UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2132

MARK A. BROWN,
Appellant

v.

SUPERINTENDENT MAHANOY SCI;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. Civ. No. 2-13-cv-03068)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Peter J. Phipps*
Circuit Judge

Date: February 8, 2022
SLC/cc: Mark A. Brown
Kelly B. Wear, Esq.

DLD-281 **September 30, 2021**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 21-2132

MARK A. BROWN, Appellant

VS.

SUPERINTENDENT MAHANOY SCI; ET AL.

(E.D. Pa. Civ. No. 2:13-cv-03068)

Present: JORDAN, KRAUSE and PHIPPS, Circuit Judges

Submitted is Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because jurists of reason would not debate the District Court's rejection of Appellant's claims. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). In particular, Appellant's claims alleging errors of state law are not cognizable on federal habeas review, see Estelle v. McGuire, 502 U.S. 62, 67-68 (1991), and he did not demonstrate that the admission of "other crimes" evidence deprived him of a fundamentally fair trial." See Riggins v. Nevada, 504 U.S. 127, 149 (1992); Bronshtein v. Horn, 404 F.3d 700, 730 (3d Cir. 2005) ("Admission of 'other crimes' evidence provides a ground for federal habeas relief only if 'the evidence's probative value is so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial.'" (quoting Lesko v. Owens, 881 F.2d 44, 52 (3d Cir. 1989))). Furthermore, given the substantial evidence of Appellant's guilt, jurists of reason could not debate the District Court's rejection of Appellant's claim of insufficient evidence to support the verdict. See Jackson v. Virginia, 443 U.S. 307 (1979) (explaining that in reviewing a challenge to the

Appendix "B"

sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). In addition, jurists of reason would not debate the District Court's conclusion that Appellant failed to demonstrate that he was prejudiced by an alleged violation of Article 36 of the Vienna Convention on Consular Relations. See Breard v. Greene, 523 U.S. 371, 377 (1998) (stating that, even if a "Vienna Convention claim [were] properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial"). Finally, reasonable jurists could not debate the conclusion that Appellant failed to demonstrate that he was prejudiced by his attorney's alleged failure (1) to advise him of his right to testify and (2) to make a second request for a directed verdict following the acquittal of his co-defendants. See Palmer v. Hendricks, 592 F.3d 386, 397-98 (3d Cir. 2010) (holding that attorney's failure to advise client of right to testify does not fall within the "very limited category of errors that are per se reversible" but instead "requires the petitioner to 'show that [the deficient conduct] actually had an adverse effect on the defense.'" (quoting Strickland v Washington, 466 U.S. 668, 693 (1984))); Tackett v. Trierweiler, 956 F.3d 358, 372 (6th Cir. 2020) (stating that "the Supreme Court has held that inconsistent verdicts do not present a constitutional problem").

By the Court,

s/ *Peter J. Phipps*
Circuit Judge

Dated: November 23, 2021
Sb/cc: Mark A. Brown
All Counsel of Record

A True Copy:

Patricia A. Dodszuweit

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

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

Mark A. BROWN,	:	
	:	CIVIL ACTION
Petitioner,	:	NO. 13-3068
	:	
v.	:	
	:	
John KERESTES, et al.,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this **26th** day of **May**, **2021**, upon careful and independent consideration of the pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski and Petitioner's objections thereto, it is hereby **ORDERED** that:

1. The Report and Recommendation (ECF No. 37) is **APPROVED and ADOPTED;**
2. Petitioner's Objections (ECF No. 43) are **OVERRULED;**[1]
3. The Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED and DISMISSED;**
4. There is no basis for the issuance of a certificate of appealability; and
5. The Clerk of Court is **DIRECTED** to mark the case **CLOSED.**

Appendix "C"

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

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[1] Judge Sitarski's Report and Recommendation ("R&R") recommends that the instant habeas petition be dismissed. Pro se Petitioner raises six objections to the R&R. The Court reviews de novo the portions of the R&R to which Petitioner objects. See 28 U.S.C. § 636(b)(1). For the reasons set forth below, the Court will overrule Petitioner's objections and will approve and adopt the R&R.

First, Petitioner objects to the R&R's conclusion that the Superior Court was reasonable in rejecting his argument that his murder and arson charges were "inextricably intertwined" with his corrupt organizations charge. A jury convicted Petitioner on all three counts, but he was subsequently granted habeas relief on the corrupt organizations charge and re-sentenced.

The Superior Court concluded that the charges were not "inextricably intertwined" because evidence of Petitioner's drug ring would have been admissible at trial to establish motive, even without the corrupt organizations charge. See Pa. R. Evid. 404(b).

The Court agrees with the R&R that this decision was neither contrary to nor an unreasonable application of clearly established federal law. See R&R 12.

Second, Petitioner objects to the R&R's conclusion that grounds two, three, and four of his habeas petition are inadequately developed. Petitioner's second ground for habeas relief argues that his conviction was "obtained on a factual basis different than as charged," his third ground alleges the "[j]ury instruction improperly shifted the burden of proof," and his fourth ground asserts a "[c]onviction of less than proof beyond a reasonable doubt of every element of the crime charged." Habeas Pet. 7, 9-10.

The "supporting facts" section for each of these grounds repeats the same factual argument Petitioner used to support ground one, stating only: "Petitioner's conviction on the charge of Corrupt Organization has been set aside leaving murder in the first degree and arson which were inextricably intertwined and considered as part of one prosecution which included the same set of jury instruction on all charges." Habeas Pet. 7, 9-11.

The Court agrees with the R&R that grounds two, three, and four are inadequately developed. See R&R 13. To the extent Petitioner also objects to the R&R's analysis of the merits of grounds two, three, and four, the Court agrees with and will adopt that aspect of the R&R as well. See R&R 13-15.

Third, Petitioner objects to the R&R's conclusion that his ineffective assistance of counsel claims are foreclosed from further review. Petitioner avers trial counsel was ineffective for failing to follow the Vienna Convention (ground five), failing to fully and adequately inform him of his right to testify (ground six), and failing to request a directed verdict when Petitioner's co-defendants were acquitted (ground seven). Habeas Pet. 12-13.

The Court agrees with the R&R that these claims are procedurally defaulted and that Petitioner has not shown cause for why the procedural default should be set aside. See R&R 16-21.

Fourth, Petitioner objects to the R&R's conclusion that his Vienna Convention claim is meritless. This claim (ground five) alleges that Article 36 of the Vienna Convention was violated because although Petitioner was a Jamaican national at the time of his arrest, the Jamaican Consulate was not notified of his arrest. Habeas Pet. 12.

The Court agrees with the R&R that, even assuming Article 36 grants Petitioner individually enforceable rights, Petitioner's claim fails because he has not shown that the failure to contact the Jamaican Consulate prejudiced him. See R&R 18-20.

Fifth, Petitioner objects to the R&R's conclusion that he has not shown that he was prejudiced by trial counsel's alleged failure to adequately explain his right to testify (ground six).

The Court agrees with the R&R that even if counsel did fail to fully inform Petitioner of his right to testify, the habeas petition does not adequately explain how such an error impacted Petitioner's case. See R&R 20; see also Palmer v. Hendricks, 592 F.3d 386, 399 (3d Cir. 2010) (concluding that the petitioner failed to make an adequate showing that he was prejudiced by his attorney's alleged failure to advise him of the right to testify); see also Ruiz v. Superintendent Huntingdon SCI, 672 F. App'x 207, 211 (3d Cir. 2016) ("[P]rejudice is not presumed where counsel fails to advise a client of his right to testify. Rather, the prejudicial effect of this failure depends on the significance of the facts to which the defendant might have testified . . . . " (citing Palmer, 592 F.3d at 399)).

Finally, Petitioner objects to the R&R's conclusion that his ineffectiveness claim related to counsel's failure to request a directed verdict (ground seven) lacks merit.

