Appendix (A)

BLD-035

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-2515**

KALVIN BISHOP,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI; ET AL.

(E.D. Pa. Civ. No. 2-19-cv-01461)

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

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing application, which seeks a certificate of appealability with respect to Bishop's claim alleging that his plea/trial counsel was ineffective for failing to object when the trial judge participated in plea negotiations, is denied. See 28 U.S.C. § 2253(c)(2). Jurists of reason would not debate the District Court's denial of this claim, nor would they otherwise conclude that Bishop has met the threshold showing that the claim "deserve[s] encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see Slack v. McDaniel, 529 U.S. 472, 484 (2000). In particular, reasonable jurists would not debate the conclusion that Bishop has not shown that there is a reasonable probability that, but for his former counsel's alleged error, he would have rejected the guilty-plea offer and insisted on going to trial. See Hill v Lockhart, 474 U.S. 52, 59 (1985); Vickers v. Superintendent Graterford SCI, 858 F.3d 841, 857 (3d Cir. 2017); see also Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

By the Court,

s/Theodore A. McKee
Circuit Judge

Dated: January 11, 2022
CJG/cc: Aaron Bell, Esq.
Berto M. Elmore, Esq.
David Napiorski, Esq.
Ronald Eisenberg, Esq.

A True Copy:

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

Appendix (B)

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

KALVIN BISHOP **Petitioner,** **v.** **THOMAS MCGINLEY, et al.,** **Respondents.**	**CIVIL ACTION NO. 19-1461**

MEMORANDUM OPINION

Rufe, J. **July 14, 2021**

Petitioner Kalvin Bishop pled guilty to third-degree murder, aggravated assault, and possessing an instrument of crime before the Honorable Lillian Ransom in the Philadelphia Court of Common Pleas.[1] He was sentenced to 22½ to 45 years of imprisonment. Petitioner has filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254.

The Petition was referred to Magistrate Judge Linda K. Caracappa, who submitted a Report and Recommendation ("R&R") that the habeas petition be denied without the issuance of a certificate of appealability. Petitioner filed objections to the R&R. For the reasons stated below, the Court will overrule the objections and adopt and approve the R&R.

I. BACKGROUND

On April 17, 2012, Petitioner shot and killed Shirley Warthen and wounded Lucrecia Phillips.[2] On December 2, 2013, Petitioner appeared before Judge Ransom for trial, and jury

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[1] *See* CP-51-CR-0011808-2012 at 4; *see also* N.T. 12/3/13.

[2] *See* N.T. 12/3/13 at 20–30.

selection commenced.[3] Later that day, trial counsel discussed with Petitioner the possibility of accepting a plea offer of 25 to 50 years, but Petitioner was not willing to accept those "numbers."[4] The following day, Judge Ransom offered to "have a discussion with" Petitioner "about his decision" in open court.[5] During this hearing, the Commonwealth stated that the plea offer had been updated to "22-and-a-half to 45 today if he pleads today." Based on this updated plea offer, Judge Ransom told Petitioner:

> Now what I want you to be sure that you understand is that should the jury listen to the various witnesses including the four people that apparently know you and observed you shooting the two people here and with the death resulting for one of them, well, what I can tell you is that I never know what a jury is going to do. But the chances are – put it this way. I would not be surprised if they returned a verdict of guilty on the murder in the first degree. If that were to happen, I have no choice but to sentence you to life in prison without parole.[6]

After Petitioner consulted with counsel, he entered a negotiated guilty plea to the charges of third-degree murder, aggravated assault, and possessing an instrument of crime, in exchange for which he received the negotiated sentence of 22½ to 45 years of imprisonment.[7] Petitioner participated in an oral plea colloquy with Judge Ransom, and signed a written colloquy.[8] He affirmed that he understood the plea, was not under the influence of any mind-altering substances, was waiving his right to a trial by jury, and was satisfied with his representation by counsel.[9]

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[3] *Id.*

[4] *See* N.T. 12/3/13, [Exhibit A, Doc. No. 20] at 3–6.

[5] *Id.* at 3

[6] *Id.* at 7.

[7] Doc. No. 14-1 at 1.

[8] *See id.* at 2.

[9] *See* PCRA Op. 5/17/17 at 7–8; N.T. 12/3/13, 11–18.

Petitioner did not file post-sentence motions or a direct appeal. On November 18, 2014, petitioner filed a timely *pro se* petition for collateral review under the Pennsylvania Post-Conviction Relief Act ("PCRA"). Counsel was appointed, and subsequently filed a no-merit letter pursuant to *Commonwealth v. Finley* and a petition to withdraw.[10] The PCRA court filed a notice of intent to dismiss pursuant to Pennsylvania Rule of Criminal Procedure 907.

On April 24, 2017, the PCRA court dismissed Petitioner's PCRA petition and the Superior Court affirmed the decision. On March 26, 2019, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. While the request for allowance of appeal was pending, Petitioner filed a second *pro se* PCRA petition, which was dismissed as untimely.

Petitioner then filed a *pro se* Petition for Writ of Habeas Corpus.[11] Petitioner asserts the following claims:

(1) Petitioner's plea was unknowing, involuntary, and unintelligent due to plea counsel's ineffective assistance;

(2) Ineffective assistance of plea counsel for failing to object to the trial judge's unconstitutional participation during plea proceedings which coerced petitioner into pleading guilty;

(3) Ineffective assistance of plea counsel for failing to withdraw petitioner's guilty plea and file a direct appeal;

(4) Ineffective assistance of PCRA counsel for failing to develop, investigate, prepare an amended petition and for filing a Finley letter;

(5) Ineffective assistance of PCRA counsel for failing to challenge petitioner's "two mandatory sentences as being unconstitutional and void ab initio";

(6) The PCRA court denied petitioner [an] adequate 907 notice; and

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[10] 550 A.2d 213 (1988).

[11] Doc. Nos. 1, 7.

(7) The Superior Court erred in finding three of petitioner's claims were waived.[12]

The Petition was referred to Magistrate Judge Caracappa, who issued an R&R recommending that the Amended Petition be denied because each claim was either meritless or noncognizable.[13] Petitioner filed timely objections, challenging the R&R's dismissal of claims one and two.[14] Petitioner has also requested a stay and abeyance to allow him to pursue a new claim in state court and filed a motion requesting the order of his psychiatric records.[15]

II. LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a petition for a writ of habeas corpus may not be granted as to any claim that was adjudicated on the merits in State court proceedings 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."[16]

Where, as here, the petition is referred to a magistrate judge for a report and recommendation under 28 U.S.C. § 636(b)(1)(B), a district court will review *de novo* "those portions of the report or specified proposed findings or recommendations to which objection is

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[12] R&R [Doc. No. 22] at 2–3.

[13] *See id.* at 1.

[14] *See* Doc. No. 26.

[15] *See* Doc. Nos. 27, 38.

[16] 28 U.S.C. 2254(d).

made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."[17]

III. DISCUSSION

Petitioner initially asserted five ineffective assistance of counsel claims and two state-law challenges. However, Petitioner objects only to the R&R's determination that 1) trial counsel was not ineffective for failing to conduct a reasonable pretrial investigation before encouraging Petitioner to take a guilty plea deal; and 2) that trial counsel was not ineffective for failing to object to the trial judge's "unconstitutional participation" during plea proceedings which allegedly coerced petitioner into pleading guilty.[18]

Petitioner does not object to the R&R's analysis of claims four, five, six, and seven—which include claims for ineffective assistance of PCRA counsel and state law challenges. The Court accepts the R&R as to these claims.[19]

Ineffective assistance of counsel claims are evaluated under the two-prong test established by the Supreme Court in *Strickland v. Washington*.[20] Under *Strickland*, counsel is

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[17] 28 U.S.C. § 636(b)(1).

[18] Doc. No. 26.

[19] Petitioner's claims four, five, six, and seven were all found by the R&R to be either meritless or noncognizable. This Court agrees and finds that Petitioner's ineffective assistance claims against PCRA counsel are meritless and the state court's determination that PCRA counsel's decision to file a *Finley* letter was not unreasonable. As discussed below, trial counsel was not ineffective and there were no meritorious claims for PCRA counsel to assert. The Court also agrees with the R&R that Petitioner's claim that PCRA counsel was ineffective for failing to challenge Petitioner's sentence is procedurally defaulted. The state court found that Petitioner had waived this claim because he did not raise it in his response to the Rule 907 notice. Because a federal habeas court may not "reexamine state-court determinations on state-law questions[,]" this court is bound by the state court's determination that petitioner waived his claim, and therefore finds it is procedurally defaulted. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Finally, Petitioner's two remaining claims are noncognizable because they assert state law violations and cannot be reviewed by this court on federal habeas review because AEDPA only provides relief if a conviction has been obtained in violation of a person's federal constitutional rights. 28 U.S.C. § 2254(a).

[20] 466 U.S. 668 (1984).

presumed to have acted reasonably and effectively unless a petitioner demonstrates that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the petitioner.[21] To establish deficiency, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness."[22] To demonstrate prejudice, "the petitioner must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[23] For example, "[a]n attorney cannot be ineffective for failing to raise a claim that lacks merit," because in such cases, the attorney's performance is not deficient, and would not have affected the outcome of the proceeding.[24]

A. Petitioner's Claim that Trial Counsel was Ineffective for Inducing an Unknowing, Involuntary, and Unintelligent Guilty Plea[25]

Petitioner asserts that trial counsel was ineffective by failing to conduct a reasonable pretrial investigation and develop every possible trial defense, which Petitioner alleges led to his unknowing, involuntary, and unintelligent guilty plea.[26] Petitioner contends that trial counsel did not interview witnesses, or reasonably investigate possible defenses before advising Petitioner to enter a guilty plea and that counsel was aware that petitioner was "heavily medicated" and "receiving Celexa and Risperdal for his mental health issues" at the time he entered the plea.[27]

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[21] *Id.* at 687.

[22] *Porter v. McCollum*, 558 U.S. 30, 38 (2009) (quoting *Strickland*, 466 U.S. at 688).

[23] *Albrecht v. Horn*, 485 F.3d 103, 127 (3d Cir. 2007) (quoting *Strickland*, 466 U.S. at 694).

[24] *Singletary v. Blaine*, 89 F. App'x 790, 794 (3d Cir. 2004).

[25] Petitioner's first claim of plea counsel's ineffective assistance is raised again fully in petitioner's third claim; thus, the court will address claims one and three of plea counsel's ineffectiveness as one claim.

[26] Doc. No. 7-1 at 2.

[27] Doc. No. 6 at 10–11.

The Superior Court affirmed the PCRA court's determination that this claim was meritless because the records indicated that prior to entering the guilty plea, Petitioner had extensive conversations with both trial counsel and his mother, underwent a lengthy colloquy during which he averred that he was not under the influence of any mind-altering substance, and stated that he was satisfied with trial counsel's representation.[28] The R&R concluded that the state court was not unreasonable in its determination that that Petitioner did not meet his heavy burden of challenging the voluntary nature of a guilty plea.

The Third Circuit has noted that factual admissions made during a plea colloquy "carry a strong presumption of verity."[29] Indeed, "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings."[30] Additionally, determinations of factual issues by state courts are presumed to be correct, and a defendant "ha[s] the burden of rebutting the presumption of correctness by clear and convincing evidence."[31]

Here, in both the written and oral colloquy, Petitioner stated that he was knowingly and voluntarily entering his guilty plea.[32] Petitioner offers no evidence that he was taking medication at the time of his plea or, if he were, that the medication rendered his plea unknowing and

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[28] N.T. 12/3/13, 11–18; PCRA Op. 5/17/17 at 7–8.

[29] *See e.g., United States v. James*, 928 F.3d 247, 256 (3d Cir. 2019) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)).

[30] *Id.*

[31] *See* 28 U.S.C. § 2254(e)(1).

