NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2276

MISAEL CORDERO,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-11-cv-06114)
District Judge: Honorable Jose L. Linares

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 2, 2021

Before: AMBRO, PORTER and SCIRICA, Circuit Judges

(Opinion filed: September 8, 2021)

OPINION*

---

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix A

PER CURIAM

Misael Cordero appeals from the District Court's order denying his habeas petition, in which he sought relief from his New Jersey conviction of first-degree murder. We will affirm.

I.

The relevant background of this case is set forth in Cordero v. Warren, 673 F. App'x 254 (3d Cir. 2016). In that appeal, we remanded for further proceedings on Cordero's claim that his counsel rendered ineffective assistance by failing to advise him on his eligibility for "gap-time" sentencing credit. Cordero claimed that this failure caused him to reject plea offers that he otherwise would have accepted.

On remand, the District Court allowed Cordero to assert a related claim that his counsel also failed to recognize that certain charges were barred by the statute of limitations and that this failure contributed to his rejection of plea offers as well. The court appointed counsel for Cordero and held an evidentiary hearing on these claims. At that hearing, it heard testimony from Cordero, the two lawyers who represented him pretrial and at trial, and Cordero's prosecutor. The court also received documentary exhibits.

The primary dispute at the hearing was whether Cordero's prosecutor even offered Cordero a plea that he could have accepted. Cordero testified that his prosecutor offered him three separate pleas. Cordero's prosecutor, by contrast, testified that he did not remember offering Cordero any plea, that he would not have done so in this case, and that

he was comfortable proceeding to trial. Cordero's two counsel likewise testified that they did not remember receiving a plea offer or even engaging in any serious plea discussions.

Following the hearing, the parties submitted proposed findings and conclusions and the District Court ultimately denied Cordero's claims on the merits. The court did so on the basis of its factual finding that Cordero's prosecutor never offered Cordero a plea that he could have accepted. It based that finding largely on the determination that the testimony of Cordero's prosecutor on that point was credible but that Cordero's was not.

Cordero appeals. A motions panel of our Court granted his request for a certificate of appealability as set forth in the margin.[1] We then appointed counsel for Cordero, who filed an opening brief and a motion to expand the record on appeal. Cordero later elected to proceed without counsel and filed a reply brief pro se.

II.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). As our certificate of appealability indicates, we review the District Court's factual findings following an evidentiary hearing only for clear error. See Ross v. Varano, 712 F.3d 784, 795 (3d Cir.

---

[1] The order reads:

> Appellant's request for a certificate of appealability is granted as to his claims that his counsel provided ineffective assistance in connection with alleged plea offers by failing to advise appellant that (1) he was eligible for "gap[-]time" credit and (2) his non-homicide charges were barred by the statute of limitations. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). The District Court denied these claims on the basis of its factual finding that appellant's prosecutor did not offer him a plea, and jurists of reason could debate whether that finding was clearly erroneous. See Buck v. Davis, 137 S. Ct. 759, 73-74, 77 (2017); Anderson

2013). A finding is clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessmer City, 470 U.S. 564, 573 (1985) (quotation marks omitted). Thus, we may not reverse the District Court's finding if it is "plausible in light of the record viewed in its entirety." Id. at 574. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. Clear error review is particularly deferential when the District Court bases its findings on credibility determinations. See id. at 575.

In this case, Cordero has largely failed to acknowledge the District Court's credibility determinations, let alone raised anything suggesting that they are clearly erroneous. Cordero does raise five other arguments that we will address. Only the first two directly challenge the District Court's reasoning, and all of them lack sufficient merit.

First, Cordero faults the District Court for relying on the lack of any documentation of the alleged plea offers. Cordero argues that there could have been no such documentation because witnesses testified that Essex County prosecutors reduced plea offers to writing only if the parties reached an agreement, which the parties here of course did not. But the District Court was well aware of that testimony, which it discussed at length in its opinion. It merely noted that Cordero offered no documentary evidence of a plea and that the only documentary evidence of plea negotiations consisted

---

v. City of Bessmer City, 470 U.S. 564, 573-75 (1985).

of a letter from the prosecutor to the second of Cordero's counsel rejecting a basis for any plea negotiations.[2] In the absence of credible testimony supporting the existence of a plea offer, the District Court did not err in looking for some kind of documentary evidence, which might not necessarily have been a writing by the prosecutor.

Second, Cordero argues that the District Court "disregarded" a statement that Cordero's second counsel made at sentencing. The statement in question is in the margin.[3] The District Court did not discuss that statement in its opinion. Far from "disregarding" that statement, however, it actually quoted it at the hearing and then explained "[t]hat doesn't mean that there was an offer made." (ECF No. 85 at 171.) That conclusion is not clearly erroneous. Counsel's reference to the possibility of "some plea bargain" does not show that an offer was made. To the contrary, counsel's statement that

---

[2] The letter reads:

> During a recent discussion concerning a possible plea deal to the charges pending against your client, Misael Cordero, you indicated that a condition of Mr. Cordero considering any plea is that the State agree to dismiss the charges against numerous co-defendants. I write this letter to inform you that those terms are unacceptable to the State. Therefore, the State is unable to continue plea negotiations under those terms. Thank you for your cooperation.

(Supp. App'x at Ra10.)

[3] The statement was:

> Your Honor knows that at any time Mr. Cordero could have, if he wished to, pled—to some—entered into some plea bargain if back when he was willing to say [co-defendant] Ruiz was involved, if he was willing to say [co-defendant] Lane in the other case was involved. And to benefit himself. He's not going to do that.

(App'x at 1027a.)

Cordero could have pleaded if he was willing to implicate his co-defendants is consistent with the prosecutor's letter refusing even to engage in plea negotiations under Cordero's condition that the charges against those co-defendants be dismissed.

Third, Cordero argues that the State never contested the existence of a plea offer until the first day of the hearing in this case. The State, however, never affirmatively conceded or admitted that it made Cordero a plea offer. Nor did it successfully assert any position that is inconsistent with the position it ultimately took below. Cordero does not cite any authority in support of this argument and does not otherwise argue for the application of any legal doctrine under which the State should be deemed to have conceded the point or should be estopped from contesting it under these circumstances. We are aware of none. Cf. MD Mall Assocs., LLC v. CSK Transp., Inc., 715 F.3d 479, 486-87 (3d Cir. 2013) (discussing judicial estoppel).

Fourth, Cordero asks to expand the record on appeal with three preliminary hearing transcripts that he did not present to the District Court but that his appellate counsel obtained after Cordero filed this appeal. He argues that these transcripts conclusively show that his prosecutor offered him a plea. They do not.[4] Nor has Cordero

[4] Cordero argues that the transcripts show that his counsel and the prosecutor "tried everything" and made "all efforts" to resolve the case with a plea. The statements in question were general statements made by the trial court when inquiring into scheduling matters. (App'x at 1206a, 1213a.) They did not refer to any specific offers or negotiations. The only specific reference to possible plea discussions was a statement by the prosecutor in response to a question from the trial court about whether the State had offered or would accept a plea making Cordero's sentence concurrent with the sentence he was then serving. The prosecutor responded: "Well, we—we—we talked about

otherwise shown any "exceptional circumstance" that might warrant a departure from the general rule that appeals are decided only on the District Court record. Acumed LLC v. Advanced Surgical Servs., Inc., 561 F.3d 199, 226 (3d Cir. 2009). Among other things, Cordero has not shown any compelling reason for failing to obtain these transcripts and present them to the District Court before. See Burton v. Teleflex Inc., 707 F.3d 417, 436 (3d Cir. 2013).[5] Thus, although we have considered these transcripts in reaching our disposition, see Acumed, 561 F.3d at 225, 227, they do not provide a basis for relief and we will deny Cordero's motion to expand the record.

Finally, Cordero relies on United States v. Gordon, 156 F.3d 376 (2d Cir. 1998) (per curiam), for the proposition that his claims have merit even in the absence of any plea offer. In that case, the court rejected the argument that a similar claim failed for lack of a "formal plea offer" because, in the absence of sound advice regarding sentencing

---

running all of them together. I mean, not necessarily concurrent." (App'x at 1220a.) This statement suggests that the parties may have engaged in some kind of plea discussions, but it does not establish that the prosecutor made the specific offers to which Cordero testified. Nor does it otherwise undermine the District Court's analysis. To the contrary, on the very next page, counsel for one of Cordero's co-defendants advised the trial court that "[w]e haven't received a plea offer," and the trial court responded that, in its experience, "the state doesn't make plea offers" unless the defendant shows some "inclination to plead." (App'x at 1221a.) That statement is consistent with the evidence that Cordero's prosecutor did not offer him a plea in this case.