The Court agrees with the R&R that trial counsel's decision not to request a directed verdict does not constitute ineffectiveness because such a motion would almost certainly have been unsuccessful. See R&R 21.

For the reasons set forth above, the Court will overrule Petitioner's objections and will approve and adopt the R&R.

12.8.20

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

MARK A. BROWN,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 13-cv-3068**
	:	
JOHN KERESTES, et al.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **November 30, 2020**

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Mark A. Brown (Petitioner), an individual currently incarcerated at the State Correctional Institution – Mahanoy, located in Frackville, Pennsylvania. The Honorable Eduardo C. Robreno referred the matter to me for a Report and Recommendation. (Order, ECF No. 27). For the following reasons, I respectfully recommend that the petition for habeas corpus be **DISMISSED**.

I. FACTUAL AND PROCEDURAL HISTORY

In its August 17, 2010 opinion, the Pennsylvania Superior Court recited the facts as follows:

> The facts of this case stem from incidents which occurred in 1988 or earlier. The case involved the prosecution of four persons: [Petitioner], Michael McCune ('Shaheen'), Sha Phillip Devon ('Sha') and Romero Green ('Mario'). Each of the other three defendants were found Not Guilty of all charges in the same trial with ~~Brown~~ Petitioner. X
>
> The evidence produced at trial was that there existed several drug houses in the Germantown section in the city of Philadelphia.

Appendix "D"

One of these was located at 5848 Crittenden Street. ... The Commonwealth alleged and the witnesses testified that crack was made from cocaine, which was imported from New York by [Petitioner], known as 'Bigger.' [Petitioner]'s girlfriend was Veronica 'Rat' Robinson. She lived in the 5855 address with her mother and grandmother.

. . . .

At the time of the trial the Commonwealth never produced any evidence of specific sales of narcotics or drugs. There was testimony to the effect that cocaine was imported from New York and sold in batches amounting to $1,500.00 worth of drugs in each batch. The testimony also indicated that several batches per day were sold at each of the locations. The Commonwealth did not charge any specific crime in violation of the Drug and Narcotic Act. The Commonwealth, however, did proceed to trial on the theory that selling narcotics was one of the predicate acts, which is required before a conviction of the Corrupt Organizations [Act] can be maintained. The Commonwealth submitted three possible areas of predicate acts to the jury: Drug Sales; Murder; Arson...

The motivation behind the instant killing was the fact that a shortage for the payment of drugs began to occur in the transactions at 5848 Crittenden Street.

About August 7, 1988, Anthony Todd Ford came to Philadelphia from New York and began to work at the drug house. The deceased was also brought from New York to sell drugs. There is no evidence of the true identity of the victim other than that he was named 'Pete.'

By October 1988, the drug house funds were $900.00 short. One of the distributors of the drugs blamed 'Sha' for stealing the money. After a confrontation, the suspicion shifted to Anthony Todd Ford. On October 21, 1988, Ford was beaten by four men at the Crittenden crack house over the money shortage. Later, after a confrontation between [Petitioner] and Anthony Todd Ford, [Petitioner] took a gun away from Ford. [Petitioner], the boss, then permitted Ford to resume managing the house. The focus of responsibility for missing drug funds shifted.

In the early [morning of October 24, 1988] prior to the killing, 'Sha' forced 'Glen' and 'Pete' to strip to find the money. They could not find the money.

> The suspicion again shifted away from Anthony Todd Ford to 'Pete.' At that point in time, both Anthony Todd Ford and 'Pete' were not too happy about returning back to the drug house.
>
> Tracy Allen was a female courier who carried drugs from [Petitioner's] brother (Mark Anthony Chase) to [Petitioner.] Tracy received orders from [Petitioner] to play up to Pete sexually. After a brief encounter at a local tavern, where they had a drink, Tracy brought Pete back to 5848 Crittenden Street.
>
> At this point in time, Pete was beaten to death. The Commonwealth attempted to show that the instruments used were a 2" by 4" board and a machete and hammer.
>
> Tracy Allen placed the other three defendants at the scene of the murder on the date of the killing. She described the organization as drug dealers and that [Petitioner] was in charge. She stated that [Petitioner] was the one who used the words, 'if he (Pete) did not give you the information, then execute him.' [Petitioner] was not present at the time Pete was killed...
>
> Some time later, after Tracy left the house, she returned to find that the firemen were there and that the fire inside the house had burned the body of Pete. After that she went to a Park Avenue address where she met with [Petitioner], Romero, Sha and Shaheen. She heard [Petitioner] say, 'this is not the way I wanted it down.' Tracy told him that she did not want to be involved in the organization, whereupon [Petitioner] told her: 'What happened to Pete could happen to you.' After this threat, Tracy did not come forward to the police department until July 11, 1989.

Com. v. Brown, No. 457 EDA 2009, at 3–6 (Pa. Super. Ct. Aug. 17, 2010) (quoting Trial Court Opinion, 8/5/09, at 1–5 (footnotes omitted)).

Petitioner, McCune, Devon, and Green were tried jointly for the murder. The jury acquitted Petitioner's co-defendants of all charges, and found Petitioner guilty of first-degree murder, arson, and corrupt organizations. ~~(Crim. Docket at 4–5)~~. On April 27, 1994, the trial court sentenced Petitioner to life in prison for the first-degree murder, with a consecutive term of forty-three to eighty-six months' imprisonment for corrupt organizations, and no further penalty

for the arson conviction. ~~*Id.*~~

On April 5, 1995, the Pennsylvania Superior Court affirmed Petitioner's judgment of sentence. *See Com. v. Brown*, No. 1920 PHL 1994 (Pa. Super. Apr. 5, 1995) (unpublished memorandum). Petitioner did not thereafter seek Pennsylvania Supreme Court review. Petitioner filed three PCRA petitions, the last of which was dismissed as untimely on October 27, 2004. ~~(Crim. Docket at 7).~~

On March 31, 2008, Petitioner filed his first habeas corpus petition in federal court. *Brown v. Kerestes*, 2008 WL 4570562, at *2 (E.D. Pa. 2008). In his petition, Petitioner raised eleven claims, including that the evidence was insufficient to support Petitioner's corrupt organizations conviction. *Id.* On October 9, 2008, the court granted relief on the corrupt organizations claim and remanded Petitioner's case for resentencing. ~~*Id.*~~ The court dismissed the rest of Petitioner's claims as untimely. ~~*Id.*~~

On January 7, 2009, the trial court vacated Petitioner's sentence for corrupt organizations, and reinstated the original sentences for murder and arson. ~~(Crim. Docket at 4–5).~~ Petitioner appealed, and on August 17, 2010, the Superior Court remanded for resentencing, specifying that Petitioner was to be represented by counsel. *Com. v. Brown*, No. 457 EDA 2009 (Pa. Super. Aug. 17, 2010). On December 6, 2010, Petitioner was sentenced to the mandatory term of life imprisonment for first-degree murder, with no further penalty for the arson conviction. ~~(Crim. Docket at 4–5, 9).~~

Petitioner then appealed his 2010 resentencing, arguing that the corrupt organizations charge was "inextricably intertwined" with the evidence presented against him at trial for the murder and arson charges, and that, since the corrupt organizations conviction had been vacated, he should be given a new trial on the remaining charges. *Com. v. Brown*, No. 34 EDA 2011, at 8

(Pa. Super. Sept. 20, 2012). The Superior Court found the claim to be meritless and outside the scope of appeal, and affirmed the judgment of sentence on September 20, 2012. ~~*Id.*; Crim. Docket at 10~~.

On May 3, 2013, Petitioner filed a PCRA petition alleging that: (1) the Commonwealth failed to comply with the Vienna Convention on Consular Relations (Vienna Convention); (2) trial counsel failed to allow Petitioner to testify; (3) trial counsel failed to request a directed verdict based on the co-defendants' acquittals; (4) trial counsel failed to appoint counsel to represent Petitioner at his first resentencing hearing; (5) trial counsel failed to request a mistrial based on juror bias; and (6) prior PCRA counsel failed to raise these claims. ~~(PCRA Pet., at ¶ 19)~~. On September 6, 2016, the PCRA court dismissed the petition, and the Superior Court affirmed the dismissal on June 26, 2017. ~~(Crim. Docket at 11, 12)~~.