[32] *See* Doc. No. 14-1.

involuntary.[33] In fact, the Court inquired if he was taking any prescription medication, and he responded that he was not.[34] In his objections, Petitioner presents no additional evidence as to why the Court should disregard his waiver of rights associated with his plea agreement.[35] The state court could, and did rely on Petitioner's plea colloquy as evidence that Petitioner knowingly, voluntarily, and intelligently entered into his plea and that Petitioner was satisfied with the work of counsel.[36]

Additionally, despite Petitioner's argument that trial counsel was unprepared, the record reflects trial counsel was ready to begin trial if Petitioner did not want to take the plea deal.[37] Petitioner cannot therefore meet the first requirement under *Strickland*, and the Court is unable to conclude that the state court was unreasonable in upholding the PCRA court's findings.[38] Petitioner's objections are overruled.

Additionally, although not specifically objected to, Petitioner argues that trial counsel was ineffective by not withdrawing his guilty plea and for not filing a direct appeal. The state

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[33] Petitioner has filed a motion requesting an "order for psych records." Doc. No. 38. Petitioner requests these records to show that he was prescribed Risperdal and Celexa prior to and during the plea proceeding. As discussed, the record does not support Petitioner's assertion and even if it did, the Court's analysis of the validity of his guilty plea would not change. The Court denies this motion on the merits.

[34] *See* N.T. 12/3/13 at 7, 11–18.

[35] *United States v. Gwinnett*, 483 F.3d 200, 206 (3d. Cir. 2007).

[36] PCRA Op. 5/17/17 at 7–8.

[37] The record reflects that trial counsel discussed possible defenses with Petitioner and that trial counsel "had [already] prepared" to cross examine the government's witnesses. *See* N.T. 12/3/13 at 4, 8–10, 13–17.

[38] *See, e.g., Thier v. United States*, 31 F. Supp. 2d 424, 430 (M.D. Pa. 1998) (finding an attorney was not ineffective for failing to conduct sufficient research prior to encouraging him to accept a plea offer); *See Mullins v. Rozum*, No. 11-2504, 2011 WL 6812888 (E.D. Pa. Dec. 28, 2011) (dismissing a claim of ineffective counsel for failure to research defenses, even once trial had begun). In addition, given the strength of the prosecution's evidence, including eyewitnesses who knew Petitioner, Petitioner cannot demonstrate prejudice.

court found both claims to be meritless on the grounds that Petitioner "provided no support for this claim other than his self-serving claims."[39]

The Court has found no evidence in the record that Petitioner asked counsel to attempt to withdraw the guilty plea or to file a direct appeal.[40] Furthermore, in order to prevail under these claims, Petitioner would have to show that his plea was made involuntarily, unknowingly, and unintelligently—something Petitioner is unable to do.[41] Under the plea agreement, Petitioner could only appeal if "I did not know what I was doing when I pled guilty, or somebody forced me to do it—it was not voluntary."[42] The state court's determination that trial counsel had no rational basis for thinking Petitioner would have wanted to withdraw the plea and file an appeal therefore was not unreasonable.[43] Finally, because the record establishes that Petitioner's guilty plea was entered voluntarily, knowingly, and intelligently, he is unable to show he was prejudiced by either of these actions. The objections are overruled.

B. Petitioner's Claim that Trial Counsel was Ineffective for Failing to Object to the Judge's Participation in the Plea Proceedings

Petitioner asserts that trial counsel was ineffective by failing to object to the trial judge's participation in plea proceedings, which he alleges coerced him into pleading guilty.[44]

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[39] PCRA Op. 5/17/17 at 9.

[40] *See Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (concluding that when there is no evidence indicating a Petitioner asked his trial counsel to file a direct appeal, counsel will only be deemed ineffective if there is a reason to think a rational defendant would want to appeal or the defendant reasonably demonstrated to counsel that he was interested in appealing).

[41] PCRA Op. 5/17/17 at 9–10.

[42] Doc. No. 14-1 at 5.

[43] *See Roe*, 528 U.S. at 480 (stating the federal standard for showing ineffective counsel for failing to file a direct appeal provides that counsel "performs in a professionally unreliable manner only by failing to follow the defendant's express instructions with respect to an appeal.").

[44] *See* Doc. No. 6 at 7–8.

Specifically, he contends that the trial judge's statements indicated that "refusal to accept the judge's preferred outcome would have been punished."[45] The PCRA court determined that the trial judge did not participate in the plea negotiations but "simply commented on the fact that [petitioner] faced a possible life sentence if convicted of first-degree murder after plea negotiations had concluded."[46]

Courts do not promote judicial participation in the plea process, for fear that a "judge's power over the accused makes his participation in plea negotiations inherently coercive."[47] "Participation," in this sense, means working with parties to set the terms of the plea agreement, or advocating in favor of the plea.[48] The Third Circuit, however, has held that trial judges may discuss the differences of a negotiated plea in relation to the maximum possible sentence the defendant might face if he decided to proceed to trial.[49] Thus, "isolated remarks, including the reference to a 'significant savings,' constitute merely an assessment of the negotiated sentence in light of [the possible maximum sentence]."[50]

The trial judge simply referred to information counsel had presented about the four eyewitnesses who were going to testify and that if the jury found Petitioner guilty of shooting two people, one resulting in death, the court would not be surprised if the jury returned a first-

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[45] *See id.* at 11–12

[46] PCRA Op. 5/17/17 at 11.

[47] *United States v. Ebel*, 299 F.3d 187, 191 (3d Cir. 2002).

[48] *See United States v. Burnett*, No. 13-2231, 2013 WL 2333796, at *3–4 (E.D. Pa. May 22, 2013).

[49] *See In re Burnett*. 537 F. App'x. 30, 32 (3d Cir. 2013).

[50] *United States v. Burnett*, 2013 WL 2333796 at *3.

degree murder conviction.[51] Further, Petitioner presents no evidence that the trial judge had any involvement in the actual plea negotiations. The record reflects that the trial judge learned about the updated plea offer of 22½ to 45 years during the proceedings in open court.[52] The trial judge also explicitly stated that Petitioner was free to make his own choice about the plea.[53]

There is no support in the record for the contention that the trial judge coerced Petitioner into entering into a guilty plea or that her questioning amounted to "an ultimatum and not a choice of free will."[54] The PCRA court also found that Petitioner failed to argue that he was prejudiced by trial counsel not objecting to the trial court's comments. The state court's determination that due to the nature of this interaction, any objection by trial counsel would have been baseless was not contrary to, or an unreasonable application of, clearly established Federal law, and the state court was therefore not unreasonable in its application of the *Strickland*.[55] Petitioner's objection is overruled.

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[51] N.T. 12/3/13, [Exhibit A, Doc. No. 20] at 7–8 ("I would have no choice but to sentence you to life in prison without parole.").

[52] N.T. 12/3/12 at 6–7.

[53] Doc. No. 6 at 9 ("[A]t the end of the day, [Petitioner] has to make the decision, and we'll do, you know, whatever he wants to do.").

[54] *See* Doc. No. 26 at 8.

[55] *United States v. Brown*, 595 F.3d 498, 521 (3d Cir. 2010) (concluding that when "the plea negotiations were over [] there was no risk that judicial pressure was going to influence the outcome of those negotiations."); *Hickson v. Kerestes*, Case No. 13-1417, [Doc. No. 13] at 20 (E.D. Pa. Dec. 30, 2014) ("It is not unreasonable to conclude that [counsel] performed with reasonable competence in his representation of [Petitioner] when he did not object to [the judge's] speech to [Petitioner] concerning the possible sentences he could face if convicted."); *Mackey v. Garman*, No. 16-5337, 2019 WL 8356735, at *9 (E.D. Pa. Aug. 9, 2019), R&R approved and adopted by Order, 2020 WL 1666515 ("The fact that the trial judge informed Petitioner of the comparative sentence exposure if he were convicted at trial and accepting a plea offer was not an improper interjection into the plea negotiating process.").

C. Motion to Stay Habeas Proceedings

Petitioner has also requested a stay and abeyance to allow him to pursue a new claim in state court. In his state court petition, Petitioner asserts that "[o]n December 3, 2012, in exchange for a negotiated guilty plea" he "was ordered to pay the amount of $3,000.00 in restitution for 3rd Degree Murder, Aggravated Assault and Possession of a Firearm."[56] Petitioner's new claim is based on the Pennsylvania Supreme Court's recent decision in *Commonwealth v. Ford*, which held that a defendant's sentence is illegal when the trial court imposes a non-mandatory fine without record evidence that the defendant is able to pay the fine.[57] Petitioner's argument is that because the state trial court did not determine on the record whether he had the ability to pay the restitution, his sentence should be deemed illegal.

The Third Circuit has explained that a "stay and abeyance may be granted only where: (1) good cause exists for the petitioner's failure to exhaust all claims, (2) the unexhausted claims are not 'plainly meritless,' and (3) there is an absence of any indication that the petitioner is engaged in 'potentially dilatory tactics.'"[58]

Petitioner's unexhausted claim—that the trial court did not determine his ability to pay restitution—is "plainly meritless" because the *Ford* holding was limited to a trial court's imposition of a non-mandatory fine. Here, the restitution Petitioner was ordered to pay was mandatory under Pennsylvania law. As the Pennsylvania Supreme Court explained in *Ford*, the Pennsylvania General Assembly provided that courts must order full restitution "[r]egardless of

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[56] Ex. A, "Petition for Stay of Obeyance" [Doc. No. 27].

[57] *See* 217 A.3d 824, 831 (Pa. 2019).

[58] *McLaughlin v. Shannon*, 454 F. App'x 83, 86 (3d Cir. 2011) (quoting *Rhines v. Weber*, 544 U.S. 269, 278 (2005)).

the current financial resources of the defendant."[59] Because Petitioner's claim is "plainly meritless," the Court will deny his "Petition for Stay of Obeyance."[60]

IV. CONCLUSION

For the reasons stated above, the court overrules Petitioner's objections and approves and adopts the R&R. The Amended Petition for Writ of Habeas Corpus is denied and there is no basis for the issuance of a certificate of appealability. An order will be entered.

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[59] *Ford*, 217 A.3d at 829 n.11 (quoting 18 Pa. C.S. § 1106(c)(1)(i)); *see also Commonwealth. v. Moss*, 2020 WL 89205, at *4 n.8 (Pa. Super. Ct. Jan. 6, 2020).

[60] Because both Petitioner's Amended Habeas Petition and his Petition for Stay in Obeyance are denied, the Court will deny his pending motion requesting psych records. As discussed above, this motion is meritless and there is no basis for the request.

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

KALVIN BISHOP **Petitioner,** **v.** **THOMAS MCGINLEY, et al.,** **Respondents.**	**CIVIL ACTION NO. 19-1461**

ORDER

AND NOW, this 14th day of July 2021, upon careful and independent consideration of the Petition for Writ of Habeas Corpus, and all related filings; and after review of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa and the objections thereto; and for the reasons stated in the accompanying memorandum opinion, it is hereby **ORDERED** that:

1. Petitioner's objections are **OVERRULED**;
2. The Report and Recommendation [Doc. No. 22] is **APPROVED and ADOPTED** as set forth in the accompanying memorandum opinion;
3. Petitioner's "Petition for Stay of Obeyance" [Doc. No. 27] is **DENIED;**
4. Petitioner's motion "requesting order for psych records" [Doc. No. 38] is **DENIED.**

It is so **ORDERED.**

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

Appendix (C)

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

KALVIN BISHOP, Petitioner,	:	CIVIL ACTION
v.	:	
THOMAS MCGINLEY, et al., Respondents.	:	No. 19-1461

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES MAGISTRATE JUDGE

Now pending before this court is a pro se petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated in the State Correctional Institution in Coal Township, Pennsylvania. For the reasons that follow, it is recommended that the instant habeas petition be DISMISSED.