[5] Cordero argues that he had no reason to present these transcripts below because the State never contested the existence of a plea offer until the first day of the hearing. Even if that were a valid excuse for failing to present these transcripts at or before the hearing, which we do not decide, it does not explain Cordero's failure to present or even mention them during the seven months between the hearing and the District Court's decision.

exposure, the defendant "did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial." Id. at 380.

Cordero, however, did not meaningfully develop any claim or argument in this regard in the District Court and has not done so on appeal. To the contrary, Cordero's claim has always been that his prosecutor made specific plea offers and that he declined those specific offers because of counsel's bad advice. The District Court found as a fact that the prosecutor never made those offers, and that finding is not clearly erroneous. Cordero did not develop any claim that his counsel's advice influenced the pursuit of plea negotiations more generally. As a result, he did not produce any evidence in support of such a claim. Thus, this case provides no occasion to consider the circumstances in which a claim like Cordero's might be viable in the absence of an actual plea offer.[6]

III.

For these reasons, we will affirm the judgment of the District Court. Cordero's motion to expand the record on appeal is denied.

---

[6] We also note that, although the Government argued in Gordon that there had been no "formal plea offer," evidence in that case—including statements by the Government in court—showed that the Government did make a specific plea offer that the defendant rejected. See Gordon, 156 F.3d at 377-78. There is no such evidence in this case apart from Cordero's own testimony, which the District Court found not credible.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MISAEL CORDERO,	:	Civil Action No. 11-6114 (JLL)
Petitioner,	:	
v.	:	**OPINION**
CHARLES E. WARREN, *et al.*,	:	
Respondents.	:	

LINARES, Chief District Judge:

Presently before the Court are the plea-related ineffective assistance of counsel claims of Petitioner Misael Cordero's petition for a writ of habeas corpus, which were remanded to this Court by the Court of Appeals. *See Cordero v. Warren*, 673 F. App'x 254, 258 (3d Cir. 2016). Following a hearing in this matter, (*see* ECF No. 85), Petitioner filed a brief in support of his claims, (ECF No. 89), and the state filed a brief in opposition, (ECF No. 87). The parties also filed a joint stipulation of facts not in dispute. (ECF No. 88). For the following reasons, Petitioner's remaining claims are denied, and Petitioner is denied a certificate of appealability.

I. BACKGROUND

Because this Court has previously summarized the background of Petitioner's conviction and trial in the Court's previous opinion, (*see* ECF No. 35), this Court will only recount the fact evinced at the evidentiary hearing on Petitioner's sole remaining set of claims, *i.e.*, his claims in which he alleges that his trial counsel misadvised him as to several alleged plea agreements and that the resulting ineffective assistance of counsel led to his turning down those agreements when he otherwise would have pursued them. The parties are largely in agreement as to the background

Appendix B

facts of this matter other than whether a plea offer was ever made, and have stipulated to many of these facts. (*See* ECF No. 88).

Petitioner, Misael Cordero, was sentenced in September 1993 to ten years imprisonment for possession with intent to distribute a controlled substance in a school zone. (ECF No. 88 at ¶ 2). Petitioner was thereafter convicted in June 1994 of further drug distribution related offenses which resulted in his receipt of a forty-year extended-term sentence. (*Id.* at ¶ 3). Over six years later, following the coming forward of certain witnesses, Petitioner was indicted on three sets of homicide charges in three separate indictments. (*Id.* at ¶¶ 4-5). Petitioner was also indicted on several underlying robbery and weapons charges related to one of those homicides. (*Id.* at ¶ 4). Petitioner was tried and convicted of all charges of the relevant indictment in this matter, including the homicide charges, robbery charges, and weapons offenses. (*Id.* at ¶ 6). Petitioner received a life sentence on the homicide counts, to run concurrent with his prior convictions, with a thirty-year parole disqualifier. (*Id.*). Petitioner's non-homicide charges, however, were dismissed at sentencing as the trial court found them barred by the relevant statute of limitations. (*Id.*). The parties agree that, because the murders were committed before the drug charges resulting in Petitioner's 1994 conviction, Petitioner was entitled at sentencing to 3,247 days of gap time credit, which would have reduced Petitioner's overall sentence had he not received a life sentence, but would not have reduced any period of parole ineligibility. (*Id.* at ¶¶ 17-19). Because Petitioner received a life sentence, however, that gap time was of no benefit to Petitioner following his conviction at trial. (*Id.*).

Petitioner was initially represented by William Fitzsimmons, who was then a member of the Public Defender's Office, while this matter was prosecuted by now retired prosecutor Edward

Gordon. (*Id.* at ¶¶ 7-8). Mr. Gordon was assigned, however, to all three of Petitioner's homicide indictments, and tried the two that went to trial. (*Id.* at ¶ 7). In August 2001, Mr. Fitzsimmons left the Public Defender's Office, and Petitioner's case was reassigned to John McMahon, who was then the chief trial attorney for the Essex Region of the Public Defender's Office. (*Id.* at ¶ 9-10). Mr. McMahon represented Petitioner through his trial and sentencing. (*Id.*).

All three attorneys who testified at Petitioner's evidentiary hearing generally agreed as to the way the Essex County Prosecutor's Office handled plea negotiations and offers at the time Petitioner was tried. As Mr. Gordon explained,

> Sometimes, not in every case[, s]ometimes depending on the defense attorney, [the defense attorney] would suggest something, and if [the prosecutor] thought it was something that [the prosecutor's] supervisors could live with and the prosecutor . . . would go speak to the supervisor, the chief prosecutor, and then [the prosecutor] would complete a recommendation . . . for [a] plea . . . disposition. And [the prosecutor] would have that signed . . . [by his] supervisor[.] Even if [the prosecutor was] a director [he would have] had a supervisor, and it would go to the deputy chief. [I]n homicide cases, . . . the [district attorney] may have signed off on most of all of those, and then [the prosecutor] would present it . . . to the defense attorney, and he and his client . . . would discuss it, and if the plea was accepted, [the parties] would execute the plea.

(*Id.* at ¶ 11). Any plea to be proposed by the prosecutor would apparently also have to be discussed with the victim's family before it would be approved by the prosecutor's office. (*Id.* at ¶ 12). The Petitioner's trial counsel agreed that, as the state was not "looking to negotiate itself" and would not "want to waste time" seeking necessary approvals unless he knew a deal would be accepted, the state would generally not make written plea offers but instead would wait for an offer from the defense before seeking approvals and reducing the offer to writing. (*Id.* at ¶¶ 12–13). The State would apparently occasionally ask the defense whether the petitioner was interested in

a plea to begin discussions, but generally offers began with the defense attorney proposing an agreement to the state. (*Id.* at ¶¶ 11–13). No agreement "would ever be written up until [the parties] actually came to an agreement, and then [the prosecutor] would write it up, and then . . . go through their chain of command" for the necessary approvals. (*Id.* at ¶ 13). The parties agree that, in this matter, neither the prosecutor's nor public defender's offices contain "any files relevant to plea negotiations or discussions other than" a letter from the state rejecting a proposed plea which would exculpate one of Petitioner's co-defendants and the actual plea agreements of two of Petitioner's co-defendants. (*Id.* at ¶ 24). There is thus no documentary evidence of any plea offer or agreement in the record of this matter.

At the hearing in this matter, Petitioner first called his initial trial counsel, William Fitzsimmons, to testify. As relevant to these habeas proceedings, Mr. Fitzsimmons testified that he was initially appointed to represent Petitioner by the spring of 2001 and represented Petitioner until he departed the public defender's office in August 2001. (ECF No. 85 at 34:23–35:95). Mr. Fitzsimmons was then aware that Petitioner was in prison, although he did not think he would have necessarily had Petitioner's judgment of conviction for his prior offenses on file. (*Id.* at 36:11–19). Mr. Fitzsimmons admitted that he failed to recognize the statute of limitations issue or discuss it with Petitioner while he represented him, and likewise admitted that he never discussed the gap time issue with Petitioner. (*Id.* at 38:23–40:8). Although Mr. Fitzsimmons remembered his dealings with Petitioner, he could not recall "ever having significant plea discussions with" Petitioner, and did not "remember being involved in . . . plea negotiations" in Petitioner's case. (*Id.* at 40:16–18, 43:18–21, 52:9–11). Mr. Fitzsimmons also did not recall ever receiving a plea offer from the state, although he suggested his file, which could not be located at the time of the

hearing, would have had notifications had there been any plea discussions. (*Id.* at 40:19–41:14). Mr. Fitzsimmons further testified on cross examination that "there would be no reason to" discuss gap time with Petitioner unless a plea offer had been made, suggesting that the issue may not have been discussed because no agreement had been offered. (*Id.* at 47:2–6). Mr. Fitzsimmons clarified, however, that he had no recollection of any plea offer being made, but that did not foreclose the possibility that one had been extended that he had forgotten. (*Id.* at 56:3–13).

