NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1142

OSCAR ALVARADO,
Appellant

v.

SUPERINTENDENT SOMERSET SCI;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

On Appeal from United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-17-cv-03283)
District Judge: Honorable Nitza I. Quinones Alejandro

Argued July 16, 2021

Before: McKEE, GREENAWAY JR., and RESTREPO, *Circuit Judges*

(Opinion filed: September 15, 2021)

Eleanor R. Barrett
Jean W. Galbraith
Benjamin Brown-Harkins
Jenifer Norwalk
Rebecca Wallace [Argued]
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Counsel for Superintendent Somerset SCI, District Attorney Philadelphia, Attorney General Pennsylvania

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OPINION*

McKEE, *Circuit Judge*.

Oscar Alvarado was convicted of second degree murder after his non-testifying co-defendant's statement was admitted in their joint trial and used against him in violation of his Sixth Amendment Confrontation Clause rights under *Bruton v. United States*.[1] The Government concedes that admitting the improperly redacted statement did violate Alvarado's rights under *Bruton*, that Alvarado's trial counsel was constitutionally ineffective for failing to object or otherwise cure the violation, and that any procedural default at the federal habeas stage is excused under *Martinez v. Ryan*.[2] Accordingly, the

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

[1] 391 U.S. 123 (1968).

[2] 566 U.S. 1 (2012).

only issue before us is whether, under the second prong of *Strickland v. Washington*, the unconstitutionally admitted statement prejudiced Alvarado.[3] We conclude that it did not. Thus, we will affirm the District Court.[4]

I.

Oscar Alvarado was accused of robbing a drug dealer and shooting another person afterward. At trial, defense counsel argued that Alvarado was guilty of third-degree murder rather than second degree because the prosecution had not proven the predicate felony of robbery. The jury convicted him of second-degree murder. Alvarado argues that the incriminating, improperly redacted statement of his co-defendant, Cynthia Alvarado, provided the "linchpin" for the government's robbery case.[5] We disagree.

The Government was able to establish the predicate offense of robbery with the testimony of Edwin Schermety, who witnessed Oscar Alvarado enter the park and take something from a drug dealer while holding a gun to his stomach, and Margie Beltran, who testified that Oscar Alvarado returned from the park with thirty Xanax he did not previously have. Beltran also testified that before Oscar Alvarado went into the park, she told him to try to get extra free pills because they had purchased a large number of

[3] 466 U.S. 668 (1984). Habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

[4] The District Court had jurisdiction to consider Alvarado's petition under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We review the underlying merits de novo because Alvarado did not present the issue to the state courts. *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236 (3d Cir. 2017).

[5] Appellant's Br. at 4.

pills earlier that day. Beltran testified that Cynthia Alvarado then told Oscar Alvarado to pull out his gun if he was not offered a deal.

Accordingly, although Cynthia's improperly admitted statement confirmed Schermety's and Beltran's testimony, the Government was able to establish the elements of robbery independent of her statement. In fact, her statement was unnecessary to prove Oscar Alvarado committed second degree (or felony) murder beyond a reasonable doubt.[6]

Alvarado relies upon *Johnson v. Superintendent Fayette SCI* in arguing that Cynthia's statement improperly corroborated the unreliable testimony of Schermety and Beltran.[7] However, there, the credibility of a witness who testified about Johnson's motive and an eyewitness were each severely impeached by testimony from other witnesses.[8] In contrast, here, the main elements of Beltran's and Schermety's testimony were not contradicted.

The main inconsistencies between Schermety and Beltran's testimony were not sufficient to cause a reasonable juror to doubt their credibility. Schermety testified that Oscar robbed a man, but Beltran testified that a woman's voice said, "[H]e took my pills."[9] However, regardless of how typically masculine or feminine the voice was, the witnesses agreed that someone stole his/her pills.

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[6] "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. Cons. Stat. § 2502(b). Robbery is established when, as relevant here, the person "in the course of committing a theft . . . threatens another with or intentionally puts him in fear of immediate bodily injury." 18 Pa. Cons. Stat. § 3701(a)(ii).
[7] 949 F.3d 791, 797 (3d Cir. 2020).
[8] *Id.* at 803.
[9] JA 158.

Next, Schermety testified that Oscar shot from the driver's side window. That was corroborated by another witness as well as the medical examiner's analysis. However, Beltran testified that Oscar put his hand over the roof of the car before shooting. But, Beltran admitted that she "didn't really see because [she] ducked and [she] threw [her]self on the baby" who was in the back of the car with her.[10]

Finally, Schermety testified he saw the back of the shooting victim's head "open up" when in reality she was shot in the chest.[11] However, both a responding police officer and another witness also thought she had been shot in the face. Thus, the fact that Schermety believed she was shot in the head does nothing to undermine Schermety's testimony.[12]

II.

Accordingly, we will affirm the District Court's denial of Alvarado petition for a writ of habeas corpus.

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[10] JA 159.

[11] JA 111.

[12] Alvarado also argues, relying on *Brown v. Superintendent Greene SCI*, 834 F.3d 506 (3d Cir. 2016), that Beltran's credibility is worrisome as she ingested several Xanax pills before the events to which she testified. This Court noted in *Brown*, however, that the witness had substantial credibility issues because he was impaired from both marijuana and Xanax, changed his narrative, and had a motive to lie. 834 F.3d at 250. Whereas here, Beltran's testimony was generally consistent with other witnesses, and she had ingested Xanax only at the time of the events. Therefore, the concern as to credibility does not rise to the level of that in *Brown*.

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

OSCAR ALVARADO,	:	
	:	CIVIL ACTION
Petitioner,	:	
v.	:	
	:	NO. 17-3283
TREVOR WINGARD, et al.,	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION

JACOB P. HART, U.S.M.J **January 8, 2019**

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

I. FACTS AND PROCEDURAL HISTORY

Following a jury trial presided over by the Honorable M. Teresa Sarmina, of the Philadelphia Court of Common Pleas, on July 15, 2010, Alvarado was found guilty of second-degree murder, robbery, and carrying a firearm without a license. After the jury returned the verdict, Alvarado pled guilty to the charge of persons not to possess firearms. Commonwealth v. Alvarado, 2366 EDA 2010 (Pa. Super 2012). Alvarado was tried with co-defendant, Cynthia Alvarado, who was also found guilty of second degree murder and robbery. On August 3, 2010, Alvarado was sentenced to the mandatory term of life imprisonment.