I. PROCEDURAL HISTORY

On December 3, 2013, petitioner pled guilty to third-degree murder, aggravated assault, and possessing an instrument of crime before the Honorable Lillian Ransom in the Philadelphia County Court of Common Pleas. See CP-51-CR-0011808-2012 at 4; see also N.T. Guilty Plea, 12/3/13. On the same day petitioner was sentenced to twenty-two-and-one-half (2 ½) to forty-five (45) years imprisonment. See id.

Petitioner did not file a direct appeal.

On November 18, 2014, petitioner filed a timely pro se petition for collateral review under the Pennsylvania Post-Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, et seq. See CP-51-CR-0011808-2012 at 7. Counsel was appointed, and subsequently submitted a no-merit letter pursuant to Commonwealth v. Finely, 379 Pa. Super. 390, 550 A.2d 213 (1988) (en

banc)[1], with a petition to withdraw. See id. at 8. The PCRA court subsequently filed a notice of intent to dismiss pursuant to Pa.R. Crim. Proc. 907 on March 6, 2017. See id. On March 16, 2017, petitioner filed a response to the court's order. See id. On April 24, 2017, the PCRA court issued an order dismissing the petition. See id. at 9. On June 26, 2018, the Superior Court affirmed the dismissal of the PCRA petition. Commonwealth v. Bishop, 2018 WL 3121801 (Pa. Super. 2018). Petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court on March 3, 2018, which was subsequently denied on March 26, 2019. See Commonwealth v. Bishop, 2015 A.3d 314 (table) (Pa. 2019).

Petitioner filed a second pro se PCRA petition on July 16, 2018, while petitioner's request for allowance of appeal was still pending in the Pennsylvania Supreme Court. See CP-51-CR-0011808-2012 at 10. On March 1, 2019, the state court dismissed petitioner's second PCRA petition as untimely. See id.

On April 1, 2019, petitioner filed the instant pro se petition for Writ of Habeas Corpus. Petitioner makes the following claims:

(1) Petitioner's plea was unknowing, involuntary, and unintelligent due to plea counsel's ineffective assistance;

(2) Ineffective assistance of plea counsel for failing to object to the trial judge's unconstitutional participation during plea proceedings which coerced petitioner into pleading guilty;

(3) Ineffective assistance of plea counsel for failing to withdraw petitioner's guilty plea and file a direct appeal;

(4) Ineffective assistance of PCRA counsel for failing to develop, investigate,

[1] Pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), appointed counsel in a post-conviction proceeding may be given leave to withdraw upon the submission of a "no-merit" letter that details the nature and extent of this review of the case, lists each issue the petitioner wished to have reviewed, and explains his assessment that the case lacks merit. The court must also conduct an independent review of the record and must agree with counsel that the petition is meritless before dismissing the petition.

prepare an amended petition and for filing a Finley letter;

(5) Ineffective assistance of PCRA counsel for failing to challenge petitioner's "two mandatory sentences as being unconstitutional and void ab initio;"

(6) The PCRA court denied petitioner oan adequate 907 notice; and

(7) The Superior Court erred in finding three of petitioner's claims were waived.

Habeas Pet. Memo. of Law 5/28/19.

Respondents contend petitioner's claims are meritless or noncognizable and should be denied. For the reasons that follow, we agree.

II. STANDARDS OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for Writ of Habeas Corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless adjudication of the claim -
>
> (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 Supreme Court of the United States, in Williams v. Taylor, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 1518-19 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded state court legal decisions, and more clearly defined the two-part analysis set forth in the statute. Under the first part of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly established federal law, as determined by the Supreme Court of the United States." Williams, 529 U.S. at 404. Justice O'Connor, writing for the majority of the Court on this issue, explained that a state court decision may be contrary to Supreme Court precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours [the Supreme Court's]." Id. at 405. However, this "contrary to" clause does not encompass the "run-of-the-mill" state court decisions "applying the correct legal rule from [Supreme Court] cases to the facts of the prisoner's case." Id. at 406.

To reach such "run-of-the-mill" cases, the Court turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). Id. at 407-08. The Court found that a state court decision can involve an unreasonable application of Supreme Court precedent in one of two ways: (1) "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407. However, the Supreme Court specified that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent

judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. The Supreme Court has more recently pronounced: "The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 573, 127 S. Ct. 1933, 1939 (2007).

III. DISCUSSION

A. Ineffective Assistance of Plea Counsel

Petitioner's claims one through four assert ineffective assistance of plea counsel.

1. Plea counsel induced an unknowing, involuntary, and unintelligent guilty plea

Petitioner's first claim is that his plea was unknowing, involuntary, and unintelligent due to plea counsel's ineffective assistance. See Habeas Pet. Memo. of Law 5/28/19 at 6-7, 10-13.[2] Petitioner alleges that plea counsel was aware that petitioner was "heavily medicated" and "receiving Celexa and Risperdal for his mental health issues." See id. at 10. Additionally, petitioner argues that plea counsel failed to conduct a reasonable pre-trial investigation, interview witnesses, and develop a defense prior to recommending petitioner plead guilty. See id. at 6-7, 11.

To comport with due process, a defendant's plea of guilty must be voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238, 242 (1969). A guilty plea is void if induced by threats that strip it of a voluntary nature. See Heiser v. Ryan, 951 F.2d 559, 561 (3d Cir. 1991). The Third Circuit has noted a habeas petitioner challenging the voluntary nature of his guilty plea "faces a heavy burden." Zilich v. Reid, 36 F.3d 317, 320 (3d Cir. 1994). Indeed, "the

[2] Petitioner's first claim of plea counsel's ineffective assistance is raised again fully in petitioner's third claim, thus, the court will address claims one and three of plea counsel's ineffectiveness as one claim.

representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations made in open court carry a strong presumption of verity." Id. (quoting Blackledge v. Allison, 431 U.S. 63, 73-74 (1977)). As such, determinations of factual issues by state courts are presumed to be correct, and a defendant "ha[s] the burden of rebutting the presumption of correctness by clear and convincing evidence." See 28 U.S.C. § 2254(e)(1).

A challenge to a guilty plea based upon ineffective assistance of counsel is analyzed using the two-part standard outlined in Strickland v. Washington, 466 U.S. 668 (1984). See Hill v. Lockhart, 474 U.S. 52 (1985) (noting Strickland applies to ineffective-assistance claims arising out of plea process). Under the first prong of Strickland, a petitioner must prove "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. In analyzing counsel's performance, the court must be "highly deferential." Id. at 689. The Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, 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)). A convicted defendant asserting ineffective assistance must therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. The reviewing court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. It

follows that counsel cannot be ineffective for declining to raise a meritless issue. See United States v. Fulford, 825 F.2d 3, 9 (3d Cir. 1987); Premo v. Moore, 131 S. Ct. 733, 741 (2011).

The second part of the Strickland test requires a petitioner to demonstrate counsel's performance "prejudiced the defense." Strickland, 466 U.S. at 687. To establish prejudice in a guilty plea case, a petitioner must show "counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59. A petitioner must demonstrate there is a "reasonable probability that, but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial." Id.

If a petitioner fails to satisfy either prong of the Strickland test, it is unnecessary to evaluate the other prong, as a petitioner must prove both prongs to establish an ineffectiveness claim. Moreover, "if 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.

The PCRA court reviewed this claim and found it meritless. The PCRA court stated the following:

> [T]he record herein shows that after jury selection had commenced and the Commonwealth amended its initial offer in [petitioner's] favor, [petitioner,] underwent a lengthy colloquy during which he averred, inter alia, that he was not under the influence of a mind altering substance, he discussed with counsel the evidence and possible defenses, the right to a jury trial, the right of cross-examination, the right to present evidence, the terms of the plea offer, the right to litigate pre-trial motions, and the limited appellate rights available to him if he pleaded guilty. (N.T. 12/3/13, 11-17). [Petitioner] also stated that he discussed the option of entering a guilty plea with his mother before deciding to do so and that he was satisfied with trial counsel's representation. (N.T. 12/3/13, 18).

PCRA Op. 5/17/17 at 7-8. The PCRA court found that under the totality of the circumstances, plea counsel was not ineffective because the record shows that petitioner had extensive conversations with counsel and his mother and petitioner's plea was entered knowingly, intelligently, and voluntarily. See id. The Superior Court affirmed the PCRA court's finding.

Commonwealth v. Bishop, 1594 EDA 2017 at 3-4 (Pa. Super. 2018).

The Pennsylvania standard for judging ineffectiveness of counsel claims is not contrary to the ineffectiveness standard enunciated in Strickland. See Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000). In addition, factual determinations of the state court are presumed to be correct absent clear and convincing evidence to the contrary. See Weeks v. Snyder, 219 F.3d 245, 257 (3d Cir. 2000).

Here, we are unable to conclude the Superior Court was unreasonable in upholding the PCRA court's implicit findings that petitioner's ineffective assistance of counsel claims were not meritorious. The record shows that petitioner decided to plead guilty on the second day of jury selection. Trial counsel conducted a colloquy of petitioner and petitioner stated that he could read, write and understand English and that he was not taking any prescription medications that would affect petitioner's understanding of the proceedings. N.T. 12/3/13 at 11-12. Petitioner agreed that counsel spent "time over the past...week or so going over [his] case," that counsel had discussed the facts of petitioner's case and possible defenses, and that petitioner was choosing to enter a guilty plea for the Commonwealth's offer of 22 ½ to 45 years imprisonment. Id. Petitioner alleges that counsel failed to investigate or develop a defense, however, petitioner makes no argument as to what potential defenses petitioner believes were available to him or, what evidence would have been uncovered through further investigation by counsel. Additionally, petitioner offers no evidence that petitioner was taking medication at the time of his plea or that said medication would have rendered petitioner's plea unknowing and involuntary. Petitioner told the court that he was not taking any prescription medication. Solemn declarations made in open court carry a strong presumption of verity." Zilich v. Reid, 36 F.3d 317, 320 (3d Cir. 1994)(quoting Blackledge v. Allison, 431 U.S. 63, 73-

74 (1977)). Petitioner has not proffered clear and convincing evidence to overcome the presumption of correctness that attaches to the state court's findings. See 28 U.S.C. § 2254(e)(1); Wheeler v. Rozum, 410 F. App'x 453, 459 (3d Cir. 2010). Having considered the evidence before the PCRA court, we cannot conclude the state court's determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented," 28 U.S.C. § 2254(d)(2), for "[e]ven if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." Wheeler, 410 F. App'x at 459-60 (citations omitted). As such, we recommend this claim be denied.

2. *Plea counsel was ineffective for failing to object to the trial judge's participation in petitioner's guilty plea*

Petitioner next argues ineffective assistance of plea counsel for failing to object to the trial judge's unconstitutional participation during plea proceedings which coerced petitioner into pleading guilty. See Habeas Pet. Memo. of Law 5/28/19 at 11-12. Petitioner alleges that the trial judge "halted the proceeding to pick 2 alternate jurors and facilitated a plea." Id. at 8. Petitioner cites to a dialogue between trial counsel and the court, where the counsel told the court petitioner was unwilling to accept the plea offer from the Commonwealth and the court commented that based on the four proposed eyewitnesses to the shooting, who could identify petitioner, the court believed the result would be conviction. See id. at 8-9.

The PCRA court reviewed this claim and found it meritless. PCRA Op. 5/17/17 at 11-12. The Superior Court affirmed. Commonwealth v. Bishop, 1594 EDA 2017 at 3-4 (Pa. Super. 2018). The PCRA court explained that the trial judge did not participate in the plea negotiations, rather, the court "simply commented on the fact that [petitioner] faced a possible life sentence if convicted of first-degree murder after plea negotiations had concluded." PCRA

Op. at 11. The court noted to petitioner that counsel informed the court that there were 4 eyewitnesses who were going to testify and that, while the court can never predict what a jury will do, if the jury found him guilty of shooting two people, one resulting in death, the court would not be surprised if they returned a first-degree murder. N.T. 12/3/12 at 6-7. Petitioner argues that the trial court's comments were incorrect because he was not charged with first-degree murder, only third-degree murder. See Amended Habeas Pet. 6/3/19 at 4. However, as the respondents note, the information shows petitioner was charged under the general murder statute, which included first-degree murder. See Resp. Habeas Pet. 10/29/19, Ex. B.