On July 6, 2018, Petitioner filed a pro se petition for writ of habeas corpus seeking clarification of his sentence for first-degree murder. (Crim. Docket at 12; Com. v. Brown, 2020 WL 838503, at *2 (Pa. Super. Ct. Feb. 20, 2020)). The trial court treated the petition as an untimely PCRA petition and dismissed it on March 5, 2019. The Superior Court agreed with Petitioner that a habeas corpus petition would be the proper avenue for the claim, but nonetheless affirmed the dismissal on February 20, 2020. ~~(Crim. Docket at 13, 14; Brown, 2020 WL 838503)~~.

Meanwhile, on May 30, 2013, Petitioner filed the instant habeas petition.[1] ~~(Hab. Pet.~~

[1] Pennsylvania and federal courts employ the prisoner mailbox rule, pursuant to which the *pro se* petition is deemed filed when it is given to prison officials for mailing. *See Perry v. Diguglielmo*, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. 1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Commonwealth v. Castro*, 766 A.2d 1283, 1287 (Pa. Super. 2001). In this case, Petitioner certified that he gave his habeas petition to prison officials on May 30, 2013, and it will be deemed filed on that date. (Hab. Pet. 18, ECF No. 1).

~~ECF No. 1)~~. In his petition, Petitioner raised seven claims for relief: (1) that Petitioner's convictions for murder and arson were "inextricably intertwined" with his vacated conviction for corrupt organizations; (2) his conviction was obtained on a factual basis different than as charged; (3) a jury instruction improperly shifted the burden of proof; (4) his conviction was based on less than proof beyond a reasonable doubt; (5) his rights to due process were violated by the Commonwealth's failure to comply with the requirements of the Vienna Convention; (6) trial counsel was ineffective for failing to inform defendant of his right to testify; and (7) trial counsel was ineffective for not requesting a directed verdict when Petitioner's co-defendants were found not guilty, and PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness. ~~(Hab. Pet. at 5, 7, 9, 10, 12, 13, ECF No. 1)~~.

On June 12, 2013, the Honorable Eduardo C. Robreno first referred this matter to me for a Report and Recommendation. ~~(Order, ECF No. 2)~~. On February 26, 2014, Judge Robreno approved this Court's Report and Recommendation to transfer the petition to the Third Circuit as a petition for leave to file a second or successive petition. ~~(Order, ECF No. 16)~~. On January 23, 2015, the Third Circuit denied the petition for leave to file a second or successive petition as "unnecessary," expressing no opinion on the merits of Petitioner's claims. In re Brown, 594 F. App'x 726, 730 (3d Cir. 2014).

On March 19, 2015, Judge Robreno approved this Court's Report and Recommendation recommending that the petition be stayed while Petitioner litigated his pro se habeas claim asking for clarification of his sentence in the state courts. ~~(Order, ECF No. 22)~~. The trial court treated the petition as an untimely PCRA and dismissed it on May 5, 2019, and the Superior Court affirmed the dismissal on February 20, 2020. ~~(Crim. Docket at 13, 14; Brown, 2020 WL 838503)~~. When the instant habeas matter was removed from civil suspense on August 13, 2018,

Judge Robreno again referred it to me for a Report and Recommendation. ~~(Order, ECF No. 27)~~. On February 28, 2020, this Court lifted the stay. ~~(Order, ECF No. 28)~~.

II. LEGAL STANDARD

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA:

> 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir.

2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)). Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to

> avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman*, 501 U.S. at 750. To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts*, 228 F.3d at 196. Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption

by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citation omitted).

III. DISCUSSION

A. Ground One: Corrupt Organizations Charge

In his first ground for relief, Petitioner argues that the prosecution of his corrupt organizations charge was "inextricably intertwined" with the charges of first-degree murder and arson, and that, since his conviction for corrupt organizations was set aside, he is entitled to a

new trial on the murder and arson convictions. (Hab. Pet. at 5, ECF No. 1). I find this claim to be procedurally defaulted and without merit.

1. Procedural Default

Petitioner first raised this claim in his appeal of his 2010 resentencing. The Superior Court denied his appeal on the basis that "a claim for a new trial and challenges to the admission of evidence are not within the scope of an appeal from a resentencing pursuant to a federal *habeas corpus* petition." *Brown*, 34 EDA 2011 at 8 (citing *Com. v. Lesko*, 15 A.3d 345, 362 (Pa. 2011)). The Court pointed out that only issues pertaining to resentencing procedure can be raised on appeal from that resentencing. *Id.* (citing *Com. v. McKeever*, 947 A.2d. 782 (Pa. Super. 2008)). Petitioner's claim here related to evidence introduced against him at trial, rather than his resentencing, so the Superior Court properly dismissed his appeal as outside the scope of review.

In its September 20, 2012 opinion, the Superior Court did alternatively address the merits of this claim "out of an abundance of caution." *Brown*, 34 EDA 2011 at 8. A state court may dismiss a claim on an independent and adequate state ground even while addressing the merits in an alternative holding; therefore, the Superior Court's analysis of the merits of this claim does not save it from procedural default. *See Harris v. Reed*, 489 U.S. 255, 264 n. 10 (Feb. 22, 1989).

Finally, Petitioner has not shown cause for why the procedural bar should be set aside. In order to show cause, a petitioner must demonstrate that some objective external factor impeded his ability to comply with the state rule. Here, Petitioner has not asserted any such factor. (Hab. Pet. at 5, ECF No. 1). Since Petitioner has not demonstrated cause or prejudice, his claim is procedurally barred.

2. Merits Review

In its 2012 opinion, the Superior Court found that Petitioner's corrupt organizations charge and his murder and arson charges were not "inextricably intertwined," because the evidence of his participation in the drug ring would have been admissible at trial even without the corrupt organizations charge. *Brown*, 34 EDA 2011 at 13. The Court found that the evidence would have been admissible in order to establish motive, an enumerated exception to the general prohibition of the use of other wrong acts in Pa.R.E. 404. *Id.*; Pa.R.E. 404(b).

This decision was not contrary to or an unreasonable application of clearly established federal law. The evidence in this case showed that the victim was killed because of Petitioner's belief that he was involved in stealing money from the drug ring. This makes evidence of Petitioner's involvement in the drug ring highly relevant in establishing his motive for the crime. *See, e.g. Commonwealth v. Fisher*, 769 A.2d 1116, 1128 (Pa. 2001) (holding defendant's belief that the victim had deceived him in a drug deal admissible as evidence of motive). Therefore, the drug ring evidence would have been admissible against Petitioner even without the corrupt organizations charge.

Based on this, the Superior Court was reasonable in finding Petitioner's claim that his murder and arson charges were inextricable from his corrupt organizations charge to be without merit. Therefore, I recommend that relief on this ground be denied.

B. Grounds Two, Three, and Four

Petitioner titles his second ground for relief "[c]onviction obtained on a factual basis different than as charged," (Hab. Pet. at 7, ECF No. 1). His third ground for relief is that a "[j]ury instruction improperly shifted [the] burden of proof," *Id.* at 9. Finally, his fourth ground for relief asserts a "[c]onviction of less than proof beyond a reasonable doubt of every element of

the crime charged." *Id.* at 10. As his factual basis for each of these claims, Petitioner asserts, verbatim, the same factual argument used to support his Ground One:

> Petitioner's conviction on the charge of Corrupt Organization[s] has been set aside leaving murder in the first degree and arson which were inextricably intertwined and considered as part [of] one prosecution which included the same set of jury instructions on all charges.