Petitioner next called John McMahon, who represented Petitioner after Mr. Fitzsimmons left the public defender's office and throughout his trial and sentencing. (*Id.* at 58:13). Mr. McMahon admitted, as had Mr. Fitzsimmons, that he failed to recognize the gap time and statute of limitations issues prior to trial, and that he thus failed to advise Petitioner as to those issues during the time when plea negotiations could have taken place. (*See id.* at 58-92). As to a plea, Mr. McMahon testified that he didn't "have any recollection at all of discussing pleas." (*Id.* at 95:16–18). When presented with the letter in which the state refused to discuss any plea deal in which Petitioner exculpated one of his co-defendants, Mr. McMahon recalled Petitioner's desire to exculpate the co-defendant, and admitted that the letter "reflected that there were some [plea] negotiations," but he still could not recall any plea offer being made. (*Id.* at 95:4–98:16). Mr. McMahon acknowledged that the matter may have been more easily resolved via a plea had he advised Petitioner of the gap time or statute of limitations issues, but he could remember no plea offers which could have led to such a resolution. (*Id.* at 98:16–22). Mr. McMahon also acknowledged that he could not remember the extent of plea discussions or how long they extended through the pre-trial process. (*See id.* at 100).

Petitioner also testified at the hearing. Petitioner testified that his attorneys never

informed him of the gap time or statute of limitations issues, and that had they done so he would have been inclined to plead guilty. (*Id.* at 109:23–11:22). Petitioner testified that he had received multiple plea offers from the state. (*Id.* at 112:10, 114:19–20, 117:21–22, 119:20–22). In the first alleged deal, Petitioner stated that Mr. McMahon told him that the state had asked if he would be "willing to take a 15-year plea consecutive" to his prior drug crime sentences. (*Id.*). Petitioner stated that he refused this deal because he was likely to serve the maximum time on his drug sentences, and would not be able to spend an additional fifteen years in prison. (*Id.*). Petitioner further testified that had he been told that gap time would have reduced the fifteen years to approximately half that amount of time, he would have been willing to take such a plea. (*Id.* at 113:18–14:18). Petitioner also testified that he thereafter received a second plea offer which would have required him to plead guilty to all three homicide indictments and receive a ten-year sentence on each homicide, totaling thirty years, which would run concurrent to his drug sentences. (*Id.* at 114:19–15:5). Petitioner testified, however, that this deal would also have required him to plead guilty to the time barred weapons charges, which he was unwilling to do as he believed himself innocent of those charges. (*Id.* at 115:7–17:8). Petitioner then testified that a third plea was offered, but would have required him to testify against his co-defendant, which he was also unwilling to do. (*Id.* at 117:21–19:21). Petitioner also stated that Mr. McMahon had requested a plea offer where murder charges against his co-defendant and weapon charges against himself would be dropped, which apparently failed to gain prosecutorial approval. (*Id.* at 119:1–13). Petitioner then stated that the state reoffered the first two plea deals again, and he again refused for the same reasons as he had done previously – he was unwilling to plead to weapons offenses and was not willing to take a consecutive fifteen-year sentence. (*Id.* at 119:23–20:2). Petitioner

did eventually take five-year plea on one of his two other homicide indictments after he was convicted of all charges at trial. (*Id.* at 120:3–5). Petitioner testified that the last of the three indictments was tried, and Petitioner "won" that case and was acquitted of those charges. (*Id.* at 121:6–10). Although Petitioner stated that the thirty-year concurrent plea would have required that he plead guilty to some of the weapons charges, Petitioner provided no further details as to which charges he would have had to plead guilty to in order to take these alleged pleas. (*See generally id.* at 111–22). Petitioner further testified that he brought these issues to his post-conviction relief ("PCR") counsel's attention, but his PCR counsel refused to raise them. (*Id.* at 124:2–25:25). Petitioner also testified at length as to his belief that PCR counsel failed to adequately represent him or raise his claims. (*See generally id.* at 124–38).

The final witness at t he evidentiary hearing in this matter was Edward Gordon, the retired prosecutor who represented the state in Petitioner's criminal matter. (*Id.* at 160:17). After describing the prosecutor's office's plea procedure as outlined above, Mr. Gordon testified that he did not recall ever making a plea offer to Petitioner, nor any real discussion of a plea with Petitioner's trial attorney. (*Id.* at 162:1–63:9). Mr. Gordon admitted that there had been "some conversation" regarding Petitioner's potential interest in a plea in which he exculpated a co-defendant, that Mr. Gordon had rejected, but stated that he could remember no serious discussion of a plea that Mr. Gordon considered actual negotiation. (*Id.* at 165:5–6). Mr. Gordon then stated that his goal in prosecuting Petitioner was ensuring that "the net result" was Petitioner's further "incarceration for the homicide" charges. (*Id.* at 164:8–15). He clarified that he "wouldn't have" considered any plea which was to run concurrent with the drug conviction sentence Petitioner was already serving. (*Id.* at 165:17–20).

On cross examination, Mr. Gordon reiterated that he had "no recollection of ever offering any plea." (*Id.* at 167:25). When Petitioner's habeas counsel suggested this meant Mr. Gordon couldn't remember one way or the other whether a plea was offered, Mr. Gordon refuted that assertion, and again asserted that he remembered no plea offer being given, and thus to the extent he could recall there was no plea offer. (*Id.* at 168:1–12). When asked whether the fact that Petitioner's was a cold case would have suggested that he should offer a plea, Mr. Gordon refuted that assertion, stating that he was "comfortable with [his] proofs." (*Id.* at 174:19–23). Mr. Gordon explained that he had no interest in a plea deal because he already had witnesses who had already been given guilty pleas including "the shooter, the actual shooter [who] told detectives . . . about this incident," and "the guy who dug the hole across the street, who was told that he was digging a hole for a bond." (*Id.* at 174:19–75:10).

II. DISCUSSION

A. Legal Standard

As this Court has previously determined, (ECF No. 72 at ¶ 6), Petitioner's current claims are procedurally defaulted because they were not raised in the state courts. *See Cordero*, 673 F. App'x at 257. He would therefore only be able to obtain relief in this Court based on those claims if he can establish that his claims meet one of the exceptions which would permit this Court to hear such a claim. *Id.* In this case, Petitioner argues that his claims should not be barred by his procedural default because those claims were not raised due to ineffective assistance of post-conviction relief counsel. *See Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). Under the *Martinez* standard, a petitioner establishes cause and actual prejudice sufficient to overcome his procedural default where he can show that "his underlying ineffective-

assistance-of-trial-counsel claim has some merit and that his state post-conviction counsel's performance fell below an objective standard of reasonableness." *Workman v. Superintendent Albion SCI*, 908 F.3d 896, 906 (3d Cir. 2018). A petitioner will generally meet this standard where he shows that he had a potentially meritorious ineffective assistance of counsel claim which his post-conviction relief attorney ignored or failed to recognize while pursuing weaker claims. *Id.* Where a petitioner shows sufficient cause and prejudice to overcome his procedural default in the state courts, a court sitting in habeas review will decide his claim "de novo because the state court did not consider the claim on the merits." *Id.* at 908 (quoting *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236 (3d Cir. 2017)). Because Petitioner's current claims, if proven, would be "substantial" claims of ineffective assistance of trial counsel, and as the parties have presented little evidence to suggest that Petitioner's PCR counsel provided objectively reasonable performance, this Court assumes for the sake of this opinion that Petitioner's claims meet the requirements of *Martinez* and addresses Petitioner's plea-related claims de novo. *Id.*

B. Credibility Findings

Having held an evidentiary hearing in this matter and having had the opportunity to observe the demeanor and testimony of the witnesses at that hearing, this Court makes the following credibility determinations. This Court finds the testimony of Petitioner's trial attorneys, John McMahon and William Fitzsimmons generally credible. Both attorneys candidly admitted their failure to recognize and discuss with Petitioner certain issues—specifically gap time and the statute of limitations for Petitioner's non-homicide charges—prior to trial. Both attorneys also were forthcoming in their admission that while they would have expected that plea negotiations would have occurred in this case, neither attorney could recall any specific plea deal being offered and

thus could not say one way or another that a plea offer was or was not made. This Court thus finds both attorneys' testimony credible.