The PCRA court found that trial counsel was not ineffective for not objecting to the trial court's comment that petitioner faced a life sentence if he was convicted of first-degree murder. Such an objection would have been baseless. The PCRA court also found that petitioner failed to argue that he was prejudiced by trial counsel not objecting to the trial court's comments. The PCRA court decision was not an unreasonable application of the Strickland standard. Williams, 529 U.S. at 404. We recommend this claim be denied.

3. *Plea counsel was ineffective for not moving to withdraw petitioner's plea and file direct appeal*

Petitioner next argues that plea counsel was ineffective for failing to withdraw petitioner's guilty plea and file a direct appeal after petitioner asked him to do so. See Habeas Pet. Memo. of Law 5/28/19 at 13-15. Petitioner alleges that he requested plea counsel move to withdraw petitioner's guilty plea and file a direct appeal. Id.

The PCRA court reviewed this claim and found it meritless. PCRA Op. 5/17/17 at 9-11. The Superior Court affirmed that decision. Commonwealth v. Bishop, 1594 EDA 2017 at 3-4 (Pa. Super. 2018). The PCRA court found that petitioner had not proven that he requested plea counsel motion to withdraw his guilty plea. The PCRA court found that petitioner

"provided no support for this claim other than his self-serving claims. PCRA Op. 5/17/17 at 9. Factual determinations of the state court are due a highly deferential presumption of correctness and are presumed to be correct absent clear and convincing evidence to the contrary. See Weeks v. Snyder, 219 F.3d 245, 257 (3d Cir. 2000); 28 U.S.C. § 2254(e)(1). Petitioner has failed to show by clear and convincing evidence that the state court's determination was incorrect.

Additionally, the state court found that petitioner failed to show he was prejudiced by plea counsel not filing a motion to withdraw. Id. at 9-10. The state court found that even if plea counsel had motioned to withdraw petitioner's plea, that motion would have been unsuccessful because petitioner would have been required to show that the plea was involuntary, unknowing, and unintelligent and as discussed above the state court found that petitioner's plea was voluntary, knowing, and intelligent. Plea counsel cannot be found ineffective for failing to file a meritless motion to withdraw petitioner's plea. The state court's determination was reasonable. 28 U.S.C. § 2254(d)(1).

Petitioner's next claim that plea counsel was ineffective for not filing a direct appeal. To show ineffective assistance of counsel for failing to file a direct appeal, the federal standard likewise provides that counsel "performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000). When a petitioner alleges ineffectiveness based on counsel's failure to appeal, "a more specific version of the Strickland standard applies." Harrington v. Gillis, 456 F.3d 118, 125 (3d Cir. 2006) (citing Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000)). In Flores-Ortega, the Supreme Court declined to institute a per se rule finding counsel performed deficiently under Strickland whenever counsel fails to consult with the client regarding an appeal. Instead, the Supreme Court adopted a case-by-case analysis, so that

evaluating alleged "deficient performance" under Strickland requires a two-step analysis. Id. (citing Flores-Ortega, 528 U.S. at 478).

First, the court must determine whether counsel consulted with his client about filing an appeal. Flores-Ortega, 528 U.S. at 478. If counsel has consulted with the client, then the court should determine whether counsel followed the client's express instructions. Id. If counsel has not consulted with the client, "the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance." Id. In determining whether a failure to consult constitutes deficient performance, the Supreme Court recognized that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is a reason to think either (1) a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Flores-Ortega, 528 U.S. at 480. To establish prejudice from counsel's failure to consult with a petitioner, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Harrington, 456 F.3d at 125 (quotation and citation omitted). Petitioner offers no proof that he requested counsel file a direct appeal. In the case of a guilty plea, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waive some or all appeal rights." Flores-Ortega, 528 U.S. at 480. Further, petitioner was facing a term of life imprisonment, negotiated for a plea of twenty-two-and-one half to forty-five years imprisonment and received the negotiated plea at sentencing. Petitioner has failed to show that plea counsel had reason to think that petitioner would want to appeal his sentence, when he received the sentence for petitioner's negotiated plea

deal. Further, petitioner has failed to prove he was prejudiced by plea counsel not filing a direct appeal. As explained above, petitioner's plea was voluntary, knowing, and intelligent. It is recommended that this claim be denied in its entirety.

B. Ineffective Assistance of PCRA Counsel

1. Ineffective assistance of PCRA counsel for filing a Finley letter

Petitioner's next claim is ineffective assistance of PCRA counsel for failing to develop, investigate, prepare an amended petition and for filing a Finley letter. See Habeas Pet. Memo. of Law 5/28/19 at 15-16.

Petitioner has failed to show that PCRA counsel was ineffective for failing to further pursue the above discussed claims. As analyzed above, the state court determination that petitioner's plea counsel claims were meritless was not an unreasonable application of the Strickland standard. Williams, 529 U.S. at 404. The court does not find PCRA counsel ineffective for finding the claims had no merit.

Petitioner appears to argue that PCRA counsel was ineffective under Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). That argument is unpersuasive.

In Martinez, the Supreme Court held that "attorney error in [initial review] collateral proceedings may sometimes establish cause to excuse the default of a claim of ineffective assistance of trial counsel." Norris v. Brooks, 794 F.3d 401, 404 (3d Cir. 2015) (citing Martinez, 132 S.Ct. at 1315). The Supreme Court characterized this exception as "narrow." Martinez, 132 S.Ct. at 1315. Martinez provides support for excusing the default of underlying ineffective assistance of trial counsel claims. Petitioner's underlying ineffective assistance of plea counsel claims are not defaulted. Petitioner does not allege that there were any claims that PCRA counsel failed to raise regarding plea counsel. The PCRA court and the

Superior Court reviewed petitioner's ineffective assistance of plea counsel claims on the merits. Petitioner is only arguing that PCRA counsel is ineffective for choosing to not actively pursue petitioner's claims. As discussed above, PCRA counsel was not ineffective for finding petitioner's claims lacked merit. See Edmonds v. Lawler, 181 F.Supp.3d 319, 322 (E.D. Pa. 2016), certificate of appealability denied (Oct. 26, 2016) ("Because petitioner has not demonstrated that his PCRA counsel was ineffective in filing a no-merit letter, Martinez does not afford him relief."); Edwards v. Walsh, 2013 WL 4457365, at *1 n.1 (E.D. Pa. Aug. 21, 2013) (finding petitioner did not show PCRA counsel's performance was deficient when PCRA counsel filed a no-merit letter and motion to withdraw, and state court permitted withdrawal after determining the petition was meritless). Martinez does not provide petitioner relief in the instant situation. Petitioner's claim that PCRA counsel was ineffective for filing a Finely letter is meritless and should be denied.

2. Ineffective assistance of PCRA counsel for failing to challenge petitioner's sentence

Petitioner argues that PCRA counsel was ineffective for failing to challenge petitioner's "two mandatory sentences as being unconstitutional and void ab initio." See Habeas Pet. Memo. of Law 5/28/19 at 16-18. Petitioner alleges that he was sentenced to two mandatory sentences and PCRA counsel should have raised a claim that those sentences were unconstitutional. See id.

Petitioner raised this claim on collateral appeal to the Superior Court and the court found the claim was waived because petitioner did not raise the claim in his response to the Rule 907 notice. Commonwealth v. Bishop, 1594 EDA 2017 at 4 (Pa. Super. 2018). Alternatively, the Superior Court found petitioner's claim meritless, noting that petitioner was not sentenced to a mandatory minimum. Id.

Petitioner's claim is procedurally defaulted. A state prisoner seeking federal habeas relief must first exhaust all available state court remedies "thereby giving the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." Baldwin v. Reese, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (citing Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995)). Federal habeas review is barred "when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Thus, "when an issue is properly asserted in the state system but not addressed on the merits because of an independent and adequate state procedural rule," it is considered procedurally defaulted. Rolan v. Coleman, 680 F.3d 311, 317(3d Cir. 2012)(citing McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999)). The court may still consider a procedurally defaulted claim if a petitioner can show either: (1) both a legitimate cause for the default and actual prejudice from the alleged constitutional violation; or (2) that a fundamental miscarriage of justice would occur from the court's failure to review the claim. Coleman, 501 U.S. at 750, 111 S.Ct. 2546.

The Superior Court found petitioner waived the instant claim. Because a federal habeas court may not "reexamine state-court determinations on state-law questions[,]" this court is bound by the state court's determination that petitioner waived his claim, and therefore finds it is procedurally defaulted. Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Petitioner alleges that PCRA counsel was ineffective for failing to challenge the constitutionality of his mandatory sentences.

Because there is no federal constitutional right to the assistance of counsel in state

post-conviction proceedings, PCRA counsel's ineffectiveness historically has not satisfied the "cause" prong to excuse procedural default. See Coleman v. Thompson, 501 U.S. 722, 752 (1991). As discussed above, the United States Supreme Court has recognized a narrow exception to this when collateral appeal counsel is the "cause" of the default of an underlying claim of trial counsel's ineffective assistance. In Martinez, the Court held in "initial-review collateral proceedings," where collateral review provides the first opportunity to litigate claims of ineffective assistance of appointed trial counsel, ineffective assistance of counsel can be "cause" to excuse the procedural default. Id. at 1315-17. The Court cautioned that its holding did not apply to counsel's error in other kinds of proceedings, such as appeals from initial-review collateral proceedings, second or successive collateral petitions, or petitions for discretionary review in state appellate courts. See id. at 1320. Its "equitable ruling" was designed to reflect the "importance of the right to effective assistance of counsel." Id. In order to establish such "cause," a petitioner must show the state courts did not appoint counsel during initial-review collateral proceeding for a claim of ineffective assistance at trial, or where counsel was appointed, that counsel was ineffective under the standard set forth in Strickland. Id. at 1318. Further, the petitioner must also demonstrate that the underlying ineffectiveness claim is "substantial" and has "some merit." Id.; see also Glenn v. Wynder, 743 F.3d 402, 409-410 (3d Cir. 2014) (quoting Martinez, 566 U.S. at 14, 132 S.Ct. 1309); see also Bey v. Superintendent Greene SCI, 856 F.3d 230, 237-238 (3d Cir. 2017). The Third Circuit Court of Appeals, noting that the Martinez Court compared this standard to that required to issue certificates of appealability, interprets the inquiry into whether the underlying ineffectiveness claim is "substantial" as a "'threshold inquiry'" that "'does not require full consideration of the factual or legal bases adduced in support of the claims.'" Bey, 856 F.3d at 238 (quoting Miller-El v.

Cockerell, 537 U.S. 322, 327, 336 (2003)).

Initially, the court notes that Martinez would not excuse default of petitioner's claim that PCRA counsel was ineffective for failing to challenge the constitutionality of petitioner's mandatory sentence. Martinez only applies when collateral appeal counsel is the "cause" of the default of an underlying claim of trial counsel's ineffective assistance. Petitioner's instant claim is not a claim of trial counsel's ineffective assistance. If petitioner had been attempting to argue that trial counsel was ineffective for failing to object to the mandatory sentences, Martinez would again not excuse the default of that claim. Martinez requires that the underlying trial counsel ineffectiveness claim be "substantial." The underlying claim that trial counsel was ineffective for failing to object to mandatory sentences is meritless. Petitioner was not sentenced to a mandatory sentence. Rather, petitioner was sentenced to the negotiated sentence from petitioner's plea agreement. PCRA counsel can not be found ineffective for failing to raise a meritless trial counsel ineffectiveness claim. It is recommended that petitioner's claim be dismissed.