(Hab. Pet. at 5, 7, 9, 10, ECF No. 1). Because of this, I find Petitioner's Grounds Two, Three, and Four to be inadequately developed. However, liberally construing Petitioner's claims, I will also briefly address the merits of each.

1. Merits Review

a. Grounds Two and Four: Sufficiency of the Evidence

In his second ground for relief, Petitioner argues that his conviction was obtained on a different factual basis than as charged. (Hab. Pet. at 7, ECF No. 1). In his fourth ground for relief, Petitioner argues that he was convicted on less than proof beyond a reasonable doubt. *Id.* at 10. Liberally construing these claims, Petitioner appears to argue that, because his corrupt organizations conviction was vacated, the evidence relating to the drug ring should not have been admitted, and that the remaining evidence was insufficient to convict him of murder and arson.

When a habeas petitioner challenges the sufficiency of the evidence underlying a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). The habeas court must examine the evidence "with reference to 'the substantive elements of the criminal offense as defined by state law.'" *Eley v. Erickson*, 712 F.3d 837, 848 (3d Cir. 2013) (quoting *Jackson*, 443 U.S. at 324). However, "the minimum amount of evidence

that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012). This standard does not allow a reviewing court to substitute its judgment for that of the jury. *Jackson*, 443 U.S. at 318-19. The court must defer to the jury's findings regarding witness credibility, resolving conflicts of evidence, and drawing reasonable inferences from the evidence. *Id.* at 319. If, upon review of the evidence, the court finds that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," then habeas relief is appropriate. *Id.* at 324.

In this case, the evidence introduced at trial was sufficient to convict Petitioner. As explained above, even without the corrupt organizations charge, the evidence of Petitioner's drug ring would have been admissible as evidence of motive. *See supra* III.A.2. Additionally, the rest of the evidence admitted against Petitioner at trial was strong. The prosecution presented the testimony of members of the drug ring, including Anthony Todd Ford and Tracy Allen, who was present and involved in the preparation for and aftermath of the murder. (N.T. 10/25/90, 24-44, 50-52, 54-56; 10/29/90, 181, 185, 195). In her testimony, Allen made it clear that Petitioner had given her instructions and orchestrated the killing. *Id.* The prosecution also presented physical evidence of the crime that corroborated Allen's version of events, including: a hammer, two pieces of wood, and a knife, all stained with blood; a bullet from the door; and a can of kerosene next to the victim's body. (N.T. 10/23/90, 83–84, 99, 112, 121, 127–33; 10/24/90, 16, 24–25; 10/31/90, 9). The prosecution also presented the testimony of an assistant fire marshal, who determined that the fire at the drug house had been intentionally started by someone pouring accelerant on the body. (N.T. 10/31/90, 9–11, 51–59). This evidence was sufficiently strong for a rational trier of fact to find that the elements of murder in the first degree and arson had been satisfied.

Therefore, Petitioner's sufficiency of the evidence argument fails on the merits, and I recommend that his Grounds Two and Four be dismissed.

b. Ground Three: Improper Jury Instruction

In his third ground for relief, Petitioner argues that the instructions given to the jury improperly shifted the burden of proof. (Hab. Pet. at 9, ECF No. 1). Petitioner does not point to which part of the jury charge allegedly shifted the burden of proof, or how it could have done so, making it difficult to interpret his claim. Moreover, Petitioner does not illustrate how the jury instructions are connected to the improper corrupt organizations charge. Because Petitioner does not adequately explain this claim, it is fatally undeveloped and not cognizable.

Very liberally construing Petitioner's claim, however, he may be arguing that the trial court should not have instructed the jury to consider the corrupt organizations charge, or the evidence of the drug ring. However, to the extent that the corrupt organizations charge was improper, Petitioner has already received relief on that basis. And as discussed previously, the evidence of the drug ring would likely have been admissible as evidence of motive even without the corrupt organizations charge. *See supra* III.A.2. Therefore, Petitioner's argument is meritless, and relief on this claim should be denied.

C. Grounds Five, Six, and Seven: Ineffective Assistance of Counsel

In his ground five for relief, Petitioner argues that trial counsel was ineffective for, and that the prosecutor deprived him of his constitutional rights by, failing to follow the Vienna Convention. (Hab. Pet. at 12, ~~ECF No. 1~~). In his ground six, Petitioner argues that trial counsel was ineffective for failing to fully and adequately inform him of his right to testify. *Id.* In his ground seven, Petitioner argues that trial counsel was ineffective for not requesting a directed

verdict when Petitioner's co-defendants were acquitted of all charges.[2] *Id.* at 13. I find these claims to be procedurally barred and without merit.

1. Procedural Default

Petitioner first raised these claims in his May 2013 PCRA petition, which the Superior Court dismissed as untimely. *Com. v. Brown*, 2017 WL 2772683, at *2 (Pa. Super. June 26, 2017). Under the PCRA, all petitions for post-conviction relief must be filed within one year of the date the defendant's judgment of sentence became final. 42 Pa.C.S. § 9545(b)(1). Petitioner argued that his PCRA petition was timely because it had been filed within one year of his resentencing becoming final. However, the Superior Court, relying on *Commonwealth v. McKeever*, found that a grant of federal habeas relief on one charge does not "reset the clock" for purposes of the PCRA where the relief granted did not reinstate Petitioner's direct appeal rights and only affected his sentence. *Brown*, 2017 WL 2772683, at *4; *Com. v. McKeever*, 947 A.2d 782 (Pa. Super. 2008). Based on this, the Superior Court found that Petitioner's judgment of sentence became final on May 5, 1995, and that his PCRA was therefore untimely. *Brown*, 2017 WL 2772683, at *5.

Dismissal of a PCRA petition based on the PCRA's statute of limitations constitutes an independent and adequate state ground. *See, e.g. Peterson v. Brennan*, 196 F.Appx. 135, 142 (3d Cir. 2006) (affirming that "the PCRA statute of limitations is an adequate and independent state ground to deny habeas relief."); *Moore v. Walsh*, No. 14-5533, 2015 WL 2446725, at *3 (E.D.

[2] In his Grounds Six and Seven, Petitioner also asserts that PCRA counsel was ineffective for failing to raise these claims. (Hab. Pet. at 13, ECF No. 1). However, ineffective assistance of PCRA counsel is not cognizable on federal habeas review. See 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."); *Burton v. Glunt*, No. 07-1359, 2013 WL 6500621, at *46 (E.D. Pa. Dec. 11, 2013).

Pa. May 18, 2015) ("These claims, which [petitioner] did not raise in his first PCRA petition, are therefore procedurally defaulted under 42 Pa.C.S.A. § 9545(b)."). Because the Superior Court properly dismissed Petitioner's PCRA as untimely, these claims are foreclosed from further state review and are therefore procedurally barred.

Finally, Petitioner has not shown cause for why the procedural default for these claims should be set aside. In grounds six and seven, Petitioner asserts that PCRA counsel was ineffective for failing to raise trial counsel's errors. These claims might be liberally construed to invoke the narrow exception to the general rule that attorney error does not constitute cause for procedural default enumerated in *Martinez v. Ryan*. 132 S. Ct. 1309 (2012).

Under *Martinez*, a petitioner can demonstrate cause to excuse procedural default of an ineffective assistance of counsel claim if: (1) his state requires that claims of trial counsel ineffectiveness be deferred to state collateral proceedings, and (2) he shows that post-conviction counsel was ineffective at the initial post-conviction proceedings for failing to raise the underlying trial counsel ineffectiveness claim. *Id.* at 1318. A petitioner must establish that the underlying claim of trial counsel's ineffectiveness is "substantial," meaning that it has "some merit." *Id.* at 1318-19. For the reasons discussed below, I do not find Petitioner's claims to be substantial.