This Court also finds highly credible the testimony of retired prosecutor Edward Gordon. Mr. Gordon was forthright and responsive to questioning and admitted that he did not have a complete recollection of Petitioner's prosecution after the passage of many years. This Court specifically credits Mr. Gordon's testimony that: (1) he did not recall ever offering a plea deal to Petitioner; (2) he was comfortable with the proofs against Petitioner and thus had little impetus to offer a plea deal; and (3) he admitted that some discussion of a plea deal may have occurred, but that he could never recall reaching a point where an actual plea offer was contemplated or made. This Court thus finds Mr. Gordon's testimony highly credible, and to the extent that it conflicts with Petitioner's testimony, credits Mr. Gordon's testimony over that of Petitioner.

Turning to Petitioner, this Court found Petitioner's testimony as to his lawyer's failure to advise him as to gap time and the statute of limitations issues credible as that testimony is well supported by both his former attorney's testimony and the record. This Court found Petitioner's testimony as to plea negotiations, however, less credible than that of Mr. Gordon or Petitioner's former attorneys, none of whom could recall any of the proposed pleas Petitioner claims were offered. This Court specifically found Petitioner to lack credibility in his testimony regarding the alleged plea deals. Although Petitioner was largely responsive to questioning, his demeanor on cross-examination as to the alleged deals was considerably more combative and less forthcoming than his testimony as to the importance of the gap time or statute of limitations issues on direct examination. That Petitioner did not assert his statute of limitations related plea claim until after the remand by the Third Circuit further raised questions about whether any deal involving the time

barred weapons charges was ever offered, and this Court specifically finds that Petitioner's testimony on that issue at the hearing lacked sufficient credibility to establish that any such plea offer was ever extended by the State. Ultimately, given his demeanor and responses to the questions posed, this Court finds Petitioner the least credible of the witnesses presented and discounts his testimony accordingly to the extent it conflicts with that of the other three witnesses.

C. Petitioner's Ineffective Assistance of Plea Counsel Claims

In his current claims, Petitioner alleges that his trial attorneys proved ineffective in advising him in regards to several alleged plea agreements by either failing to inform him that he may have been entitled to nearly nine years of gap time credit or by failing to advise him that certain non-homicide charges on which he had been indicted were time barred, and that he therefore turned down plea agreements to which he otherwise would have agreed. "The [Supreme] Court has []emphasized that '[d]efendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.'" *United States v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015) (quoting *Lafler v. Cooper*, 566 U.S. 156, 162 (2012)). This right requires counsel to provide a defendant with "enough information to make a reasonably informed decision whether to accept a plea offer," which generally requires a discussion of comparative sentencing exposure. *Id.* (internal quotations and citations omitted). Although a criminal defendant is entitled to adequate advice of counsel as to any offered plea, defendants "have no right to be offered a plea," nor a federally guaranteed right to a judge accepting any plea deal. *Lafler*, 566 U.S. at 168 (quoting *Missouri v. Frye*, 566 U.S. 134, 148 (2012)).

Where a petitioner can show that counsel failed to adequately advise him as to a proposed plea agreement, he will still not be entitled to relief unless he can show that he was prejudiced by

that failing. This requires a petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . [which i]n the context of pleas [requires] a [petitioner] show the outcome of the plea process would have been different with competent advice." *Id.* at 163. A petitioner will therefore succeed in establishing prejudice where he shows that a plea agreement was offered, that he would have accepted the proposed plea agreement absent counsel's deficient advice, that the deal in question would not have been withdrawn by the Government, and that the sentence received pursuant to the offered plea would have been less severe than the result of his trial. *Id.* at 164.

Because Petitioner's trial attorneys admitted that they failed to discuss the gap time and statute of limitations issues with Petitioner prior to trial, because Petitioner's trial attorneys also acknowledged that they should have recognized those issues during the plea negotiation stage and discussed them with Petitioner, and because Petitioner has alleged that he would have accepted the alleged pleas had these issues been discussed, the testimony at the hearing held in this matter is more than sufficient to establish that Petitioner's trial attorneys provided him with deficient performance, provided that Petitioner can establish that there was a plea agreement for them to discuss with him. As both of Petitioner's attorneys testified, Petitioner was clearly entitled to a significant quantity of gap time which could have reduced any over-all sentence of less than life imprisonment, information which surely would have been vital to any decision to accept or reject an offered plea deal. Likewise, that some of the charged counts—including the weapons charges of which Petitioner contends he was innocent—surely was information that would have been important to Petitioner in choosing whether to accept a plea deal had one been offered. Thus, if Petitioner could establish the existence of an offered plea deal, the testimony at the hearing held

in this matter would clearly establish deficient performance.

Because Petitioner's uncontested testimony at the hearing suggests that Petitioner would have taken any of the deals he alleges he was offered had he been properly advised as to the gap time and statute of limitations issues, Petitioner's entitlement to relief relies entirely on his ability to establish that there was in fact an offered plea agreement, rather than mere discussions. *See Lafler*, 566 U.S. at 163–64. The record of this matter contains no documentary evidence of an offered plea agreement; instead, the only documentary evidence related to plea discussions between the prosecutor and Petitioner is a letter from the prosecutor which specifically rejects a plea proposal made by Petitioner's counsel prior to trial. (*See* Joint Stipulated Findings of Fact, ECF No. 88 at ¶ 24; *see also* ECF No. 59-8). Instead, the record contains only one source of information which suggests that any actual plea offer, as opposed to mere negotiations, was ever extended—Petitioner's own testimony. Neither of Petitioner's trial attorneys could recall a plea offer being extended by the prosecutor's office, and the assigned prosecutor credibly testified that he could recall no "serious discussion concerning a plea," that he had "no recollection of making a plea offer," and was not inclined to seek a plea as he was "comfortable with [his] proofs" in light of the multiple witnesses against Petitioner whose testimony had already been secured, including "the actual shooter." (ECF No. 85 at 168, 172, 174–75).

Although this Court does not doubt that Petitioner and his counsel may have discussed the potential for a plea agreement, and may even have discussed their wish to seek deals which could have included terms such as a fifteen year sentence or three ten year terms to run concurrent with his prior sentence, this Court finds Petitioner's assertion that any such plea deal was ever offered by the State lacking in credibility. Petitioner has failed to present sufficient credible evidence in

support of his assertion that a plea deal was offered by the state, and this Court finds that what evidence has been presented—including the letter in the record and the testimony of the three attorneys at the hearing in this matter—supports a contrary conclusion. Based on the evidence in the record, and this Court's credibility determinations as outlined above, Petitioner has failed to show that an actual plea offer was ever extended to him by the state. Petitioner has therefore failed to meet his burden of showing that there was a plea deal which was offered by the state, and thus cannot show that there was an available deal he would have taken had his trial counsel more adequately advised him to the gap time and statute of limitations issues. Petitioner thus cannot establish *Strickland* prejudice, and his plea-related ineffective assistance of counsel claims must fail in light of this Court's credibility findings. *See Lafler*, 566 U.S. at 163–64. Petitioner is therefore not entitled to habeas relief as to his remaining ineffective assistance of plea counsel claims.

In so concluding, this Court does not wish to diminish the failures of trial counsel in this matter. Their failure to advise Petitioner as to two important issues—Petitioner's entitlement to gap time credit and the fact that the non-homicide charges Petitioner faced were time barred—is considerable, and this opinion should not be read to excuse or condone those failings. Counsel's deficient performance alone, however, is not sufficient to warrant habeas relief, only with a showing of prejudice could Petitioner prevail, and it is there that his claims stumble. Ultimately, Petitioner's claims fail solely because the evidence presented viewed in light of this Court's credibility findings did not convince this Court that any plea offer was actually extended to Petitioner, and as Petitioner has no right to be offered a plea deal, he cannot show the required *Strickland* prejudice. *See Lafler*, 566 U.S. at 168 (stating that where "no plea offer is made" the

"issue [of ineffective assistance of counsel in advising a petitioner as to a plea] simply does not arise"). Indeed, any non-plea related prejudice as to the gap time issue was essentially erased by Petitioner's life sentence—as the parties agree gap time cannot reduce a life sentence—and any non-plea related prejudice as to the statute of limitations issues was essentially diffused when the time barred charges were dismissed at Petitioner's sentencing. As stated above, Petitioner has failed to show that there was a plea offer extended to him, and the evidence presented instead leads this Court to conclude that no such offer was extended. Petitioner therefore cannot establish that he was prejudiced by the failings of counsel in this matter, and it is for that reason that his claims must fail.

