquire, as appellate counsel. Appellant subsequently presented a challenge to the trial court's alleged *ex parte* interaction with the jury at his trial to this Court. We affirmed Appellant's judgment of sentence and our Supreme Court denied *allocator*.

Commonwealth v. Coker, No. 2397 EDA 2016, 2017 WL 3172558, at *1 (Pa. Super. Ct. July 26, 2017).

[5] *See also Commonwealth v. Coker*, 990 A.2d 39 (Pa. Super. 2009) (table).

> Attorney Brown. The PCRA court appointed PCRA counsel, Elayne Bryn, Esquire. Attorney Bryn filed a *Turner/Finley* no-merit letter and petition to withdraw as counsel on May 11, 2015. The following day, the PCRA court granted Attorney Bryn's request to withdraw and issued a Rule 907 notice of its intent to dismiss the petition without a hearing. Appellant filed a response, requested the appointment of new counsel, and requested a hearing. The PCRA court granted Appellant's request for new counsel and appointed David Rudenstein, Esquire, on August 28, 2015.
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> Shortly thereafter, Attorney Rudenstein filed an amended petition through which Appellant raised seven allegations of ineffective assistance of counsel, renewed Appellant's request for an evidentiary hearing, and requested a new trial. The PCRA court filed a Rule 907 notice of its intent to dismiss the petition as amended on May 12, 2016. In response, Appellant filed a motion for leave to hold an immediate *Grazier* hearing. The PCRA held the *Grazier* hearing, and after determining that Appellant did not wish to proceed without counsel, denied the petition on June 30, 2016. This timely appeal followed.
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> On appeal, Appellant contends that the PCRA court erred by dismissing his PCRA petition without an evidentiary hearing. To support this claim, Appellant raises seven separate allegations of trial counsel ineffectiveness and appellate counsel ineffectiveness that he claims would have proved meritorious at an evidentiary hearing.

Commonwealth v. Coker, No. 2397 EDA 2016, 2017 WL 3172558, at *2 (Pa. Super. Ct. July 26, 2017).

The Superior Court addressed all seven claims of ineffective assistance—based on (1) trial counsel's failure to object to the prosecution's mention of the victim's race in opening arguments, (2) trial counsel's failure to object to the prosecution's remarks related to Coker's Fifth Amendment right to remain silent in opening arguments, (3) trial counsel's failure to disclose a potential conflict of interest, (4) trial counsel's failure to request a cautionary instruction, (5) trial counsel's failure to object to irrelevant information in a search warrant, (6) appellate counsel's failure to raise an issue of judicial error related to the testimony of Mr. Wirth, and (7) trial counsel's failure to properly investigate and call Kia Miller as a witness—and affirmed the denial of Coker's petition in its entirety. *See generally Coker,* 2017 WL 3172558.

On January 31, 2018, the Pennsylvania Supreme Court denied allowance of appeal. *See Commonwealth v. Coker*, 180 A.3d 1211 (Pa. 2018) (table).

B. The instant habeas petition

On August 9, 2018, Coker filed the instant habeas petition. *See* Hab. Pet. [ECF No. 2]. His petition lists the following two claims for relief: (1) "[the trial court] violated Petitioner's constitutional right to have counsel present when [trial counsel] gave [a] reiterative instruction to jury w/o counsel present;" and (2) "[the trial court] illegally sentenced Petitioner to an enhanced sentence for gun charges based on incorrect information." *Id.* at 5, 7.[6]

To his petition, Coker also attached the brief his second PCRA counsel attached to his amended PCRA petition, which asserts the following arguments:[7] (1) "trial counsel was ineffective for failing to object to prosecutorial misconduct during the Commonwealth's opening;"[8] (2) "trial counsel was ineffective when he failed to object to the prosecutor's misconduct in opening statement where the prosecutor pandered to the jury by announcing that the victim would not be taking the stand and, moreover, trampled upon the defendant's constitutional right to refrain from testifying when she [sic] referred to the defendant's anticipated silence;" (3) "trial counsel was ineffective for having failed to notify the defendant that he had a potential conflict of interest and further failing to withdraw from the representation;" (4) "the defendant should be awarded a new trial as the result of ineffectiveness of trial counsel when counsel failed to properly object; failed to move for a proper cautionary

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6 The Court cites to the page number of the document as it appears on the ECF "ribbon" at the top of each page.

7 These are the seven arguments that were addressed by the Superior Court in its July 26, 2017 decision affirming the dismissal of Coker's PCRA petition. *See generally Coker*, 2017 WL 3172558.

8 These quotations are capitalized in the attached brief; for readability, the Court has capitalized only the appropriate words.

instruction and failed to move for a mistrial, when Commonwealth's witness Wirth testified that the defendant was 'known in the area;'" (5) trial counsel was ineffective when he failed to object to irrelevant information about a search and seizure warrant and the defendant must be awarded a new trial;" (6) appellate counsel was ineffective when he failed to raise the issue of judicial error surrounding certain testimony and the appearance of Mr. Wirth;" and (7) trial counsel was ineffective for having failed to properly investigate witness Kia Miller and to call her to the stand as her testimony is in good faith believed to have been exculpatory for the defendant." *Id.* at 10-18.

Coker has also attached to his petition his response to the PCRA court's Rule 907 notice. This attachment asserts the following arguments, which the Court lists here notwithstanding that some are duplicative or non-cognizable: (1) trial counsel was ineffective "for failing to obtain exculpatory testimony from Dr. Susan Williams the medical examiner that did the actual autopsy of the deceased;" (2) trial counsel was ineffective "for failing to adequately investigate Ms. Kia Miller, [who] would have provided exculpatory testimony supporting Mr. Coker's claim that he acted in self defense;" (3) trial counsel was ineffective "for entering into an agreement to stipulate the [sic] deceased's criminal history;" (4) appellate counsel was ineffective "for failing to investigate the background of Commonwealth witness, James Wirth;" (5) appellate counsel was ineffective "for failing to obtain an affidavit from Ms. Kia Miller who was an eyewitness to the crime;" (6) Coker "was prejudiced by the Commonwealth's introduction of false testimony at trial through the state's witness Dr. Chamara;" (7) Coker's right to confront witnesses was violated in several ways related to Dr. Chamara's testimony; (8) the Commonwealth "withheld vital document [sic] that would have allowed the defendant to properly challenge Dr. Chamara's testimony about the hospital report;" (9) Coker "was denied his right to confront his accuser

through cross-examination because the accuser became illusory when an inadmissible hospital report was offered into evidence without its author being present;" (10) "a violation of Due Process" occurred "wherein [the] trial court amended the criminal information at trial to include the charge of voluntary manslaughter" which was not requested by defense counsel;[9] and (11) the trial court "violated the double jeopardy protections . . . when imposing consecutive terms of probation in addition to the sentence(s) imposed in this matter."[10] Hab. Pet. at 25-39.

C. The report and recommendation

In the R&R, Magistrate Judge Hey organized and distilled Coker's myriad claimed bases for relief into the following seventeen distinct claims:

1. The trial court violated Coker's right to have counsel present when the trial court gave a reiterative instruction to the jury without counsel present,

2. The trial court illegally sentenced Coker to an enhanced sentence for a gun charge based on incorrect information,

3. Ineffective assistance of trial counsel for failing to object to prosecutorial misconduct during the Commonwealth's opening (involving references to race),

4. Ineffective assistance of trial counsel for failing to object to prosecutorial misconduct during the Commonwealth's opening (involving reference to the victim not taking the stand and Coker's anticipated silence),

5. Ineffective assistance of trial counsel for failing to notify Coker of a potential conflict of interest and failing to withdraw,

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[9] This claim is titled "Claim 13—Amended claim." Coker's response to the Rule 907 notice as attached to the habeas petition appears to be missing pages 13-18, on which would have appeared claims ten, eleven, and twelve. For ease of understanding, the Court numbers the claims that do appear in the document consecutively, such that "Claim 13" in the document is claim number ten in this list.

[10] This claim is titled "Claim 14—Amended claim." Additionally, at the bottom of the last page of the document, there appears the beginning of what Coker has labeled "Claim 15—Amended claim," however only this title and two lines of text appear. The Court is therefore unable to determine what was contained in this claim, or if there are additional claims beyond "Claim 15."

6. Ineffective assistance of trial counsel for failing to object, request a cautionary instruction, and move for a mistrial when Commonwealth witness James Wirth testified that Coker was known in the area,

7. Ineffective assistance of trial counsel for failing to object to irrelevant information regarding a search and seizure warrant,

8. Ineffective assistance of appellate counsel for failing to present an issue regarding certain testimony and the appearance of Commonwealth witness Mr. Wirth,

9. Ineffective assistance of trial counsel for failing to investigate witness Kia Miller and call her to the stand,

10. Ineffective assistance of trial counsel for failing to obtain exculpatory testimony from Dr. Williams, the medical examiner who performed the victim's autopsy,

11. PCRA counsel was ineffective for failing to obtain a statement from Ms. Miller,

12. Ineffective assistance of trial counsel for stipulating to the deceased's criminal history and failing to pursue a form of alibi defense,

13. Dr. Chamara's testimony violated Coker's right to confront the witnesses against him because he was not the author of the autopsy report and his testimony was misleading,

14. Dr. Chamara's testimony violated Coker's right to confront the witnesses against him because he was not the author of either the surgical or autopsy report and Coker could not question him about discrepancies between the two reports,

15. Dr. Chamara's testimony violated Coker's right to confront the witnesses against him because he was not the author of the surgical report,

16. Coker's due process rights were violated when the trial court added voluntary manslaughter to the jury instructions when neither attorney requested such a jury charge, and

17. The probationary sentence following the prison term constitutes double jeopardy.

R&R [ECF No. 11] at 8-9. Judge Hey states that claims one and two in this reorganized list are the two claims contained in Coker's habeas petition, claims three through nine are the claims

contained in Coker's appellate brief attached to the petition, and claims ten through seventeen are the non-duplicate claims contained in Coker's Rule 907 response. *See id.* at 7.

Addressing the above claims in non-chronological order, Judge Hey found that Coker's second claim, for illegal sentence enhancement, is unexhausted because it was never presented to the state court, and moreover, procedurally defaulted. *See* R&R at 17-18. Judge Hey moreover observes that *Martinez v. Ryan*, 566 U.S. 1 (2012) only excuses procedural defaults of ineffective assistance of trial counsel claims, and as such does nothing to excuse the default of this claim. *See id.* at 18. Accordingly, the R&R recommends that habeas relief be denied as to Coker's second habeas claim. *See id.*

Judge Hey found claims thirteen through seventeen—relating to Dr. Chamara's testimony, the voluntary manslaughter jury instruction, and the probation component of his sentence—to be similarly unexhausted and procedurally defaulted. *See* R&R at 18-20. The R&R observes that claims thirteen, fourteen, and fifteen, despite being included in Coker's *pro se* PCRA petition, were not included in the counseled amended PCRA petition, and were therefore never presented to the state court. *See id.* at 18-19. Claims sixteen and seventeen were similarly omitted from Coker's amended PCRA petition, despite being included in his response to the court's Rule 907 notice. *See id* at. 19. Because these claims are procedurally defaulted, and in light of the fact that *Martinez*, which is applicable only to claims of ineffective assistance of trial counsel, does not excuse the default of these five claims, the R&R recommends habeas relief be denied. *See id.* at 20.

The R&R next addresses claims ten and twelve, for ineffective assistance of trial counsel based on counsel's alleged failure to obtain exculpatory evidence from the medical examiner and stipulating to the decedent-victim's criminal history. Judge Hey noted that while these claims

were unexhausted and procedurally defaulted, *Martinez* might apply to excuse the defaults. *See* R&R at 21. However, the R&R ultimately concludes that these claims of ineffective assistance are without merit, and therefore Coker cannot rely on *Martinez* to excuse the defaults. *See id.* at 22-27.

Judge Hey found that habeas claims one and three through nine were properly exhausted and are appropriate for a merits review.

Coker's first claim as identified by Judge Hey alleges a violation of his right to counsel by the trial court when it gave the jury a reiterative instruction outside the presence of counsel. *See* R&R at 29. The R&R concludes that the Superior Court's decision as to this claim—that because the instruction "conveyed nothing more than to resume deliberation with the aid of the exhibits already provided by all counsel, it was not tantamount to an instruction of law and thus did not represent a critical stage of the trial"—was not contrary to or an unreasonable application of federal law, and did not involve an unreasonable determination of the facts. *Id.* at 28; *see id.* at 29. As such, the R&R recommends habeas relief be denied as to this claim. *See id.* at 29.

Coker's third habeas claim as identified by Judge Hey alleges ineffective assistance of trial counsel for failing to object to the prosecution's remarks during opening arguments characterizing the victim as a "young black man." R&R at 31. Judge Hey found that "in light of the trial transcript" and "uncontested evidence," "the Superior Court reasonably concluded that the prosecutor's references to the race of the victim did not inflame the jury and accordingly did not infect the trial with unfairness." *Id.* at 32. The R&R concludes that the Superior Court's determination that trial counsel cannot be considered ineffective accordingly was not contrary to or an unreasonable application of federal law, or an unreasonable factual determination, and as such does not give rise to habeas relief. *See id.*

Coker's fourth habeas claim as identified by Judge Hey alleges ineffective assistance of trial counsel for failing to object to the prosecution's remarks during opening argument regarding the victim not testifying, which Coker contends infringed upon his right to remain silent "by implying that Coker would be testifying." R&R at 32. Judge Hey concluded that "here, where the prosecutor referred to the victim not taking the stand" as opposed to Coker, "the Superior Court reasonably found that the prosecutor's reference was not a comment on Coker's silence," and "can reasonably be considered oratorical flair." *Id* at 33 (emphasis in original). Accordingly, the R&R concludes that the Superior Court's determination that failing to object to these remarks did not give rise to a claim of ineffective assistance of counsel was not an application of or contrary to federal law, or an unreasonable factual determination, and as such recommends that habeas relief be denied. *See id.*

Coker's fifth habeas claim as identified by Judge Hey alleges ineffective assistance of trial counsel for failure to notify Coker of a potential conflict of interest and failure to withdraw from the case. *See* R&R at 33. Specifically, Coker's trial counsel had previously represented the daughter of one of the Commonwealth's witnesses in an unrelated incident in the same neighborhood. *See id.* at 34. Judge Hey found that the Superior Court's rejection of this claim, because counsel "did not represent competing interests," was not contrary to or an unreasonable application of federal law and did not constitute an unreasonable factual determination. *Id.* at 35. As such, the R&R recommends habeas relief as to this claim be denied. *See id.* at 35-36.

Coker's sixth habeas claim as identified by Judge Hey alleges ineffective assistance of trial counsel for failing to request a proper cautionary instruction and/or move for a mistrial when Commonwealth witness James Wirth stated that Coker was "known in the area." R&R at 36. Construing the claim as one impermissibly permitting evidence of prior bad acts, the

Superior Court found that there was no evidence in the record that Wirth testified as to any prior actions on behalf of Coker, as he did not mention any crimes, wrongs, or acts, and therefore failure to request a cautionary instruction or to move for a mistrial did not constitute ineffective assistance. *See id.* at 37. Judge Hey concluded that "[a]t its core, Coker's claim is one of state evidentiary law and the admission of evidence. The state courts determined that the trial court's actions, striking the testimony and instructing the jury to disregard the statement, was sufficient to address the remark. Such state evidentiary rulings are beyond habeas review absent a violation of due process." *Id.* at 38. The R&R concludes that Coker cannot show that the circumstances surrounding Mr. Wirth's testimony denied him a fair trial, and as such the Superior Court's determination does not give rise to habeas relief. *See id.*

Coker's seventh habeas claim as identified by Judge Hey alleges ineffective assistance of trial counsel for failing to object when a detective testified that a judicial authority issued a search and seizure warrant upon a showing of probable cause. *See* R&R at 38. Detective Richard Flynn, the detective assigned to the investigation, testified at trial as to what a search warrant is, and the requirement that probable cause exist in order for one to issue. *See id.* at 39. The Superior Court rejected Coker's claim that whether or not a judicial authority has found probable cause is irrelevant to the issue of guilt at trial, concluding that Coker was not prejudiced by Detective Flynn's testimony. *See id.* In her R&R, Judge Hey concludes that the Superior Court's determination "was consistent with Strickland and a reasonable determination of the facts. . . . Coker admitted that he had a gun, that the gun fell to the ground when Mr. Morgan was beating him up on the street, and that he grabbed the gun and fired it an unknown amount of times." *Id.* at 40. Accordingly, "the fact that an issuing authority found probable cause to search for the gun in Coker's house is immaterial," and Judge Hey found that he cannot show that

failure to object prejudiced him. *Id.* As such, the R&R recommends habeas relief be denied as to this claim. *See id.*

Coker's eighth habeas claim as identified by Judge Hey alleges that direct appellate counsel was ineffective for failing to challenge the trial court's decision to allow a Commonwealth witness to testify that Mr. Wirth was arrested after he left the courtroom. *See* R&R at 40. The Superior Court agreed with the PCRA court that evidence of Wirth's arrest after testifying "was highly relevant to corroborate an important part of Wirth's testimony"—specifically, that he was not receiving favorable treatment in exchange for his testimony. *Id.* at 41-42. Judge Hey concluded that the admissibility of the at-issue evidence was "a finding beyond the scope of habeas review," and as such recommends that habeas relief be denied as to this claim. *Id.* at 42.