C. State Court Errors

Petitioner makes two arguments of state court error. Petitioner argues that the PCRA court denied petitioner an adequate Rule 907 notice. See Habeas Pet. Memo. of Law 5/28/19 at 18-19. Petitioner also alleges that the Superior Court erred in finding three of petitioner's claims were waived. See Habeas Pet. Memo. of Law 5/28/19 at 19-20.

Petitioner's final two claims are noncognizable and cannot be reviewed by this court on federal habeas review. Under the AEDPA, habeas relief is only available to petitioner if his conviction was obtained in violation of his federal constitutional rights. 28 U.S.C. § 2254(a). Errors of state law are not cognizable. See Priester v. Vaughn, 382 F.3d 394, 402 (3d Cir.2004)

(federal courts conducting habeas review cannot reexamine state court determinations as to state law); quoting Estelle v. McGuire, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The adequacy of the PCRA court's rule 907 notice and the Superior Court's finding that petitioner waived three of his claims are state law claims and unreviewable by this court pursuant to a habeas petition. It is recommended that petitioner's final two claims be dismissed and the petition be denied in its entirety.

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 27th day of December 2019, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED. Further, there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/S LINDA K. CARACAPPA
LINDA K. CARACAPPA
UNITED STATES MAGISTRATE JUDGE

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

KALVIN BISHOP, Petitioner,	:	CIVIL ACTION
v.	:	
THOMAS MCGINLEY, et al., Respondents.	:	No. 19-1461

ORDER

CYNTHIA M. RUFE, J.

AND NOW, this _____ day of _____, , upon careful and independent consideration of the petition for Writ of Habeas Corpus, together with the response thereto, and after review of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for Writ of Habeas Corpus is DISMISSED with prejudice.
3. There is no probable cause to issue a certificate of appealability.
4. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

_____
CYNTHIA M. RUFE, J.

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

12/30/2019

RE: BISHOP v. MCGINLEY, et al.,
CA No. 19-1461

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Caracappa, 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/Stephen Gill_____
Stephen Gill, Deputy Clerk

cc: Pro Se Plaintiff
Defendants Counsel

Courtroom Deputy to Judge Rufe

civ623.frm

(11/07)

Appendix (D)

(Following held in open court among counsel, defendant, and the Court:)

THE COURT: Want me to have a discussion with your client this morning about his decision of yesterday, or have you spoken with him today in terms of whether he has reconsidered his thought from yesterday?

00:00:01 00:00:06 00:00:09

MR. REYNOLDS: I went out to the prison last night, spoke with him about an hour-and-a-half. His position has not changed.

00:00:13 00:00:15 00:00:18

His position is only, so we're clear, it's just the numbers, Judge. It's not the idea of pleading. It's just about numbers. Doesn't make a difference, but --

00:00:20 00:00:23 00:00:26 00:00:29

THE COURT: It's not quite six on one hand, half dozen on the other. I mean, it's --

00:00:30 00:00:34

MR. REYNOLDS: I wish we could come to an agreement.

00:00:39 00:00:40

THE COURT: If I understand correctly from the two of you, there are at least four eyewitnesses who know this defendant, and they were all present at the time of the shooting?

00:00:40 00:00:47 00:00:55 00:00:59

MR. REYNOLDS: Right.

00:01:02

THE COURT: Now Mr. Reynolds, I'm taking nothing away from you because I know that you are an excellent attorney.

00:01:03 00:01:07 00:01:10

00:01:13 However, I mean, I don't mind talking with
00:01:16 him and seeing -- I'm guessing the offer would be still
00:01:19 on the table if I inquired if the offer was still on the
00:01:23 table?
00:01:23 MS. FAIRMAN: Yes.
00:01:23 THE COURT: Okay. And, I mean, at the end
00:01:28 of the day, he has to make the decision, and we'll do,
00:01:31 you know, whatever he wants to do. But I, based on what
00:01:35 you're telling me, I would -- I'm not seeing a set of
00:01:41 circumstances that would result in other than a
00:01:48 conviction.
00:01:49 I guess the possibility might be that
00:01:56 there's some defense, and I'm not asking you what the
00:01:59 defense might be, but some defense that might bring it
00:02:02 to third as opposed to first?
00:02:04 MR. REYNOLDS: Maybe manslaughter. I've
00:02:09 explained it to him.
00:02:18 THE COURT: Is there any, any indication
00:02:21 that the decedent was a moving party here? I mean, was
00:02:27 a -- I understand all I have is that there was an
00:02:30 argument, okay.
00:02:31 MR. REYNOLDS: Sure. My client at the house
00:02:33 of Lucrecia Phillips.
00:02:34 THE COURT: Right.
00:02:35 MR. REYNOLDS: He's minding his own

00:02:36 business, and the decedent comes to him. And there's
00:02:40 evidence that he came earlier in the day, and there's
00:02:44 evidence he wanted to fight my client.
00:02:47 THE COURT: Talking.
00:02:48 MR. REYNOLDS: Arguing, not talking.
00:02:49 THE COURT: Fist-fight.
00:02:50 MR. REYNOLDS: There was a -- there was not
00:02:52 a fist-fight between my client and decedent.
00:02:55 THE COURT: Some heated --
00:02:56 MR. REYNOLDS: Yes, heated.
00:02:57 THE COURT: And a gun.
00:02:57 MR. REYNOLDS: Not at the first stage.
00:02:59 THE COURT: Second stage.
00:03:00 MR. REYNOLDS: Second stage.
00:03:01 THE COURT: Words.
00:03:01 MR. REYNOLDS: Yes.
00:03:04 THE COURT: Okay. Whenever you're ready,
00:12:55 we'll swear the defendant. And I just need to have a
00:12:58 conversation with him this morning.
00:12:58 COURT CRIER: State your full name, spell
00:13:00 your last name.
00:13:00 THE DEFENDANT: My name is Calvin Bishop.
00:13:06 (Defendant duly sworn)
00:13:06 COLLOQUY OF DEFENDANT
00:13:06 BY THE COURT:

00:13:11 Q. All right, Mr. Bishop, good morning.
00:13:13 A. Good morning.
00:13:15 Q. Your attorney had a discussion with you yesterday
00:13:24 on the record regarding the offer that had been made to
00:13:28 you to enter a guilty plea to two of the charges I think
00:13:33 it was --
00:13:34 A. Yes.
00:13:34 Q. -- that you are facing.
00:13:35 A. Yes.
00:13:36 Q. And yesterday you indicated that you were not
00:13:42 interested in taking the offer?
00:13:44 A. Yes.
00:13:44 Q. Okay. Now later during the day I think when you
00:13:51 may not have been in the room actually, I talked with
00:13:54 the attorneys just to get a sense of how the witnesses
00:13:59 were going to go, what the various testimony might be.
00:14:04 And from what I understand from the attorneys,
00:14:08 there are at least four people who were present during
00:14:16 the course of this incident. They are all people who
00:14:20 know you, and they are all people who witnessed what
00:14:26 happened at the home.
00:14:28 A. Yes.
00:14:28 Q. The offer as I knew it from yesterday, and I'm
00:14:39 guessing that it's still the same offer, was 25 to
00:14:42 50 years --

00:14:43 A. Yes.

00:14:43 Q. -- in exchange for a plea to third-degree murder?

00:14:47 MS. FAIRMAN: Actually today, Your Honor, I told him, counsel, that because they had requested it repeatedly that I could come down, and I offered 22-and-a-half to 45 today if he pleads today, but that's like a blue-plate special.

00:14:57 BY THE COURT:

00:14:59 Q. That's fine. So there's been an adjustment in the offer to 22-and-a-half to 45 years, okay. Now what I want to be sure that you understand is that should the jury listen to the various witnesses including the four people that apparently know you and observed you shooting the two people here and with death resulting for one of them, well, what I can tell you is, I never know what a jury is going to do.

00:15:38 But the chances are -- put it this way. I would not be surprised if they returned a verdict of guilty on the murder in the first degree. If that were to happen, I have no choice but to sentence you to life in prison without parole.

00:16:05 A. Yes.

00:16:05 Q. Okay. How old are you, 25 now?

00:16:09 A. Yes.

00:16:10 Q. So you understand, I mean, if you do the math, if

00:16:16 you were to take the offer, you would be out, at least
00:16:25 have a chance of being paroled before you were 50.
00:16:28 A. Yes.
00:16:28 Q. If you go to trial, which is your absolute right
00:16:33 to go to trial, if you are not successful and the jury
00:16:40 does return a verdict of guilty to murder in the first
00:16:46 degree, then you will not be out of custody again ever.
00:16:54 A. Yes.
00:16:54 Q. All right. Are there any questions that you want
00:17:02 to ask about this, what I have said to you this morning?
00:17:10 (Counsel confers with defendant)
00:19:03 MR. REYNOLDS: Judge, I was just explaining
00:19:04 to my client if he's found guilty of manslaughter and ag
00:19:08 assault and firearms charge, that he could potentially
00:19:10 get the same sentence that is being offered.
00:19:12 MS. FAIRMAN: Right.
00:19:13 MR. REYNOLDS: Because of statutory
00:19:14 maximums.
00:19:15 THE COURT: Uh-huh.
00:19:16 MR. REYNOLDS: And I think --
00:19:18 THE COURT: And some of those would be
00:19:20 mandatory, too, the ag assault with a gun.
00:19:22 MR. REYNOLDS: There's two five-year
00:19:24 mandatories, so he'd have to at least do ten. We've
00:19:28 talked about the mandos.

00:19:29 THE COURT: Okay.

00:19:30 MR. REYNOLDS: I think that's...

00:19:33 (Counsel confers with client)

00:21:06 MR. REYNOLDS: Judge, do you know if the manslaughter, voluntary, F-1 or F-2? I have it. If you don't mind, I'll check my phone.

00:21:13

00:21:22 THE COURT: Voluntary you said?

00:21:24 MR. REYNOLDS: Yeah.

00:21:25 THE COURT: F-1.

00:23:31 MR. REYNOLDS: Judge, can I have a second with the DA?

00:23:33

00:23:34 THE COURT: Certainly.

00:27:06 MR. REYNOLDS: Judge, I think we're close. Can we talk in the booth again, and would you give me a short for his mother to talk to --

00:27:08

00:27:11

00:27:12 SHERIFF: Your Honor, if you give me permission, he don't need a short. His mom can just talk to him in the booth.

00:27:15

00:27:18

00:27:19 THE COURT: Mother is here?

00:27:20 MR. REYNOLDS: She's here. She was here yesterday. She's here.

00:27:22

00:27:23 THE COURT: That's fine. Go ahead. Thank you.

00:27:26

00:27:26 SHERIFF: You're welcome.

00:27:28 MR. REYNOLDS: Thank you, Your Honor.

00:27:29 THE DEFENDANT: Thank you, Judge, I appreciate it.

00:27:30 THE COURT: No problem.

00:36:43 (Pause in proceeding)

00:37:38 MS. FAIRMAN: So murder, PIC, and ag assault.

00:37:40 MR. REYNOLDS: Right, right, 22-and-a-half to 45?

00:37:44 MS. FAIRMAN: Right.

00:37:45 COURT CRIER: Please restate your name for the record.

00:41:46 THE DEFENDANT: Calvin Bishop.

00:46:03 COURT CRIER: The Court reminds you you're still under oath.

00:46:03 CONTINUED COLLOQUY OF DEFENDANT

00:46:04 BY THE COURT:

00:46:04 Q. Mr. Bishop, good morning.

00:46:07 MR. REYNOLDS: Judge, he just needs to sign the short sheets.

00:46:08 BY THE COURT:

00:46:10 Q. Okay, that's fine. All right.