2. Merits Review

A claim for ineffective assistance of counsel is governed by *Strickland v. Washington*. In *Strickland*, the United States Supreme Court established the following two-pronged test to obtain habeas relief on the basis of ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must

> show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Thus . . . a defendant must overcome the 'presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Here, Petitioner has not satisfied *Strickland*, because he has not shown that counsel's performance was deficient, or that counsel's actions prejudiced his case at trial.

a. Ground Five: Vienna Convention

In his Ground Five, Petitioner alleges that trial counsel was ineffective for, and that the prosecutor and police deprived him of his constitutional rights by, failing to follow the Vienna Convention. He argues that, because of his status as a Jamaican national, the Jamaican consulate should have been notified of his arrest in accordance with Article 36 of the Convention. (Hab. Pet. at 12, ECF No. 1).

Whether Article 36 provides for individually enforceable rights has not been firmly decided by the U.S. Supreme Court. *See Breard v. Greene*, 523 U.S. 371, 376 (Apr. 14, 1998). Several courts of appeals have explicitly held that it does not. *See, e.g. United States v.*

Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001); *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008); *Mora v. New York*, 524 F.3d 183 (2nd Cir. 2008); *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007). The Seventh Circuit has held that the treaty does create individual rights. *See Osagiede v. U.S.*, 543 F.3d 399 (7th Cir. 2008); *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007). A number of courts have avoided deciding the issue by finding that, regardless of whether the treaty creates a private right, the various remedies sought by defendants, such as quashing an indictment, the exclusionary rule, or overturning a conviction, are not appropriate cures for a violation. *See, e.g. United States v. Santos*, 235 F.3d 1105, 1108 (8th Cir.2000); *U.S. v. Lombera–Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000); *U.S. v. Li*, 206 F.3d 56, 66 (1st Cir. 2000). Other courts have held that a defendant must show prejudice to establish a violation of the Convention. *See, e.g. Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005); *U.S. v. Ademaj*, 170 F.3d 58, 67 (1st Cir. 1999). The Third Circuit followed a blend of these last two approaches in *United States v. Castillo*, where it "assume[d], without deciding," that Article 36 granted the defendant individually enforceable rights, but found that dismissal of the indictment or suppression of the evidence was not an appropriate remedy, and that the defendant had not shown how the failure to notify the consulate prejudiced him. 742 Fed.Appx. 610, 614–15 (3d Cir. 2018).

In this case, there is no basis to conclude that Petitioner's claim of a Vienna Convention violation would have succeeded. While it may not be definitively settled as to whether Article 36 grants individually enforceable rights, several jurisdictions have found that it does not, and only one has found that it does. Even assuming the Vienna Convention grants individual rights, the Third Circuit ruled in *Castillo* that a showing of prejudice is necessary to successfully invoke Article 36. Here, Petitioner has not shown that the prosecution's or trial counsel's failure to

invoke the Vienna Convention had any prejudicial effect on his case. Petitioner argues that his limited ability to speak English prevented him from fully understanding his situation. (Hab. Pet. at 12, ECF No. 1). However, he does not suggest how contacting the Jamaican consulate might have alleviated this problem, or explain why he could not request the assistance of a court interpreter. This makes any claim based on the Article 36 violation meritless, and counsel is not obligated under *Strickland* to raise a meritless argument. *See U.S. v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015) (citing *U.S. v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999)).

Because Petitioner does not explain how contacting the Jamaican consulate could have changed the results of his trial, he has not satisfied *Strickland*, and this claim is meritless.

b. Ground Six: Failure to Explain Right to Testify

In his Ground Six, Petitioner alleges that counsel did not adequately explain his right to testify. However, Petitioner does not offer any factual basis for this claim, or make any indication of what his testimony would have been at trial. Because of this, Petitioner has not offered any evidence to show that trial counsel's alleged failure to fully explain Petitioner's right to testify caused him any prejudice at trial. In this case, the evidence the Commonwealth introduced against Petitioner at trial included statements from multiple witnesses regarding the Petitioner's role in the murder, as well as physical evidence obtained from the scene. (N.T. 10/25/90, 54–56; 10/23/90, 83–84, 99, 112, 121, 127–133; 11/1/90, 138; 11/7/90, 77). Because the evidence presented against Petitioner was strong, even if counsel did fail to fully inform Petitioner of his right to testify, there is nothing to suggest such an error would have had any effect on Petitioner's case.

Because Petitioner has failed to show that counsel's alleged error prejudiced his trial, his claim fails under *Strickland* and is without merit.

c. Ground Seven: Failure to Request Directed Verdict

Finally, in his Ground Seven, Petitioner argues that trial counsel was ineffective for not requesting a directed verdict when Petitioner's co-defendants were found not guilty. Here, as in Ground Five, Petitioner purports to fault trial counsel for failing to raise a meritless claim.

Petitioner's conviction may not have in fact been inconsistent with the acquittals of his co-defendants; the evidence at trial showed that Petitioner was the leader of the drug ring, and was therefore not identically situated to his co-defendants. Nonetheless, Pennsylvania law permits inconsistent verdicts. *See, e.g. Commonwealth v. Phillips, 879 A.2d 1260,* 1263 (Pa. Super. 2005); *Commonwealth v. Gillen*, 798 A.2d 32 225, 230 (Pa. Super. 2002); *Commonwealth v. Troy*, 553 A.2d 992, 996 (Pa. Super. 1989); *see also Harris v. Rivera*, 454 U.S. 339, 345 (Dec. 14, 1981) (insufficiency in a verdict was not sufficient reason to set it aside on a habeas corpus challenge). Petitioner's trial counsel would not have had any reason to raise a motion for directed verdict on this ground, as such a motion would almost certainly have been unsuccessful.

As discussed above, failure to raise a meritless claim does not constitute ineffectiveness under *Strickland.* Therefore, this claim is meritless, and Petitioner does not satisfy the *Martinez* exception to procedural default.

For these reasons, I recommend that all three of Petitioner's ineffective assistance of counsel claims be denied.

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that Petitioner's petition for writ of habeas corpus be denied without the issuance of a certificate of appealability.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW this 30th day of November, 2020, I respectfully RECOMMEND that the petition for writ of habeas corpus be DENIED without the issuance of a certificate of appealability.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
United States Magistrate Judge

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MARK BROWN	:	
Appellant	:	No. 802 EDA 2019

Appeal from the PCRA Order Entered March 5, 2019
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0306772-1990

BEFORE: LAZARUS, J., NICHOLS, J., and McLAUGHLIN, J.

MEMORANDUM BY NICHOLS, J.: **FILED FEBRUARY 20, 2020**

Appellant Mark Brown appeals *pro se* from the order denying his petition for writ of *habeas corpus*.[1] Appellant argues that the trial court abused its discretion by denying his request for clarification of his sentence. We affirm.

We previously summarized the underlying facts and procedural history of this matter as follows:

> In 1990, a jury convicted Appellant of first-degree murder, arson, and engaging in activities of corrupt organizations. In 1994, Appellant was sentenced to life imprisonment for murder, and to a consecutive prison sentence of forty-three to eighty-six months on the corrupt organizations charge. We affirmed the judgment of sentence on April 5, 1995. Appellant did not seek review by the Supreme Court of Pennsylvania. Appellant thereafter filed several PCRA petitions, none of which were successful.

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[1] As discussed below, the trial court initially dismissed Appellant's petition as a serial untimely Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546 petition.

Appendix "E"

> Appellant did have success, however, in federal court: in 2008, Appellant filed a *pro se* petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania. As a result of that petition, the District Court issued an order instructing that Appellant's conviction for violating the corrupt organizations law be vacated and Appellant be resentenced without regard to that charge.
>
> * * *
>
> In December 2010, Appellant was again sentenced, following a hearing, to life imprisonment for first-degree murder.
>
> Appellant appealed from his 2010 resentencing. He asserted that the corrupt organizations charge adversely affected the evidence presented against him at trial on the other two charges, and, because his corrupt organizations conviction has since been vacated, he should be awarded a new trial on the remaining charges. On September 20, 2012, we affirmed the trial court's denial of a new trial, because
>
> > a claim for a new trial and challenges to the admission of evidence are not within the scope of an appeal from resentencing pursuant to a federal *habeas corpus* petition. Guilt was established for the [murder and arson] charges in 1990, more than twenty years ago, and Appellant's last PCRA petition was dismissed in 2004. . . . [O]nly issues pertaining to the resentencing procedure [can] be raised on appeal from that resentencing.