Coker's ninth habeas claim as identified by Judge Hey alleges ineffective assistance of trial counsel for failing to investigate proposed defense witness Kia Miller and failure to call her to testify. *See* R&R at 42. The Superior Court rejected this claim on the grounds that Coker only established the identity of the potential witness, and admits that he "does not have any information pertaining to Kia Miller." *Id.* at 43. Judge Hey concluded that the Superior Court's determination is consistent with federal law: Coker's failure to put forward facts that support his contention that Ms. Miller was available to testify, and would have given exculpatory testimony, precludes his ineffective assistance claim. *See id.* at 44. Accordingly, the R&R recommends habeas relief be denied as to this claim. *See id.*

Finally, as to habeas claim eleven, which Judge Hey identifies as a claim of ineffective assistance of PCRA counsel, the R&R concludes that because there is no constitutional right to counsel to collaterally attack a conviction, such a claim is not cognizable in a habeas petition.

See R&R at 16. Accordingly, the R&R recommends that habeas relief be denied as to this claim. *See id.*

D. Coker's objections

In his timely filed objections, before addressing the R&R's findings with respect to his individual habeas claims, Coker first argues that PCRA counsel was ineffective for failing to raise several of his PCRA claims in the amended, counseled PCRA petition. *See* Coker's Objections ("Obj.") [ECF No. 16] at 11-13. It is unclear exactly what portion of the R&R that Coker is attempting to address here.

Coker's specifically identified objections indicate that he objects to the R&R's findings and recommendations with respect to claims six, nine, ten, and thirteen through fifteen of his habeas petition.

As to claim six, Coker argues that "the conduct of ADA Feeney and Det. Mcdermott [sic] was prejudicial when they came into contact with James Wirth there [sic] alleged eyewitness. . . . ADA Feeney and Det. Mcdermott [sic] obstructed justice and committed prosecutor misconduct and violated Coker's right to a fair trial." Obj. at 19. Coker alleges that the prosecution "had some type of deal with Judge Chiovero in regard to Mr. Wirth." *Id.* According to Coker, "an agreement or deal for leniency was reach[ed] because Mr. Wirth was facing a mandatory ten years in prison for failure to register under the Meghen's [sic] law, and additional time for violation of probation in sexual assault case." *Id.* Coker further asks that the Court "review James Wirth sentencing transcripts . . . to see if Mr. Wirth was given a deal or any kind of leniency for testimony against Coker." *Id.*

As to claim nine, Coker appears to first argue that he cannot be responsible for providing facts to support his assertion that Ms. Miller was able to and would have provided exculpatory

testimony because he "does not know the content on what Ms. Miller can testify to because he never spoke to her." Obj. at 20. Rather, Coker states, "Ms. Miller spoke to [his] family after the incident," specifically, his mother, an affidavit from whom he attaches to his objections. *Id.* The second part of his argument with respect to claim nine, is that "[t]rial counsel was ineffective because he failed to conduct any pre-trial investigation or try to contact any potential witness." *Id.* at 21. Coker contends that "[s]ince it takes alot [sic] to prove justifiable / self-defense, it was trial counsel duty [sic] to investigate strategies choices [sic] made after thorough investigation of law and facts to put forth the best defense," and counsel's failure "to locate interview or present witnesses supportive of the defense" constituted ineffective assistance. *Id.*

As to claim ten, Coker argues that trial counsel's questioning of Dr. Chamara did not satisfy Coker's right to confront witnesses against him, and also contends that trial counsel's failure to call Dr. Williams, the medical examiner who actually performed the autopsy of the decedent, constituted ineffective assistance. *See* Obj. at 17-18. On this second point, Coker states that "[t]rial counsel is provided with a copy of the witness list before the start of trial, once he did not see Dr. Williams name on the witness list all [he] had to [do] is use the court's subpoena system, and [he] would have known if Dr. Williams was available to testify." *Id.* at 18. Counsel's failure in this regard, according to Coker, prejudiced him, because Dr. Williams would have given exculpatory testimony, and, additionally, he was never able to cross examine Dr. Williams about the findings in her reports. *See id.*

As to claims thirteen, fourteen, and fifteen, which concern Dr. Chamara's testimony and alleged Confrontation Clause issues, Coker argues that Dr. Chamara did not have the knowledge, qualifications, or experience in surgical procedures to properly testify as an expert, and the

introduction of the lab report without the ability to question its creator, Dr. Williams (as opposed to Dr. Chamara) violated Coker's right to confront the witnesses against him. *See* Obj. at 13-16.

III. LEGAL STANDARDS AND APPLICABLE LAW

A. Contested reports and recommendations—general principles

When timely objections to a magistrate judge's report and recommendation have been filed under 28 U.S.C. § 636(b)(1)(C), the district court must make a *de novo* review of those portions of the report to which specific objections are made. 28 U.S.C. § 636(b)(1)(C); *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). Where objections are general rather than specific, *de novo* review is not required. *Snyder v. Bender*, 548 F. App'x 767, 771 (3d Cir. 2013); *Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011). Uncontested portions of a report and recommendation, as well portions to which untimely or general objections are made, may be reviewed under a standard determined by the district court; however, at the very least, these portions should be reviewed for "clear error or manifest injustice." *Colon-Montanez v. Delbalso*, No. 3:15-CV-02442, 2016 WL 3654504, at *1 (M.D. Pa. July 8, 2016); *Equal Employment Opportunity Comm'n v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017) ("[A] district court should 'afford some level of review to dispositive legal issues raised by the report[.]' We have described this level of review as 'reasoned consideration.'" (quoting *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987))). A district court "may accept, reject, or modify, in whole or in part, the findings and recommendations" contained in a report, 28 U.S.C. § 636(b)(1)(C), and "[is] not required to make any separate findings or conclusions when reviewing a Magistrate Judge's recommendation de novo under 28 U.S.C. § 636(b)." *Hill v. Barnacle*, 655 F. App'x 142, 147 (3d Cir. 2016).

B. Habeas corpus petitions under 28 U.S.C. § 2254—general principles

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). Under 28 U.S.C. § 2254, which governs petitions for a writ of habeas corpus on behalf of state court prisoners, habeas relief is available to a petitioner only where a state court's determination of the merits of his claims resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[11] 28 U.S.C. § 2254(d)(1)-(2). Section 2254 mandates that federal courts "presume" the correctness of state court factual determinations with respect to issues presented in a habeas petition. 28 U.S.C. § 2254(e)(1). The statute also states that a habeas petitioner "shall have the burden of rebutting [this] presumption of correctness by clear and convincing evidence." *Id.*; *Fahy v. Horn*, 516 F.3d 169, 181 (3d Cir. 2008) ("[A] federal habeas court must afford a state court's factual findings a presumption of correctness and that [ ] presumption applies to the factual determinations of state trial and appellate courts.");[12] *Hunterson v. Disabato*, 308 F.3d 236, 245 (3d Cir. 2002) ("[I]f permissible inferences could be drawn either way, the state court decision must stand, as its determination of the facts would not be unreasonable.").

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[11] Section 2254 was modified by the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), one purpose of which was "to reduce delays in the execution of state and federal criminal sentences." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). In particular, Congress adopted an amended 28 U.S.C. § 2254(d), governing petitions for writs of habeas corpus where a petitioner's claims were previously "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *Woodford*, 538 U.S. at 206.

[12] "[T]he § 2254(e)(1) presumption of [factual] correctness applies regardless of whether there has been an 'adjudication on the merits' for purposes of § 2254(d)." *Nara v. Frank*, 488 F.3d 187, 200-01 (3d Cir. 2007).

In the end, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."[13] *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (quoting *Harrington*, 562 U.S. at 101); *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (explaining that § 2254 "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt").

C. Exhaustion and procedural default—general principles

Because of the deference owed to state courts under § 2254, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before seeking federal habeas review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); 28 U.S.C. § 2254(b)(1) (explaining that a petition for a writ of habeas corpus "shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State").[14] Similar to the requirement of "exhaustion," where a state court has denied a petitioner's claim for collateral relief based on an adequate and independent state procedural rule, the claim is considered "procedurally defaulted," and may not be reviewed by a federal court. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) ("[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. This is an important 'corollary' to the exhaustion

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[13] The heightened level of deference in § 2254(d) is not applicable to a state court's determination as to whether a petitioner waived his right to review, because, in such a situation, there has not been an adjudication on the merits of any "claim." *Id.* at 180.

[14] A petitioner can overcome the requirement of exhaustion if "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B).

requirement.") (citations omitted);[15] *see Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) (explaining that "[j]ust as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address" the merits of "those claims in the first instance").

While failure to exhaust claims usually requires a district court to dismiss a habeas petition without prejudice so that a petitioner can return to state court to exhaust his claims, where state law forecloses review of unexhausted claims—as happens when the PCRA statute of limitations has run—the claims are considered procedurally defaulted. *See Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000). However, "[a] state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" *Davila*, 137 S. Ct. at 2064-65 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). To establish "cause," a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Davila*, 137 S. Ct. at 2065 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). A factor is "external" only if it cannot be attributed to the petitioner. *Coleman*, 501 U.S. at 753.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.' That is so . . . because the attorney is the prisoner's agent, and under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." *Maples v.*

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15 "The procedural default doctrine [ ] advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine." *Id.* at 2064 (citing *McCleskey v. Zant*, 499 U.S. 467, 493 (1991)).

Thomas, 565 U.S. 266, 280-81 (2012) (quoting *Coleman*, 501 U.S. at 753-54). In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court recognized the following narrow exception to this rule: "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17. The Court made clear that its holding in *Martinez* "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* at 16.

D. Ineffective assistance of counsel—general principles

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the standard applicable to claims of ineffective assistance of counsel. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To establish the first factor—deficiency—a "'defendant must show that counsel's representation fell below an objective standard of reasonableness' 'under prevailing professional norms.'" *Elias v. Superintendent Fayette SCI*, 774 F. App'x 745, 750 (3d Cir. 2019) (quoting *Strickland*, 466 U.S. at 688), *cert. denied sub nom. Elias v. Capozza*, 140 S. Ct. 437, 205 L. Ed. 2d 261 (2019). To establish the second factor—prejudice—"the defendant must show that prejudice resulted, such 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Elias*, 774 F. App'x at 750 (quoting *Strickland*, 466 U.S. at 694). Importantly, "[j]udicial scrutiny of a counsel's performance must be highly deferential," and

"every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. There is, moreover, a "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard," because the question before a federal court is not whether the state court's determination was correct, but whether the determination was unreasonable. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see Bell v. Cone*, 535 U.S. 685, 6994 (2002).

IV. DISCUSSION

A. Ineffective assistance of PCRA counsel is not a cognizable habeas claim.

The Court will address Coker's arguments with respect to his objections to habeas claims six, nine, ten, thirteen, fourteen, and fifteen, however it must first address Coker's contention that PCRA counsel was ineffective for failing to raise his PCRA claims in the amended, counseled PCRA petition. *See* Obj. at 11-13. This objection is styled as a general objection before Coker directs his objections to particular claims. *See id.* While Coker does not appear to explicitly reference the R&R's findings with respect to what Judge Hey has identified as habeas claim eleven, it is in this portion of the R&R where Judge Hey correctly states that ineffectiveness of state post-conviction counsel is not a cognizable habeas claim. *See* R&R at 16; *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) ("[T]here is no right to counsel in state collateral proceedings."); *Taylor v. Pennsylvania*, No. CIV A 09-CV-00313, 2009 WL 1956218, at *3 (E.D. Pa. June 30, 2009) ("There is no federal constitutional right to PCRA counsel . . . ."). Although the basis for Coker's argument on this point is less than clear,[16] as is whether it was

[16] This portion of his objections is difficult to decipher, and while it is clear that Coker is attempting to argue ineffective assistance of PCRA counsel here, *see* Obj. at 12, he also argues that violations of his right to confront witnesses prejudiced him sufficiently to overcome what he

something he asserted it in his habeas petition in the first instance,[17] any argument based upon ineffective assistance of PCRA counsel is clearly without merit, and this objection is overruled.

B. Coker's objections as to habeas claim six are without merit.

Judge Hey found that the Superior Court's determination relevant to claim six—that failure to request a cautionary instruction regarding Mr. Wirth's statement that Coker was "known in the area" did not constitute ineffective assistance of counsel—was a state law evidentiary determination that could not be reviewed by way of a habeas petition. *See* R&R at 36-38. Coker objects to this determination by asserting that the prosecution, the police, the trial court, and Mr. Wirth were all part of an improper agreement under which Mr. Wirth would give inaccurate testimony against Coker in return for favorable treatment regarding his own criminal case. *See* Obj. at 19.

The allegations put forward in Coker's objections to the R&R as to claim six were never raised in his habeas petition. *See* Hab. Pet. at 13-15 (discussing trial counsel's ineffectiveness in failing to seek a cautionary instruction based on the alleged prejudicial nature of Mr. Wirth's testimony). Additionally, they do not even attempt to address what is legally incorrect with

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sees as the procedural default of his ineffective assistance of PCRA counsel claims, *see id.* at 12-13. Judge Hey did not find that his ineffective assistance of PCRA counsel claim was procedurally defaulted; rather, she correctly found that no such claim is cognizable in a habeas petition. Additionally, Coker's reference to ineffective assistance of PCRA counsel in the petition is based on an alleged failure to investigate and call as a witness Ms. Kia Miller, *see* Hab. Pet. at 23, not alleged violations of Coker's rights under the Confrontation Clause.

[17] Judge Hey references pages 27 and 28 of the Coker's habeas petition as the basis for her characterization of claim eleven as ineffective assistance of PCRA counsel. *See* R&R at 16. However, this portion of the petition (which is "claim 2" of Coker's response to the Rule 907 notice), appears to be a claim for ineffective assistance of *trial* counsel for failure to adequately investigate Ms. Kia Miller, rather than PCRA counsel. *See* Hab. Pet. at 27. However, the R&R also references page 23 of the petition, *see* R&R at 16, and here, Coker does state that "Mr. Rudenstein [PCRA counsel] . . . is still ineffective like trial counsel." Hab. Pet. at 23.

Judge Hey's findings as to this claim.[18] Coker's attempt to raise entirely new arguments and his failure to squarely respond to the R&R are each independent bases for plain error review of the R&R. *See Adkins v. Wetzel*, No. 13-3652, 2014 WL 4088482, at *3 (E.D. Pa. Aug. 18, 2014) ("[N]ew issues and evidence shall not be raised after the filing of the Magistrate Judge's Report and Recommendation if they could have been presented to the magistrate judge." (citing E.D. Pa. Loc. R. Civ. P. 72. 1.IV(c))); *Kightlinger v. Pennsylvania*, No. CIV.A. 11-936, 2013 WL 4504382, at *2 (W.D. Pa. Aug. 22, 2013) (explaining that consideration of issues raised for the first time in an objection to a report and recommendation "would reduce the proceedings before the magistrate[ ] Judge to a mere dress rehearsal, which is contrary to the very reason for having magistrate judges"); *Kennedy v. Borough of Minersville Pennsylvania*, No. 3:19-CV-0124, 2019 WL 4316218, at *1 (M.D. Pa. Sept. 11, 2019) ("Plaintiff's objections are not specific. In particular, Plaintiff does not take issue with the substance of any of the Magistrate Judge's conclusions and/or recommendations. As such, the Report and Recommendation is reviewed for clear error, and finding none, it will be adopted."); *Guzman v. Rozum*, No. CV 13-7083, 2017 WL 1344391, at *9 (E.D. Pa. Apr. 12, 2017) (explaining that "federal district courts are not required to engage in *de novo* review of objections to a Magistrate's R&R that lack specificity").