00:46:10 Mr. Bishop, the Court has been advised by your attorney and by the Assistant District Attorney that you have decided to accept the offer that was amended today to 22-and-a-half to 45 years; is that correct?

00:46:11

00:46:51

00:46:56

00:46:59

00:47:04

00:47:09 A. Yes.
00:47:09 Q. All right. Fine enough. And if I am correct, you are pleading guilty to one count of murder in the third degree, one count of aggravated assault, and one count of possessing an instrument of crime?
00:47:14 00:47:19 00:47:22
00:47:24 A. Yes.
00:47:25 Q. All right. So Mr. Reynolds, if you would just conduct the guilty plea colloquy?
00:47:31
00:47:32 MR. REYNOLDS: Sure.
00:47:33 THE COURT: Then we can go forward.
00:47:35 COLLOQUY OF DEFENDANT
00:47:35 BY MR. REYNOLDS:
00:47:35 Q. Mr. Bishop, how old are you today?
00:47:36 A. 25.
00:47:37 Q. How far did you go in school?
00:47:40 A. A year-and-a-half of college.
00:47:42 Q. So it would be correct you read, write, and understand the English language?
00:47:45
00:47:46 A. Yes.
00:47:46 Q. Are you under the influence of any drugs or alcohol at this moment?
00:47:51
00:47:52 A. No.
00:47:52 Q. Are you taking any prescription medications which would affect your ability to understand these proceedings?
00:47:55 00:47:57

00:47:57 A. No.

00:47:57 Q. Have you ever been diagnosed with a mental health disorder which would affect your ability to understand these proceedings?

00:48:01 A. No.

00:48:02 Q. Do you understand that we had come here today prepared to select a final juror for our case and proceed to trial today?

00:48:08 A. Yes.

00:48:12 Q. And we've spent quite some time over the past I guess week or so going over your case?

00:48:13 A. Yes.

00:48:14 Q. And we have discussed the facts of your case?

00:48:17 A. Yes.

00:48:19 Q. Possible defenses?

00:48:19 A. Yes.

00:48:22 Q. And we've also -- I have also been conversing with the District Attorney in regards to an offer on this case?

00:48:23 A. Yes.

00:48:25 Q. And at this stage of the proceedings, is it fair to say that you have elected to accept the current amended offer of 22-and-a-half to 45 years by the Commonwealth?

00:48:25 A. Yes.

00:48:29

00:48:32

00:48:32

00:48:33

00:48:37

00:48:42

00:48:45

00:48:45

00:48:46 Q. **Now you understand that you have a right to**
00:48:50 **continue the jury selection and finish selecting your**
00:48:53 **jury?**
00:48:53 A. **Yes.**
00:48:53 Q. **You understand that those jurors would have to**
00:48:59 **make a decision if all 12 people agreed and if they**
00:49:04 **found you guilty, you'd be found guilty. Do you**
00:49:06 **understand that?**
00:49:06 A. **Yes.**
00:49:06 Q. **And if all 12 jurors could not agree -- that is,**
00:49:10 **if some were for guilt, some were for innocence -- it's**
00:49:15 **a mistrial; you'd have a new trial at some point?**
00:49:17 A. **Yes.**
00:49:17 Q. **You also understand if all 12 jurors said you**
00:49:21 **were not guilty, you'd be declared not guilty. The**
00:49:22 **judge would indicate so, and you'd be acquitted of the**
00:49:25 **charges?**
00:49:25 A. **Yes.**
00:49:26 Q. **Now you understand by pleading guilty, you're**
00:49:30 **giving up your right to continue in the selection**
00:49:32 **process of your jury?**
00:49:34 A. **Yes.**
00:49:34 Q. **You understand you're giving up your right to**
00:49:36 **actually have a trial in this matter?**
00:49:38 A. **Yes.**

00:49:39 Q. And you understand you're giving up your right to possibly testify in this case, correct?
00:49:43 A. Yes.
00:49:45 Q. And it would be fair to say that you had intended to testify in this case, correct?
00:49:45 A. Yes.
00:49:49 Q. To explain to the Court how it is that it came about that you shot Mr. Shaw that night, correct?
00:49:50 A. Yes.
00:49:50 Q. And your state of mind in doing that, correct?
00:49:59 A. Yes.
00:49:59 Q. And that we had talked about the cross-examination of the Commonwealth witnesses, correct?
00:50:03 A. Yes.
00:50:03 Q. We had prepared that. We actually talked about specific questions we were going to ask each and every one of those witnesses, right?
00:50:10 A. Yes.
00:50:10 Q. And that you were fully a part of the defense in going over, preparing for this case --
00:50:11 A. Yes.
00:50:13 Q. -- is that correct? You understand that by pleading guilty, you're giving up the right to have those witnesses cross-examined?
00:50:15
00:50:16
00:50:17
00:50:20
00:50:21
00:50:21
00:50:25
00:50:27

00:50:28 A. Yes.
00:50:28 Q. You're giving up the right to testify and tell
00:50:31 the Court and the jury your position; is that correct?
00:50:35 A. Yes.
00:50:36 Q. Do you understand that I also filed a pretrial
00:50:41 motion to preclude a statement possibly about you having
00:50:46 contact with Ms. Phillips' daughter at some point after
00:50:52 the incident?
00:50:53 A. I don't understand.
00:50:54 Q. There was a statement taken about you having
00:50:58 contact with Ms. Phillips' daughter at some point after
00:51:01 this incident. I had filed a motion to preclude it?
00:51:04 A. All right.
00:51:04 Q. Okay. The judge won't hear that motion now. In
00:51:07 fact, the judge won't hear any of the pretrial motions
00:51:10 or any pretrial motions to preclude that.
00:51:13 A. Yes.
00:51:14 Q. You understand you're giving that up?
00:51:15 A. Yes.
00:51:16 Q. At this stage of the proceedings, once you plead
00:51:18 guilty, the judge is going to sentence you immediately
00:51:20 thereafter, and that will leave you with some appellate
00:51:24 rights. I'm going to review those with you.
00:51:26 A. Yes.
00:51:26 Q. Your appellate rights at that point would be that

00:51:29 you could tell the -- first you could file a motion
00:51:32 within ten days saying that you wanted to withdraw your
00:51:36 guilty plea.
00:51:36 But I tell you right now the current case law in
00:51:38 Pennsylvania is that once you are sentenced, it's
00:51:42 virtually impossible to have your guilty plea withdrawn.
00:51:45 You understand that?
00:51:45 A. Yes.
00:51:46 Q. Also you could file an appeal to the Superior
00:51:52 Court within 30 days. That appeal would be limited to
00:51:55 two following grounds: One, that you didn't know what
00:51:58 you were doing.
00:51:59 A. Yes.
00:52:00 Q. It wasn't intelligently made or entered into,
00:52:02 this guilty plea, correct?
00:52:03 A. Yes.
00:52:03 Q. You need to understand that. I'm sorry, that
00:52:05 someone forced, threatened, or coerced you to do it.
00:52:08 You understand that?
00:52:08 A. Yes.
00:52:08 Q. And the last two are that the judge did not have
00:52:12 jurisdiction over the case, which, I can assure you she
00:52:14 does. She's a duly-elected judge in the City and County
00:52:18 of Philadelphia; that the crime didn't occur in
00:52:20 Philadelphia, which it did. So that could be an issue

for you but would not be a successful one. Do you understand?

A. Yes.

Q. And your final issue on appeal would be that the judge somehow gave you a sentence over the statutory maximum, and I can assure you that the sentence we have agreed on with the Commonwealth is under the statutory maximum. You understand that?

A. Yes.

Q. So that would leave you with very few appellate rights. Do you understand that?

A. Yes.

Q. Knowing that, is it still your intention today to plead guilty?

A. Yes.

Q. And are you doing that of your own free will?

A. Yes.

Q. No one -- is it correct that no one is forcing, threatening you, or coercing you into accepting that guilty plea?

A. It's correct.

Q. Would it also be fair to say you're doing that after consultation with myself?

A. Yes.

Q. And did I answer -- in that consultation, did I

00:53:10 answer all your questions?
00:53:10 A. Yes.
00:53:11 Q. And you also got a chance to speak with your
00:53:14 mother?
00:53:14 A. Yes.
00:53:14 Q. And you're doing this guilty plea after
00:53:18 consulting with her also, correct?
00:53:20 A. Yes.
00:53:20 Q. Now as you sit here right now, do you have any
00:53:23 questions for myself, Her Honor, or the Assistant
00:53:26 District Attorney on the case?
00:53:27 A. No.
00:53:27 Q. And let me ask you, have I answered all your
00:53:32 questions?
00:53:32 A. Yes.
00:53:32 Q. Are you satisfied with my representation?
00:53:35 A. Yes.
00:53:35 Q. There is -- you understand -- you're not on
00:53:42 probation or parole, right?
00:53:43 A. No.
00:53:44 Q. So there's no issue with that. And you're a U.
00:53:47 S. Citizen, correct?
00:53:48 A. Yes.
00:53:48 Q. Do you have any children?
00:53:49 A. Yes.

00:53:50 Q. Understand that a guilty plea to this case could
00:53:56 affect your parental rights to that child?
00:53:59 A. Yes.
00:53:59 Q. You understand that?
00:54:00 A. Yes.
00:54:01 Q. Okay. I'm not saying they will, but they
00:54:03 possibly could. And I think that I have covered
00:54:07 everything.
00:54:10 The Assistant District Attorney is going to ask
00:54:11 you some questions. Well, she's going to read the
00:54:13 statement to you about the facts, and you're going to
00:54:17 have -- she's going to ask you if you agree. Do you
00:54:19 understand that?
00:54:20 A. Yes.
00:54:20 THE COURT: All right. Do you have anything
00:54:21 to add to the colloquy?
00:54:22 MS. FAIRMAN: This decision is your own; is
00:54:25 that correct --
00:54:26 THE DEFENDANT: Yes.
00:54:26 MS. FAIRMAN: -- you're making on your own --
00:54:27 THE DEFENDANT: Yes.
00:54:28 MS. FAIRMAN: -- ultimately? Thank you.
00:54:29 THE COURT: Yes. That's fine. So I'm going
00:54:32 to ask Ms. Fairman at this point -- Mr. Bishop,
00:54:36 she will read the summary of the facts of this case just

00:54:39 as your attorney has said. Listen carefully to what she
00:54:42 says. If you need to make any adjustments, let
00:54:44 Mr. Reynolds know, and he will advise you.
00:54:47 THE WITNESS: Yes.
00:54:47 THE COURT: All right. Yes, ma'am.
00:54:48 MS. FAIRMAN: If this case were to go to
00:54:50 trial, the Commonwealth would have presented the
00:54:51 testimony of Lucrecia Phillips.
00:54:55 Ms. Phillips would have testified back on
00:54:56 April of 2012, a series of events culminated in a
00:55:00 shooting, the shooting death of Shirkey Warthen at her
00:55:02 home at 5426 Florence Avenue.
00:55:07 Ms. Phillips would have testified that the
00:55:11 precursors -- the incident actually began the Friday I
00:55:13 believe before the murder, which was on a Tuesday, the
00:55:16 shooting on a Tuesday -- that on that Friday or over the
00:55:19 weekend at least, there was a block party at the
00:55:22 Florence Avenue home or in that area.
00:55:24 During that party, a fight ensued: An
00:55:27 argument first, and then a physical fight between
00:55:30 Ms. Phillips, her daughter Sanshai, I believe it is,
00:55:35 Phillips, and a man named Jeff whose last name escapes
00:55:39 me right now. It's on the witness list, Your Honor. I
00:55:43 don't have it right now.
00:55:44 THE COURT: All right.

00:55:45 MS. FAIRMAN: Regardless of that, the people were throwing soda on each other and doing ridiculous things, and it culminated in Ms. Phillips chasing after, and her daughter, chasing after this Jeff and hitting him, striking him with objects as well as fists; that after that took place, this Jeff got away, and things cooled down.