The facts of the case as determined by the testimony were summarized by Pennsylvania Superior Court as follows:

At approximately 4:20 p.m. on October 21, 2008, Marta Martinez (decedent) was fatally shot by [Petitioner] at Fairhill Square Park, located at the intersection of Lawrence Street and Lehigh Avenue in Philadelphia.

At approximately 3:00 p.m. that same day [Petitioner] and his cousin, co-defendant Cynthia Alvarado, had purchased Xanax pills from a person in Fairhill Park, which was well-known for the illegal sale of prescription medication pills. [FN 6- The identity of this person is unknown.] While [Petitioner] purchased the pills in the park, [Cynthia] waited across the street in her car, a red Honda Civic. While waiting, [Cynthia] encountered a childhood friend, Maiced Beltran. [FN 7- Ms. Beltran testified for the Commonwealth to many of the facts contained herein.] [Cynthia] offered Ms. Beltran a ride, which she accepted. When [Petitioner] returned from purchasing the drugs, each person ingested multiple Xanax pills.

The trio spent an hour traveling to various locations, with [Cynthia] driving, [Petitioner] sitting in the passenger seat, and Ms. Beltran and [Cynthia's] one-year old daughter sitting in the back seat. At some point during this hour, [Petitioner] pulled a gun out from underneath his seat and showed it to Ms. Beltran and [Cynthia]. At approximately 4:00 p.m., the trio returned to the park to purchase more Xanax pills. [Cynthia] parked the car near the intersection of 4th and Lawrence Streets. Upon arriving, Ms. Beltran suggested to [Petitioner] that he try to "get a play," meaning that he should try and get extra pills in addition to the amount for which he was paying. [Petitioner] began to walk away from the car and into the park to make the purchase, but [Cynthia] called him back and stated, "Cuz, you know, you know what to do. You know, if they don't give you a play, just pull that shit out." Ms. Beltran understood this to mean that [Cynthia] was suggesting to [Petitioner] that he should use his gun to get the extra pills. Ms. Beltran got upset with [Cynthia] for making this statement and began to yell at her. [Petitioner] then left the vehicle and walked into the park. The decedent, a homeless woman, was standing near the parked vehicle.

[Petitioner] approached a male drug dealer in the park, [FN 8- The identity of the drug dealer is unknown.] pulled the gun out of his waistband, stuck it into the drug dealer's midsection, a took a bottle of Xanax pills that the drug dealer was holding in his hand. [Petitioner] then turned around and began walking back to the vehicle. The drug dealer began yelling, "He robbed me!" and the other people in the park, including the victim, joined in. Some people started following [Petitioner]. [Petitioner] ran towards the car and got back into the passenger seat of the vehicle. The decedent approached the vehicle and attempted to look inside the driver's side window. [Petitioner] reached across the driver's seat and shot the victim through the partially open driver's side window. [Petitioner] then opened the passenger door, reached over the hood of the car, and fired two to three more shots into the park area. [FN 9- Eyewitness accounts differ as to how [Petitioner] shot the gun after the initial shot through the open window. One eyewitness, Edwin Schermety, stated that [Petitioner] did not reach over the hood

> but continued to shoot through the window. In her police statement, [Cynthia] stated that [Petitioner] walked to the back of the car and fired the shots from that location.] [Petitioner] then told [Cynthia] to drive away, and she obliged, leaving the area of the park.
>
> As the trio left the park, they ingested more Xanax pills from the bottle that [Petitioner] had just taken from the drug dealer. The group then drove to various locations, including [Cynthia's] father's house, where they traded the red Honda Civic for her father's red Dodge pickup truck, and dropped off [Cynthia's] child. After leaving the house, the group also purchased a vial of the drug angel dust. [FN 10- Ms. Beltran testified that she smoked the angel dust, but did not see either [Petitioner] or [Cynthia] do so.] The group then drove to [Cynthia's] apartment, located at 106 West Thompson Street, where they stayed until their arrest at approximately 8:00 p.m. that evening. The police, having received a license plate number for the red Honda Civic and descriptive information of [Petitioner] and [Cynthia], were able to eventually locate them both the same day. As the police arrived at [Cynthia's] residence to arrest them, [Petitioner] went to the apartment of Erica Martinez, a neighbor who lived in that same building, and banged on her apartment door. When Ms. Martinez opened the door, [Petitioner] stated, "I need to hide in your apartment." Ms. Martinez refused, and [Petitioner] was arrested at that time.

Direct Appeal Opinion, 5/31/2011 at 2-4 (citations to the notes of testimony omitted).

The Pennsylvania Superior Court affirmed Petitioner's judgement of sentence on direct appeal. Commonwealth v. Alvarado, 2366 EDA 2010 (Pa. Super. 2012).

On February 28, 2013, Alvarado filed a pro se petition for post-conviction relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 et seq. On October 11, 2014, appointed counsel filed a no-merit letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988) and a motion to withdraw as counsel. On February 5, 2015 after reviewing the pleadings, the PCRA court filed a notice of its intent to dismiss the petition pursuant to Pa.R.Crim.P. 907. After Petitioner filed a pro se response, the PCRA court dismissed the petition on March 13, 2015.

The Pennsylvania Superior Court affirmed the dismissal of Alvarado's PCRA petition on August 18, 2016. Commonwealth v. Alvarado, No. 963 EDA 2015 (Pa. Super. Ct. 2016)

(Respondent's Ex. A). On January 18, 2017, The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal.

Alvarado filed the present petition for writ of habeas corpus on July 21, 2017. Respondents argue that all of Petitioner's claims must be dismissed because they were reasonably rejected by the state courts or are procedurally defaulted. As more fully discussed below, this Court agrees that none of Alvarado's claims warrant habeas relief and recommends that his petition be denied.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Issuance of a Writ of Habeas Corpus

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly limited the federal courts' power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

1. Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

2. Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

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

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

Further, state court factual determinations are given considerable deference under the AEDPA. Lambert v. Blackwell, 387 F.3d 210, 239 (3d Cir. 2004). A petitioner must establish that the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

B. Exhaustion and Procedural Default

"[A] federal habeas court may not grant a petition for writ of habeas corpus unless the petitioner has first exhausted the remedies available in the state courts." Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The procedural default barrier, in the context of habeas corpus, precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . ." Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

1. Exceptions to Procedural Default

To survive procedural default in the federal courts, a petitioner must either "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or

demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

a. Cause and Prejudice Exception

A showing of cause demands that a petitioner establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available to counsel; or (2) a showing that "some interference by officials" made compliance with the state procedural rule impracticable. Murray v. Carrier, 477 U.S. 478, 488 (1986). Once cause is proven, a petitioner must also show that prejudice resulted from trial errors that "worked to [petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494.

b. Fundamental Miscarriage of Justice Exception

To establish the fundamental miscarriage of justice exception, the petitioner must demonstrate his or her "actual innocence." Schlup v. Delo, 513 U.S. 298, 324 (1995); Calderon v. Thompson, 523 U.S. 558, 559 (1998). A demonstration of actual innocence requires the petitioner to present new, reliable evidence of his or her innocence that was not presented at trial. Schlup, 513 U.S. at 324. The new evidence must be considered along with the entire record, including that which was excluded or unavailable at trial. Id. at 327-28. Once such evidence is presented, the petitioner's defaulted claims can only be reviewed if "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of the new factual evidence. Id. at 327.