Finding no plain error in Judge Hey's thoughtful findings and recommendations as to habeas claim six,[19] the Court overrules Coker's objections with respect to this claim.

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[18] Moreover, Coker's assertions in his objections to claim six are, on their face, purely speculative.

[19] The Court agrees with Judge Hey's finding that the Superior Court's determination, which was in essence a determination of state evidence law, is beyond habeas review. *See Johnson v. Folino*, 735 F. Supp. 2d 225, 246 (E.D. Pa. 2010) ("Petitioner cannot use the instant habeas petition to challenge the Pennsylvania state courts interpretation of the Pennsylvania Rules of Evidence. . . . Therefore, to the extent that Petitioner asserts that the Pennsylvania courts incorrectly admitted these statements as extra-judicial admissions under the Pennsylvania Rules of Evidence, such a claim is barred from federal habeas review."); *Roulhac v. Lawler,* No.

C. Coker's objections as to habeas claim nine are without merit.

Judge Hey found that Coker's ninth habeas claim—that trial counsel was ineffective for failing to investigate and call as a witness Kia Miller—was meritless, because, as the Superior Court observed, Coker offered no evidence in support of his assertion that Ms. Miller was available to testify and would in fact provide exculpatory evidence. *See* R&R at 43. Coker objects to Judge Hey's findings by arguing that (1) he cannot be responsible for providing facts to support his assertion that Ms. Miller was able to and would have provided exculpatory testimony because he "does not know the content on what Ms. Miller can testify to because he never spoke to her," and rather his mother did, Obj. at 20-21; and (2) trial counsel's failure to locate and interview Ms. Miller constituted ineffective assistance of counsel, especially in light of the fact that James Wirth was the only eye witness to the crime to testify, *see id.* at 21.

Coker's arguments are without merit. First, the affidavit of Coker's mother attached to his objections is dated October 17, 2019, *see* Obj. at 30, and was not submitted with either his PCRA petition or his habeas petition. As such the Court cannot consider it.[20] *See Adkins*, 2014 WL 4088482, at *3. As to the second and related argument with respect to claim six, Coker simply reasserts his general contention that his trial counsel's failure to investigate and call Ms. Miller was a dereliction of his duty to investigate and present an adequate defense. As an

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08–5124, 2009 WL 5910245, at *5 (E.D.Pa. Oct. 29, 2009) (holding that a challenge of the trial's court evidentiary ruling under the Pennsylvania Rules of Evidence is not cognizable on federal habeas review). Therefore, even under de novo review, the R&R's conclusions and recommendation with respect to this claim would be adopted.

[20] While the Court cannot consider the affidavit because it was not filed with the habeas petition, because it was also not filed with Coker's PCRA petition, the issue of whether it would have satisfied Coker's obligation to provide "proof of [a] witness's availability to testify, as well as an adequate assertion that the substance of the purported testimony would make a difference in the case," *Commonwealth v. Coker*, No. 2397 EDA 2016, 2017 WL 3172558, at *7 (Pa. Super. Ct. July 26, 2017), is unexhausted and procedurally defaulted.

objection premised on new arguments or facts warrants only plain error review, so does an objection which simply reasserts arguments raised in the underlying motion or pleading. *See Florez-Montano v. Scism*, No. 3:10-CV-2404, 2011 WL 837764, at *3 (M.D. Pa. Mar. 4, 2011) (reviewing a report and recommendation for clear error where, "[i]n his objections, Petitioner raises the same arguments as set forth in his § 2241 petition"), *aff'd*, 453 F. App'x 145 (3d Cir. 2011); *see also Kennedy*, 2019 WL 4316218, at *1 ("Plaintiff's objections are not specific. In particular, Plaintiff does not take issue with the substance of any of the Magistrate Judge's conclusions and/or recommendations. As such, the Report and Recommendation is reviewed for clear error, and finding none, it will be adopted.").

The Court finds no plain error with the R&R as to claim nine and agrees with Judge Hey that "Coker's bare assertion that Ms. Miller would have testified on his behalf does not entitle him to habeas relief." R&R at 44. His objections as to claim six are overruled accordingly.

D. Coker's objections as to habeas claim ten are without merit.

With respect to habeas claim ten—ineffective assistance of trial counsel for failing to obtain exculpatory testimony from the medical examiner, Dr. Williams—Judge Hey determined that this claim was procedurally defaulted because it was never presented to the state courts. *See* R&R at 21. Judge Hey moreover determined that trial counsel effectively used the autopsy report to undermine Dr. Chamara's testimony, and Coker's ineffective assistance of counsel claim was therefore not "substantial" under *Martinez*—*i.e.*, it was meritless because Coker could not satisfy the "prejudice" element of *Strickland*. *See id.* at 23-25. Accordingly, Judge Hey found the procedural default of claim ten cannot be excused. *See id.* at 25. In objecting to this portion of the R&R, Coker contends that (1) trial counsel's questioning of Dr. Chamara based on the autopsy report did not satisfy Coker's right to confront witnesses against him, and (2)

counsel's failure to call Dr. Williams, which Coker states could have easily been effected through a trial subpoena, constituted ineffective assistance. *See* Obj. at 17-18.

Most of Coker's first argument in his objections to claim ten, as well as portions of his second argument, allege violations of his rights under the Confrontation Clause. This argument was not raised in his habeas petition, and as such it is improper. *See Adkins*, 2014 WL 4088482, at *3. As to Coker's argument that trial counsel should have subpoenaed Dr. Williams, who authored the autopsy report, and that failure to do so constituted ineffective assistance, this is simply a re-hashing of the argument made in his habeas petition. Indeed, in certain places, the language is identical. *Compare* Ha. Pet. at 26 ("Dr. Susan Williams is the actual declarant of the report who should have been automatically the number 2 option because she author . . . .") *with* Obj. at 18 ("Dr. Williams is the actual declarant of the report . . . [q]ualifying her automatically as the number 2 option."); *see Florez-Montano*, 2011 WL 837764, at *3. Similarly, Coker's objections fail to engage with the R&R and explain why Judge Hey's analysis and conclusion—that trial counsel effectively undermined Dr. Chamara's testimony—is incorrect. *See Kennedy*, 2019 WL 4316218, at *1. For these reasons, the R&R as to habeas claim ten receives plain error review. Finding none, the Court overrules Coker's objections as to claim ten.[21]

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[21] Additionally, Coker's objections state that "Dr. Williams where abouts [sic] was 'known' at the time of Coker's trial, and her where about [sic] still is 'unknown' up until this today [sic]." Obj. at 18. As the Superior Court stated in its decision on Coker's PCRA petition in regard to Kia Miller, "[w]here a[n appellant] claims that counsel was ineffective for failing to call a particular witness, we require proof of that witness's availability to testify, as well as an adequate assertion that the substance of the purported testimony would make a difference in the case." *Coker*, 2017 WL 3172558, at *7 (quoting *Commonwealth v. Michaud*, 70 A.3d 862, 867 (Pa. Super. 2013)). Therefore, Coker's concession that he did not know where Dr. Williams was during the trial necessary defeats his ineffective assistance claim based on a failure to call her as a witness.

E. Coker's objections as to habeas claims thirteen, fourteen, and fifteen are without merit.

As to habeas claims thirteen, fourteen, and fifteen, which allege that Dr. Chamara's testimony violated Coker's right to confront witnesses against him because Dr. Chamara did not author either the surgical or autopsy reports, Judge Hey concluded that each of these claims was unexhausted and procedurally defaulted. *See* R&R at 18-19. Judge Hey moreover concluded that these claims could not be saved by *Martinez*, which applies only to claims of ineffective assistance of trial counsel. *See id.* at 20. In objecting to these claims, Coker argues the merits of his Confrontation Clause claims, and nowhere addresses Judge Hey's conclusion that these claims are each procedurally defaulted. *See* Obj. at 13-16.

Because Coker's objections do not address Judge Hey's conclusion that claims thirteen, fourteen, and fifteen are procedurally defaulted, and, moreover, cannot be saved by the exception provided for in *Martinez*, the Court reviews the R&R as to these claims for plain error. *See Kennedy*, 2019 WL 4316218, at *1; *Guzman*, 2017 WL 1344391, at *9. Finding none, the Court agrees with Judge Hey that these claims, having never been presented to a state court,[22] are unexhausted and moreover procedurally defaulted. As such, Coker's objections as to habeas claims thirteen, fourteen, and fifteen, are overruled.

F. The remainder of the R&R is approved and adopted.

The Court has reviewed the portions of the R&R to which Coker has raised no objections for plain error. *See Colon-Montanez v. Delbalso*, No. 3:15-CV-02442, 2016 WL 3654504, at *1

[22] Coker's claims as to Dr. Chamara were abandoned by Coker's second PCRA counsel when counsel filed Coker's amended PCRA petition. The amended PCRA petition raised seven claims, none of which were claims for violation of Coker's Confrontation Clause rights related to the testimony of Dr. Chamara. *See* Hab. Pet. at 10-21.

(M.D. Pa. July 8, 2016). Finding none, the Court approves and adopts the R&R as to the remainder of the habeas claims Coker attempts to assert.

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

A certificate of appealability ("COA") should only be issued "if the petitioner 'has made a substantial showing of the denial of a constitutional right.'" *Tomlin v. Britton*, 448 F. App'x 224, 227 (3d Cir. 2011) (quoting 28 U.S.C. § 2253(c)). "Where a district court has rejected the constitutional claims on the merits . . . the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the denial of a habeas petition is based on procedural grounds and the Court does not reach the underlying constitutional claim, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

For the reasons discussed at length herein and in the R&R, it is not the case that reasonable jurists would disagree that Coker's habeas claims are either procedurally defaulted, not cognizable under § 2254, or lack merit. Consequently, he is not entitled to a COA.

APPENDIX C

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

CHRISTOPHER COKER	:	CIVIL ACTION
v.	:	
THERESA DELBALSO, et. al	:	No. 18-3385

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. September 9, 2019

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Christopher Coker, who is currently incarcerated at the Mahanoy State Correctional Institution in Frackville, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. PROCEDURAL HISTORY

On July 19, 2005, after a trial before the Honorable Peter F. Rogers, a jury convicted Coker of voluntary manslaughter and possessing an instrument of crime ("PIC"). N.T. 7/19/05 at 3-4. The charges arose from the April 30, 2003 shooting of Jermaine Morgan[1] near the corner of Brill and Hedge Streets in Philadelphia, which resulted in Mr. Morgan's death eleven days later due to complications from the gunshot wounds. N.T. 7/14/05 at 83. On August 30, 2005, Judge Rogers sentenced Coker to

[1]The victim is identified as Jermaine Morgan in the preliminary paperwork in the case, see Criminal Complaint, DC #03-15-039807 (Phila. M.C. Aug. 6, 2003); Arrest Report (dated Aug. 13, 2003), and in the Verdict Sheet signed by the jury foreperson. See Commonwealth v. Coker, CP-51-CR-1200411-2003, Verdict Sheet (7/19/05). However, at various times in the transcript and in the state court opinions, the victim is identified as Jermane Morgan.

consecutive prison terms of six -to- twelve years for manslaughter and one -to- two years for PIC, followed by ten years' reporting probation. N.T. 8/30/05 at 19-21.

On direct appeal,[2] Coker claimed as follows through newly appointed counsel:

1. The evidence was insufficient to support the convictions,

2. The verdict was against the weight of the evidence,

3. The sentencing court erred in denying reconsideration of sentence,

4. The sentencing court erred because the PIC sentence exceeded the standard and aggravated ranges, and

5. The sentencing court erred in denying the request for reconsideration of sentence to the extent the court failed to consider required reports and guidelines, and failed to make required findings on the record.

Commonwealth v. Coker, CP-51-CR-1200411-2003, Pa. R. App. Proc. 1925(b) Statement of Errors Complained of on Appeal (Phila. C.C.P. Dec. 10, 2007). In a subsequently filed statement of issues, Coker also contended that the trial court erred in ruling on various evidentiary questions during the testimony and in instructing the jury outside the presence of, and without consulting, counsel. Commonwealth v. Coker, CP-51-CR-1200411-2003, Rule 1925(b) Statement of Errors Complained of on Appeal (Phila. C.C.P. Sept. 10, 2008). Judge Rogers addressed Coker's issues in an opinion

[2]Judge Rogers reinstated Coker's direct appellate rights nunc pro tunc on April 19, 2007, after which Coker filed post-trial motions and a notice of appeal. See Commonwealth v. Coker, CP-51-CR-1200411-2003, Notice of Appeal (Phila. C.C.P. Oct. 1, 2007) (noting that appellate rights were restored and post-sentence motions were denied by operation of law); see also Commonwealth v. Coker, CP-51-CR-1200411-2003, Docket Sheet (Phila. C.C.P. entries dated Apr. 30, Aug. 30, and Oct. 1, 2007).

recommending affirmance. Commonwealth v. Coker, CP-51-CR-1200411-2003, Opinion (Phila. C.C.P. Nov. 17, 2008).

In his appellate brief, Coker presented only the issue relating to the court's instructing the jury outside the presence of and without consulting counsel. Commonwealth v. Coker, 2539 EDA 2007, Brief for Appellant, at 3-4 (Pa. Super filed Mar. 16, 2009) (attached to Response, Doc. 10-1). The Superior Court affirmed the judgment of sentence, addressing the sole issue raised in the brief. Commonwealth v. Coker, No. 2539 EDA 2007, Memorandum (Pa. Super. Dec. 15, 2009). The Pennsylvania Supreme Court denied Coker's petition for allowance of appeal. Commonwealth v. Coker, 34 EAL 2010, 996 A.2d 1067 (Pa. June 15, 2010) (table).

On November 12, 2010, Coker filed a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551, claiming:

1. Ineffective assistance of trial counsel for failing to obtain the testimony of Dr. Susan Williams, who conducted the autopsy,

2. Ineffective assistance of trial counsel for failing to adequately investigate Kia Miller who would have provided exculpatory testimony supporting Coker's claim of self-defense,

3. Ineffective assistance of trial counsel for stipulating to the deceased's criminal record,

4. Ineffective assistance of direct appellate counsel for failing to obtain James Wirth's sentencing records to establish that he was given leniency for testifying against Coker,

5. Ineffective assistance of appellate counsel for failing to obtain an affidavit from Ms. Miller attesting that Coker acted in self-defense,

6. The prosecutor introduced false testimony through Commonwealth witness Dr. Chamara,

7. Coker was confronted with substantive evidence (the autopsy report and hospital report), admitted through Dr. Chamara, that he could not cross examine because the authors of the reports were not called as witnesses,

8. The prosecutor withheld vital documents that would have allowed Coker to question Dr. Chamara about the hospital report,

9. Coker was denied his right to confront the author of a hospital report who did not testify,

10. Coker's due process rights were violated when Commonwealth witness, Mr. Wirth, testified falsely regarding a deal for his testimony, and

11. Coker's due process rights were violated because:

    a. Commonwealth witness, Mr. Wirth, was a corrupt source,
    b. Coker should not have been held for trial based on Mr. Wirth's testimony,
    c. The prosecutor and a detective obstructed justice by failing to bring Mr. Wirth to justice for his testimony against Coker,
    d. The prosecutor and a detective should not have released Mr. Wirth back into the community when they knew he had violated his probation,
    e. The trial judge, prosecutor, and a detective should not have let Mr. Wirth take the stand when he was wanted for other crimes,
    f. Mr. Wirth was a corrupt source,
    g. The trial court should not have allowed the trial to proceed based solely on the testimony of Mr. Wirth, and
    h. The prosecutor offered into evidence an autopsy and medical report that contained discrepancies.

Commonwealth v. Coker, CP-51-1200411-2003, Motion for Post Conviction Collateral Relief & Facts in Support of Alleged Errors (Phila. C.C.P. Nov. 12, 2010).