But over the weekend after that, she would testify that the defendant in this case who she knew as Nephew, Calvin Bishop -- she would identify him in this courtroom -- perhaps thinking he was defending her, engaged -- called out Jeff on a subsequent occasion.

They were all out on the street again, Lucrecia Phillips, her daughter, other people, as well as the defendant, and this Jeff.

The defendant at that time called Jeff out and had a physical fight with him. The testimony was that as a result of that, the defendant seemed to get the worst of it. He ended up with a bloody nose and was bleeding at the time. That fight broke up after that.

On the day of murder, 4-17-2012, the deceased in this case, Shirkey Warthen, who was apparently a very close friend of Jeff either through Mr. Warthen's brother or directly himself, they were

00:56:58 close friends, was seeking out the defendant to, as he
00:57:02 would put it, as Shirkey Warthen would put it, to holler
00:57:04 at him to discuss with him what had happened.
00:57:06 People -- Ms. Phillips would testify that
00:57:09 her impression was that things had settled down between
00:57:13 all the participants, between Jeff and the defendant as
00:57:16 well as Shirkey Warthen, but Shirkey Warthen was seen
00:57:17 coming to the house on Florence Avenue, and he was
00:57:21 speaking about talking to the defendant about this
00:57:23 incident and the series of incidents.
00:57:25 But that Ms. Phillips would say his voice
00:57:28 was loud, and an argument ensued, that Mr. -- she was
00:57:32 not present, but other people had told her that
00:57:35 Mr. Warthen had been at the home on Florence Avenue
00:57:37 earlier that day on 4-17 of 2012 now, but that Ms.
00:57:41 Phillips was home at 9:53 p.m.
00:57:44 And at her home at that time was the
00:57:45 defendant, another individual who some people called
00:57:49 Oreo whose name was Brian Williams, Ms.
00:57:54 Phillips' daughter, Sanshai.
00:57:54 Upstairs was a friend of Sanshai, Shasay
00:57:58 Rivers, and also a man named Perry Brown.
00:58:01 Downstairs in addition to Ms. Phillips was
00:58:03 Malik Williams; that an argument ensued between Warthen
00:58:07 and the defendant. She couldn't hear all of it.

00:58:12 Appeared to be over this incident that had taken place
00:58:14 earlier, that voices became heated.
00:58:16 That at some point in that argument, the
00:58:18 defendant took a large black gun out of his clothing and
00:58:21 shot repeatedly at Shirkey Warthen, that this is a small
00:58:25 row home.
00:58:26 There would be testimony by
00:58:27 Ms. Phillips as well as Crime Scene officers, is a
00:58:30 narrow row home. That he struck Mr. Warthen at least
00:58:35 four times. That she was also -- she was standing next
00:58:38 to and behind Shirkey Warthen, she, Ms. Phillips, and
00:58:41 she was struck in her kneecap by one of the bullets she
00:58:45 would testify to.
00:58:46 She would testify after that, she became
00:58:48 engrossed with the fact she was injured, and when she
00:58:50 last saw the defendant, he had been holding the gun
00:58:53 shooting at Mr. Warthen, but then she didn't see him
00:58:55 exit.
00:58:57 She would testify that she, Ms.
00:58:59 Phillips, was taken by police and medics to the Hospital
00:59:01 of the University of Pennsylvania where she was forced
00:59:03 to undergo surgery. She had a broken kneecap as well as
00:59:06 another broken bone in her leg.
00:59:08 She had surgeries and remained in the
00:59:10 hospital for a period of time suffering great pain as a

00:59:12 result of that and had to have therapy and treatment
00:59:15 after her release from the hospital a week later as
00:59:18 well.
00:59:18 We would also present the testimony of Malik
00:59:22 Williams who was 14 at the time of this incident.
00:59:24 Mr. Williams would have testified that he was present at
00:59:27 the time of the shooting. He was in the house, that he
00:59:32 saw Shirkey Warthen come into the house, that the
00:59:35 defendant who Mr. Williams would identify as the
00:59:38 defendant in this courtroom was already present in the
00:59:40 home, that Mr. Williams heard Shirkey Warthen in a loud
00:59:45 voice telling the defendant that he was going to holler
00:59:47 at him, that it appeared to Mr. Williams that Shirkey
00:59:52 Warthen might have been trying to engage in a fist-fight
00:59:54 with the defendant, but that the defendant at that point
00:59:56 pulled out a gun and shot repeatedly at Mr. Warthen
01:00:00 causing Mr. Warthen's death.
01:00:01 Malik Williams would testify, in his fear,
01:00:04 he jumped out a back door from the kitchen on to a car
01:00:07 and fled the scene after the shooting. He also would
01:00:09 testify that he returned and saw Lucrecia Phillips who
01:00:12 had been shot in the leg as a result of this.
01:00:14 We would also present the testimony, Your
01:00:17 Honor, of Jeanette Nichols who would have testified that
01:00:20 she was in the home at 4726 Florence Avenue on

April 17th, 2012, as well, and she heard an oral argument between the defendant and Shirkey Warthen; that she saw the defendant shoot Shirkey Warthen repeatedly at that time; that Shirkey Warthen was unharmed, and Lucrecia Phillips would also say that at no time did she see a gun in anybody's hand but the defendant's.

We would also present the testimony of Ryan Williams who people have identified as Oreo during this case. Mr. Williams would have testified that he was present in the home along with the defendant, that he saw the defendant and Shirkey Warthen engaged in an oral argument, that it appeared to him that possibly Shirkey Warthen wanted to engage in a fist-fight with Mr. Bishop, but Mr. Williams would testify that Mr. Bishop took out a gun and shot repeatedly at Shirkey Warthen.

I should have said, Your Honor, if I did not, that each of those individuals would say that prior to this occasion, they had known the defendant from contacts in the neighborhood, and they identified him from both police and would identify him in court.

We would also have presented the testimony of other witnesses who would have testified; Mr. Brown, for example, who saw the fight the day before and would say that he could identify the defendant as the individual who he saw leaving the fight with a bloody

nose saying that -- the defendant saying he would take care of that, he would take care of that after the fight occurred.

We would have then presented the testimony, Your Honor, of Police Officer Clyde Frasier who would testify that he along with William Whitehouse and Lamont Fox went to the home at 5726 after the police had arrived and taken the people to medics and processed the scene for the Crime Scene Unit.

They would have said when they got to the scene, it was being held by police officers and that Clyde Frasier as well as his cohorts from Crime Scene Unit processed the scene and placed five fired cartridge casings that they located inside that home on a property receipt. They would have testified that they submitted those fired cartridge casings subsequently to the Firearms Identification Unit in the Philadelphia Police Department.

We would have then presented the testimony I guess in fairness to defendant, they would have testified they found a bullet, stray bullet, in the wall that we would have presented evidence was there from a previous occasion that they also took into custody.

We would have next presented the testimony, for completeness sake, of Robert Heaver who would have

01:02:54 testified he responded to a call at 9:53 p.m. on
01:02:57 April 17th of 2012 to 5426 Florence Avenue, that when he
01:03:02 arrived, there was a group of people outside, that he
01:03:04 found Lucrecia Phillips inside suffering from an obvious
01:03:07 gunshot wound into her leg and found that the deceased
01:03:11 Shirkey Warthen behind a couch between the area of the
01:03:15 dining room and the living room of that home. He also
01:03:18 noted that Shirkey Warthen was unresponsive suffering
01:03:21 from apparent gunshot wounds.

01:03:23 The officer would testify that he arranged
01:03:26 for medics to transport both people that were injured,
01:03:29 that he and his fellow officer then secured the scene
01:03:31 and tried to identify the witnesses and have them
01:03:33 brought to the various detective divisions for
01:03:36 interview.

01:03:36 We would have next presented the testimony
01:03:38 of Officer Robert Stott who would testify that he was
01:03:44 from the Firearms Identification Unit of the
01:03:46 Philadelphia Police Department, that he received into
01:03:49 his possession for his analysis the five fired cartridge
01:03:52 casings that were taken from 5426 Florence by the Crime
01:03:57 Scene Unit as well as a bullet that was taken from the
01:04:00 wall of that scene and two bullets that were removed
01:04:03 from Shirkey Warthen's remains during an autopsy that we
01:04:06 will present testimony about.

Officer Stott would testify that he compared and contrasted all those items, that he determined that all of the fired cartridge casings were 380 caliber cartridge casings and were fired from a single gun. That was with respect to the bullet that had been taken from that wall, that that appeared to be an unrelated gun, that it was not fired from that gun -- it was a different caliber -- and that the bullets taken from Mr. Warthen were fired from the same gun as well, consistent with being fired from a 380, the same gun as each other. Can't be compared to the casings.

We would have next presented the testimony of Dr. Sam Gulino. Dr. Gulino would testify that he's a medical examiner in Philadelphia. He would testify as an expert in the field of forensic medicine.

He would testify that he received the remains of Shirkey Warthen after Mr. Warthen had been pronounced dead at the Hospital of the University of Pennsylvania on April 17th, 2012, at approximately 11:20 p.m.; that Dr. Gulino would testify that he performed an internal and external examination of the remains of Mr. Warthen and noted the following:

That he noted four gunshots to Mr. Warthen person. One of those could have been a re-entry from one of the other shots, so it's possible that there were

actually three shots that were fired at Mr. Warthen, or it's possible there were four.

That there was a gunshot wound to the torso that perforated the liver and the abdominal aorta. There was a gunshot wound to the abdomen, and that was the one that lodged just in the subcutaneous fat, so it appeared that it had been passed through something, possibly one of the wounds that we'll talk about that went through the arm that went through there; that there was a gunshot wound to the left upper arm, and there was a gunshot wound to the left leg; that the arm wound was a perforating wound, which meant it came through and through, and that possibly explained the other wound.

The cause of death was most likely the most serious shot, was the first gunshot wound to the torso which perforated the liver and abdominal aorta. The cause of death were the gunshot wounds. And the manner of death also to a reason reasonable degree of medical certainty was homicide.

I should state that Office Stott would qualify as an expert in the field of ballistics comparison for purposes of his testimony. And if I may have just one moment to think this through, I believe... that that would be it, Your Honor.

Oh, I should -- no, that is not it. I

should say a warrant was issued in May of 2012 following police investigation that when the defendant could not be found at his usual addresses immediately that the Homicide Unit turned it over to their fugitive unit, that the fugitive unit began to do surveillance of various addresses. And I'll get that date, Your Honor, if I may have one moment.

4-26 of 2012, a warrant was issued. And in May of 2012, the fugitive unit began their investigation. They did computer notifications throughout the city and the nation in fact on the computers, that he was wanted for murder, that they notified all the local police departments, and the police divisions provided them with pictures, that they did surveillance on various addresses. They did a search of various addresses, that eventually the defendant was found in, I believe it's called Newport News, it's called, in Virginia.

After that, his extradition was arranged, and his transportation back to Philadelphia was arranged by the fugitive unit.

And with that, that would be the facts we presented.

THE COURT: Mr. Reynolds, any additions or corrections from your client?

01:08:09 MR. REYNOLDS: Obviously there are certain
01:08:12 things my client, we were going to go to trial and
01:08:16 disagree with obviously.
01:08:19 So some things he disagrees with, but he
01:08:22 understands that's the evidence that would be presented
01:08:23 by the Commonwealth and that's the evidence the jury,
01:08:25 you know, would consider subject to the
01:08:27 cross-examination if we'd gone to trial. He agrees with
01:08:30 the sum and substance of it.
01:08:31 THE COURT: All right. So that he is
01:08:34 basically, he is in agreement with the sum and substance
01:08:38 of the summary that's been provided by the Commonwealth;
01:08:41 is that correct?
01:08:42 MR. REYNOLDS: Is that correct?
01:08:47 (Counsel confers with defendant)
01:08:54 THE DEFENDANT: Yes.
01:08:55 THE COURT: All right. Thank you. You may
01:08:57 arraign the defendant.
01:08:58 COURT CRIER: Calvin Bishop, to this Common
01:09:02 Pleas docket 0011808-2012 charging you with murder in
01:09:08 the third degree, victim, Shirkey Warthen, how do you
01:09:08 plead.
01:09:11 THE DEFENDANT: Guilty.
01:09:13 COURT CRIER: Calvin Bishop, to the same
01:09:14 Common Pleas docket charging you with possession of an

instrument of crime, misdemeanor of the first degree, how do you plead?