III. CERTIFICATE OF APPEALABILITY

A petitioner may not appeal from a final order in a habeas proceeding where that petitioner's detention arises out of a state court proceeding unless he has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In light of this Court's credibility determinations and the lack of credible evidence of a plea offer having been made in this case, Petitioner's ineffective assistance of plea counsel claims are without merit and Petitioner has therefore failed to make a substantial showing of the denial of a constitutional right. Petitioner is therefore denied a certificate of appealability.

IV. CONCLUSION

For the reasons set forth above, Petitioner's remaining ineffective assistance of plea

counsel claims are denied, and Petitioner is denied a certificate of appealability. An appropriate Order follows this Opinion.

Dated: February 21st, 2019.

JOSE L. LINARES
Chief Judge, United States District Court

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1758

MISAEL CORDERO,
Appellant

v.

CHARLES E. WARREN, JR.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-11-cv-06114)
District Judge: Honorable Jose L. Linares

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 6, 2016
Before: CHAGARES, KRAUSE and ROTH, Circuit Judges

(Opinion filed: December 22, 2016)

OPINION*

PER CURIAM

Pursuant to our grant of a certificate of appealability ("COA"), Misael Cordero

---

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix C

appeals from the District Court's order denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We will vacate the District Court's order as to the claim on which we granted a COA and will remand for further proceedings.

I.

In 2002, a New Jersey jury found Cordero guilty of first-degree murder for orchestrating a drug-related killing in 1991. The trial court sentenced him to life imprisonment with 30 years of parole ineligibility. The trial court also awarded him 3,247 days of so-called "gap-time" credit under N.J. Stat. Ann. § 2C:44-5(b)(2). It appears that this award was meaningless, however, because gap-time credit may be applied only against a determinate sentence and not against a sentence of life imprisonment.[1] Cordero unsuccessfully appealed and sought postconviction relief in state court before filing the federal habeas petition at issue here.

Among the claims he raised was a claim that his trial counsel rendered ineffective assistance by failing to advise him on the gap-time issue during plea negotiations. In particular, Cordero claims that the prosecutor offered him a plea to manslaughter and other charges that would have resulted in a sentence of 15 years of imprisonment with five years of parole ineligibility. Cordero further claims that he would have accepted that plea if counsel had advised him that he would receive the gap-time credit (totaling over

[1] The parties have cited no authority to this effect, but the trial court later wrote that it "was fully aware when sentencing the defendant that gap-time would not provide him any practical benefit" in light of his life sentence (ECF No. 12-4 at 3), and the State asserts that "gap-time credits . . . do not reduce a life sentence." (Appellee's Br. at 16.)

eight years) against that 15-year sentence but would lose its benefit if convicted and sentenced to life imprisonment. (ECF Nos. 1 at 4; 1-4 at 27; 33 at 8, 36-37.)

The District Court denied Cordero's petition on the merits but, in doing so, it did not address this claim. Cordero appealed pro se, and we granted a COA on this claim as follows:

> Appellant's application for a certificate of appealability is granted as to the second aspect of his first claim that counsel rendered ineffective assistance during plea bargaining—i.e., his claim that counsel failed to advise him on operation of the "gap-time" credit under N.J. Stat. Ann. § 2C:44-5(b)(2) during plea negotiations and that he would have accepted a plea offer of fifteen years in prison with five years of parole ineligibility if counsel had properly advised him that he would receive gap-time credit against that sentence but would lose the gap-time credit if convicted of first-degree murder and sentenced to life imprisonment after trial. See Lafler v. Cooper, 132 S. Ct. 1376, 1384-85 (2012); United States v. Day, 969 F.2d 39, 42-45 (3d Cir. 1992). We conclude that this claim, which it appears the District Court did not address, is adequate to deserve encouragement to proceed further. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). In addition to such other issues as the parties may wish to raise regarding this claim, the parties are directed to address in their briefs (1) when and how appellant first raised this claim in state court and whether it is subject to any procedural bar in light of the time or manner in which appellant did so, and (2) whether this claim was "adjudicated on the merits" in state court for purposes of 28 U.S.C. § 2254(d).

Following our grant of a COA, the Court appointed counsel to represent Cordero on appeal. Cordero, however, ultimately filed a motion to discharge counsel and to proceed pro se. The Court granted that motion. Cordero has briefed this appeal pro se, and it is ripe for disposition. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

II.

As our grant of a COA suggests, this claim presents several substantive and

procedural issues. Having reviewed the parties' briefing on those issues, we conclude that the District Court should address them in the first instance. Thus, we will vacate the District Court's order denying Cordero's habeas petition to the extent that it did not address this claim and will remand for further proceedings. To assist with proceedings on remand, we will briefly address four issues that the parties raise and explain why we do not find them dispositive at this stage.

First, Cordero concedes that this claim is procedurally defaulted because his postconviction relief ("PCR") counsel did not raise it before the PCR court. He argues, however, that PCR counsel's failure to do so constitutes cause to excuse the default under Martinez v. Ryan, 132 S. Ct. 1309 (2012). The State has not addressed Cordero's argument under Martinez and instead appears to suggest that Cordero can still raise this claim in a second PCR petition. As Cordero argues, however, it would appear that any second PCR petition would be barred by the provisions of N.J. Court R. 3:22-12. Thus, although we express no definitive opinion on this point, it would appear that this claim is procedurally defaulted and that the District Court (unless it otherwise disposes of this claim) should address Cordero's argument regarding Martinez.[2]

---

[2] The State also argues that this claim (and Cordero's entire petition) is untimely. The District Court already has rejected that argument (ECF No. 35 at 18 n.2), and we see no need to revisit it. Even if the State's legal theory regarding statutory tolling were correct (which we do not decide), we agree with Cordero that his petition remains timely when giving him the benefit of the periods for appealing the denial of his PCR petition to the Appellate Division and for seeking certification from the New Jersey Supreme Court. The State did not include those periods in its calculation.

Second, the State argues that this claim lacks merit because, at the PCR hearing, Cordero "maintained his innocence and stated that he was not interested in a plea." (Appellee's Br. at 15.) Cordero denies that he asserted his innocence at the PCR hearing, which he may or may not have done.[3] Regardless, as Cordero also argues, the State's assertion that he testified that "he was not interested in a plea" appears to misstate the record. The State has not cited any portion of the record in which Cordero made such a statement, and we have located none. As Cordero further argues, an assertion of innocence, though certainly relevant, is not necessarily conclusive proof that a defendant would not have accepted a plea. See, e.g., Griffin v. United States, 330 F.3d 733, 738 (6th Cir. 2003).

Third, the State argues that the trial court could not have accepted a guilty plea from Cordero in light of his assertion of innocence because New Jersey does not permit pleas of nolo contendere and New Jersey courts are required to reject guilty pleas accompanied by protestations of innocence. Even assuming that the State is right on those points, Cordero's potential assertion of innocence during his PCR hearing does not necessarily suggest that he would have attempted to maintain his innocence while

[3] The State relies solely on four lines of the PCR transcript in which Cordero, in testifying about why he believed that further investigation would have bolstered his defense, answered "yes" to the following question: "Because you—you never—You've always stated that had nothing to do with this murder. Is that correct?" (N.T., 5/2/08, at 92; ECF No. 31-4 at 93.) Cordero's testimony that he previously asserted his innocence is not necessarily tantamount to an assertion of his innocence again.

pleading guilty years before.[4]

Finally, the State argues that Cordero cannot show prejudice on this claim because the trial court awarded him 3,247 days in gap-time credit following his trial. Thus, the State argues, "[w]hether [Cordero] pled guilty or was found guilty by a jury, he would have received the same amount of gap-time credit." (Appellee's Br. at 16.) But Cordero's claim is not that he would have received more gap-time credit if he pleaded guilty. Instead, Cordero's claim is that he actually could have used the gap-time credit, and against a lesser sentence.