Judge Rogers appointed counsel who filed a Finley letter[3] and motion to withdraw. Commonwealth v. Coker, CP-51-CR-1200411-2003, Motion to Withdraw as Counsel and accompanying letter (Phila. C.C.P. May 11, 2015). Judge Rogers issued a notice of intent to dismiss the petition. Commonwealth v. Coker, CP-51-CR-1200411-2003, Notice Pursuant to Pennsylvania Rule of Criminal Procedure 907 (Phila. C.C.P. May 12, 2015). After Coker responded to the Rule 907 notice, identifying additional claims, Judge Rogers appointed new counsel. Commonwealth v. Coker, CP-51-CR-1200411-2003, Petitioner's Response to the Proposed Dismissal under Pa. R. Crim. P., Rule 907 (Phila. C.C.P. July 28, 2015); Commonwealth v. Coker, CP-51-CR-1200411-2003, Order (Phila. C.C.P. Aug. 26, 2015).

Newly appointed counsel filed an amended PCRA petition, claiming:

1. Trial counsel was ineffective for failing to object to prosecutorial misconduct during the Commonwealth's opening regarding race,

2. Trial counsel was ineffective for failing to object to prosecutorial misconduct in the Commonwealth's opening referencing Coker's anticipated silence,

3. Trial counsel was ineffective for failing to disclose a potential conflict of interest to Coker and failing to withdraw,

[3]Pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), appointed counsel in a post-conviction proceeding may be given leave to withdraw upon the submission of a letter that details the nature and extent of his review of the case, lists each issue the petitioner wished to have reviewed, and explains his or her assessment that the case lacks merit. The court must also conduct an independent review of the record and must agree with counsel that the petition is meritless before dismissing the petition.

4. Trial counsel was ineffective for failing to object or request a cautionary instruction or mistrial when a Commonwealth witness testified that Coker was known in the area,

5. Trial counsel was ineffective for failing to object to irrelevant information about the search and seizure warrant,

6. Appellate counsel was ineffective for failing to raise an issue of judicial error regarding certain testimony and the appearance of Mr. Wirth, and

7. Trial counsel was ineffective for failing to properly investigate and call Ms. Miller as a witness.

Commonwealth v. Coker, CP-51-CR-1200411-2003, Amended Post Conviction Relief Act Petition and attached letter brief, at 9-18 (Phila. C.C.P. Feb. 28, 2016).

On May 12, 2016, the Honorable Glenn B. Bronson, now sitting as the PCRA court, issued a notice of intent to dismiss the PCRA petition, addressing each of the claims in the amended PCRA petition. Commonwealth v. Coker, CP-51-CR-1200411-2003, Notice Pursuant to Pennsylvania Rule of Criminal Procedure 907 (Phila. C.C.P. May 12, 2016). In response, Coker filed a motion seeking to represent himself, asserting that counsel failed to raise meritorious issues. Commonwealth v. Coker, CP-51-CR-1200411-2003, Motion for Leave to Hold an Immediate Grazier Hearing (Phila C.C.P. May 23, 2016). Judge Bronson conducted a hearing on June 30, 2016, addressing each of the issues Coker wanted raised, and on the same date denied the motion to proceed pro se as well as the amended PCRA petition. N.T. 6/30/16; Commonwealth v. Coker, CP-51-CR-1200411-2003, Order (Phila. C.C.P. June 30, 2016). At the hearing, Coker elected to keep his appointed attorney for his appeal. N.T. 6/30/16 at 48.

On appeal, Coker pursued the same seven claims that were presented in the amended PCRA petition. Commonwealth v. Coker, CP-51-CR-1200411-2003, Statement of Matters Complained of Pursuant to Rule of Appellate Procedure 1925(b) (Phila. C.C.P. Oct. 17, 2016). Judge Bronson issued an opinion recommending affirmance on appeal, addressing each of the claims. Commonwealth v. Coker, CP-51-CR-1200411-2003, Opinion (Phila. C.C.P. Oct. 25, 2016). The Superior Court similarly addressed all seven claims, and affirmed the denial of PCRA relief. Commonwealth v. Coker, No. 2397 EDA 2016, 2017 WL 3172558 (Pa. Super. July 26, 2017). The Pennsylvania Supreme Court denied Coker's petition for allowance of appeal. Commonwealth v. Coker, 402 EAL 2017, 180 A.3d 1211 (Pa. Jan. 31, 2018) (table).

On August 9, 2018, Coker filed this petition for habeas corpus. In the petition, Coker lists two claims and then incorporates the brief his second PCRA counsel attached to the amended PCRA petition, see Doc. 2 at 10-21,[4] which I will label claims 3 through 9, and his response to Judge Rogers' Rule 907 notice, id. at 25-39, which I will label claims 10 through 17. Id. at 22.[5] The District Attorney has responded that the first two claims are meritless, that Coker's attempt to incorporate claims by attaching state court

[4]Throughout this Report, pinpoint citations to documents filed in the federal court will be to the court's ECF pagination.

[5]Coker indicates that the claims presented in the PCRA brief are grounds 3 through 10. See Doc. 2 at 9. However, the brief contains seven claims. Thus, they should be numbered 3 through 9. Additionally, the claims he identifies as 11 through 19 should be numbered 10 through 17. Id. at 22-24.

filings is improper, and that the claims presented therein do not entitle him to relief. Doc. 10.

As best as I can discern, Coker's habeas claims are as follows:

1. The trial court violated Coker's right to have counsel present when the trial court gave a reiterative instruction to the jury without counsel present,

2. The trial court illegally sentenced Coker to an enhanced sentence for a gun charge based on incorrect information,

3. Ineffective assistance of trial counsel for failing to object to prosecutorial misconduct during the Commonwealth's opening (involving references to race),

4. Ineffective assistance of trial counsel for failing to object to prosecutorial misconduct during the Commonwealth's opening (involving reference to the victim not taking the stand and Coker's anticipated silence),

5. Ineffective assistance of trial counsel for failing to notify Coker of a potential conflict of interest and failing to withdraw,

6. Ineffective assistance of trial counsel for failing to object, request a cautionary instruction, and move for a mistrial when Commonwealth witness James Wirth testified that Coker was known in the area,

7. Ineffective assistance of trial counsel for failing to object to irrelevant information regarding a search and seizure warrant,

8. Ineffective assistance of appellate counsel for failing to present an issue regarding certain testimony and the appearance of Commonwealth witness Mr. Wirth,

9. Ineffective assistance of trial counsel for failing to investigate witness Kia Miller and call her to the stand,

10. Ineffective assistance of trial counsel for failing to obtain exculpatory testimony from Dr. Williams, the medical examiner who performed the victim's autopsy,

11. PCRA counsel was ineffective for failing to obtain a statement from Ms. Miller,

12. Ineffective assistance of trial counsel for stipulating to the deceased's criminal history and failing to pursue a form of alibi defense,

13. Dr. Chamara's testimony violated Coker's right to confront the witnesses against him because he was not the author of the autopsy report and his testimony was misleading,

14. Dr. Chamara's testimony violated Coker's right to confront the witnesses against him because he was not the author of either the surgical or autopsy report and Coker could not question him about discrepancies between the two reports,

15. Dr. Chamara's testimony violated Coker's right to confront the witnesses against him because he was not the author of the surgical report,

16. Coker's due process rights were violated when the trial court added voluntary manslaughter to the jury instructions when neither attorney requested such a jury charge, and

17. The probationary sentence following the prison term constitutes double jeopardy.

Doc. 2 at 5-39. Coker concedes that Claims 10 through 17 (as numbered above) are unexhausted in the state courts but argues that this was due to PCRA counsel's ineffectiveness and that Martinez v. Ryan, 566 U.S. 1 (2012), provides a basis to allow the federal court to hear these claims. Doc. 2 at 23, 44. The District Attorney argues that these claims are procedurally defaulted, Martinez is inapplicable, and the claims are meritless in any event. Doc. 10 at 24-30. The Honorable Joseph F. Leeson referred the case to me for a Report and Recommendation. Doc. 5.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

Before the federal court can consider the merits of a habeas claim, a petitioner must comply with the exhaustion requirement of section 2254(b), which requires a petitioner to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Exhaustion requires the petitioner to present to the state courts the same factual and legal theory supporting the claim. Landano v. Rafferty, 897 F.2d 661, 669 (3d Cir. 1990). It also requires the petitioner to preserve each claim at the state appellate level. See Holloway v. Horn, 355 F.3d 707, 714 (3d Cir. 2004) (exhaustion satisfied only if claim fairly presented at each level of the state court system) (citing O'Sullivan, 526 U.S. at 844-45). The habeas petitioner has the burden of proving exhaustion. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

A petitioner's failure to exhaust his state remedies may be excused in limited circumstances on the ground that exhaustion would be futile. Lambert, 134 F.3d at 518-19. Where such futility arises from a procedural bar to relief in state court, the claim is subject to the rule of procedural default. See Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). In addition, if the state court does not address the merits of a claim because the petitioner failed to comply with the state's procedural rules in presenting the claim, it is also procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

If a claim is found defaulted, the federal court may address it only if the petitioner establishes cause for the default and prejudice resulting therefrom, or that a failure to

consider the claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192. To meet the "cause" requirement to excuse a procedural default, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). Additionally, a petitioner can rely on post-conviction counsel's ineffectiveness to establish cause to overcome the default of a substantial claim of ineffective assistance of trial counsel. Martinez, 566 U.S. at 14. To establish prejudice, a petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Bey v. Super't Greene SCI, 856 F.3d 230, 242 (3d Cir. 2017).

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

B. Merits Review

Under the federal habeas statute, review is limited in nature and may only be granted if (1) the state court's adjudication of the claim "resulted in a decision contrary

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

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

C. Ineffective Assistance of Counsel ("IAC")

In several of his claims, Coker alleges that his counsel was ineffective. Such claims are governed by Strickland v. Washington, 466 U.S. 668 (1984), in which the Supreme Court set forth a two-pronged test for the consideration of IAC claims. First, the petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Id. at 687. Second, the petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair and reliable trial. Id. In determining prejudice, the question is whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see also Smith v. Robbins, 528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed"). Counsel will not be considered ineffective for failing to pursue a meritless argument. Real v. Shannon, 600 F.3d 302, 309 (3d Cir. 2010); McAleese v. Mazurkiewicz, 1 F.3d 159, 169 (3d Cir. 1993).

III. DISCUSSION[6]

A. Factual Background

Consideration of Coker's claims will require a discussion of the trial evidence. I begin by reproducing Judge Rogers' synopsis set forth in his opinion recommending affirmance on direct appeal, and I will discuss specific evidence and testimony further as necessary to address the claims.

> [Coker] was charged with the murder of Jermane Morgan on the afternoon of April 13, 2003[7] in the Frankford section of Philadelphia. He was in the neighborhood to help his girlfriend prepare for a birthday party for her son. While he was cleaning the area and moving trash cans, he became involved in an argument with the decedent who lived in that neighborhood and was known there by his street name, "Score Again."
>
> The argument between the two of them escalated from a verbal encounter to a physical confrontation. [Coker] was armed with a .45 caliber handgun, and he pulled it from his

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[6]The District Attorney does not challenge the timeliness of the habeas petition, see Doc. 10, and I find that it is timely. Coker's conviction became final on September 13, 2010, when the time for seeking review in the United States Supreme Court expired. See Kapral v. United States, 166 F.3d 565, 570 (1999) (conviction becomes final when time expires to seek next level of review on direct appeal); Sup. Ct. R. 13.1 (requiring certiorari petition to be filed within ninety days). On November 12, 2010, sixty days later, the habeas limitations period tolled when Coker filed a PCRA petition. The limitations period resumed running on January 31, 2018, when the Pennsylvania Supreme Court denied Coker's petition for allowance of appeal. See See Stokes v. Dist. Att'y of the County of Phila., 247 F.3d 539, 542 (3d Cir. 2001) ("The ninety-day period during which a state prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of his state post-conviction petition does not toll the [habeas] limitations period."). With 305 days remaining, Coker's habeas filing on August 9, 2018, 190 days later, was timely.

[7]Testimony and the criminal complaint indicate that the shooting took place on April 30, 2003. N.T. 7/13/05 at 54 (testimony of Officer Frasier), 96 (testimony of Officer Monts), 104 (testimony of Diane Morgan), 120 (testimony of James Wirth); Criminal Complaint, DC #03-15-039807 (Phila M.C. Aug. 6, 2003).

> pocket during the altercation. He began to shoot at the decedent who then turned to run away from [Coker]. [Coker] continued shooting at him, and actually shot the decedent six times in various parts of his body, including the back of his leg.
>
> One of the gunshots severed an artery, and caused extensive bleeding. The decedent was unconscious when he was taken to the hospital, and he was listed in very critical condition. He never regained consciousness, and he died of complications from his injuries on May 11, 2003.
>
> Immediately after the shooting, [Coker] left the area and did not return. He was finally apprehended four months later by the "warrant squad" of the Philadelphia Police Department, and charged with murder and several related offenses.

Commonwealth v. Coker, CP-51-CR-1200411-2003, Opinion, at 2-3 (Phila. C.C.P. Nov. 17, 2008).

The evidence presented at trial included the eyewitness testimony of James Wirth, who saw Coker shoot at the victim, N.T. 7/13/05 at 122-28, and the testimony of Mary Terrinovi[8] and Harold Robles, who saw Coker with a gun seconds after hearing six to eight gunshots. Id. at 163-64; N.T. 7/14/05 at 26-27. According to Mr. Robles, Coker looked angry, was holding his chest, and looked like he was scuffed up from "a little wrestling." N.T. 7/14/05 at 26. He did not appear seriously hurt. Id. The Commonwealth also called Edward Stephan Chamara, M.D., who was a Forensic Pathology Fellow in the Philadelphia Medical Examiner's Office at the time of Coker's trial. Dr. Chamara testified that based on his review of the photographs taken at the

[8]When called during the Commonwealth's case-in-chief, this witness is identified in the transcript at Mary Terrenovi. N.T. 7/13/05 at 158. When she was called on rebuttal, she is identified in the transcript as Mary Terrenova. N.T. 7/15/05 at 31. In referring to this witness I will use the name which appears earlier in the transcript.

autopsy, at least one of the wounds to the back of the decedent's left thigh was an entrance wound, indicating that the decedent was shot from behind. N.T. 7/14/05 at 65-67. Coker testified that he acted in self-defense after the decedent, who was bigger than he and known to be aggressive, attacked him. Id. at 165-66.

B. Discussion of Claims

I have reordered and grouped Coker's habeas claims for ease of discussion.

1. Non-Cognizable Claim – IAC of PCRA Counsel (Claim 11)

In this claim, Coker asserts that his PCRA counsel was ineffective for failing to obtain a statement from Kia Miller establishing that she would have provided exculpatory testimony supporting Coker's claim of self-defense. Doc. 2 at 23, 27-28.[9] The District Attorney correctly responds that the claim is not cognizable, Doc. 10 at 28, as the Supreme Court has held that there is no constitutional right to counsel at a state post-conviction proceeding. Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1990). Thus, the ineffectiveness of state post-conviction counsel does not rise to the level of a constitutional violation and does not provide a basis for habeas relief. See 28 U.S.C. § 2254(i) (ineffectiveness of federal or state post-conviction counsel is not a ground for habeas relief).[10]

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[9]I will go into further detail regarding this proposed witness when I discuss Coker's claim that his trial counsel was ineffective for failing to investigate and call Ms. Miller (Claim 9).

[10]As will be discussed later in this Report, the ineffectiveness of PCRA counsel can, in limited circumstances, provide cause to excuse the procedural default of a claim of ineffective assistance of trial counsel.

2. Defaulted Claim Never Presented to the State Court – Illegal Sentence Enhancement (Claim 2)

In his second claim, Coker complains that the trial court applied an enhanced sentence for the gun charge based on incorrect information and asserts that he argued this issue on direct appeal. Doc. 2 at 7. The District Attorney argues that Coker did not present this claim on direct appeal and therefore the claim is procedurally defaulted. Doc. 10 at 14-15.