Commonwealth v. Brown, 3007 EDA 2016 at 9 (Pa. Super. filed June 26, 2017) (unpublished mem.) (citation omitted) (some formatting altered).

Appellant subsequently filed an untimely PCRA petition, which the PCRA court dismissed. On appeal, this Court affirmed the PCRA court's ruling, explaining that

> Appellant's conviction on the corrupt organizations charge has been vacated through the federal *habeas* petition, Appellant has consequently been resentenced by the trial court, and Appellant's PCRA petition comes within one year after that judgment became

> final. However, the finality of the convictions which Appellant seeks to challenge has remained undisturbed since May 5, 1995, when the period in which Appellant could have sought review by the Pennsylvania Supreme Court expired and his direct appeal concluded. Therefore, Appellant cannot now file a PCRA petition raising errors unrelated to his resentencing. To allow otherwise would thwart the jurisdictional timeliness requirements of the PCRA.

Id. at 9.

On July 6, 2018, Appellant filed the instant *pro se* petition for writ of *habeas corpus* seeking clarification of his sentence for first-degree murder. Specifically, Appellant argued there was "ambiguity" in the statute under which he was sentenced, as it "may or may not preclude eligibility for parole." Appellant's Pet. for Writ of *Habeas Corpus*, 7/6/18, at 4.

The Commonwealth filed a response in which it agreed with Appellant that his claim was not cognizable under the PCRA. However, the Commonwealth argued that Appellant waived his *habeas* claim by failing to raise it previously. Nonetheless, the Commonwealth asserted that Appellant's claim was meritless.

Initially, the trial court regarded Appellant's petition as an untimely PCRA petition. On January 31, 2019, the trial court issued a notice of intent to dismiss Appellant's petition pursuant to Pa.R.Crim.P. 907. The Rule 907 notice stated that (1) Appellant's petition was untimely, (2) Appellant's claims had no arguable merit, and (3) Appellant's claims were previously litigated. ***See*** Trial Ct. Rule 907 Notice, 1/31/19. Appellant filed a *pro se* response on

February 12, 2019, asserting that *habeas corpus* was the proper vehicle for his claim. On March 5, 2019, the trial court dismissed Appellant's petition.

On March 12, 2019, the trial court docketed Appellant's *pro se* notice of appeal. Appellant subsequently filed a timely court-ordered Pa.R.A.P. 1925(b) statement. The trial court issued a Rule 1925(a) opinion asserting that although Appellant raised a *habeas* claim, he waived the issue by failing to raise it at sentencing, in a post-sentence motion, or on direct appeal. ***See*** Trial Ct. Op., 4/15/19, at 6-7.

On appeal, Appellant raises one issue for our review:

> Whether the trial court erred by denying Appellant's petition for writ of *habeas corpus* relief seeking clarification as to whether the statute under which he was sentenced, 42 Pa.C.S. § 9711, possessed an eligibility to apply for parole component?

Appellant's Brief at 3 (some formatting altered).

Appellant argues that "[t]he statutes governing first degree murder appear[] to have extreme flaws which directly [a]ffect the legality, constitutionality, and applicability of the sentences imposed for such convictions." ***Id.*** at 8. Appellant acknowledges that an offender may be sentenced to life without parole for first-degree murder. ***Id.*** at 7. However, he notes that while Section 9714(a)(2) "specifies a sentencing condition of 'without parole,'" for repeat offenders, Section 9711 "only authorizes a sentence of life imprisonment, with no additional sentencing condition preventing parole eligibility." ***Id.*** Appellant does not explicitly claim that his sentence exceeds the statutory maximum. Instead, he suggests that because

Section 9711 does not mention parole, the legislature's intent is unclear. Therefore, Appellant argues that he is entitled to a writ of *habeas corpus* to clarify whether he is eligible for parole. ***Id.*** at 11. Finally, Appellant asserts that his issue is not waived, as "he was not informed on the record that failure to [file a post-sentence motion] would affect his right to raise issues upon appeal." ***Id.*** at 9.

Initially, we must determine whether Appellant's claim is cognizable under the PCRA. This determination presents a question of law over which our standard of review is *de novo* and our scope of review plenary. ***Commonwealth v. Montgomery***, 181 A.3d 359, 367 (Pa. Super. 2018) (*en banc*), *appeal denied*, 190 A.3d 1134 (Pa. 2018).

"It is well-settled that the PCRA is intended to be the sole means of achieving post-conviction relief. Unless the PCRA could not provide for a potential remedy, the PCRA statute subsumes the writ of *habeas corpus*." ***Commonwealth v. Taylor***, 65 A.3d 462, 465-466 (Pa. Super. 2013) (citations omitted); ***see also*** 42 Pa.C.S. § 9542. Accordingly, if an issue is "cognizable under the PCRA," it "must be raised in a timely PCRA petition, and cannot be raised in a *habeas corpus* petition." ***Taylor***, 65 A.3d at 466 (citations omitted).

Section 9543 defines the eligibility requirements for the PCRA and provides that a petitioner may seek relief under the PCRA for "a conviction or sentence" that resulted from one or more of the following:

> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> * * *
>
> (vii) The imposition of a sentence greater than the lawful maximum.
>
> (viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S. § 9543(a)(2)(i)-(ii), (vii)-(viii).

Even if a claim is not cognizable under the PCRA, it is well settled that "*[h]abeas corpus* is an extraordinary remedy and is available after other remedies have been exhausted or ineffectual or nonexistent. It will not issue if another remedy exists and is available." ***See Commonwealth v. Rouse***, 191 A.3d 1, 6 (Pa. Super. 2018) (citation omitted). A *habeas* petition is not a substitute for a direct appeal. ***See Com. ex rel. Ashmon v. Banmiller***, 137 A.2d 236, 238 (Pa. 1958); ***Com. ex rel. Smith v. Cavell***, 144 A.2d 505, 506 (Pa. Super. 1958). Therefore, challenges to a conviction or sentence that could have been raised at trial or in a direct appeal are waived for purposes of a habeas petition. ***See Com. ex rel. Brogan v. Banmiller***, 136 A.2d 141, 142 (Pa. Super. 1957); ***accord Rouse***, 191 A.3d at 7.

In ***Rouse***, this Court addressed a petitioner's claim that the second-degree murder statute was "void for vagueness because it fails to give

adequate notice that a sentence of life imprisonment is, in fact, life imprisonment without the possibility of parole." ***Id.*** at 2 n.1. Initially, the trial court treated the petitioner's filing as a PCRA challenging the legality of his sentence. ***Id.*** On appeal, this Court held that the petitioner's claim was not cognizable under the PCRA. ***Id.*** The ***Rouse*** Court explained that

> because [the petitioner's] claim does not challenge the imposition of a sentence in excess of the lawful maximum, it does not fall under the purview of Section 9543(a)(2)(vii). And, to the extent that Section 9543(a)(2)(vii) encompasses all illegal-sentencing issues, [the petitioner's] claim does not implicate any category of illegal sentences previously recognized by Pennsylvania Courts. Moreover, because [the petitioner's] constitutional challenge to Section 1102(b) does not implicate his guilt or innocence for the underlying offense, his void-for-vagueness claim cannot arise under the typical provision used to address constitutional errors, Section 9543(a)(2)(i).

Rouse, 191 A.3d at 7.

Ultimately, the ***Rouse*** Court held that the petitioner's claim, "just like all claims (but for the three categories of illegal-sentencing claims), is subject to waiver." ***Id.*** at 6 (citation omitted). Further, because the petitioner could have raised the issue "at his sentencing hearing, or in a post-sentence motion, he failed to exhaust all available remedies before resorting to *habeas corpus*." ***Id.*** at 7.