Cordero was sentenced to life imprisonment and thus lost the practical benefit of over eight years in gap-time credit that the trial court awarded. He claims that he would have been entitled to the same gap-time credit against the 15-year sentence that he claims the prosecutor offered. He further claims that, if counsel had so advised him, he would

---

[4] The State does not otherwise develop any argument on this point, but it cites State v. Taccetta, 975 A.2d 928 (N.J. 2009). In that case, the New Jersey Supreme Court held that, as matter of state law, PCR relief is not available on a claim of the kind at issue here if the petitioner testifies at the PCR hearing that he is innocent but that he would have committed perjury in admitting guilt in order to plead guilty. See id. at 934-36. A Panel of this Court later held that the New Jersey Supreme Court's ruling was not contrary to clearly established federal law for purposes of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See Taccetta v. Adm'r N.J. State Prison, 601 F. App'x 165, 168-69 (3d Cir.) (not precedential), cert. denied 136 S. Ct. 187 (2015). The Panel's decision in Taccetta, in addition to being non-precedential, is not controlling for at least two reasons. First, Taccetta involved AEDPA deference. If the District Court reaches the merits of Cordero's claim in this case, it arguably should review the claim de novo (an issue that we leave to the District Court to decide if necessary in the first instance). Second, Cordero's single potential assertion of innocence at the PCR hearing in this case bears little resemblance to the express and repeated testimony of the petitioner in Taccetta that he was innocent but would have perjured himself in order to take a plea.

have accepted the plea. If Cordero can show a reasonable probability that he would have accepted the plea and that the trial court would have approved it and sentenced him to something less than life imprisonment as a result, then he can establish prejudice. See Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012).

III.

For these reasons, we will vacate the District Court's order denying Cordero's habeas petition to the extent that it did not address the claim discussed herein and will remand for further proceedings. We express no opinion on the merits of this claim and are remanding solely for the District Court to address it in the first instance. In addition to the issues discussed above, the District Court is free to consider such other issues as may prove relevant on remand.

MISAEL CORDERO, Petitioner, v. GREG BARKOWSKI, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
2014 U.S. Dist. LEXIS 24907
Civil Action No. 11-6114 (JLL)
February 26, 2014, Decided
February 26, 2014, Filed

Notice:

NOT FOR PUBLICATION

Editorial Information: Subsequent History

Vacated by, Remanded by Cordero v. Warren, 2016 U.S. App. LEXIS 23045 (3d Cir. N.J., Dec. 22, 2016)

Editorial Information: Prior History

State v. Cordero, 2006 N.J. Super. Unpub. LEXIS 1541 (App.Div., Aug. 15, 2006)

Counsel Misael Cordero, Pro se, Trenton, NJ.
John Anderson, Essex County Prosecutor's Office, Newark, NJ, Attorney for Respondents.

Judges: JOSE L. LINARES, United States District Judge.

Opinion

Opinion by: JOSE L. LINARES

Opinion

LINARES, District Judge

Exhibit D

Petitioner Misael Cordero submitted this petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 challenging his state court conviction, and Respondents submitted an answer to the petition (ECF No. 11), with the available state court record. Petitioner also filed a traverse to the answer (ECF No. 33). For the following reasons, the petition will be denied.

BACKGROUND

The relevant facts are set forth in the opinion of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), in Petitioner's direct appeal.1 See Respondents' Exhibit ("RE") 6.

In late April or early May 1991, knowing that Elias Lopez was going to be returning from Puerto Rico with a large amount of cocaine, defendant and Santiago plotted to kill him and to steal the cocaine. Defendant and Santiago agreed that Santiago would kill Lopez in exchange for $20,000, which would be paid after the drugs were sold. On May 6, 1991, defendant and Santiago requested that Ruiz dig a hole in the dirt floor {2014 U.S. Dist. LEXIS 2}of the premises at 133 Parker Street, Newark, because they were "going to kill a guy." Ruiz agreed to dig the hole in exchange for $400.

On May 7, 1991, Lopez arrived at defendant's apartment at 126 Parker Street, Newark, to take part in a scheduled drug sale. Inside defendant's apartment were defendant and his girlfriend, Cynthia Cordero. Santiago remained outside the apartment. Having observed Lopez arrive, Santiago went to the basement of 126 Parker Street, left a bag containing $2,000 in cash and newspapers cut to resemble stacks of cash on a table, and then joined the others upstairs in defendant's apartment. After defendant and Lopez "tested the coke," defendant and Santiago lured Lopez to the basement where Lopez anticipated to be paid. As Lopez proceeded into the basement, Santiago shot him in the back of the head, killing him. Defendant took the money, drugs, and Lopez's car keys. After the murder, defendant and Cynthia drove to her mother's house, where defendant showered and changed into new clothes purchased by Cynthia with money provided by defendant. Defendant, after having returned to 126 Parker Street with Jose Carrabollo, a friend, directed Carrabollo to clean the basement {2014 U.S. Dist. LEXIS 3}and wrap Lopez's body. Defendant and Santiago left the basement in order to dispose of Lopez's car by abandoning it in East Orange. Upon their return to the place of the murder, Santiago and Carrabollo placed Lopez's body into the trunk of defendant's car, drove it across the street to 133 Parker Street, and buried it in the basement grave. At a later date, cement was poured over the dirt floor in the basement at 133 Parker Street.

In early 1999, when Cynthia Cordero was questioned as part of an investigation into an unrelated homicide, she provided a formal statement about Lopez's murder. In April 1999, the police executed search warrants at 126 and 133 Parker Street. Lopez's remains were recovered from the basement of 133 Parker Street, after which an autopsy confirmed the remains as being that of

Lopez. The autopsy further confirmed the entrance and exit wounds in the back of the neck and forehead areas of Lopez's skull. The cause of death was determined to have been a gunshot wound to the head.(RE 6 at pp. 1-2).

On May 13, 2002, after a jury trial, Petitioner was found guilty of first-degree murder, first-degree robbery, and other charges, contrary to New Jersey state law. Petitioner was sentenced on July 31, 2002 to a life sentence, with thirty years of parole ineligibility. Petitioner's sentence was upheld by the Appellate Division on August 15, 2006 (RE 6). On December 8, 2006, the New Jersey Supreme Court denied Petitioner's petition for certification (RE 7B).

Petitioner filed a motion for post-conviction relief ("PCR") in the trial court which was denied on August 26, 2008 (RE 11). The denial was upheld by the Appellate Division on October 1, 2010 (RE 16). On September 7, 2011, the New Jersey Supreme Court denied certification of Petitioner's petition for review (RE 20).

Petitioner filed this petition on or about October 17, 2011 (ECF No. 1). Respondents filed a Response and the relevant state court record on June 1, 2012 (ECF Nos. 11-32), to which Petitioner replied on August 20, {2014 U.S. Dist. LEXIS 5}2012 (ECF No. 33).

In his petition before this Court, Petitioner seeks relief under 28 U.S.C. 2254, arguing: (1) he was denied his right to effective assistance of counsel; (2) jury selection procedures resulted in a denial of Petitioner's constitutional rights; and (3) failure to correct the testimony of a state witness through the use of an interpreter violated Petitioner's constitutional right to a fair trial and due process (Pet., 13).

DISCUSSION

A. Section 2254 Cases

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2254 now provides, in pertinent part:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.28 U.S.C. 2254(a).

With respect to any claim adjudicated on the merits in state court proceedings, 2254 further provides that the writ shall not issue unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application {2014 U.S. Dist. LEXIS 6}of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.28 U.S.C. 2254(d).

A state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [the Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (O'Connor, J., for the Court, Part II). A state court decision "involve [s] an unreasonable application" of federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case."1 *Id.* at 407-09. To be an "unreasonable application" of clearly established federal law, the state court's application must be objectively unreasonable. *See id.* at 409. In determining whether the state court's application {2014 U.S. Dist. LEXIS 7}of Supreme Court precedent was objectively unreasonable, a habeas court may consider the decisions of inferior federal courts. *See Matteo v. Superintendent*, 171 F.3d 877, 890 (3d Cir. 1999); *see also Williams v. Ricci*, Civ. Action No. 09-1822 (DRD), 2012 U.S. Dist. LEXIS 177857, 2012 WL 6554371, *14 (D.N.J. Dec. 14, 2012)(slip copy)(citing *Matteo*).

The deference required by 2254(d) applies without regard to whether the state court cites to Supreme Court or other federal caselaw, "as long as the reasoning of the state court does not contradict relevant Supreme Court precedent." *Priester v. Vaughn*, 382 F.3d 394, 398 (3d Cir. 2004) (citing *Early v. Packer*, 537 U.S. 3, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); {2014 U.S. Dist. LEXIS 8}*Woodford v. Visciotti*, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)), *cert. denied*, 543 U.S. 1093, 125 S. Ct. 974, 160 L. Ed. 2d 906 (2005).