Although Coker challenged his sentence in his direct appeal 1925(b) statement, he did not brief the issue to the Superior Court and the Superior Court did not address it. See Commonwealth v. Coker, No. 2539 EDA 2007, Brief for Appellant, 2009 WL 3826243, at *2 (Pa. Super. March 12, 2009); Commonwealth v. Coker, No. 2539 EDA 2007, Memorandum (Pa. Super. Dec. 15, 2009).[11] Similarly, Coker did not present this claim to the Superior Court in his PCRA appeal via an IAC claim. See Commonwealth v. Coker, No. 2397 EDA 2016, Memorandum, 2017 WL 3172558, at *3-7 (Pa. Super. July 26, 2017). Thus, Coker has failed to exhaust the claim in the state court and has no way to do so at this point. See 42 Pa. C.S.A. § 9545(b) (establishing one-year statute of limitations for filing PCRA petition); 9544(b) (issue waived if not presented at earliest opportunity). Thus, the claim is procedurally defaulted. See Werts, 228 F.3d at 192 ("claims deemed exhausted because of a state procedural bar are procedurally defaulted).

[11]The only claim Coker raised on direct appeal, involving the court's communication with the jury (Claim 1), will be discussed later in this Report.

Coker does not recognize that the claim was not properly presented to the state courts and has failed to provide any basis to excuse his procedural default. In other areas of his petition Coker relies on Martinez to excuse the default of unexhausted claims, arguing that his PCRA counsel was ineffective for failing to present claims at that stage of the state court proceedings. See Doc. 2 at 44. Martinez is not applicable to Coker's sentencing claim because Martinez is applicable only to excuse the default of claims of ineffective assistance of trial counsel. See 566 U.S. at 17 (limiting holding to a "substantial claim of ineffective assistance at trial"). Thus, Coker's sentencing claim remains defaulted, precluding federal review.

3. Defaulted Claims Presented in Some Form to the State Courts– Martinez Inapplicable (Claims 13 - 17)

Coker presented several of his habeas claims to the PCRA court in his pro se PCRA petition. For purposes of the current discussion, Coker argued that allowing Dr. Chamara to testify based on his review of the surgical and autopsy reports violated Coker's right to confront the witnesses against him because Dr. Chamara was not the author of either of those reports and Coker could not question the doctor about discrepancies between the two reports. Doc. 2 at 23-24, 31-34, 35-36 (Claims 13-15).

These claims, however, were not included by his second-appointed PCRA counsel in the amended PCRA petition and were never considered by any state court.[12] Because

[12]As detailed in the procedural history, Coker raised a myriad of claims in his pro se PCRA petition, supra at 3-4, but newly appointed counsel filed an amended PCRA petition which did not incorporate or raise Coker's pro se claims. Supra at 5-6. Thereafter, Judge Bronson and the Superior Court addressed only the claims presented in second appointed counsel's Amended PCRA petition. Supra at 6-7.

Coker has no way to present the claims to the state court at this time, the claims are procedurally defaulted. See Werts, 228 F.3d at 192 ("claims deemed exhausted because of a state procedural bar are procedurally defaulted).

Similarly, Coker presented his claims alleging a due process violation based on the amendment of the bills to include voluntary manslaughter (Claim 16) and a double jeopardy violation based on the imposition of a probationary sentence (Claim 17) in his response to Judge Rogers' notice of intent to dismiss the pro se PCRA petition. Commonwealth v. Coker, CP-51-CR-1200411-2003, Petitioner's Response to the Proposed Dismissal Under Pa. R. Crim. P. Rule 907, at 19 (Phila C.C.P. July 28, 2015). These claims were not considered by the court, not included in second-PCRA counsel's amended PCRA petition, and not presented in Coker's appeal of the denial of PCRA relief. Because he has no way to present the claims to the state court at this point, they too are procedurally defaulted. See Werts, 228 F.3d at 192.

In his petition, Coker acknowledges that these claims were not properly presented to the state courts and relies on Martinez to excuse his procedural default. Doc. 2 at 43-44. The District Attorney argues that the claims are procedurally defaulted and meritless and that Coker's reliance on Martinez is inappropriate. Doc. 10 at 24-25, 29-31.

I conclude that Martinez does not provide a basis to excuse the default, albeit on different grounds than asserted by the District Attorney. The District Attorney contends that Martinez is not applicable to these claims because "Martinez, under its express language, does not apply to claims defaulted on PCRA appeal." Doc. 10 at 25-26 (citing Martinez, 566 U.S. at 16). This argument misapprehends the procedural history. The

default occurred when Coker's second PCRA counsel abandoned the claims Coker had previously presented in his pro se PCRA petition. Although Judge Rogers initially issued a notice of intent to dismiss, he subsequently allowed second appointed PCRA counsel to file an amended PCRA petition, and thereafter the courts addressed only the claims presented in new counsel's amendment. Thus, no court has ever considered these claims, and this particular limiting language of Martinez does not apply.

Nevertheless, Martinez applies only to claims of ineffective assistance of trial counsel. See 566 U.S. at 17 ("a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in [an] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"). None of the five claims at issue here alleges ineffective assistance of trial counsel. Thus, Martinez cannot provide cause to excuse the default of Coker's confrontation clause, due process, and double jeopardy claims.[13]

4. Defaulted Claims Presented in Some Form to the State Courts– Martinez Applicable (Claims 10 & 12)

Two of Coker's habeas claims presented in his pro se PCRA petition, but abandoned by second-PCRA counsel, allege IAC. In his tenth claim, Coker alleges that trial counsel was ineffective for failing to obtain exculpatory testimony from Dr.

[13]With respect to Coker's claim that the trial court violated his due process rights by amending the bills to include a charge of voluntary manslaughter without any such request by either counsel, I note that the transcript indicates that Judge Rogers granted the defense request for a jury instruction on voluntary manslaughter. N.T. 7/15/05 at 45, 47, 98.

Williams, the medical examiner who performed the autopsy on the victim. Doc. 2 at 23, 25. In his twelfth claim, Coker alleges that trial counsel was ineffective for stipulating to the deceased's criminal history and failing to pursue "a form of alibi defense." Id. at 23, 28. The District Attorney argues that these claims are defaulted and meritless. Doc. 10 at 24-26, 27-28.

Coker concedes that these claims were not properly presented to the state courts and relies on Martinez to excuse the default arguing that his PCRA counsel was ineffective for failing to present the underlying IAC claims. Doc. 2 at 44. The District Attorney argues that Martinez is inapplicable because it "does not apply to claims defaulted on PCRA appeal." Doc. 10 at 25-26. As previously explained, the default with respect to these claims occurred at the initial post-conviction proceeding, not on appeal. Therefore, Martinez is potentially available to provide cause to excuse the default of the underlying IAC claims.

Martinez applies where the default was caused by the ineffective assistance of PCRA counsel in the initial review collateral proceeding, and where the underlying claim of trial counsel ineffectiveness is substantial. See Cox v. Horn, 757 F.3d 113, 119 (3d Cir. 2014) (citing Martinez, 566 U.S. at 13-14). Rather than proceeding through each step of the Martinez analysis with respect to these two claims, I conclude that the underlying claims of ineffective assistance of trial counsel are meritless.[14]

[14]Because the state courts did not address these claims, the federal court applies de novo review in analyzing these claims. See Bey, 856 F.3d at 236 (once procedural default is excused, review is de novo because state court did not consider claim on the merits).

a. Claim 10 – IAC for Failing to Call Dr. Williams

At trial the Commonwealth called Dr. Edward Stephen Chamara, who was a Forensic Pathology Fellow at the Philadelphia Medical Examiner's Office at the time of the trial, to testify as an expert witness as to the decedent's injuries and cause of death. N.T. 7/14/05 at 45-46. Dr. Chamara explained that Dr. Susan Williams performed the autopsy on the victim under the guidance of Dr. Ian Hood, that Dr. Hood prepared the autopsy report, and that he (Dr. Chamara) was testifying based on his review of the hospital medical report and the autopsy report and photographs. Id. at 51, 85-86.[15]

Coker claims that his trial counsel was ineffective for failing to subpoena and call Dr. Williams at trial. The District Attorney argues that Coker cannot meet his burden on this claim because he has not proffered evidence that Dr. Williams was available to testify or what the testimony would be. Doc. 10 at 25-26 (citing, inter alia, Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) (rejecting IAC claim for failure to call witnesses where claim was "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense")).

In order to establish ineffectiveness, Coker must demonstrate that his trial counsel's performance in failing to call Dr. Williams was deficient and prejudiced the defense. Strickland, 466 U.S. at 687, 694. The court need not determine whether counsel's performance was deficient if a petitioner cannot establish prejudice. Id. at 696.

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[15]Dr. Chamara testified that Drs. Hood and Williams were "out of town" at the time of Coker's trial. N.T. 7/14/05 at 86.

Here, even assuming counsel should have called Dr. Williams, Coker has failed to establish that the failure to do so prejudiced the defense.

As previously mentioned, Dr. Williams performed the autopsy under the supervision of Dr. Hood, and Dr. Chamara testified based on his review of the autopsy, medical reports, and the autopsy photographs. N.T. 7/14/05 at 51, 86. Relevant for purposes of Coker's claim, Dr. Chamara testified that, looking at the photographs taken during the autopsy, he could identify two bullet entrance wounds, one on the back of the left thigh and one on the side of the left thigh. Id. at 65-68. According to Dr. Chamara, the position of the entrance wound on the back of the thigh indicated that "the back of the decedent was facing the muzzle of the gun." Id. at 69. This testimony obviously undermined the theory of self-defense.

During cross-examination, defense counsel questioned Dr. Chamara about certain aspects of his testimony that conflicted with the autopsy report. For example, Dr. Chamara testified on direct that two entrance and exit wounds were "very, very clear," N.T. 7/14/05 at 63, but on cross-examination, he conceded that the autopsy report indicated that "due to surgical intervention and time of survival, the wounds and wound path could not be identified with certainty." Id. at 87. Similarly, on direct Dr. Chamara testified that the bullet that entered the side of the decedent's thigh did not go in on an angle because the entrance wound was clear and round. Id. at 69. Defense counsel again relied on the autopsy report to discredit this statement, noting that the report did not address angle of entry or path. Id. at 88.

BY [DEFENSE COUNSEL]:
Q. Nowhere in Dr. Williams' and Dr. Hood's report does it discuss any sort of angle of bullet path, isn't that correct?
A. That's correct.
Q. And, in fact, in Dr. Hood's and Dr. William's [sic] report, as I just read, due to surgical intervention and time of survival, the wounds and wound path cannot be identified with certainty?
A. That's what it says.

Id. at 88-89.

Defense counsel also undermined Dr. Chamara's direct testimony that "the back of the decedent was facing the muzzle of the gun." N.T. 7/14/at 69. Dr. Chamara conceded that the same wound would result if the shooter "was laying on the ground [and] I walked up and lifted my leg up like this to slam my foot down on them and I got shot in the back of the thigh." Id. at 91. Judge Rogers then asked the doctor to clarify his earlier statement.

THE COURT: All right. Now you were asked by [the] Commonwealth on direct examination about whether or not the victim's back was to the shooter and you answered what?
THE WITNESS: The bullet went in –
THE COURT: You answered what, that it was the victim's back was to the street?
THE WITNESS: At some point the posterior of the thigh was facing the muzzle of the gun.
THE COURT: Well, that's not what you testified to, that's what I'm talking about. You answered [the prosecutor's] question about the victim, the person who got shot, had his back to the shooter. Okay. That's what you testified to; do you remember that?
THE WITNESS: Yes, I do.
THE COURT: Now, do you want to correct it and say what you can or cannot say about the victim's back and the shooter?

THE WITNESS: At some point when the bullet was fired, the posterior aspect of the thigh was facing the muzzle of the gun.

THE COURT: But you don't know what position the back was in relation to the shooter.

THE WITNESS: That's correct.

Id. at 92-93.

I conclude that defense counsel effectively used the autopsy report to undermine Dr. Chamara's testimony, questioning several aspects of his testimony, which was, by the doctor's own admission, based on his review of reports and photographs. Coker has failed to establish that calling Dr. Williams would have provided a better basis to challenge Dr. Chamara's testimony than using the very documents that provided the foundation for Dr. Chamara's testimony. Therefore, Coker has failed to demonstrate that the failure to call Dr. Williams prejudiced the defense.

b. Claim 12 – IAC for Stipulating to Decedent's Criminal History and Failing to Pursue Alibi Defense

Coker also argues that his trial counsel was ineffective for stipulating to the decedent's criminal history rather than presenting evidence to support his self-defense claim that the victim was a "known bully in the neighborhood with a history of being violent and aggressive." Doc. 2 at 28. In the alternative to default, the District Attorney responds that counsel's stipulation was reasonable and furthered his claim of self-defense. Doc. 10 at 29.

During presentation of the defense case, defense counsel told the jury that the parties stipulated that, if called as a witness, the Clerk of Quarter Sessions would testify that the decedent had pled guilty to two separate charges of simple assault. N.T. 7/15/05

at 18-19. At other times throughout the trial, defense counsel attempted to characterize the decedent as a bully. See N.T. 7/13/05 at 46 (opening statement), 148 (asking Mr. Wirth if decedent "was so big you could see him fighting"), 172 (asking Ms. Terrinovi about a fight between the decedent and her daughter), 176-84 (arguing at side bar why he should be able to explore acts of aggression and decedent's reputation as an aggressor); N.T. 7/14/05 at 165 (Coker testified that he knew decedent to slap people, knock people out, and try to kidnap people); N.T. 7/15/05 at 55 (arguing in closing that Coker "knows the attacker [and] did not start the fight"). The stipulation bolstered that argument. Further, as a result of the stipulation, Judge Rogers instructed the jury that they could consider the decedent's prior convictions for crimes of violence in determining who the initial aggressor was in the altercation between Coker and the decedent. N.T. 7/15/05 at 95-96 (discussion with counsel), 130-31 (jury instruction). Admission of the decedent's prior convictions for simple assault through the stipulation aided rather than hampered the defense strategy. Coker has not proffered what additional information would have been admissible about the decedent's prior convictions. Counsel's performance in this respect was neither deficient nor prejudicial.

In this claim, Coker also alleges that his trial counsel was ineffective for failing to present "a form of alibi defense." Doc. 2 at 28.[16] The District Attorney argues that this

[16]Coker cites Commonwealth v. Bolden, an IAC case in which the Pennsylvania Supreme Court aligned state jurisprudence with Strickland and determined that counsel's error in failing to cross-examine a witness with a police report contradicting his trial testimony was an omission rather than a deliberate attempt to create error. 534 A.2d 456, 458 (Pa. 1987). I see no relevance to Bolden other than for the IAC standard.

portion of the claim is not clear because counsel "made every attempt to convince the jury that petitioner reasonably shot the victim out of fear." Doc. 10 at 29.

The suggestion of an alibi defense when Coker admitted shooting Mr. Morgan, N.T. 7/14/05 at 166, is contrary to all logic. Coker has not pointed to evidence suggesting that alibi was a viable defense, and much of the evidence at trial, including the eyewitness testimony and Coker's own admission, undermine any such theory.

5. Properly Exhausted Claims – Merits Review (Claims 1 & 3 - 9)

The remainder of Coker's claims were properly presented to the state courts on direct or PCRA appeal, and thus are exhausted, and ripe for merits review.

a. Claim 1 – Absence of Counsel during Jury Instruction

In his first claim, Coker contends that the trial court violated his right to counsel when the court gave the jury a reiterative instruction without counsel present. Doc. 2 at 5. The District Attorney responds that the Superior Court's determination of the claim was not contrary to nor an unreasonable application of clearly established federal law. Doc. 10 at 13-14. The claim is exhausted because Coker presented it in his direct appeal.

The jury began deliberations on Friday, July 15, 2005. After the jury returned its verdict the following Tuesday, Judge Rogers made the following statement:

> On the record, I want to make sure the record was complete, there was a question that came in on the 18th that's yesterday at 10:30 a.m. counsel was aware, they were away. They requested all bullet casings found on the crime scene. They had one back there. This court told them to continue to deliberate. I did not say yes or no. I just told them don't stop deliberating because there was no bullet casings sent back, seven or eight shell casings whatever the other number was. I meant to put that on the record, this is my first opportunity.

> We could have done it before we did the verdict but I meant to and I'm placing that on the record now. We could have done that before the verdict, but I didn't do that. So I'm making a record of that now.

N.T. 7/19/05 at 9-10.[17]

The Superior Court rejected this issue on direct appeal finding that counsel was not missing during a critical stage of the trial.