THE DEFENDANT: Guilty.

COURT CRIER: Calvin Bishop, to this Common Pleas docket 0011813-2012 charging you with aggravated assault, victim, Lucrecia Phillips, felony of the first degree, how do you plead?

THE DEFENDANT: Guilty.

COURT CRIER: Your Honor, defendant pled guilty to the charges and has signed off on them.

THE COURT: All right, that's fine. Thank you. All right. Mr. Bishop, the Court listened to the answers that you gave to the questions raised by your attorney regarding this guilty plea. The Court is satisfied that you do understand what you're doing today and that you have not been forced or threatened in order to get you to offer to enter this guilty plea.

Finally, the Court listened to the summary of events that occurred on April the 17th and a couple days preceding that. The Court is satisfied that that summary does make out the elements of the crimes to which you are offering to pled guilty. So on CP-51-CR-0011808-2012 --

MS. FAIRMAN: Excuse me, Your Honor. I think Mr. -- oh, you're just accepting the guilty plea,

I'm sorry.

THE COURT: Yes.

MS. FAIRMAN: I'm sorry, Your Honor.

THE COURT: Okay. So on that CP number that was just stated, the Court accepts your plea to one count of murder in the third degree and one count of possessing an instrument of crime.

And then on CP-51-CR-0011813, year 2012, the Court accepts your plea to one count of aggravated assault graded as a felony of the first degree.

Now the Court's intention would be to move to sentencing today. Does your client waive his right to presentence reports?

MR. REYNOLDS: He does, Your Honor.

THE COURT: All right. Now the Court understands that the negotiations here, the total negotiations are for 22-and-a-half to 45 years. I believe that that would be 15 to 30 on the murder in the third degree, two and-a-half to five on the PIC, and 5 to 10 on the aggravated assault.

MS. FAIRMAN: I would ask if we put the 20 to 40 on the murder just...

THE COURT: Well, it has to be. The ag assault with a gun is a mandatory, okay, so that --

MS. FAIRMAN: Just run it concurrent.

juvenile justice law center.

As we speak, there's a mural of him on 56th and Chester Avenue through works and stuff he did with the juvenile justice, being a mentor and all.

He got a job. He was engaged. He has left behind a beautiful six-year-old daughter who's no longer having a father just like his kid's no longer having a father.

How sad our young people get out here not thinking about the family they left behind that have to deal with this, not just me but his family also.

Q. Sure.

A. I mean, I'm a child of God. I'm a true believer. April 17, 2012, my child was out here because God was ready for him. My question was to you, Calvin, is why you did it. I could have dealt with my son getting hit by a tractor/trailer, anything.

But him getting shot four, five times with no remorse, I have a problem with that, and, you know, it just hurts. It hurts; it really does.

Q. Ma'am, the people from the juvenile law center were here actually yesterday to introduce themselves and to be available if we needed them; is that right?

A. Yes, yes, they were.

Q. Because they so valued Shirkey's work?

A. Yes. If you Google his name, so much positive stuff is going to come up, it's incredible. He got three awards alone once he was killed honoring him.

And it's just sad he was out here trying to do the best thing. He realized that the streets weren't for him. To be taken so young. But like I said, end of the day, I know that God has a day for all of us, so I believe that when that day, God was ready for Shirkey, but the way he went wasn't up to him to take him.

Q. Sure.

A. And that's the problem I have with all of this.

MS. FAIRMAN: Thank you, ma'am.

THE COURT: Thank you very much.

MS. FAIRMAN: Ms. Sullivan, did you want to speak as well?

COURT CRIER: Please state your name for the record.

THE WITNESS: Khalicia Sullivan.

(Witness is duly sworn)

THE WITNESS: I'm the mother of his child.

MS. FAIRMAN: Shirkey Worthan's child?

THE WITNESS: Yes. On behalf of not only myself but of my six year-old daughter who is his twin, worshipped the ground he walked on. I got to stare at my daughter every day, you know. She asked questions

about her dad. No, she can no longer hug her dad. She can no longer kiss her dad. She can't do anything, you know. That hurts. They're twins.

Daughter look nothing like me, looks like her dad with real long hair. My daughter is like unable to see her father. This gentleman still possibly see his kids.

She can't see her dad. She has to visit a grave sight or look at a picture on her wall.

Me and him had our ups and downs or whatever, but at the end of the day, my friend was tooken. I don't care what we ever been through, something like this I would never wish upon anybody.

And I have to say that, you know, there will be no father/daughter dances for my daughter. There is no her playing in the park with her dad. There's none of that. Only thing she can go off is the little six years of memories. I'm going to say five, because she just turned six January this past. She's about to be seven. Five years she has left of her father, and I'm hoping within 20 years she'll still remember her father. And that's all I have to say.

MS. FAIRMAN: Thank you, Ms. Sullivan.

THE COURT: Thank you, Ms. Sullivan.

MS. FAIRMAN: That's it, Your Honor.

01:17:41 THE COURT: All right. Mr. Reynolds or
01:17:43 Mr. Bishop, is there anything that Mr. Bishop wishes to
01:17:47 say?
01:17:47 MR. REYNOLDS: There is, Your Honor, and I
01:17:49 would just, I just want to note that obviously up until
01:17:53 this point, Mr. Bishop has not been able to speak.
01:17:57 But from the moment that I was appointed on
01:17:59 this case -- and I didn't have the case at the
01:18:01 preliminary hearing; I was appointed at some point after
01:18:04 that. But from the moment I was appointed on the case,
01:18:06 Mr. Bishop was completely forthright and honest with me
01:18:09 about what had happened.
01:18:11 He has his reasons for why that happened,
01:18:15 and that was the basis for us going to trial. But my
01:18:21 discussions with him were never that he didn't do it.
01:18:23 My discussions with him were, what's his degree of
01:18:26 culpability, and that is why when we finally got the
01:18:30 offer today from the Commonwealth that although it
01:18:33 wasn't an offer he wanted to accept, it was an offer he
01:18:36 was willing to except.
01:18:40 He has always to me discussed the fact that
01:18:44 he wished it never happened, that he was remorseful for
01:18:47 it happening, and that things just got out of hand that
01:18:51 day. They happened quickly, and that he generally
01:18:56 thought that something bad was going to happen to him

from Mr. Warthen.

I believe he's going to reiterate those same points to you now, Judge, and I believe he's going to apologize and express his sorrow and remorse to the family of Mr. Warthen.

THE COURT: All right.

MR. REYNOLDS: I'll let him do that now.

THE COURT: I'll hear from Mr. Bishop. If there's something you want to say, this would be the time to do that.

THE DEFENDANT: I stand right here?

THE COURT: Yes, sir.

THE DEFENDANT: All right. Ms., my mom was killed when I was 18 years old. Somebody blew her brains out. I know what that feels like.

Me and Jeff did get into a fight but the day after me and Jeff squashed. Shirkey had no reason to come to me to squash anything.

MS. FAIRMAN: I'm just going to ask if you can ask him to address the judge.

THE DEFENDANT: Shirkey, Shirkey, even though he came to confront me, I asked him can we talk. Shirkey was not trying to hear anything that I had to say. He was in a rage.

I'm not saying this to justify anything that

01:20:26 I've done, but it was no reasoning with Shirkey at the
01:20:30 time. And I was trying to separate myself from Shirkey.
01:20:33 That's why I stayed in Lacrecia's house for five hours
01:20:37 trying to avoid him.

01:20:39 My last measure of avoidance was when he
01:20:42 told me to come the fuck outside was to go to the
01:20:49 kitchen to go out the basement to go out the back door,
01:20:52 but I never got to make it to the dining room, because
01:20:56 as soon as I got in the middle of the living room, he
01:20:58 was charging at me.

01:20:59 Believe it or not, Shirkey Warthen was
01:21:03 intoxicated. He was in a rage, and it was no telling
01:21:09 what type of measurement he was going to take. I had a
01:21:13 split second, and I reacted. I'm sorry for my actions,
01:21:16 and that's the honest to God truth. I'm sorry for my
01:21:22 actions. I'm sorry for your loss, Miss.

01:21:30 THE COURT: Thank you, sir. All right. So
01:21:37 then with that, the Court is going to impose the
01:21:43 negotiated sentence in this matter. On the count of
01:21:49 murder in the third degree, the Court will impose the
01:21:52 sentence of 20 to 40 years.

01:22:16 On the possessing an instrument of crime,
01:22:19 the Court will impose a sentence of 22 --
01:22:23 excuse me, two-and-a-half to five years. Those two are
01:22:28 to run concurrently.

01:22:32 And then on the count of aggravated assault, the Court will impose a sentence of five to ten years to run... Let me do that again. The 20 to 40 and the two-and-a-half to five are to run consecutive, okay. And then the 5 to 10 is to run concurrent.

THE CLERK: Okay.

THE COURT: For a total sentence of 22-and-a-half to 45 years to be served in a state correctional institution to be supervised by the state parole board upon your release. Is there any claim for restitution?

MS. FAIRMAN: There's a request -- there's unreimbursed bills in the amount of $3,000 approximately.

THE COURT: If you will complete the appropriate form.

MS. FAIRMAN: I will.

THE COURT: That will be imposed, restitution in the amount of $3,000. There will be court fines and costs which the probation department will let me know what those are and will work out a repayment schedule with you for that. Do you understand?

THE DEFENDANT: Yes.

THE COURT: You may inquire. I mean, excuse

me. Please advise your client.

MR. REYNOLDS: Understood, Judge understood.

Mr. Bishop, you've just been sentenced by the Honorable Judge Ransom to 22-and-a-half to 45 years. Do you understand that?

THE DEFENDANT: Yes.

MR. REYNOLDS: And you understand that's the aggregate of your sentence. There were a lot of numbers up there, but your total sentence is 22-and-a-half to 45 years.

THE DEFENDANT: Yes.

MR. REYNOLDS: You have ten days from today to file a motion with the judge requesting to withdraw your guilty plea.

THE DEFENDANT: Yes.

MR. REYNOLDS: For the reasons I discussed with you earlier, you understand once you've been sentenced, that's virtually impossible?

THE DEFENDANT: (The Defendant Nods Head)

MR. REYNOLDS: You have 30 days from today to file an appeal to the Superior Court on the grounds that I listed earlier: That your plea today was not knowingly, intelligently, and voluntarily made, that the Court did not have proper jurisdiction to hear your case, or that the sentence you received was somehow over

01:25:21 the maximum sentences that you could receive. Do you understand that?

THE DEFENDANT: Yes.

MR. REYNOLDS: As your appointed counsel, I can file any of those motions for you. Those motions must be in writing, and they need to be filed by me, your attorney.

You have to let me know prior to the expiration of those times and dates though if you wish to proceed, and I'll go to see you shortly if you want to talk about it.

Do you have any questions?

THE DEFENDANT: No.

AUDIENCE MEMBER: Judge, can I ask a question?

COURT CRIER: Hold on, ma'am.

MR. REYNOLDS: I don't know who she is.

MS. FAIRMAN: Ask to nol pros any bills we didn't move on.

THE COURT: That's fine. That's it for today.

(Proceeding was concluded at 1:10 p.m.)

*****

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the hearing of the above cause, and this copy is a correct transcript of the same.

_____

Kristin R. Ferraro, RPR
Official Court Reporter

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