Finally, a *pro se* pleading is held to less stringent standards than more formal pleadings drafted by lawyers. *See Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). A *pro se* habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. *See Rainey v. Varner*, 603 F.3d 189, 198 (3d Cir. 2010); *Royce v. Hahn*, 151 F.3d 116, 118 (3d Cir. 1998); *Lewis v. Attorney General*, 878 F.2d 714, 721-22 (3d Cir. 1989).

B. Petitioner's Habeas Claims Will Be Denied.

1. Ineffective Assistance of Counsel

Petitioner alleges that trial counsel was ineffective because of lack of preparation and investigation, failure to object to false testimony, failure to produce witnesses, and failure to consult with Petitioner (Pet., 13A).

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel is "the right to *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970) (emphasis added).

To prevail {2014 U.S. Dist. LEXIS 9}on a claim of ineffective assistance of counsel, a habeas petitioner must show both that his counsel's performance fell below an objective standard of reasonable professional assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92, 102 (3d Cir. 2012) (citing *Strickland*). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. The performance and prejudice prongs of *Strickland* may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Id.* at 697.

An evidentiary hearing was held by the {2014 U.S. Dist. LEXIS 10}PCR court to assess Petitioner's ineffective assistance of counsel claims. Defendant's trial counsel, John McMahon, testified. He stated that he prepared a defense for Petitioner attacking the credibility of the co-defendants who were among the State's witnesses (RE 43).

After hearing the testimony, the PCR court issued a written opinion (RE 11). Citing *Strickland*, the PCR judge fully examined Petitioner's ineffective assistance of counsel claims and denied PCR finding:

In sum, Cordero has failed to demonstrate by a preponderance of the evidence that had appellate and trial counsel raised the issues Cordero now asserts, the result would have been different. Among those issues were a jury instruction regarding the co-defendants' plea agreement.

investigation into defenses and witnesses, failure to move for dismissal of the counts barred by the statute of limitations, and failure to make objections to allegedly inadmissible hearsay testimony and testimony about religious beliefs. Constitutionally defective representation that affected the outcome must be proved, and this Cordero has failed to do so [sic]. The record does not support a fair inference that either McMahon or Blum's performance {2014 U.S. Dist. LEXIS 11}was in any way inadequate or below a level of reasonable competence. The impact of Cordero's claims of error could not have had a prejudicial impact on the outcome of the trial or appeal.(RE 11 at pp. 8, 21).

The Appellate Division also considered the counsel claims on appeal of the PCR decision and found:

We have considered the arguments raised by defense counsel in Points I, II, and III of her brief and by defendant pro se in Points I and II of his supplemental brief in light of the record and applicable law. We are satisfied that none of them are of sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). On those issues, we affirm substantially for the reasons expressed by Judge Goldman in his thoughtful written decision of August 26, 2008.(RE 16).

Petitioner's claim that he could have had a better plea deal had counsel reacted quicker to dismiss time barred charges does not satisfy the *Strickland* standard, as the time barred charges did not include the murder charge- the charge to which Petitioner would have pled. Although Petitioner argues in his traverse that he was prejudiced because the time barred charges were not dismissed, (*see* Traverse, pp. 5-6), Petitioner {2014 U.S. Dist. LEXIS 12}has not demonstrated a reasonable probability that the outcome would have been different had the time barred charges been dismissed, as found by the state court.

The Appellate Division found on direct appeal (RE 6 at pp. 26-33) that the trial court did not err in failing to discover and dismiss the time barred claims, and the PCR judge found no prejudice to satisfy the second prong of *Strickland* (RE 11). This Court agrees that Petitioner has not shown prejudice. Thus, as Petitioner fails to meet the prejudice prong of *Strickland,* performance does not have to be addressed. *See Strickland,* 466 U.S. at 697. This claim does not warrant habeas relief.

As to Petitioner's claim that counsel failed to prepare concerning an earlier investigation, the state courts accepted that counsel's use of the information concerning the earlier investigation was to attack the credibility of a State witness and constituted trial strategy (RE 44, 24T34-9 to 37-18). The state court's finding after the PCR hearing that counsel's use of the information was trial strategy was reasonable and therefore in accordance with *Strickland.*

Petitioner's claim that trial counsel failed to object to testimony concerning a witness' {2014 U.S. Dist. LEXIS 13}religious beliefs was addressed at the evidentiary hearing held by the state PCR court. Counsel testified that for strategic reasons he did not object to the testimony because he thought it helped Petitioner (RE 44, 43T26-21 to 25).

Likewise, counsel's failure to call a witness who was serving a sentence for double homicide and allegedly knew nothing about the murder (RE 11 at p. 12, was deemed trial strategy. The witness had no personal knowledge of the murder. Everything he knew, which was not much, he learned from one of petitioner's co-defendants, Javier Santiago. He did not know the names of the alleged victim or the co-conspirator. He did not even know when the murder occurred. Moreover, when asked, he testified that he did not even believe Santiago's story was true. The PCR Court properly concluded that the proposed witness would not have been beneficial to the petitioner. (RE 11 at p. 12).

The record does not support Petitioner's claims that trial counsel failed to consult and prepare for trial. As noted by the PCR judge, "[t]he {2014 U.S. Dist. LEXIS 14}alleged failure of the trial counsel to investigate all claims on his client's behalf and to produce all witnesses is far from professional misconduct." (RE 11 at p. 13). The PCR court found:

Many of the items complained of are minor details which would not be useful in a "cold case." Thus, it is reasonable to see why McMahon made the judgments that he did while proceeding with this case even though substantial portions of the trial file, including McMahon's trial notes were missing by the time of the PCR hearing. His judgments are afforded heavy deference. Furthermore, Cordero, himself, admits that he could only speculate as to the additional evidence that would have been produced had McMahon conducted the investigation he now complains did not occur.(RE 11 p 13).

Here, a review of the record, including the transcripts of trial and the state court decisions, which cited the proper United States Supreme Court precedent in *Strickland*, were neither contrary to, nor involved an unreasonable application of, clearly established federal law, nor were they based upon an unreasonable determination of the facts in light of the evidence presented. Thus, Petitioner is not entitled to relief on {2014 U.S. Dist. LEXIS 15}these claims.

2. <u>Claim Regarding Jury Selection</u>

Petitioner alleges that the trial court erred in denying eight challenges for cause, "forcing defendant to spend peremptory challenges on those jurors." (Pet., 13B). The trial court also denied additional questioning to determine cause as to one juror, and erred in denying Petitioner's two motions to discharge the jury (Pet., 13B).

The Appellate Division explained these claims in detail in Petitioner's direct appeal:

Defendant argues that the trial judge erred by failing to remove potential juror Bernard Carter for cause, thereby forcing defendant to expend his last peremptory challenge when removing the juror. Defendant contends that not only because of the result of trial judge's inaction, but also because of his failure to grant defendant's request for additional peremptory challenges, defendant "was unable to dismiss two other objectionable jurors, Audrey Reese and Diane Guarino, who ultimately sat on the jury."

* * *

At a sidebar conference during the voir dire, juror Carter advised that "although [he did not] think it would affect [his] judgment," his thirty-five year old daughter had been abducted and murdered by a serial killer {2014 U.S. Dist. LEXIS 16}in Florida, fifteen months earlier. Having received that advice from Carter, the judge asked Carter whether he was "sure it wouldn't have any impact on [his] ability to be fair and impartial in this case[?]" to which Carter responded, "[n]o, sir, it wouldn't." Following up on that response, the judge asked "[w]ould having a case involving a homicide in any way cause you pain, discomfort sitting here listening to testimony perhaps about somebody being killed and-and be a painful experience for you in light of what-in light of your recent painful experience?" Carter answered: "At this moment, no, I don't think it would." Concerned about the impact that the Florida murder may have had upon Carter, defendant requested the trial judge to remove the juror for cause. The motion was denied. Questioned again the following day, Carter maintained that his daughter's homicide would not affect his ability to be fair and impartial. After defendant used peremptory challenges to excuse thirteen other potential jurors, defendant used his last peremptory challenge to excuse Carter. Defendant had requested additional peremptory challenges, but his request was denied.*State v. Cordero*, 2006 N.J. Super. Unpub. LEXIS 1541, 2006 WL 2346306 at ** 3-4(N.J. App. Div. Aug. 15, 2006).