> The one issue for our review is whether the trial court violated [Coker's] constitutional right to have counsel present at a critical stage of trial when it received a question from the deliberating jury and communicated an answer without the knowledge or presence of counsel.[1] Because the court's answer conveyed nothing more than to resume deliberation with the aid of the exhibits already approved by all counsel, it was not tantamount to an instruction of law and thus did not represent a critical stage of trial as recognized by our jurisprudence.
>
> ---
>
> [1]There is an obvious disagreement between the court's transcribed statement on the record that counsel "was aware" and [Coker's] assertion that counsel had no such notice. Though no explanation is given to clarify this matter, it appears as if the transcribed excerpt . . . contains a scrivener's error, recording that counsel "was aware" instead of "was away," which the court states immediately thereafter.
>
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> . . . .
>
> . . . the trial court here did not supply an instruction on the law of the case, but simply advised them to continue deliberations with the exhibits that all counsel had already agreed it could view. [Coker] offers no argument as to how

[17]It appears that Judge Rogers' statement that this was the first opportunity to make a record of the question and response is incorrect. Judge Rogers indicates that the request for the bullet casings was made at 10:30 a.m. on Monday, July 18, 2005. N.T. 7/19/05 at 9. However, the July 18 transcript establishes that the jury sent a series of requests/questions to the court at 1:30 p.m. on Monday, July 18, 2005, and Judge Rogers made no mention of the request for the bullet casings at that time. N.T. 7/18/05 at 3.

> this exchange, devoid as it was of additional instruction, advice, or opinion, represented a critical stage of his case where the presence of counsel might have affected the court/jury interaction and possibly altered the outcome of trial. Under these circumstances, we find no reversible error in the *ex parte* communications at issue. Accordingly, we conclude that the court's response was in the nature of jury management as opposed to jury instruction, for which the presence and input of counsel was necessary.

Commonwealth v. Coker, No. 2539 EDA 2007, Memorandum, at 4-6 (Pa. Super. Dec. 15, 2009).

"[I]f counsel is denied at a critical stage of trial, it is prejudice *per se*." United States v. Toliver, 330 F.3d 607, 613 (3d Cir. 2003) (citing United States v. Cronic, 466 U.S. 648 (1984); Roe v. Flores-Ortega, 528 U.S. 470 (2000)). The question here is whether the absence of counsel occurred at a critical stage of the trial. In Toliver, the Third Circuit rejected a similar denial of counsel claim when the trial court provided excerpted record testimony requested by the jury without notifying counsel or the defendant. 330 F.3d at 614. The court drew a distinction between clarifying the substantive elements of the charged offense or providing guidance as to how a jury should fulfill their decision-making function, which provided instructions to the jury requiring the presence of counsel, and providing requested testimony, which "does not similarly 'instruct' the jury." Id.

Here, the judge merely heard a request from the jury for the bullet casings and told them to continue deliberating. This is not akin to instructing the jury. I conclude that the Superior Court's decision is not contrary to nor an unreasonable application of federal law and did not involve an unreasonable determination of the facts.

b. Claim 3 – IAC for Failing to Object to Racial Comments in Opening

Incorporating the brief attached to his amended PCRA petition, Coker claims that trial counsel was ineffective for failing to object to racial comments made by the prosecutor in her opening statement. Doc. 2 at 9-11. The District Attorney argues that counsel could not be considered ineffective because the Superior Court, applying state law, found that the underlying claim of prosecutorial misconduct did not have merit and, even if evaluated under the federal due process standard, the claim is meritless. Doc. 10 at 16-18.[18] Coker's second appointed PCRA counsel presented this claim in the amended PCRA petition and Coker pursued the claim on PCRA appeal. Therefore, the claim is exhausted.

At the beginning of her opening statement, the prosecutor, comparing the trial to those seen on the television show "Law and Order," made the following statement,

> Well, I'm going to tell you right now that the facts that you're going to hear today and the next few days in this case were not ripped from the pages of today's headlines or any other days' [sic] headlines for that matter.
>
> Because it's a sad real[i]ty for us as citizens of the city of Philadelphia that when a young, black man gets shot, cut down in his prime and gets killed in the streets of Philadelphia it very, very rarely makes the headlines.

[18]The District Attorney first asserts that Coker's incorporation of the PCRA brief is improper. Doc. 10 at 15. Although the District Attorney is correct, see Loc. R. Civ. P. 9.3(a) ("All petitions for writs of habeas corpus . . . shall be filed on forms provided by the Court and shall contain the information called for by such forms [and] [a]ny attempt to circumvent this requirement by purporting to incorporate by reference other documents which do not comply with this Rule may result in dismissal of the petition."), I will address the claims appended to the habeas petition in deference to Coker's pro se status.

> But that's exactly what happened in this case . . . . This defendant . . . shot and killed . . . Jermaine Morgan, a young black man . . . .

N.T. 7/13/05 at 35-36. Just moments later, she reiterated, "Like I said, it doesn't make headlines when a young black man gets killed on the streets of Philadelphia." Id. at 37.

Coker presented this claim in his PCRA appeal and the Superior Court rejected it. "While perhaps ill advised, the prosecutor's statement did not inflame any racial bias within the jury: the main issue in the case was self-defense and both the victim and [Coker] were African-American. Thus, the issue merits no relief." Commonwealth v. Coker, No. 3397 EDA 2016, Memorandum, 2017 WL 3172558, at *3 (Pa. Super. 2017).

The Superior Court's determination of the underlying claim is consistent with established federal law. In the federal context, claims of prosecutorial misconduct are governed by Darden v. Wainwright, 477 U.S. 168, 181 (1986), in which the Supreme Court stated that "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' . . . The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. at 181 (quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). Thus, "Supreme Court precedent counsels that the reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." Moore v. Morton, 255 F.3d 95, 107 (3d Cir. 2001).

In light of the trial transcript, including the uncontested evidence that Coker shot the victim, the evidence that Coker shot the victim from behind, Coker's admitted failure to seek help for the victim or provide information to the police, and in the absence of other improper references to race, the Superior Court reasonably concluded that the prosecutor's references to the race of the victim did not inflame the jury and accordingly did not infect the trial with unfairness. Thus, counsel cannot be considered ineffective for failing to challenge the prosecutor's statements. See Real, 600 F.3d at 209 (counsel cannot be considered ineffective for failing to pursue a meritless motion).

c. Claim Four – IAC for Failing to Object to Prosecutor's Reference to Coker's Silence in Opening

Coker next claims that his trial counsel was ineffective for failing to object to references to his silence in the prosecutor's opening. Doc. 2 at 11-12. The District Attorney argues that the claim is meritless. Doc. 10 at 16-17. Like the previous claim, second-appointed PCRA counsel presented this in the amended PCRA petition and Coker included it in his PCRA appeal. Thus, the claim is exhausted.

In describing the evidence she would be presenting against Coker, the prosecutor referred to ballistics evidence and witnesses who would be testifying. N.T. 7/13/05 at 41. She also stated: "The one person who will not be taking to [sic] this stand is Mr. Morgan, but the physical evidence will testify for him and speak for him. I need you to pay careful attention to that." Id. at 41. Coker contends that, by stating that the victim was the only person who would not testify, the prosecutor infringed upon Coker's right to remain silent by implying that Coker would be testifying. Doc. 2 at 12.

The Superior Court rejected this claim on PCRA appeal.

> Instantly, unlike situations in which a prosecutor comments on a defendant's failure to testify, [Coker] claims that the prosecutor indicated that [Coker] *would* be testifying. [Coker] does not, and cannot, point to any case law that indicates that a prosecutor's comments relating to the mere fact that a defendant was *planning* to testify violates [his] rights. Further, there is a severe attenuation in the leap from the actual comment by the prosecutor to [Coker's] understanding of the comment. Therefore, we do not find that [Coker] could have shown that he was prejudiced in any manner by this statement.

Commonwealth v. Coker, No. 2397 EDA 2016, Memorandum, 2017 WL 3172558, at *4 (Pa. Super. July 26, 2017) (emphasis in original).

Had Coker maintained his silence at trial, and had the prosecutor highlighted his decision not to testify, her comments would have violated his Fifth Amendment right against self-incrimination. See generally Griffin v. California, 380 U.S. 609 (1965) (reversing conviction where court instructed that jury could take into account defendant's failure to testify to facts about which he had knowledge, and prosecutor argued to jury that defendant failed to explain what happened). However, here, where the prosecutor referred to the victim not taking the stand, the Superior Court reasonably found that the prosecutor's reference was not a comment on Coker's silence. In context, the prosecutor's reference to the victim's inability to testify can reasonably be considered oratorical flair rather than a comment on Coker's right to remain silent.

d. Claim 5 – IAC for Conflict of Interest

Coker next claims that his counsel was ineffective for failing to notify Coker that he had a potential conflict of interest and in failing to withdraw from the case. Doc. 2 at

12-13. The District Attorney responds that the claim is meritless. Doc. 10 at 18-19. This claim was included in Coker's amended PCRA petition and PCRA appeal, and it is therefore exhausted.

After the lunch recess on the first day of testimony, the prosecutor informed the court that Coker's trial counsel had previously represented the daughter of one of the Commonwealth witnesses (Mary Terrenovi) in an unrelated incident in the same neighborhood. N.T. 7/13/05 at 107-09. According to Coker's counsel, Coker was not involved in the incident involving his prior client. Id. at 109.

On PCRA appeal, the Superior Court, rejected the claim.

> An attorney owes his client a duty of loyalty, including a duty to avoid conflicts of interest. See Strickland v. Washington, 466 U.S. 668, 688 (1984). "An appellant cannot prevail on a preserved conflict of interest claim absent a showing of actual prejudice." Commonwealth v. Collins, 957 A.2d 237, 251 (Pa. 2008) (citations omitted). However, if an appellant is able to show that trial counsel experienced an actual, rather than a potential conflict of interest, prejudice is presumed. See id. "To show an actual conflict of interest, the appellant must demonstrate that: (1) counsel actively represented conflicting interests; and (2) those conflicting interests adversely affected his lawyer's performance." Id. (citations and internal quotation marks omitted).
>
> We agree with the PCRA court that this issue has no merit. As the PCRA court explain[ed] in its well-written opinion:
>
> > At trial, the prosecutor informed the trial court that trial counsel had a possible conflict of interest as he previously represented the daughter of one of the Commonwealth's witnesses in a matter involving a street fight between the daughter and other girls in the neighborhood. N.T. 7/13/05 at 107-110. However, trial counsel informed the court that, while he had represented the daughter, there

> was no actual conflict of interest as the daughter would not be testifying at [Coker's] trial, [Coker] was not involved in the daughter's street fight, and trial counsel had not contacted the daughter or the Commonwealth witness in any way to request assistance in [Coker's] case. N.T. 7/13/05 at 109-110. In addition, the Commonwealth witness at issue was only being called by the Commonwealth to say that she saw [Coker] running with a gun, which were the facts not disputed in this self-defense case. N.T. 7/13/05 at 110.
>
> PCRA Court Opinion, 10/25/16, at 8.
>
> It is clear from the record trial counsel did not represent competing interest. As there was no actual conflict, this issue merits no relief.

Commonwealth v. Coker, 2397 EDA 2016, Memorandum, 2017 WL 3172558, at *4-5 (Pa. Super. July 26, 2017).

Counsel is ineffective if he "actively represented conflicting interests," and an actual conflict of interest adversely affected the lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). If the petitioner shows that an actual conflict of interest tainted counsel's performance, prejudice is presumed. Strickland, 466 U.S. at 692. However, if the petitioner can only show a potential conflict of interest, prejudice must be proved. Hess v. Mazurkiewicz, 135 F.3d 905, 910 (3d Cir. 1998) (citing United States v. Acty, 77 F.3d 1054, 1057 n.3 (8th Cir. 1996); Stoia v. United States, 22 F.3d 766, 770 (7th Cir. 1994)).

Here, Coker claims that his counsel had either an actual or potential conflict of interest. Doc. 2 at 13. However, Coker failed to establish that his counsel was actually representing conflicting interests. His earlier client's case had no bearing on Coker's and

his client was not testifying at Coker's trial. Moreover, as the Superior Court noted, the witness at the core of this claim testified that she saw Coker with a gun moments after hearing gunshots, facts that were undisputed in a self-defense case. N.T. 7/13/05 at 164. The Superior Court's decision is consistent with the governing federal law and a reasonable determination of the facts.

e. Claim 6 – IAC for Failing to Object to Testimony that Coker Was "Known in the Area"

Coker next claims that his counsel was ineffective for failing to request a proper cautionary instruction and/or move for a mistrial when Commonwealth witness James Wirth stated that Coker was "known in the area." Doc. 2 at 13-14. The District Attorney responds that the claim is meritless. Doc. 10 at 21-22. Coker exhausted this claim by presenting it in his amended PCRA petition and PCRA appeal.

During Mr. Wirth's testimony, the prosecutor asked him about a probationary sentence he was serving for a 2003 conviction for indecent assault. N.T. 7/13/05 at 131-32. Mr. Wirth explained that shortly after Mr. Morgan's shooting, he went to his probation officer because he was planning to move to Minnesota. Id. at 132-33. Mr. Wirth explained that he did not wait for the necessary paperwork to be processed, but "took off because I was afraid for my life." Id. at 133. When asked why he was afraid, Mr. Wirth began to refer to Coker's reputation, but was cut off.

> Q. Why were you afraid for your life?
> A. Because I knew that Mr. Coker and his buddies were known in the area as being –
> [DEFENSE COUNSEL]: Objection, judge.
> THE COURT: Stricken from the record. You don't need to talk any more.

> THE WITNESS: I'm sorry.
> THE COURT: You moved. That's all we need to know. Totally disregard anything about allegedly Mr. Coker's friends. That's not evidence in this case. It doesn't exist and it's not true, as far as I'm concerned. So just totally blank it out. Okay.

Id. Coker argues that the trial court's instruction only addressed Mr. Coker's friends and should have extended to Mr. Coker. Doc. 2 at 14.

Construing the claim as one impermissibly permitting evidence of prior bad acts, the Superior Court denied Coker relief.

> [Coker's] claim of error rests upon his belief that Wirth's statement that he left town because he was afraid and that [Coker] and his friends were "known in the area" introduced *prior* bad acts evidence in violation of Rule 404. There is no evidence of record, however, that Wirth testified as to any *prior* actions on behalf of [Coker] that would have inspired his fear. As he "did not mention other crimes, wrongs, or acts, [Wirth's] testimony does not implicate Rule 404." Commonwealth v. Cook, 952 A.2d 594, 620 (Pa. 2008) (citation and internal quotation marks omitted). Accordingly, trial counsel was not ineffective for failing to request a "proper" cautionary instruction or move for a mistrial based upon the introduction of this evidence.

Commonwealth v. Coker, No. 2397 EDA 2016, Memorandum, 2017 WL 3172558, at *5 (Pa. Super. July 26, 2017) (emphasis in original).[19]

[19]The PCRA court denied the claim on several other grounds, finding that (1) Mr. Wirth's fear was properly admitted to rebut the defense use of his absconding from probation supervision to attack his credibility, (2) the court immediately struck the statement from the record, and (3) there was no basis to move for a mistrial. Commonwealth v. Coker, CP-51-CR-1200411-2003, Opinion at 9-10 (Phila. C.C.P. Oct. 25, 2016).

At its core, Coker's claim is one of state evidentiary law and the admission of evidence. The state courts determined that the trial court's actions, striking the testimony and instructing the jury to disregard the statement, were sufficient to address the remark. Such state evidentiary rulings are beyond habeas review absent a violation of due process. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (habeas relief does not lie for errors in state law evidentiary rulings unless they rise to the level of a deprivation of due process). Considering the evidence presented at trial, Coker cannot establish that a comment cut off by an objection that the court then struck from the record and admonished the jury not to consider denied him a fair trial. Thus, counsel will not be considered ineffective. See Priester v. Vaughn, 382 F.3d 394, 402 (3d Cir. 2004) (counsel not ineffective for failing to raise a state-law objection that the state courts found meritless).

f. Claim 7 – IAC for Failing to Object to Irrelevant Information Regarding Search and Seizure Warrant

Coker next claims that his counsel was ineffective for failing to object when a detective testified that a judicial authority issued a search and seizure warrant upon a showing of probable cause. Doc. 2 at 15-16. The District Attorney responds that the claim is meritless. Doc. 10 at 22-23. Coker exhausted this claim by presenting it in his amended PCRA petition and the PCRA appeal.