C. Ineffective Assistance of Legal Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 686–88, 693–94.

First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. at 688. The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Because of the difficulties in making a fair assessment, eliminating the "distorting effect" of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). It is well-established that counsel cannot be ineffective for failing to raise a meritless claim. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d 706, 730 (E.D. Pa. 2001).

To satisfy the second prong of the Strickland analysis, a defendant must establish that the deficient performance prejudiced the defense. This showing requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. Strickland, 466 U.S. at 687. More specifically, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. DISCUSSION

A. Ineffective Assistance of Trial Counsel for Failing to Seek Severence of his Trial from Co-Defendant

In his first claim Alvarado argues that his trial counsel provided ineffective assistance of counsel by failing to seek severance of his trial from that of his co-defendant, Cynthia Alvarado. Petition at p.6. Following the dismissal of his PCRA petition, the Superior Court considered this claim and found that the record belies Alvarado's contention that trial counsel failed to move for severance. The court noted as follows:

> The record reflects that trial counsel filed a motion to sever on August 18, 2009. The record further reflects that Attorney Anderson again objected to a joint trial at a pre-trial hearing when she stated, 'We continue our vociferous objection to the cases being tried together.' (Notes of testimony, 7/21/10 at 77.) Additionally, defense counsel renewed the motion immediately prior to jury selection, and the trial court denied the motion. (Notes of testimony, 7/8/10 at 131-132, 144.) Therefore, this claim lacks arguable merit.

Commonwealth v. Alvarado, 963 EDA 2015 (Pa. Super. 2016) (Respondent's Ex. A) at p. 10.

Since counsel cannot be deemed ineffective for failing to do something that counsel actually did, the claim was reasonably rejected by the state court. Therefore, the claim lacks merit and no relief is due.

Petitioner has now acknowledged that his counsel moved for severance before trial and that trial counsel raised the issue in his 1925(b) statement, but he continues to argue that his trial counsel was ineffective for failing to object to co-defendant's statement as a violation of his rights under the Confrontation Clause and failing to seek a mistrial.

B. Ineffective Assistance of Counsel for Failing to Argue that his Rights under the Confrontation Clause Were Violated

Next, Alvarado asserts his related claim that his counsel was ineffective for failing to raise a Confrontation Clause claim as a result of his co-defendant's statement being read to the jury, in violation of Bruton v. United States, 391 U.S. 123 (1968). He argues that all counsel were ineffective for failing to pursue the claim that the trial court erred by denying the motion to sever and then by admitting the co-defendant's redacted statement into evidence. He also alleges that the prosecutor did not properly redact the statement.[1] Alvarado argues that trial counsel was

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[1] The relevant portion of the redacted statement was read into evidence by the detective as follows:

> Q. Were you present when the shooting occurred?
> A. Yes. I was in the car. Yes.
> Q. Who was in the car when you first went to the park?
> A. In was me; the girl Margie—she's my best friend; my daughter, Bianca Deanne Ortiz, and another person.
> Q. Can you tell us in your own words what happened related to the shooting of the woman in the park today.
> A. We went to – we went to the park, me Margie, my daughter, and another person. This other person got out and bought 25 Xannies from one of the guys out there. We went back to the park about two hours later to get more Xannies. The person who bought them wanted to get some discount from buying 25 Xannies earlier. They wouldn't do it, so this person took the Xannies off the "old head" and left. As this person was leaving, they started coming towards us. The person that took the Xannies got into the car and the lady, she was banging on the back window. The person that took the Xannies shot through the window and then got out of the car and walked to the back and bust off – and bust off a few more shots. I saw the lady fall and roll down. The person who was shooting then got in and said, "pull off. Pull off." I pulled off and I went to my dad's house. I took all the ducky streets because that's what the person who had been shooting told me.
> Q. When you pulled off, did you see the woman lying on the ground?
> A. yes, I saw her lying on the ground, but I didn't see no blood.
> Q. What was the – was that the same woman you saw banging on the window?
> A. Yes.
> Q. Did you see anyone else on the ground?
> A. No; just her.
> Q. After you pulled off, what did the person who had been doing the shooting say about the shooting?
> A. "Fuck them. They were chasing me. I don't give a fuck."
> ...
> Q. What was it that this person took from the old lady in the park?
> THE COURT: From the old what?
> MS. McCAFFERTY: From the "old head."

THE WITNESS: I'm sorry. (Reading): The "old head" in the park.
(Reading): It was a bottle of Xannies. There was 28 in there.
Q: What are Xannies?
A: Pills. Xanax.
Q: Where are those pills now?
A: We sold some to – we sold some to people from our neighborhood, and the person that took them had the rest.
Q: Can you describe the car that you were driving when the shooting at the park happened.
A: It was a red Honda Civic. It's in my name.
Q: Can you tell who was sitting where in the car when you went to the park at the time of the shooting?
A: I was driving. The person I'd been talking about was in the passenger seat and Margie was in the back on the driver's side. My daughter, she was behind the stupid-ass person I have been talking about.
Q: After you left the park, what did you do with your red Honda Civic?
A: I parked it at my dad's, at 8th and Wingohocking. I left the keys with my dad and I took his truck.
Q: Then what did you do?
A: We went back to my house. I left my daughter with my dad, and then all three of us went to my house.
Q: What type of vehicle were you driving at that time – at the time.
A: It's a red Dodge pickup truck.
Q: Did the person you've been talking about still have the gun with them when you went back to your house?
A: Yes. The person had it on them.
Q: Can you describe the gun that this person had?
A: It was a revolver, silver .38 revolver with rubber grip.
Q: Do you know where that gun is now?
A: I believe the gun is still at the house because when the cops got there, the person with the gun went in the house with it.
Q: Did you see where this person put the gun?
A: No.
Q: Did this person only go into your apartment when they had the gun?
A: Yeah. This person was trying to go to the third floor, but I stopped them.
Q: When did this person get the gun?
A: About three days ago from guys from out of town. I think they were from Maryland. They were black dudes.
Q: How much did this person pay for the gun?
A: 250.
Q: Were you with this person when they bought the gun?
A: Yes. It was around Broad and Allegheny, a gas station.
Q: Who was at the house tonight when the police stopped you?
A: It was me, the tall girl Margie, and the person I've been talking about. Ten minutes later Bruce pulled up with Tammy in the champagne Navigator. It's a black .38. I heard Bruce tell the person it was there.
Q: What were you doing at the house when the police came by?
A: We were getting the stuff out of the person I've been talking about, out of my –
BY MS. McCAFFERY:
Q: Just repeat that.
A: (Reading): We were getting the stuff out of the person I've been talking about.
THE COURT: The stuff –
BY MS. McCAFFERY:
Q: One more time.
THE COURT: The stuff of, not "off."