Here, Appellant's claim is properly regarded as a petition for writ of *habeas corpus*. ***See id.*** When reviewing the denial of a claim for *habeas* relief,

> [o]ur standard of review . . . is limited to abuse of discretion. Thus, we may reverse the court's order where the court has

> misapplied the law or exercised its discretion in a manner lacking reason. As in all matters on appeal, the appellant bears the burden of persuasion to demonstrate his entitlement to the relief he requests.

Rivera v. Pennsylvania Dep't of Corr., 837 A.2d 525, 528 (Pa. Super. 2003) (citations omitted).

Here, the trial court addressed Appellant's claim in its Rule 1925(a) opinion as follows:

> Appellant challenges his sentence of life imprisonment without the possibility of parole for his conviction of first-degree murder. Our Superior Court has recently addressed the propriety of bringing that issue under the purview of a petition for a writ of *habeas corpus* as opposed to the [PCRA] in [***Rouse***, 191 A.3d at 1]. [In ***Rouse***, the C]ourt determined that such a claim does not allege that the sentence impermissibly exceeded the statutory maximum and therefore was not one which falls within the meaning of "illegal sentence" as defined in the PCRA statute. . . . As in ***Rouse***, this issue could have been raised at [Appellant's] sentencing hearing, in post-sentencing motions or in the several appeals filed in this matter and [A]ppellant's failure to do so constitutes a waiver.

Trial Ct. Op. at 6-7.

Based on our review of the record, we agree with the trial court that Appellant's issue was not cognizable under the PCRA. ***See Montgomery***, 181 A.3d at 367; ***see also Rouse***, 191 A.3d at 7. Further as Appellant waived his *habeas* claim by failing to raise it previously, we discern no reversible error in

the trial court's decision to deny relief.[2] ***See Rivera***, 837 A.2d at 528; ***see also Rouse***, 191 A.3d at 7. Accordingly, we affirm.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/20/20

[2] To the extent Appellant argues that trial counsel failed to fully advise him of his post-sentence or appellate rights, this claim is waived due to Appellant's failure to raise in in the trial court. ***See also*** Pa.R.A.P. 302(a) (stating that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Nonetheless, his claim would be cognizable under the PCRA. Because Appellant did not establish an exception to the PCRA time-bar, we would have no jurisdiction to address this issue. ***See*** 42 Pa.C.S. § 9545(b). Moreover, Appellant's claim would be waived based on his failure to raise the issue in his prior PCRA petitions. ***See*** 42 Pa.C.S. § 9544(b) (stating that "an issue is waived if the petitioner could have raised it but failed to do so . . . on appeal or in a prior state postconviction proceeding").

6.29.17

J-S18020-17

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MARK A. BROWN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3007 EDA 2016

Appeal from the PCRA Order dated September 6, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0306772-1990

BEFORE: PANELLA, J., SOLANO, J., and FITZGERALD, J.*

MEMORANDUM BY SOLANO, J.: **FILED JUNE 26, 2017**

Appellant Mark A. Brown appeals *pro se* from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. We affirm.

In 1990, a jury convicted Appellant of first-degree murder, arson, and engaging in activities of corrupt organizations.[1] In 1994, Appellant was sentenced to life imprisonment for murder, and to a consecutive prison sentence of forty-three to eighty-six months on the corrupt organizations charge.[2] We affirmed the judgment of sentence on April 5, 1995. ***See Commonwealth v. Brown***, No. 1920 PHL 1994 (Pa. Super. Apr. 5, 1995)

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 2502(a), 3301(a), and 911, respectively.

[2] Appellant received no additional penalty for the arson conviction.

Appendix "F"

(unpublished memorandum). Appellant did not seek review by the Supreme Court of Pennsylvania. Appellant thereafter filed several PCRA petitions, none of which were successful.[3]

Appellant did have success, however, in federal court: in 2008, Appellant filed a *pro se* Petition for a Writ of *Habeas Corpus* in the United States District Court for the Eastern District of Pennsylvania. As a result of that petition, the District Court issued an order instructing that Appellant's conviction for violating the corrupt organizations law be vacated and Appellant be resentenced without regard to that charge. ***See Brown v. Kerestes***, No. CIV.A. 08-1643, 2008 WL 4570562 (E.D. Pa. Oct. 9, 2008).[4]

The trial court entered an order in 2009 vacating the corrupt organizations conviction and stating that the original sentences on the murder and arson convictions "stand' as originally recorded." Appellant

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[3] The first of these petitions was filed in 1997 and was dismissed by the PCRA court. We affirmed the dismissal, ***see Commonwealth v. Brown***, No. 1860 PHL 1998 (Pa. Super. June 22, 1999) (unpublished memorandum), and the Pennsylvania Supreme Court denied review. ***See Commonwealth v. Brown***, No. 477 E.D.Alloc. 1999 (Pa. Nov. 4, 1999). The second petition was filed in 2000. It was dismissed by the PCRA court in 2001, and the subsequent appeal was dismissed by this Court in 2002 for failure to file a brief. The third petition was filed in 2004. It was dismissed by the PCRA court as untimely that same year, and Appellant did not appeal its dismissal.

[4] The relief was granted based on ***Commonwealth v. Besch***, 674 A.2d 655 (Pa. 1996), in which the Supreme Court held that the Pennsylvania Corrupt Organizations Act did not apply to wholly illegitimate enterprises (such as the one in which Appellant participated). The other ten issues that Appellant raised in his federal *habeas* petition were dismissed by the District Court, and Appellant did not appeal that ruling.

appealed, and in August 2010, we remanded for resentencing, specifying that the trial court was to resentence at a hearing at which Appellant was represented by counsel. ***See Commonwealth v. Brown***, No. 457 EDA 2009 (Pa. Super. Aug. 17, 2010) (unpublished memorandum). In December 2010, Appellant was again sentenced, following a hearing, to life imprisonment for first-degree murder.

Appellant appealed from his 2010 resentencing. He asserted that the corrupt organizations charge adversely affected the evidence presented against him at trial on the other two charges, and, because his corrupt organizations conviction has since been vacated, he should be awarded a new trial on the remaining charges. On September 20, 2012, we affirmed the trial court's denial of a new trial, because —

> a claim for a new trial and challenges to the admission of evidence are not within the scope of an appeal from resentencing pursuant to a federal *habeas corpus* petition. Guilt was established for the [murder and arson] charges in 1990, more than twenty years ago, and Appellant's last PCRA petition was dismissed in 2004. . . . [O]nly issues pertaining to the resentencing procedure [can] be raised on appeal from that resentencing.

Commonwealth v. Brown, No. 34 EDA 2011, at 8 (Pa. Super. Sept. 20, 2012) (unpublished memorandum).[5] The Supreme Court denied *allocatur* on April 11, 2013.

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[5] We also addressed the merits of the request for new trial out of "an abundance of caution." ***Brown***, No. 34 EDA 2011 at 8.

Appellant filed the instant PCRA petition on May 3, 2013. In it, Appellant asserted that his petition was timely because it was filed before July 10, 2014. Appellant reasoned that July 10, 2013 was ninety days after April 11, 2013 (the date the Pennsylvania Supreme Court denied review of the appeal from Appellant's 2010 resentencing), and therefore was the date when his time for seeking review by the United States Supreme Court expired. ***See*** PCRA Pet., 5/3/13, at 10-11; ***see also*** U.S. Sup. Ct. R. 13 (an appellant has ninety days following the exhaustion of state review to seek review with the United States Supreme Court). Therefore, he concluded, his petition was timely so long as he filed it within a year of that date. ***See*** 42 Pa.C.S. § 9545(b)(1) (PCRA petitions must generally be filed within one year of the date the judgment becomes final); (b)(3) ("For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review").