Detective Richard Flynn testified that, as the detective assigned to the investigation, he went to the scene shortly after the report of the shooting. N.T. 7/14/05 at 7-8. After interviewing people to find out what had happened, he developed Coker as

a person of interest, and applied for a search warrant for Coker's residence to look for a handgun, shotgun, ammunition, and clothing stained with blood. Id. at 11, 15. In introducing the search warrant to the jury, the prosecutor asked Detective Flynn to explain what a search and seizure warrant is. Id. at 12. The detective explained,

> A search and seizure warrant allows a police officer [or] anybody in law enforcement to enter someone's property in order to find evidence of a crime. In order to do that, you have to convince a juridical authority, the person issuing the warrant, that there was enough probable cause to do this; there is enough evidence or to believe that there is evidence of a crime within a person's home.

Id. at 12.[20] Coker complains that whether a judicial authority has found probable cause is irrelevant to the issue of guilt at trial. Doc. 2 at 15.

The Superior Court rejected this claim, relying on the reasoning of the PCRA court.

> The PCRA court "agrees that it is not relevant at trial that a judicial authority found probable cause to believe that evidence of a crime would be found in [Coker's] home." PCRA Court Opinion, 10/25/16, at 10. The police obtained the warrant to search for the handgun used in the shooting. At trial, as the PCRA court notes, [Coker] admitted he possessed the handgun – and that he shot the decedent. The only issue at trial was self-defense. "Under these circumstances, the evidence that probable cause existed to show that [Coker] had a gun in his home could not have adversely affected [Coker's] case." Id., at 11. This reasoning is sound. [Coker] cannot establish prejudice. Thus [Coker's] . . . claim of trial counsel ineffectiveness on appeal fails.

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[20]Later in his testimony, Detective Flynn explained that a bail commissioner is the issuing authority for a warrant and takes the place of a judge. N.T. 7/14/05 at 13.

Commonwealth v. Coker, No. 2397 EDA 2016, Memorandum, 2017 WL 3172558, at *6 (Pa. Super. July 26, 2017).

Based on the testimony at trial, the Superior Court's determination was consistent with Strickland and a reasonable determination of the facts. As previously noted, to succeed on an IAC claim, a petitioner must show that his counsel's performance was deficient, and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687, 694. Here, Coker admitted that he had a gun, that the gun fell to the ground when Mr. Morgan was beating him up on the street, and that he grabbed the gun and fired it an unknown number of times. N.T. 7/14/05 at 165-66. Thus, the fact that an issuing authority found probable cause to search for the gun in Coker's house is immaterial. Coker cannot show that failure to object to this testimony prejudiced his defense.

g. Claim 8 – IAC of Appellate Counsel for Failing to Challenge Testimony Regarding Mr. Wirth's Arrest

Coker claims that his direct appellate counsel was ineffective for failing to challenge the trial court's decision to allow a Commonwealth witness to testify that Mr. Wirth was arrested after he left the courtroom. Doc. 2 at 16-18. The District Attorney contends that the claim is meritless. Doc. 10 at 23-24. This claim was exhausted in Coker's amended PCRA petition and PCRA appeal.

As previously mentioned (in addressing Claim 6), the prosecutor elicited Wirth's testimony that he moved to Minnesota shortly after the shooting of Mr. Morgan, thereby absconding from probation. N.T. 7/13/05 at 133-34. Mr. Wirth testified that he became aware of an outstanding bench warrant for his arrest about two weeks prior to his

testimony and that one of the reasons he returned was to turn himself in. Id. at 134-35. He further testified that he had not been made any promises or deals in exchange for his testimony in Coker's trial. Id. at 135. Defense counsel challenged this testimony on cross-examination, suggesting that Mr. Wirth expected lenience for his testimony and focusing on the fact that he had not been arrested. Id. at 139-42.

At the time Mr. Wirth testified, he had not been arrested and was not in custody. However, the prosecutor informed the court the next day that Mr. Wirth had been arrested following his testimony and asked that defense counsel not be permitted to argue that Mr. Wirth "just strolled in here unencumbered" in his closing. N.T. 7/14/05 at 55-56. Defense counsel objected to the prosecution's introduction of evidence of the arrest, but the court permitted the testimony. Id. at 57. Thereafter, Detective John McDermott testified that, after Mr. Wirth testified the day before, he was placed placed into custody with the Sheriff's Department and the probation office and remained in custody. Id. at 104-05.

Direct appellate counsel did not present the underlying challenge on appeal.[21] Coker presented the claim in his PCRA appeal challenging the stewardship of his direct appellate counsel, and the Superior Court rejected it, relying on the reasoning of the PCRA court.

> The PCRA court cogently explained its reasoning for dismissing this claim in its opinion:
>
> > Here, the evidence of Wirth's arrest after testifying was highly relevant to corroborate an important part of Wirth's testimony. In

[21]Coker was represented by new counsel on direct appeal.

> particular, Wirth testified that he returned to Philadelphia after absconding knowing that there was a warrant outstanding for his arrest, and fully expecting to surrender to authorities. He also testified that no promises had been made to him for returning and testifying, and that he was aware that he could face new charges and be imprisoned upon his return. N.T. 7/13/05 at 134-136. Wirth's arrest following his testimony corroborated Wirth's stated belief that he was actually not receiving favorable treatment and would face consequences for violating probation. Moreover, the potential for unfair prejudice was minimal.
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> PCRA Court Opinion, 10/25/16, at 12.
>
> We agree with the PCRA court that the testimony was relevant. Thus, an objection posed by trial counsel would have failed. We cannot deem Appellate counsel ineffective for failing to present a meritless claim on direct appeal.

Commonwealth v. Coker, No. 2397 EDA 2016, Memorandum, 2017 WL 3172558, at *6 (Pa. Super. July 26, 2017).

The Superior Court determined that the evidence at the root of this claim was admissible, a finding beyond the scope of habeas review. See Estelle, 502 U.S. at 67-68. Consistent with federal law, the Superior Court also found that counsel cannot be ineffective for failing to present a meritless claim. Real, 600 F.3d at 309; McAleese, 1 F.3d at 169. Therefore, Coker is not entitled to habeas relief on this claim.

h. Claim 9 – IAC for Failing to Investigate/Call Kia Miller

Finally, Coker claims that his trial counsel was ineffective for failing to investigate proposed defense witness Kia Miller and call her to testify. Doc. 2 at 18-19. The District Attorney responds that the Superior Court properly rejected this claim because Coker

offered no proffer concerning the witness, her ability and willingness to testify, that she was known to trial counsel, or that absence of her testimony denied Coker a fair trial. Doc. 10 at 23-24. Coker exhausted this claim by raising it in his amended PCRA petition and on PCRA appeal.

In his pro se PCRA petition, Coker alleged the ineffectiveness of both his trial and direct appellate counsel with respect to Ms. Miller, whom Coker alleged was an eyewitness to the incident and "would have provided exculpatory testimony in support of [his] claim that he acted in self-defense." Commonwealth v. Coker, CP-51-0001200411-2003, Facts in Support of Alleged Errors (Phila. C.C.P. Nov. 12, 2010) (attached to PCRA petition). Coker offered no evidence in support of his assertion that Ms. Miller would provide exculpatory testimony, nor did he proffer her availability or that he made his trial counsel aware of the witness. In his brief, second-PCRA counsel stated that he had no information regarding Ms. Miller but wished to preserve the issue. Commonwealth v. Coker, CP-51-CR-1200411-2003, Letter Brief attached to Amended Post Conviction Relief Act Petition, at 17-18 (Phila. C.C.P. 2/28/16); see also Doc. 2 at 18-19.

The Superior Court rejected the claim.

> Here, [Coker] establishes the identity of the witness, Kia Miller – and that is all. [Coker] writes in his appellate brief that "in being forthright, [he] does not have any information pertaining to Kia Miller." Appellant's Brief, at 22. He raises this claim only to "preserve the issue at this time and would investigate if the case were remanded for an evidentiary hearing and/or a new trial were granted." Id. That is not how one successfully raises this claim. The

> PCRA court committed no error in finding it was without merit.

Commonwealth v. Coker, No. 2397 EDA 2016, Memorandum, 2017 WL 3172558, at *7 (Pa. Super. July 26, 2017).

The Superior Court's determination of the claim is consistent with federal law. In Zettlemoyer, the Third Circuit denied an IAC claim because the petitioner provided nothing more than his own allegation that exculpatory testimony existed:

> We recognize that [the petitioner] maintains that counsel failed to call some other witness who might have presented testimony crucial to his defense of diminished capacity; however, he neither alleges nor offers evidence that any such testimony was forthcoming or available upon reasonable investigation. A witness cannot be produced out of a hat. [The petitioner] cannot meet his burden to show that counsel made errors so serious that his representation fell below an objective standard of reasonableness based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense. Rather he must set forth facts to support his contention.

923 F.2d at 298 (citing Mayberry v. Petsock, 821 F.2d 179, 187 (3d Cir. 1987) (petitioner's vague and general allegations and supporting materials fail to make a sufficient showing to justify relief); see also Young v. Vaughn, Civ. No. 00-3512, 2002 WL 393106, at *8 (E.D. Pa. March 6, 2002) (Padova, J.) ("Petitioner's bare assertion that [a witness] might have testified in his favor is insufficient to support a claim of [IAC]"). Thus, Coker's bare assertion that Ms. Miller would have testified on his behalf does not entitle him to habeas relief.

IV. CONCLUSION

With respect to eight claims that Coker exhausted in the state courts, I conclude that the decisions of the state courts were consistent with federal law and did not result in an unreasonable determination of the facts. Coker procedurally defaulted eight of his claims by failing to properly present them to the state courts. He has relied on Martinez to excuse his defaults, but Martinez only applies to the default of ineffective assistance of trial counsel claims. Just two of his claims fall into this category, leaving six claims defaulted. With respect to these two claims to which Martinez may apply, applying de novo review, I conclude that he has failed to establish that his trial counsel was ineffective under Strickland. His claim alleging ineffective assistance of PCRA counsel is not cognizable on habeas review.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 9th day of September 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ ELIZABETH T. HEY

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

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

CHRISTOPHER COKER	:	CIVIL ACTION
v.	:	
THERESA DELBALSO et. al	:	No. 18-3385

ORDER

AND NOW, this day of , 2019, upon careful and independent consideration of the petition for writ of habeas corpus, memorandum of law, response, reply, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED AND ADOPTED.
2. The petition for writ of habeas corpus is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

JOSEPH F. LEESON, JR., J.

Appendix - D

COMMONWEALTH OF PENNSYLVANIA, Respondent v. CHRISTOPHER COKER, Petitioner
SUPREME COURT OF PENNSYLVANIA
645 Pa. 431; 180 A.3d 1211; 2018 Pa. LEXIS 647
No. 402 EAL 2017
January 31, 2018, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

Petition for Allowance of Appeal from the Order of the Superior Court.Commonwealth v. Coker, 175 A.3d 415, 2017 Pa. Super. Unpub. LEXIS 2846 (July 26, 2017)

Opinion

{645 Pa. 432} **ORDER**

PER CURIAM

AND NOW, this 31st day of January, 2018, the Petition for Allowance of Appeal is **DENIED**.

Appendix - E

COMMONWEALTH OF PENNSYLVANIA v. CHRISTOPHER COKER, Appellant
SUPERIOR COURT OF PENNSYLVANIA
2017 Pa. Super. Unpub. LEXIS 2846; 175 A.3d 415
No. 2397 EDA 2016
July 26, 2017, Decided
July 26, 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. Coker, 645 Pa. 431, 180 A.3d 1211, 2018 Pa. LEXIS 647, 2018 WL 636644 (Jan. 31, 2018)Post-conviction relief denied at, Post-conviction relief denied at, Judgment entered by, Affirmed by, Post-conviction relief dismissed at, Post-conviction relief dismissed at, Decision reached on appeal by, Motion denied by Commonwealth v. Coker, 2021 Pa. Super. Unpub. LEXIS 894, 2021 WL 1292352 (Apr. 7, 2021)

Editorial Information: Prior History

Appeal from the PCRA Order June 30, 2016. In the Court of Common Pleas of Philadelphia County. Criminal Division at No(s): CP-51-CR-1200411-2003.Commonwealth v. Coker, 990 A.2d 39, 2009 Pa. Super. LEXIS 6862 (Pa. Super. Ct., Dec. 15, 2009)
Judges: BEFORE: PANELLA, J., OLSON, J., and FORD ELLIOTT, P.J.E. MEMORANDUM BY PANELLA, J. President Judge Emeritus Ford Elliott joins the memorandum. Judge Olson concurs in the result.

Opinion

Opinion by: PANELLA

Opinion

MEMORANDUM BY PANELLA, J.

Appellant, Christopher Coker, appeals from the order dismissing his petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546 without a hearing.1 Appellant raises seven claims based upon his assertion that both trial and appellate counsel were ineffective. After careful review, we conclude that none of Appellant's claims have merit, and therefore affirm.

A panel of this Court previously summarized the facts of this matter as follows.

> The facts of this case involve Appellant firing multiple gunshots at his victim at the street corner where the two men were arguing on April 13, 2003. One neighbor testified to having heard two gunshots and then seeing Appellant standing in a "shooting posture" with his left hand supporting the gun-holding right while aiming it at the victim, who at that point was trying to run away.

> Watching from his enclosed porch, where he had told his children to wait while the dispute between Appellant and his victim was escalating, the neighbor heard a "few more shots" and the victim yell for someone to "please help" just moments before he fell to the ground. Another witness testified to hearing six to eight gunshots, and seconds later looked out her window directly across the street and could clearly see her neighbor, Appellant, holding a gun as he entered his home for several minutes before leaving in his car. She phoned police immediately.
>
> Emergency personnel found the victim unconscious and bleeding heavily from various parts of the body, including the back of his leg, where a bullet severed a major artery. Listed in critical condition upon arrival at Temple University Hospital's emergency room, Appellant never regained consciousness and died from his injuries on May 11, 2003. Approximately four months later, Appellant was arrested by the "warrant squad" of the Philadelphia Police Department and charged with murder along with [possessing an instrument of crime]. ***Commonwealth v. Coker***, No. 2539 EDA 2007, at 2 (Pa. Super., filed 12/15/09) (unpublished memorandum) (internal citations to the record omitted).

Appellant proceeded to a jury trial where he was convicted of voluntary manslaughter and possessing an instrument of crime. On August 30, 2005, the trial court sentenced Appellant to an aggregate term of seven to fourteen years' incarceration followed by a ten-year probation term. Appellant did not file a direct appeal, but later filed a timely PCRA petition seeking the reinstatement of his direct appeal rights. The PCRA court reinstated Appellant's appeal rights and appointed Richard Brown, Jr., Esquire, as appellate counsel. Appellant subsequently presented a challenge to the trial court's alleged *ex parte* interaction with the jury at his trial to this Court. We affirmed Appellant's judgment of sentence and our Supreme Court denied *allocator*.

On November 12, 2010, Appellant filed the instant PCRA petition, alleging the ineffectiveness of both trial counsel, Todd Henry, Esquire, and appellate counsel, Attorney Brown. The PCRA court appointed PCRA counsel, Elayne Bryn, Esquire. Attorney Bryn filed a ***Turner/Finley*** no-merit letter and petition to withdraw as counsel on May 11, 2015. The following day, the PCRA court granted Attorney Bryn's request to withdraw and issued a Rule 907 notice of its intent to dismiss the petition without a hearing. Appellant filed a response, requested the appointment of new counsel, and requested a hearing. The PCRA court granted Appellant's request for new counsel and appointed David Rudenstein, Esquire, on August 28, 2015.

Shortly thereafter, Attorney Rudenstein filed an amended petition through which Appellant raised seven allegations of ineffective assistance of counsel, renewed Appellant's request for an evidentiary hearing, and requested a new trial. The PCRA court filed a Rule 907 notice of its intent to dismiss the petition as amended on May 12, 2016. In response, Appellant filed a motion for leave to hold an immediate ***Grazier*** hearing. The PCRA held the ***Grazier*** hearing, and after determining that Appellant did not wish to proceed without counsel, denied the petition on June 30, 2016. This timely appeal followed.