THE WITNESS: (Reading): We were getting the stuff of the person I've been talking about out of my house. We were carrying it out when the police got there. Did you see – did you see –
THE COURT: "Question."
THE WITNESS: Question: Did you see the gun that was supposed to be in the Navigator?
A: Yes. Bruce had it about five days ago. It's a black revolver.
Q: Detective Dove is showing you a gun. Do you recognize this?
A: Yes. That's Bruce's gun.
Q: Other than who you told us about today, does anyone else know what happened?
A: Nobody.
Q: Does this person have a cell phone?
A: Yes. It's (215) 910-7301.
Q: Does Margie have a cell phone?
A: I don't know.
Q: Is there anything else that you would like to add at this time?
A: That I didn't have anything to do with what happened.
Q: Have I or anyone else at the Homicide Unit forced you, threatened you, or made any promises to you to speak with us tonight?
A: No.
Q: Have you been treated fairly and been given something to drink and have access to the bathroom?
A: Yes.
Q: Please read over your interview. You can make additions or deletions that you want. And when you agree with how it's been recorded, please sign – please sign each page. Do you understand?
A: Yes.
Q: We are showing you a revolver that was recovered from your apartment. Do you recognize this weapon?
A: Yeah. That's the gun the person I've been talking about had today. That's the gun he used to shoot that lady.
...

N.T. 7/13/2010 at 199-207.

As soon as Ms. Alvarado's statement was mentioned, prior to Detective Peter's reading the statement into the record, the Court gave the following instruction to the jury:

> Before we continue, I do want to tell the ladies and gentlemen of the jury that the statement that is going to be discussed and testified to here by Detective Peters is an item of evidence which you can only evaluate in considering whether the Commonwealth has proved her guilt beyond a reasonable doubt. Whatever weight you give to this evidence is for you to consider, but only as to her.
>
> You are specifically prohibited from considering anything that is in that statement or even the fact that she gave a statement in any way as part of the evidence that you consider and weigh against Oscar Alvarado.
>
> So I wanted to make sure that you know that from the beginning in terms of evaluating the evidence.
>
> Thank you.

N.T. 7/13/2010 at 190-91.

also ineffective for failing to object and seek a mistrial when the prosecutor in the opening statement "undid" the redactions and that appellate counsel and PCRA counsel were ineffective for failing to litigate these claims. Doc. No. 18 at 13.

Respondents contend that Alvarado failed to properly raise the claim in state court and due to the PCRA's waiver provision and the statute of limitations he can no longer do so now. Therefore, Respondents argue that the claim is procedurally defaulted.

Exceptions to Procedural Default-
Ineffective Assistance of Appellate Counsel for Failing to Preserve Claim:

Alvarado argues that the ineffective assistance of his appellate counsel for failing to pursue the Bruton claim on direct appeal after it was included in the Concise Statement of Errors Complained of on Appeal (1925(b) Statement) filed by his trial counsel should serve as cause to excuse the default. Doc. No. 16 at 3. He alleges that appellate counsel's failure to pursue the issue should serve as cause because there was no basis for counsel to strenuously object and initially raise the issue on appeal, but then have appellate counsel fail to litigate it. Id. When the issue of ineffective assistance of trial/appellate counsel was raised in his PCRA petition, the PCRA court found that the issue of severance was raised during trial and on appeal, but failed to recognize that although it was raised in his 1925(b) statement filed by trial counsel and therefore addressed in the trial court's opinion, the issue was abandoned by appellate counsel and therefore not considered by the Superior Court. The PCRA court stated as follows:

> The issue was addressed in this Court's 5/25/2011 1925(a) opinion, at pp. 7-8. The Superior Court found no errors in the issues raised on appeal, and affirmed petitioner's judgment of sentence. Because trial counsel diligently raised the issue of severance both before trial as well as on appeal, this claim lacks merit, and therefore fails.

PCRA Court's Notice Pursuant to Pa. R. Crim. P. 907 filed 2/5/2015) at p. 3.

On appeal of the dismissal of his PCRA petition, the Pennsylvania Superior Court found Alvarado's Bruton related claims were waived because of his failure to include them in his pro se response to the Court's Rule 907 Notice.

Alvarado's claim that the ineffective assistance of his appellate counsel should serve as cause to satisfy the cause and prejudice required to excuse the procedural default must fail. Although ineffective assistance of counsel for failure to preserve a claim can serve as "cause" to excuse default, "a claim of ineffective assistance must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." See Edwards v. Carpenter, 529 U.S. 446, 452 (2000) (holding that an ineffective assistance of counsel claim asserted as cause for another procedurally defaulted federal claim can itself be procedurally defaulted, and unless the state prisoner can satisfy the cause and prejudice standard for the procedurally defaulted ineffective assistance of counsel claim, that claim cannot serve as cause for another procedurally defaulted claim.). Alvarado attempted to raise the issue of ineffective assistance of all prior counsel in his PCRA petition, but PCRA counsel filed a no-merit letter and the issue was not properly presented to the Superior Court. Therefore, in this case the claim of ineffective assistance of appellate counsel for failing to preserve the issue of ineffective assistance of trial counsel is also procedurally defaulted. Murray v. Carrier, 477 U.S. at 489 (While ineffective assistance of counsel can constitute cause for a procedural default, the exhaustion doctrine "generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.") Therefore, even if appellate counsel was ineffective for failing to preserve the claim, such ineffective assistance cannot serve as cause to excuse the procedural default in this case. Id.