The {2014 U.S. Dist. LEXIS 17}Appellate Division examined the claim, first, noting that under the Sixth Amendment of the United States Constitution, "an impartial jury is a necessary condition to a fair trial." 2006 N.J. Super. Unpub. LEXIS 1541, [WL] at *4 (citations omitted). The Court noted that under New Jersey law: "A trial judge's decision whether to remove a juror for cause will not be reversed unless there has been an abuse of discretion." *See* 2006 N.J. Super. Unpub. LEXIS 1541, [WL] at *5 (citation omitted).

For purposes of 2254 review, the United States Supreme Court has held: "In reviewing claims of this type, the deference due to [trial] courts is at its pinnacle: 'A trial court's findings of juror impartiality may be overturned only for manifest error.'" *Skilling v. United States*, 561 U.S. 358,

396, 130 S. Ct. 2896, 2923, 177 L. Ed. 2d 619 (2010) (quoting *Mu'Min v. Virginia*, 500 U.S. 415, 428, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)).

The Appellate Division noted the trial judge's observations:

On the following day, defendant raised the possibility that by allowing Carter to sit on the jury, there was a risk that Carter would sympathize with family members of the victim when they testify, and perhaps would be unable to adhere to his oath. Although this was a valid concern, Carter expressed an ability to keep his personal situation {2014 U.S. Dist. LEXIS 18}separate, and the judge was satisfied that he would. The judge, finding Carter to be "intelligent," "straightforward," "open," and "honest," stated: "I'm satisfied beyond any reasonable doubt that this juror's discussion of his ability to be fair and impartial is honest, truthful, and genuine in every respect."

The judge concluded by saying:

We are satisfied that the trial judge carefully considered Carter's ability to serve as a juror, and no abuse of discretion existed in denying defendant's request that Carter be dismissed for cause.

Again, this is-this is really remote. And when I take its remoteness on one hand-take the remoteness of the criminal incident on the one hand and I take the similarity, I also take the fact the-the extenuation of the concept of victim and I take all those factors into consideration, the bottom line is-is that while I appreciate the language in ... [Singletary] and I agree that if I had any doubt at all, if I had any doubt of this juror's sense of fairness or mental integrity, if I had the slightest iota of doubt, if I was not convinced beyond a reasonable doubt that this juror could and would be fair, I would agree with you.

But if I[am] honestly convinced and genuinely convinced that there is no basis and that I[am] convinced beyond a reasonable doubt based upon my evaluation of this juror's responses that he can and would and will be fair, I can[not] {2014 U.S. Dist. LEXIS 19}in good conscience excuse him for cause.

Jurors have a constitutional right as well to be jurors and not to be excused for [any] reason at all. And I [am] satisfied this juror can and should be a fair juror.*Cordero,* 2006 N.J. Super. Unpub. LEXIS 1541, 2006 WL 2346306 at **5-6.

Here, as in *Skilling,* the trial judge "had looked [each of these jurors] in the eye and ... heard all [their answers and] found [their] assertions of impartiality credible." *Id.* at 2924 (citations and

internal quotation marks omitted). Under these circumstances, the New Jersey courts' adjudication of Petitioner's inadequate voir dire claim was not contrary to, or an unreasonable application of, *Skilling* or other Supreme Court holdings. Petitioner is not entitled to relief on this claim.

3. Interpreter Claim

In Ground Three of his petition, Petitioner argues that a portion of a state witnesses' testimony was translated incorrectly, rendering the trial unfair. Specifically, after review of the videotaped testimony, "two Court appointed interpreters agreed {2014 U.S. Dist. LEXIS 20}that corrections were needed," however when it "came time to make such corrections, the interpreters changed their minds and petitioner was denied the opportunity to explain the correct meaning of the testimony to the jury." (Pet., 13C).

The Appellate Division examined this claim on direct appeal and found it to be without merit to warrant discussion. *Cordero,* 2006 N.J. Super. Unpub. LEXIS 1541, 2006 WL 2346306 (N.J. App. Div. Aug. 15, 2006).

The transcripts of the trial reveal that Petitioner disagreed with an interpretation that one of the courtroom interpreters stated during the trial, in particular, the difference between "he" was going to kill me versus "they" were going to kill me. (RE 31, 11T21-1 to 9). Petitioner argues that: "The incorrect translation accused petitioner of threatening three state witnesses . . . in order to keep them from talking. On the other hand, if the correction would have been made the defendant would not have been branded as one of the individuals who made the threats." (Pet., 13(C)).

The interpreter's supervisor explained at sidebar:

THE INTERPRETER: The reason why I asked to speak to you for a moment outside the jury is because the topic of controversy last Thursday was whether it was {2014 U.S. Dist. LEXIS 21}*they were* going to kill me or *he was* going to kill me. Today Miss Marte [another interpreter] is confirming part of what I was convinced I heard last Thursday, that the part of the answer in question says he said that if I didn't say anything to anybody nothing was going to happen but if I talked, *they were* going to kill me and Samuel Soto and Nereida, his wife. So later in the question it does change to *they were* going to kill me.(RE 31, 11T15-9 to 16-17)(emphasis added).

Defense counsel asked that Petitioner be permitted to interpret what he believed said, but the Court denied the request (RE 31, 11T17-20 to 23). The interpreter reviewed her interpretation and concluded that her initial interpretation was correct (RE 31, 11T18-4 to 14; 11T21-1 to 9).

Here, although Petitioner may disagree with the interpretation, he does not establish that his constitutional rights were violated by the examination of the interpretation, or that any wrongdoing occurred. Certainly, he has not established that the process in figuring out the interpretation compromised the fairness of his trial. Nor has Petitioner established that the trial court's actions were an unreasonable application of clearly established {2014 U.S. Dist. LEXIS 22}federal law, as determined by the United States Supreme Court. *Cf. Kitchen v. Tucker*, No. __, 2012 U.S. Dist. LEXIS 185865, 2012 WL 7051038 (N.D. Fla. Sept. 20, 2012) ("Petitioner has pointed to no Supreme Court precedent, in his state court pleadings or here, holding that a court-appointed interpreter's translation of witnesses' examination under the circumstances presented here violates a defendant's federal constitutional rights to due process and confrontation. The undersigned has not found any such precedent."); *see also Nguyen v. Tilton*, No. __, 2009 U.S. Dist. LEXIS 30771, 2009 WL 839278, *19 (N.D. Cal. Mar. 30, 2009) ("Petitioner . . . claims that denying the prosecution's witness an interpreter somehow violates the Petitioner's constitutional rights . . . . However, there is no clearly established federal law extending any such right to witnesses.") As such, this claim does not warrant habeas relief.2

C. Certificate of Appealability

Pursuant to 28 U.S.C. 2253(c), unless a circuit justice or judge issues a certificate of appealability, {2014 U.S. Dist. LEXIS 23}an appeal may not be taken from a final order in a proceeding under 28 U.S.C. 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Here, Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, no certificate of appealability shall issue.

CONCLUSION

For the reasons set forth above, the petition and pending motion are denied. No certificate of appealability will issue.

An appropriate order follows.

/s/ Jose L. Linares

JOSE L. LINARES

United States District Judge

Dated: 2/26/14

ORDER

FOR THE REASONS set forth in this Court's Opinion filed herewith;

IT IS ON THIS 26 day of February, 2014;

ORDERED that Petitioner's petition for a writ of habeas corpus is hereby DENIED; and it is further

ORDERED that no certificate of appealability shall issue; and it is finally

ORDERED that the Clerk of the Court shall close {2014 U.S. Dist. LEXIS 24} this case.

/s/ Jose L. Linares

JOSE L. LINARES

United States District Judge

Footnotes

1

Pursuant to 28 U.S.C. 2254(e)(1), "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State {2014 U.S. Dist. LEXIS 4}court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."
1

"[A] state court adjudication fails the 'unreasonable application' test only if the state court identified the correct governing legal rule but unreasonably applied it to the particular case or if the state court either unreasonably extended a legal principle from Supreme Court precedent to a new context in which it should not apply or where it unreasonably refused to extend such a principle to a new context in which it should apply." *Greene v. Palakovich*, 606 F.3d 85 104 n.14 (3d Cir. 2010) (quoting *Fountain v. Kyler*, 420 F.3d 267, 273 (3d Cir. 2005)).
2

Respondents' Affirmative Defense that Petitioner's case is time-barred is denied, as the time that the PCR is pending is tolled for purposes of the time limitations on habeas relief. *See* 28 U.S.C. 2244(d)(2).

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