On appeal, Appellant contends that the PCRA court erred by dismissing his PCRA petition without an evidentiary hearing. ***See*** Appellant's Brief, at 3. To support this claim, Appellant raises seven separate allegations of trial counsel ineffectiveness and appellate counsel ineffectiveness that he claims would have proved meritorious at an evidentiary hearing. ***See id.***, at 13-22.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 619 Pa. 549, 65 A.3d 339, 345 (Pa. 2013) (citation omitted) "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." ***Commonwealth v. Koehler***, 614

Pa. 159, 36 A.3d 121, 131 (Pa. 2012) (citation omitted).

Through all of Appellant's claims on appeal, he asserts ineffectiveness of counsel. ***See*** Appellant's Brief, at 13-22. We presume the effective assistance of counsel; an appellant has the burden of proving otherwise. ***See Commonwealth v. Pond***, 2004 PA Super 81, 846 A.2d 699, 708 (Pa. Super. 2004). "In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, ineffective assistance of counsel which ... so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Johnson***, 2005 PA Super 59, 868 A.2d 1278, 1281 (Pa. Super. 2005) (citation omitted). Further,

> Appellant must plead and prove by a preponderance of the evidence that: (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) Appellant suffered no prejudice because of counsel's action or inaction.***Commonwealth v. Spotz***, 610 Pa. 17, 18 A.3d 244, 260 (Pa. 2011) (internal citations and quotation marks omitted).

The right to an evidentiary hearing on a post-conviction petition is not absolute. ***See Commonwealth v. Jordan***, 2001 PA Super 111, 772 A.2d 1011, 1014 (Pa. Super. 2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. ***See id.*** It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting a hearing. ***See Commonwealth v. Hardcastle***, 549 Pa. 450, 701 A.2d 541, 542-543 (Pa. 1997).

In "ineffectiveness claim in particular, if the record reflects that the underlying issue is of no arguable merit or no prejudice resulted, no evidentiary hearing is required." ***Commonwealth v. Baumhammers***, 625 Pa. 354, 92 A.3d 708, 726-727 (Pa. 2014) (citation omitted). "Arguable merit exists when the factual statements are accurate and could establish cause for relief. Whether the facts rise to the level of arguable merit is a legal determination." ***Commonwealth v. Barnett***, 2015 PA Super 162, 121 A.3d 534, 540 (Pa. Super. 2015) (citation omitted). "Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Commonwealth v. Stewart***, 2013 PA Super 317, 84 A.3d 701, 707 (Pa. Super. 2013) (internal citations and quotation marks omitted). We review a PCRA court's decision to deny a claim without a hearing for an abuse of discretion. ***See id.***

In his first two claims, Appellant contends trial counsel was ineffective for failing to object to statements made by the prosecutor in her opening remarks. ***See*** Appellant's Brief, at 9, 13-15. We have previously recognized that

> [n]ot every unwise remark made by an attorney amount to misconduct or warrants the grant of a new trial. Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict.
>
> Furthermore, according to the Pennsylvania Supreme Court in ***Commonwealth v. Chmiel***, [585 Pa. 547, 889 A.2d 501, 543-544 (Pa. 2005)]:
>
> In determining whether the prosecutor engaged in misconduct, courts must keep in mind that comments made by a prosecutor must be examined within the contest of defense counsel's conduct. It is well settled that the prosecutor may fairly respond to points made in the defense

closing. A remark by a prosecutor, otherwise improper, may be appropriate if it is in fair response to the argument and comment of defense counsel. Moreover, prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair.***Commonwealth v. Collins***, 2013 PA Super 158, 70 A.3d 1245, 1252-53 (Pa. Super. 2013) (internal citations and quotation marks omitted; brackets added and omitted).

Appellant first challenges the references to the victim's race the prosecutor made during opening statements. ***See*** Appellant's Brief, at 9, 13-14. Specifically, Appellant contends that the following statements improperly injected the issue of race into the trial. ***See id.***, at 13-14.

> COMMONWEALTH: Well I'm going to tell you right now that the facts you're going to hear today and the next few days in this case were not ripped from the pages of today's headlines or any other day's headlines for that matter. Because it's a sad reality for us as citizens of the City of Philadelphia that when a young, black man gets shot, cut down in his prime and gets killed in the streets of Philadelphia it very, very rarely makes the headlines. But that's exactly what happened in this case, ladies and gentlemen. The defendant Christopher Coker, shot and killed the victim in this case Jermane Morgan. Jermane Morgan, a young black man of 29 years of age.N.T., Jury Trial, 7/13/05, at 35-36. The prosecutor mentioned the victim's race again, stating:
>
> COMMONWEALTH: Like I said, it doesn't make headlines when a young black man gets killed on the streets of Philadelphia.***Id.***, at 37.

We agree with the PCRA court, ***see*** PCRA Court Opinion, 10/25/16, at 5-6, that this issue has no merit. While perhaps ill advised, the prosecutor's statement did not inflame any racial bias within the jury: the main issue in the case was self-defense and both the victim and defendant were African American. Thus, this issue merits no relief.

Appellant next argues trial counsel failed to object to the prosecutor's impermissible remark concerning Appellant's Fifth Amendment right to remain silent. ***See*** Appellant's Brief, at 9, 15. Appellant draws this conclusion from the prosecutor's remark that "[t]he one person who will not be taking this stand is [the victim], but the physical evidence will testify for him and speak for him." N.T., Jury Trial, 7/13/05, at 42. Appellant contends that, through this statement, the prosecutor impermissibly implied Appellant *would* be testifying at trial, thus violating his Fifth Amendment right to choose not to testify. ***See*** Appellant's Brief, at 15.

As a general rule, "any comment that the prosecuting attorney makes regarding a defendant's election not to testify is a violation of the defendant's right against self-incrimination as guaranteed by the Fifth Amendment of the United States Constitution, Article I, Section 9 of the Pennsylvania Constitution and by statute, codified at 42 Pa.C.S.A. § 5941." ***Commonwealth v. Trivigno***, 561 Pa. 232, 750 A.2d 243, 248 (Pa. 2000) (plurality) (citation omitted). A comment will infringe upon this right if "the language used by the prosecutor is intended to create for the jury an adverse inference from the failure of the defendant to testify." ***Commonwealth v. Clark***, 551 Pa. 258, 710 A.2d 31, 39 (Pa. 1998), *abrogated on other grounds by* ***Commonwealth v. Freeman***, 573 Pa. 532, 827 A.2d 385 (Pa. 2003).

Instantly, unlike situations in which a prosecutor comments on a defendant's failure to testify, Appellant claims that the prosecutor indicated that Appellant *would* be testifying. Appellant does not, and cannot, point to any case law that indicates that a prosecutor's comments relating to the mere fact that a defendant was *planning* to testify violates these rights. Further, there is a severe attenuation in the leap from the actual comment by the prosecutor to Appellant's understanding of the comment. Therefore, we do not find that Appellant could have shown that he was prejudiced in any manner by this statement. Thus, the PCRA court properly denied this claim without an evidentiary hearing.

Next, Appellant contends that trial counsel was ineffective for failing to notify Appellant of a conflict of

interest that arose during the course of the trial. ***See*** Appellant's Brief, at 9, 16. Specifically, Appellant claims that trial counsel's prior representation of one of the Commonwealth's witness's daughters in an unrelated matter renders counsel ineffective. ***See id.***, at 16.

An attorney owes his client a duty of loyalty, including a duty to avoid conflicts of interest. ***See Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "An appellant cannot prevail on a preserved conflict of interest claim absent a showing of actual prejudice" ***Commonwealth v. Collins***, 598 Pa. 397, 957 A.2d 237, 251 (Pa. 2008) (citations omitted). However, if an appellant is able to show that trial counsel experienced an actual, rather than potential conflict of interest, prejudice is presumed. ***See id.*** "To show an actual conflict of interest, the appellant must demonstrate that: (1) counsel actively represented conflicting interests; and (2) those conflicting interests adversely affected his lawyer's performance." ***Id.*** (citations and internal quotation marks omitted).

We agree with the PCRA court that this issue has no merit. As the PCRA court explains in its well-written opinion:

> At trial, the prosecutor informed the trial court that trial counsel had a possible conflict of interest as he had previously represented the daughter of one of the Commonwealth's witnesses in a matter involving a street fight between the daughter and other girls in the neighborhood. N.T. 7/13/05 at 107-110. However, trial counsel informed the court that, while he had represented the daughter, there was no actual conflict of interest as the daughter would not be testifying at defendant's trial, defendant was not involved in the daughter's street fight, and trial counsel had not contacted the daughter or the Commonwealth witness in any way to request assistance in defendant's case. N.T. 7/13/05 at 109-110. In addition, the Commonwealth witness at issue was only being called by the Commonwealth to say that she saw defendant running with a gun, which were the facts not disputed in this self-defense case. N.T. 7/13/05 at 110.PCRA Court Opinion, 10/25/16, at 8.

It is clear from the record trial counsel did not represent competing interests. As there was no actual conflict, this issue merits no relief.

In his fourth alleged error, Appellant contends trial counsel rendered ineffective assistance for failing to move for a "proper" cautionary instruction and mistrial following an improper statement made by James Wirth that Appellant and his friends were "known in the area." Appellant's Brief, at 17-18. Appellant contends this statement, when combined with Wirth's earlier statement that he fled Philadelphia because he feared for his life, improperly introduced evidence of Appellant's *prior* bad acts. ***See id.*** Further, Appellant contends that while the trial court instructed the jury to disregard the statement as it applied to Appellant's friends, the trial judge failed to include Appellant in this instruction. ***See id.*** Therefore, Appellant contends it was error for trial counsel to fail to specifically request Appellant be included in this instruction and to fail to move for a mistrial. ***See id.***

"Evidence of prior crimes or bad acts may not be presented at trial to establish the defendant's criminal character or proclivities." ***Commonwealth v. Hudson***, 2008 PA Super 195, 955 A.2d 1031, 1034 (Pa. Super. 2008) (citation omitted). ***See also*** Pa.R.E. 404(b)(1).

Appellant's claim of error rests upon his belief that Wirth's statement that he left town because he was afraid and that Appellant and his friends were "known in the area" introduced *prior* bad acts evidence in violation of Rule 404. There is no evidence of record, however, that Wirth testified as to any *prior* actions on behalf of Appellant that would have inspired his fear. As he "did not mention other crimes, wrongs, or acts, [Wirth's] testimony does not implicate Rule 404." ***Commonwealth v. Cook***, 597 Pa. 572, 952 A.2d 594, 620 (Pa. 2008) (citation and internal quotation marks omitted). Accordingly, trial

counsel was not ineffective for failing to request a "proper" cautionary instruction or move for a mistrial based upon the introduction of this evidence. Thus, we will not disturb the PCRA court's determination that this issue was meritless and did not require an evidentiary hearing.2

Next, Appellant argues trial counsel was ineffective for failing to object to a police officer's alleged irrelevant testimony relating to a search warrant. ***See*** Appellant's Brief, at 18-19. Specifically, Appellant contends that the following comments made by Detective Richard Flynn were irrelevant and allowed the Commonwealth to place its "imprimatur on the case" ***Id.***, at 19.

> PROSECUTOR: I'm going to ask you to explain to the jury what a search and seizure warrant is and what power, if any, does it give you.
>
> DETECTIVE FLYNN: A search and seizure warrant allows a police officer, anybody in law enforcement, to enter someone's property in order to find evidence of a crime. In order to do that, you have to convince a judicial authority, the person issuing the warrant, that there was enough probable cause to do this; there is enough evidence or to believe that there is enough of a crime within a person's home.N.T., Jury Trial, 7/14/05, at 12.

"Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Drumheller***, 570 Pa. 117, 808 A.2d 893, 904 (Pa. 2002) (citation omitted). "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402.

The PCRA court "agrees that it is not relevant at trial that a judicial authority found probable cause to believe that evidence of a crime would be found in defendant's home." PCRA Court Opinion, 10/25/16, at 10. The police obtained the warrant obtained to search for the handgun used in the shooting. At trial, as the PCRA court notes, Appellant admitted he possessed the handgun-and that he shot the decedent. The only issue at trial was self-defense. "Under these circumstances, the evidence that probable cause existed to show that defendant had a gun in his home could not have adversely affected defendant's case." ***Id.***, at 11. This reasoning is sound. Appellant cannot establish prejudice. Thus, Appellant's fifth claim of trial counsel ineffectiveness on appeal fails.

Appellant raises a similar challenge to the introduction of allegedly irrelevant evidence in his sixth issue. Appellant claims appellate counsel was ineffective when he failed to challenge, on direct appeal, the trial court's evidentiary ruling that allowed a detective to testify that the Commonwealth witness, Wirth, had been arrested for absconding from probation following his testimony. ***See*** Appellant's Brief, at 21. Appellant contends that this information was not relevant, and therefore its introduction only served to prejudice Appellant by unfairly undermining the impeachment of Wirth. ***See id.***

The PCRA court cogently explained its reasoning for dismissing this claim in its opinion:

> Here, the evidence of Wirth's arrest after testifying was highly relevant to corroborate an important part of Wirth's testimony. In particular, Wirth testified that he returned to Philadelphia after absconding knowing that there was a warrant outstanding for his arrest, and fully expecting to surrender to authorities. He also testified that no promises had been made to him for returning and testifying, and that he was aware that he could face new charges and be imprisoned upon his return. N.T. 7/13/05 at 134-136. Wirth's arrest following his testimony corroborated Wirth's stated belief that he was actually not receiving favorable treatment and would face consequences for violating probation. Moreover, the potential for unfair prejudice was minimal.PCRA Court Opinion, 1025/16, at 12.

We agree with the PCRA court that the testimony was relevant. Thus, an objection posed by trial

counsel would have failed. We cannot deem Appellate counsel ineffective for failing to present a meritless claim on direct appeal. ***See Commonwealth v. Lawrence***, 2008 PA Super 262, 960 A.2d 473, 478 (Pa. Super. 2008).

In his seventh and final alleged error, Appellant claims that trial counsel was ineffective in failing to investigate and call Kia Miller as a witness at trial. ***See*** Appellant's Brief, at 22.

"Where a[n appellant] claims that counsel was ineffective for failing to call a particular witness, we require proof of that witness's availability to testify, as well as an adequate assertion that the substance of the purported testimony would make a difference in the case." ***Commonwealth v. Michaud***, 2013 PA Super 180, 70 A.3d 862, 867 (Pa. Super. 2013) (citation omitted; brackets in original). In the PCRA petition, the petitioner "shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony." 42 Pa.C.S.A. § 9545(d)(1).

Here, Appellant establishes the identity of the witness, Kia Miller-and that is all. Appellant writes in his appellate brief that "in being forthright, [he] does not have any information pertaining to Kia Miller." Appellant's Brief, at 22. He raises this claim only to "preserve the issue at this time and would investigate if the case were remanded for an evidentiary hearing and/or a new trial were granted." ***Id.*** That is not how one successfully raises this claim. The PCRA court committed no error in finding it was without merit.

Order affirmed.

President Judge Emeritus Ford Elliott joins the memorandum. Judge Olson concurs in the result.

Judgment Entered.

Date: 7/26/2017

Footnotes

1

The PCRA court's Rule 1925(a) opinion states that Appellant's petition was denied following an evidentiary hearing on June 30, 2016. ***See*** PCRA Court Opinion, 10/26/16, at 2. However, upon evaluation of the transcript, it is evident that the purpose of the June 30 hearing was not to collect evidence, but rather to hold a hearing pursuant to the dictates of ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (Pa. 1998), to determine whether Appellant wanted to continue with appointed counsel. ***See*** N.T., ***Grazier*** Hearing, 6/30/16. Thus, we will evaluate the denial of Appellant's PCRA petition as a denial without an evidentiary hearing.

2

"[A]n appellate court may affirm the lower court on any basis, even one not considered or presented in the court below." ***Commonwealth v. Burns***, 2009 PA Super 260, 988 A.2d 684, 690 n.6 (Pa. Super. 2009).

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

No._____

Christopher Forman

Petitioner

v.

Commonwealth of Pennsylvania

Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for Writ of Certiorari contain 5,000 words or less, excluding the parts of the petition that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

(s) Christopher Forman

Christopher Forman

Pro Se

9/10/21