Exceptions to Procedural Default- Martinez:

Alvarado also alleges that the procedural default should be excused as a result of the ineffective assistance of his PCRA counsel, pursuant to Martinez v. Ryan, 132 S. Ct. 1309 (2012). As a general rule because there is no constitutional right to an attorney in a state post-conviction proceeding, a habeas petitioner cannot claim constitutionally ineffective assistance of PCRA counsel. Coleman v. Thompson, supra, at 752. However, in Martinez v. Ryan, 566 U.S. 1 (2017), the United States Supreme Court decided that attorney error in collateral proceedings may sometimes establish cause for the default of a claim of ineffective assistance of trial counsel.

In Martinez v. Ryan, the Supreme Court held that "where, 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 1320. Martinez has been used to establish cause for failure to bring ineffective assistance of counsel claims at initial review collateral proceedings where they could not have previously been raised. Id.

In order to overcome procedural default under Martinez, a petitioner must demonstrate that his collateral review counsel was ineffective pursuant to the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) and "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the petitioner must demonstrate that the claim has some merit." Id. at 1318.

In this case, appointed PCRA counsel filed a "no-merit" letter, in which he concluded that Petitioner had no meritorious claims, along with a motion to withdraw as counsel. In the Finley letter, counsel specifically noted that Petitioner was not prejudiced by a joint trial, noting

that "[h]is co-defendant's statement was redacted to omit any references to the petitioner and the trial court cautioned the jury that the statement was admissible only against the co-defendant. (N.T. 7/13/10 p. 190; 7/14/10 p. 36-37)." See Finley letter (filed by Janis Smarro, Esq. on 10/11/2014) at p.3. PCRA counsel indicated that trial counsel included the issue in its 1925(b) statement and it was addressed by the trial court in its written opinion, but also acknowledged that counsel did not pursue the claim. Id. PCRA counsel concluded that trial counsel was not ineffective. Id. Upon review of the Finley letter, the PCRA court issued its notice of intent to dismiss, in which the court agreed with appointed counsel that trial counsel had not been ineffective with regard to severance. The court found that counsel had pursued the issue of severance prior to trial, but the judge denied the motion, ordering that the co-defendant's statement be redacted to eliminate any implications of Petitioner's guilt. (Notice Pursuant to Pa. R. Crim. P. 907 filed 2/5/2015) at p. 3.[2]

In response to the PCRA court issuing its notice of intent to dismiss the petition, Petitioner asserted several claims of ineffective assistance of counsel in his pro se response. However, Petitioner did not include this claim of ineffective assistance of trial counsel related to a Bruton violation. As a result, the Superior Court found that the claim had been waived. Commonwealth v. Alvarado, No. 963 EDA 2015 (Pa. Super. Ct. 8/18/2016) (PCRA Appeal) at 9-10.

Respondents argue that Martinez cannot apply to excuse the procedural default since Petitioner failed to include this claim in his pro se response to the notice of intent to dismiss. While Respondents assert that Petitioner cannot now claim that his PCRA counsel was

[2] The PCRA court noted that it had previously addressed this issue in its 5/25/2011 1925(a) Opinion and that the Superior Court found no errors in the issues raised on appeal and affirmed Petitioner's judgment of sentence. Notice at p. 3. While that is true, the PCRA court did not recognize the fact that the Bruton issue, although it was raised in the initial statement of issue for appeal and therefore addressed by the trial court, was abandoned by appellate counsel and therefore not considered by the Superior Court.

ineffective for failing to pursue the claim since he failed to include the claim in his pro se response to the court's notice of intent to dismiss, I disagree.

In Mack v. Superintendent Mahanoy SCI, the Third Circuit held that where the Petitioner failed to raise a claim in his pro se response to a notice of intent to dismiss following a Finley letter, Martinez may still apply to excuse default if PCRA counsel was ineffective for filing a no-merit letter and failing to raise the claim. 714 Fed. Appx. 151, 153-54 (3d Cir. 2017). Even though Petitioner failed to raise the claim in his response to the court's notice of intent to dismiss, he did not choose to proceed on his own. Rather, it was only a result of his appointed counsel's finding that there were no meritorious claims and his filing the Finley letter, which caused Petitioner to have to proceed pro se. The court found that the responsibility to raise a claim of trial counsel's ineffectiveness rests with PCRA counsel and not with Petitioner. Id. at 154.

Therefore, we must conduct the required Martinez analysis to determine whether PCRA counsel's ineffectiveness can serve as cause to excuse the default. We must determine whether PCRA counsel was ineffective for filing the Finley letter and failing to pursue the claim of ineffective assistance of trial counsel for failing to argue that his Confrontation Clause rights were violated as a result of his co-defendant's statement being admitted. Therefore, we must examine if there is any merit to Petitioner's underlying claim.

Confrontation Clause:

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend VI. The United States Supreme Court has interpreted the Sixth Amendment to include the right to cross-examine witnesses. See Pointer v.

Texas, 380 U.S. 400, 404 (1965). The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004).

In Bruton v. United States, the Supreme Court held that the introduction of a statement of a non-testifying co-defendant which implicates the defendant by name violates the Confrontation Clause. 391 U.S. 123, 126 (1968). The Court created an exception to the general rule that cautionary jury instructions are sufficient to eradicate potential prejudice in joint trials. The Court reversed Bruton's conviction where his co-defendant's statement implicated Bruton in a robbery. The judge had instructed the jury that the co-defendant's confession must be disregarded with regard to Bruton, but the court found that the risk that the jury would not adhere to the limiting instruction was too great. Id. at 135. The Court held that regardless of the limiting instruction to the jury, the confession of his non-testifying co-defendant implicating him violated his right to confront witnesses secured by the Confrontation Clause of the Sixth Amendment. Id. at 135-36.

The Supreme Court limited the scope of its holding in Bruton and approved the practice of redacting co-defendant's statements in joint trials to eliminate the defendant's name and any reference to his existence in Richardson v. Marsh. 481 U.S. 200, 211(1987). The redaction in Richardson eliminated all references to the non-testifying co-defendant, but the confession was still incriminating when linked with the other evidence at trial. The court held that with such redactions and where the statement is not incriminating to the defendant on its face, but only became incriminating when coupled with other evidence, then a proper limiting instruction was sufficient so that the statement's introduction does not violate the Sixth Amendment. Id. at 208-

09. The Supreme Court in Richardson sated that it "expressed no opinion on the admissibility of a confession in which the defendant's name had been replaced with a symbol or neutral pronoun." Id. at 211, n.5.

In Gray v. Maryland, the Supreme Court partially addressed that question and addressed the issue of "whether a redaction that replaces the defendant's name with an obvious indication of deletion, such as a blank space, the word 'delete' or a similar symbol, still falls within Bruton's protective rule." 523 U.S. 185, 192 (1998). In Gray, the statement of the non-testifying co-defendant was read into evidence at the joint trial substituting the defendant's name with blanks or the word "deleted". Id. at 188. Then, following the reading of the statement, the question was asked whether the statement led to the arrest of the defendant. The Court noted that although the State redacted the co-defendant's statement, unlike in Richardson, "the confession refers directly to the 'existence' of the nonconfessing defendant." Id. at 192. The Court found that the redaction was similar enough to the unredacted confession in Bruton as to warrant the same legal results. Id. at 192-93. The Court found that the obvious deletion will cause the jury to speculate and the jury will "often realize that the confession refers specifically to the defendant." Id. at 193. The Court noted that in Richardson the statement became incriminating only when linked with other evidence, but that statements in Gray, despite redaction "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." Id. at 196.

In Commonwealth v. Travers, 768 A.2d 845 (2001), the case relied upon by the state courts, the Pennsylvania Supreme Court examined "the second half of the unanswered question posed in Richardson: the viability of redaction that substitutes a neutral pronoun, rather than a

symbol or deletion, for the defendant's name." 788 A.2d at 850. The Pennsylvania Supreme Court found that the redaction replacing the name with "the other man" was sufficient to avoid violating the Sixth Amendment. The Travers court relied upon the United States Supreme Court's reasoning in Gray, finding the redaction along with a limiting instruction proper because it did not identify the defendant by name and did not contain an obvious indication of deletion or an alteration that was the functional equivalent of naming him. Id. at 851. The Pennsylvania court found that because the statement was not powerfully incriminating on its face, the general rule that jurors follow their instruction, to which Bruton and Gray are limited exceptions, must apply. Id. Travers allows redaction of a witness statement to include substituting the co-defendant's name with phrases such as "my boy", "the other guy" or "the other man", along with a cautionary instruction to the jury. The Pennsylvania Supreme Court has accepted the use of these terms as a general rule.

Given the fact that the Pennsylvania Courts have applied Commonwealth v. Travers, 768 A.2d 845 (2001), and have generally accepted that a redaction to include terms such as "the other person," as was used in this case, to be acceptable, it is doubtful that the Pennsylvania Superior Court would have disagreed with the trial court's finding in this case as to Alvarado's Bruton claim. Pursuant to Travers and the Pennsylvania Supreme Court, it is likely that the state courts would not have granted relief in this case. Therefore, at first glance PCRA counsel's determination that he did not have a meritorious claim does not appear to have been entirely unreasonable under the law as applied by the Pennsylvania Courts. However, even the PCRA court in its opinion in this case applying Travers and upholding the redaction, noted that the Third Circuit has held to the contrary. See Opinion 5/31/2011 at p. 8, n. 15 (noting that recent federal law is contrary to Travers). Furthermore, it was PCRA counsel's failure to pursue the

claim, which resulted in the claim ultimately being defaulted and in potentially barring review of this Constitutional claim in this Court.

The Third Circuit has on a multiple occasions held that redactions containing generic terms in place of the defendant's name fall within the protective rule of Bruton. "Even redacted statements will present Confrontation Clause problems unless the redactions are so thorough that the statement must be linked to other evidence before it can incriminate the co-defendant." U.S. v. Hardwick, 544 F.3d 565, 573 (3d Cir. 2008). The Third Circuit has specifically held that the Pennsylvania Supreme Court's seeming "bright-line rule that when terms like 'my boy,' the 'other guy,' or the 'other man' are used as a substitute for an actual name in a statement admitted at trial there cannot be a Bruton violation" is an unreasonable application of the clearly established federal law. Vazquez v. Wilson, 550 F.3d 270, 281-82 (3d Cir. 2008). Where there is a strong implication that the non-testifying co-defendant's confession refers to the defendant, it may still violate Bruton even if the statement is redacted with neutral pronouns and the appropriate jury instruction is given. Id.

In Vasquez v. Wilson, the Third Circuit held that the redacted statement which replaced the defendant's name with "my boy" and "the other guy" in a two-person murder trial violated the defendant's Confrontation Clause rights. Vasquez, 550 F.3d 270, 281 (3d Cir. 2008). Similarly, in Eley v. Erickson, the Third Circuit found that the Pennsylvania Supreme Court had unreasonably applied Bruton by affirming the trial court where the redacted statement replaced the names of two defendants with the words "the other two". 712 F.3d 837, 860 (3d Cir. 2013). The Third Circuit found in that case that just as in Gray, the statement even as redacted obviously referred directly to someone and the jury need only look at the counsel table to determine to whom "the other two" referred. Id. The court found that "if- as we suspect- the

Superior Court affirmed the trial judge through a mechanical application of the Travers bright-line rule, it thereby unreasonably applied clearly established federal law under Bruton and its progeny. Id. at 861.

Similar to this case, in Washington v. Secretary Pa. Dep't of Corrs., the Third Circuit held that there was a Confrontation Clause violation where the redacted statement introduced at trial had substituted the defendant's name with "someone I know", "the driver" and "the other guy." 726 F.3d 471, 473 (3d Cir. 2013). The court found that the Pennsylvania Superior Court had "applied a blanket rule, derived from Travers, that any redaction that would require a juror to consider an additional piece of information outside the confession in order to identify the coconspirator being referred to automatically" was permissible under the Supreme Court's holding in Richardson. Id. at 477. The Third Circuit found that this was not reasonable and that referring to the defendant as the driver was tantamount to using his name given the other evidence describing him as the driver. Id. at 480.

In Priester v. Vaughn, the Third Circuit noted that the number of people involved in the case has a significant impact on whether these terms cause the jury to implicate a specific individual. Priester v. Vaughn, 382 F.3d 394, 399-400 (3d Cir. 2004). Priester involved at least 15 people so the use of the term "the other guy" or "another guy" did not point to a specific person. Therefore, the Court in Priester distinguished U.S. v. Richards, which involved only 3 people making the redactions "tantamount to an explicit reference to the co-defendant." Id., citing Richards, 241 F.3d 335, 401 (3d Cir. 2001).

The state court's reliance on the redaction and limiting instruction is not alone sufficient to determine if there was a Bruton violation. Rather, it is the likelihood that the instruction will be ignored that is relevant. Pabon v. Mahonoy, 654 F.3d 385, 397 (3d Cir. 2011). The court

must focus on "the extent of any resulting prejudice in the particular circumstances of the trial, rather than the quantity or number of jury instructions given." Id.

In light of the clearly established federal law, we agree that the redaction in this case was not sufficient to avoid implicating Petitioner and therefore was in violation of Bruton. Given that Petitioner was the only other person on trial and was one of only three people in the car at the time of the shooting, it is natural that the jury would assume the statement referred to him. See Vazquez, 550 F.3d at 282 (recognizing the number of persons involved is significant). In a case such as this where there were only three people involved and the other two are accounted for, the statement clearly implicates Petitioner as the shooter. Id. (noting that in United States v. Richards, 241 F.3d 335 (3d Cir. 2001) involving only three people, the redactions were "tantamount to an explicit reference to the co-defendant.").

Therefore, the description of Petitioner as "another person", "the person who took the Xannies", "the person who had been doing the shooting", "the person I've been talking about" and "this person" is tantamount to an explicit reference[3]. The statement as read to the jury contained obvious indications that it had been redacted to eliminate Petitioner's name and the redaction certainly did not eliminate reference to Petitioner's existence. Instead, it replaced his name with neutral terms, which were obvious indications that it was the third person (other than the defendant making the statement and the testifying witness, Ms. Beltran). The jury need only lift their eyes to find Petitioner "sitting at counsel table, to find what ... seem[ed] the obvious

[3] Alvarado notes that at the end of the statement the redaction was "undone" and the statement included "that's the gun ***he*** used to shoot the lady." While this reference might have been contrary to the trial court's ruling that neutral pronouns be used, we do not find this reference to be any more damaging than the rest of the redactions in the statement. He also argues that the prosecutor's opening statement "undid" the redaction because in it he was referred to by his name as the shooter and the passenger. He argues that the prosecutor's opening statement included details "derived from Cynthia Alvarado's redacted statement," but the details were derived from other witness testimony. The fact that Cynthia Alvarado was the driver of a red Honda Civic and Petitioner was the passenger and shooter were established by the testimony of the witnesses at trial.

answer," Gray, 523 U.S.l at 193. The likelihood that the jury would disregard the instruction in this case and conclude that the person repeatedly referred to in the statement was Petitioner is very high. Accordingly, under Bruton and its progeny, the redaction in this case was not sufficient to avoid a Confrontation Clause violation.

Harmless Error/ Actual Prejudice:

However, the inquiry does not end upon finding a Bruton violation. The court must determine whether the error was harmless or if the constitutional violation had a "substantial and injurious effect" on the fairness of the trial. Lee v. Collins, Civ. A. No. 09-4023, 2010 WL 5059517, at *13 (E.D. Pa. July 22, 2010) (quoting Fry v. Pliler, 551 U.S. 112, 121 (2007); additional citations omitted). Under this standard, no relief is due unless the Petitioner can establish that the violation resulted in "actual prejudice". Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting United States v. Lane, 474 U.S. 438, 449 (1986). Relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015) (quoting O'Neal v. McAninch,513 U.S. 432, 436 (1995)). "There must be more than a 'reasonable probability' that the error was harmful." Id. (quoting Brecht, 507 U.S. at 637).

In order to examine whether the error in a Confrontation Clause case was harmless or whether its admission caused actual prejudice, we must examine factors such as "the importance of the [statement] in the prosecution's case, whether [it] was cumulative, the presence or absence of evidence cooberating or contradicting the [statement] on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." David v. Eckard, Civ. A. No. 14-7123, 2017 WL 3388921, at * 13 (E.D. Pa. Aug. 7, 2017) (quoting

Johnson v. Lamas, 850 F.3d 119, 133 (3d Cir. 2017). "[A] Bruton violation will not result in a reversal where the independent, 'properly admitted evidence of [the defendant's] guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission [is] so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.'" (quoting Schneble v. Florida, 405 U.S. 427, 430 (1972)).

In this case, the statement was cumulative to the overwhelming properly admitted evidence of Petitioner's guilt. The other witnesses who were available for cross-examination provided evidence sufficient for the jury to find Petitioner guilty beyond a reasonable doubt. The witnesses included Margie Beltran, who testified that she was in the car with Cynthia Alvarado and Petitioner during the shooting and remained with them afterwards. Ms. Beltran provided a comprehensive view of the events of the day, just as the co-defendant's statement did. Beltran testified that Cynthia Alvarado was the driver of the red Honda Civic, Petitioner was the passenger in the car, and she was in the backseat with Cynthia's one-year old daughter. N.T. 7/12/2010 at 105, 109. She testified that they decided to get more Xanax and Petitioner exited to purchase the pills for the second time (Id. at 110-11), that he had showed her that he had a gun on him (Id. at 104), that Cynthia had told him to pull it out if he didn't get a "play" (Id. at 111-14), that when he was returning to the car a whole bunch of people were following him and someone was shouting "Get him. Get him" in Spanish, "He took my pills." (Id. at 115-19). She testified that she heard the decedent's voice yelling at Petitioner (N.T. 131-32), that she saw him motion to retrieve his gun from his waistband and heard the shots while she ducked covering Ms. Alvarado's child (Id. at 120-25), and that he returned to the car and ordered Cynthia to drive away (Id. at 128). Beltran also testified that when Petitioner returned to the car he had at least 30 Xanax that he did not have before (Id. at 134-35), that they each took more Xanax after the

shooting and then they purchased angel dust for her (Id. at 137-430). They changed cars at Cynthia's dad's garage, leaving the red Honda Civic and taking a red truck (Id. at 141-42) and they went to Cynthia's apartment where the police came and took them into custody (Id. at 145-48).

Edwin Schermety, who was also available for cross-examination, testified that he knew Petitioner and Cynthia Alvarado from seeing them in the neighborhood. N.T. 7/9/2010 at 55. He testified that his father has a vending stand in the park near where the shooting occurred (Id. at 56), that at about 4 pm he saw a red Honda Civic pull up and he saw Petitioner in the passenger seat, Cynthia Alvarado driving and a lady and a child in the back (Id. at 58-59). Schermety testified that Petitioner got out of the car, walked into the park and pulled out a gun and put it into a guy's stomach and robbed him. Id. at 61. He testified that when Petitioner first got out of the car he started towards the park, went back towards the car and talked to Cynthia and then went straight to the man in the park. Id. at 62-64. He explained that Petitioner took a gun from his waistband and put it in the man's stomach, took what the man had and began to walk off. Id. at 65-68. Schermety testified that as Petitioner was getting in the car people in the park began yelling he robbed me. Id. at 71-72. He testified that the Mexican lady (the decedent) was standing 2 or 3 feet from the car and started to look into the vehicle and that is when Petitioner leaned over and shot her. Id. at 71-72, 74-77, 82-84. He saw the decedent fall to the ground and saw Petitioner fire the gun three more times into the park before the car sped away. Id. at 84-86.

Elizabeth Ortiz also testified that she witnessed a red car pull onto the street by the park and she saw the front passenger make a hand motion and heard a shot being fired. Id. at 22-24. She testified that he fired the first shot from inside the car through an open window. Id. at 31,

36. She stated that the passenger then exited the vehicle with a silver gun and fired four more shots towards the corner into the park. Id. at 28, 32-33, 36. She saw the victim, Ms. Yvonne, drop to the floor with her face covered in blood. Id. at 39. She testified that the passenger was a light skinned, young, Puerto Rican male, wearing a baseball cap with a letter "P". Id. at 40.

While the witnesses did not observe the exact same things, their accounts were pretty much consistent. While the witnesses did not provide a matching description of the drug dealer and their accounts of exactly where Alvarado was in relation to the car when he fired the shots vary slightly, their accounts are otherwise consistent and identify Alvarado as the individual who took Xanax from the dealer and fired shots into the park killing the victim.

The testimony of these witnesses along with that of the police officers was certainly sufficient for the jury to find Petitioner guilty of both robbery and second degree murder (which charges merged) absent the co-defendant's redacted statement being read into evidence. The testimony, including that of Ms. Beltran who was in the car with them, identified Petitioner as the passenger in the car and as the individual who exited the car to purchase the drugs and then returned to the car and shot the victim, was sufficient to remove "grave doubt" as to whether the Bruton violation had a substantial and injurious effect on the verdict in this case. Given all of the properly admitted evidence presented at trial, we cannot conclude that the Bruton violation had a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); Fogg v. Phelps, 414 fed. Appx. 420, 427 (3d Cir. 2011) (Where statement was admitted in violation of Bruton, but the evidence was cumulative to other properly admitted evidence, the error was harmless and therefore, counsel could not be ineffective for failing to pursue the issue of a Confrontation Clause violation).

Given the other overwhelming evidence in the case, we find the error harmless. As was the case in Hardwick, the evidence in this case was more than sufficient to support the jury's verdict against Petitioner, even absent Cynthia Alvarado's statement. See Hardwick, 544 F.3d at 573 (finding that introduction of the co-defendant's statement was a violation of his Sixth Amendment right to confrontation, but the error was harmless beyond a reasonable doubt). Therefore, even if the redaction in this case was not adequate according to Bruton, we find the error was harmless. See Hardwick, 544 F.3d 565, 574 (3d Cir. 2008) (citing Monachelli v. Warden, SCI Graterford, 884 F.2d 749, 753 (3d Cir. 1989). Accordingly, even if the Petitioner's procedural default could be excused pursuant to Martinez (or if this Court was considering a properly exhausted direct claim of trial court error), pursuant to Bruton and its progeny, even as interpreted by the Federal courts, Petitioner still would not be entitled to relief.

Ineffective Assistance of Counsel:

Accordingly, the claim of ineffective assistance of PCRA counsel for filing a no-merit letter rather than pursuing the claim of trial counsel ineffectiveness as to the Confrontation Clause issue, must fail. Given that there was no prejudice resulting from the trial court error or from trial counsel's failure to pursue the claim, PCRA counsel cannot be ineffective for failing to pursue the claim of ineffective assistance of trial counsel. Id. Even if counsel's conduct was unreasonable under the first prong of Strickland, the claim must fail under the second prong of the Strickland analysis since the errors were not so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. Strickland, 466 U.S. at 687. Therefore, Petitioner cannot prove ineffective assistance of his PCRA counsel in order to satisfy the Martinez standard and excuse the procedural default[4].

[4] The default of Petitioner's claim of ineffective assistance of appellate counsel for failing to preserve the Bruton claim or the related claim of trial counsel ineffectiveness could not have been excused by Martinez. See Davila v.

Furthermore, given this court's finding that there was no actual prejudice caused by a Bruton violation, Petitioner's claims of ineffective assistance of counsel for failing to pursue the claim would also fail. Even if counsel's failure to pursue the claim was unreasonable, Alvarado cannot establish prejudice caused by counsel's inaction. Id. at 694 (requiring a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Alvarado cannot establish that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. Strickland, 466 U.S. at 687. Therefore, even if they were not defaulted, any claims of ineffective assistance of trial counsel for failing to object or seek a mistrial or appellate counsel for failing to pursue the issue on appeal and preserve it for this court must fail.

IV. CONCLUSION

For all of the foregoing reasons, Alvarado's habeas petition should be denied in its entirety. Accordingly, I make the following:

Davis, 137 S. Ct. 2058, 2061 (2017) (declining to extend the Martinez exception to allow a court to hear a substantial but defaulted claim of ineffective assistance of appellate counsel). Martinez can only be used to excuse the procedural default of a claim of ineffective assistance of trial counsel where the claim couldn't have been raised before the collateral proceedings. Id. Therefore, even if the default was excused under Martinez, it would have only been Petitioner's claim of ineffective assistance of trial counsel that this court could have considered.

RECOMMENDATION

AND NOW, this 8th day of January, 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. The Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT

/s/ Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

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

OSCAR ALVARADO,	:	
	:	CIVIL ACTION
Petitioner,	:	
v.	:	
	:	NO. 17-3283
TREVOR WINGARD, et al.,	:	
	:	
Respondents.	:	

ORDER

NITZA I. QUIÑONES ALEJANDRO, J.,

AND NOW, this day of , 2019, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for a writ of habeas corpus is DENIED.

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

BY THE COURT:

NITZA I. QUIÑONES ALEJANDRO, J.

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

1/8/19

RE: Alvarado v. Wingard, et al
CA No. 17-3283

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Hart, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

KATE BARKMAN
Clerk of Court

By:/s/ P. Rosser
Deputy Clerk

cc: O. Alvarado, Pet.
C. Kiefer, Esq.

Courtroom Deputy to Judge Nitza I. Quinones Alejandro

civ623.frm (11/07)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-1142

OSCAR ALVARADO,
Appellant

v.

SUPERINTENDENT SOMERSET SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. No. 2-17-cv-03283)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, 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

Date: October 19, 2021
Tmm/cc: Oscar Alvarado
Eleanor R. Barrett
Jean W. Galbraith
Ilana H. Eisenstein
David Napiorski