Counsel was appointed to represent Appellant, and on July 14, 2016, counsel filed a petition to withdraw and a "no-merit letter" pursuant to the requirements of ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), because counsel concluded that the petition was untimely. Appellant's petition was dismissed by the PCRA court as untimely on September 6,

2016, and counsel was permitted to withdraw.[6] Appellant filed a timely *pro se* appeal, raising the following issues:

> A. Whether trial counsel was ineffective for not objecting to violations of Appellant's rights under the Vienna Convention. Appellant is a citizen of Jamaica and was not informed of his rights to contact the Consulate for advice or assistance in preparing his legal defense and helping him understand his legal rights?
>
> B. Whether trial counsel was ineffective for not allowing Appellant to testify depriving him the opportunity to deny the charges directly and present his version to the jury?
>
> C. Whether trial counsel was ineffective for not requesting a directed verdict when Appellant's three co-defendants were found not guilty eliminating the Commonwealths' [*sic*] theory of conspiracy and the only evidence to support it?
>
> D. Whether PCRA counsel was ineffective for filing a no-merit letter where the sentence on the charge of first degree murder and arson warrants a new trial where Appellant had been discharged on the Corrupt Organization charge supporting them?
>
> E. Whether PCRA counsel was ineffective for filing a no-merit letter where the right to trial before an impartial jury guaranteed by the Pennsylvania Constitution requires the disqualification of juror with a personal relationship with a family member of a Commonwealth witness that existed in the instant case?

Appellant's Brief at 3.

When we review an order dismissing a petition under the PCRA, our standard is "to determine whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA

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[6] It does not appear from the record that the PCRA court complied with the notice requirements of Pa.R.Crim.P. 907 before dismissing Appellant's petition without a hearing; however, that issue is not before us for review.

court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Barndt***, 74 A.3d 185, 192 (Pa. Super. 2013) (citations and internal quotation marks omitted).

The timeliness of a post-conviction petition is jurisdictional. ***Commonwealth v. Furgess***, 149 A.3d 90, 92 (Pa. Super. 2016). We have explained:

> Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment is final unless the petition alleges and the petitioner proves one of the three exceptions to the time limitations for filing the petition set forth in Section 9545(b)(1) of the statute.

Id. (footnote omitted).[7]

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[7] The three exceptions are:

> (i) the failure to raise the claim previously was the result of interference of government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1). A petition which asserts one of the three exceptions must be filed within sixty days of the earliest date that the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

Appellant does not claim that one of the three Section 9545(b)(1) timeliness exceptions applies to his petition. Rather, Appellant asserts that his judgment became final on July 10, 2013, following the conclusion of our state courts' review of his 2010 sentencing and the expiration of the time when he may have sought review in the United States Supreme Court. ***See*** Appellant's Reply Brief at 2. In essence, although Appellant was originally sentenced for first degree murder and arson in 1994, Appellant argues that the resentencing he received in 2010 (which flowed from the successful grant of his federal *habeas corpus* petition) replaced his original 1995 judgment date with a new 2013 judgment date from which the PCRA's jurisdictional clock should run.

The PCRA court disagreed that Appellant's petition was timely, and so do we. In ***Commonwealth v. McKeever***, 947 A.2d 782 (Pa. Super. 2008), McKeever pleaded guilty to several charges, including a corrupt organizations charge, and was sentenced accordingly. ***Id.*** at 783. He initially filed a direct appeal, but later discontinued it. ***Id.*** Later, he petitioned the federal district court for *habeas corpus* relief. The federal court granted that petition and ordered the trial court to vacate the corrupt organizations charge and resentence McKeever. ***McKeever***, 947 A.2d at 783. In addition to resentencing, McKeever requested that the trial court allow him to withdraw his guilty plea, but the trial court denied that relief. ***Id.*** at 784. The

defendant appealed, we affirmed the denial of the requested relief, and the Pennsylvania Supreme Court denied review. ***Id.***

McKeever then filed a PCRA petition, which was dismissed by the PCRA court. ***McKeever***, 947 A.2d at 784. We affirmed that dismissal based on the petition's untimeliness, and stated:

> The Eastern District Court's grant of federal *habeas corpus* relief as to [the defendant]'s corrupt organizations convictions does not "reset the clock" for the finality of [the defendant's] judgment of sentence . . . for purposes of the PCRA where the relief granted . . . neither restored a petitioner's direct appeal rights nor disturbed his conviction, but, rather, affected his sentence only. . . .
>
> Although [the defendant] successfully challenged his corrupt organizations convictions and sentences successfully in federal court, the remainder of his convictions, each having a distinct sentence, were not disturbed by the Eastern District Court's grant of *habeas corpus* relief or by the trial court when it vacated the corrupt organizations sentences in its resentencing order.

Id. at 785 (citations and footnote omitted).

This Court therefore determined that McKeever's convictions, which had not been disturbed by the federal court, became final when McKeever had discontinued his direct appeal, and that McKeever's PCRA petition, which challenged those convictions, was untimely for purposes of PCRA jurisdiction. 947 A.2d at 786. ***See also Commonwealth v. Lesko***, 15 A.3d 345 (Pa. 2011).[8]

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[8] In ***Lesko***, we held that, when a trial court resentenced a defendant after a federal court granted his *habeas corpus* petition, the defendant's subsequent PCRA petition — which was filed within a year of the entry of his new
(Footnote Continued Next Page)

The instant case is nearly identical to ***McKeever***. Appellant's conviction on the corrupt organizations charge has been vacated through the federal *habeas* petition, Appellant has consequently been resentenced by the trial court, and Appellant's PCRA petition comes within one year after that judgment became final. However, the finality of the convictions which Appellant seeks to challenge has remained undisturbed since May 5, 1995, when the period in which Appellant could have sought review by the Pennsylvania Supreme Court expired and his direct appeal concluded. ***See McKeever***, 947 A.2d at 786. Therefore, Appellant cannot now file a PCRA petition raising errors unrelated to his resentencing. ***Id.*** at 785; ***accord Lesko***, 15 A.3d at 357-67. To allow otherwise would thwart the jurisdictional timeliness requirements of the PCRA.

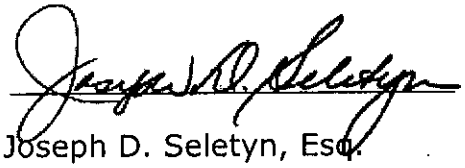
Appellant's petition therefore is untimely, and the PCRA court correctly held that it lacked jurisdiction to consider it. ***Id.*** at 785-86.[9]

(Footnote Continued)
sentence but which raised claims unrelated to his resentencing — was untimely. We stated, "[A] limited grant of federal habeas sentencing relief does not give rise to a 'right' to full-blown serial PCRA review of a trial whose result (conviction) has long been final," and "the answer to whether the federal civil collateral order entered in this case operates to reopen the final Pennsylvania judgment concerning the verdict of guilt is clear[:] It does not." 15 A.3d at 357-67.

[9] We agree that Appellant would have had one year from July 10, 2013, in which to file a timely PCRA petition raising claims based on alleged errors regarding his resentencing, provided that his claims had not been previously litigated or waived. ***See*** 42 Pa.C.S. § 9543. In its Pa.R.A.P. 1925(a) opinion, the PCRA court indicated that Appellant had one year from the date of the entry of the District Court's *habeas* order in which to file a PCRA petition
(Footnote Continued Next Page)

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/26/2017

(Footnote Continued) ——————————
raising such issues. The PCRA does not include the date of a dismissal of claims by a federal court in the determination of the timeliness of a PCRA petition; it looks only to the finality of judgment, which is based on direct review. ***See*** 42 Pa.C.S. § 9545(b)(3). This error does not affect our analysis.

J.S29037/12

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MARK A. BROWN, Appellant	:	No. 34 EDA 2011

Appeal from the Judgment of Sentence December 6, 2010
In the Court of Common Pleas of Philadelphia County
Criminal No(s).: CP-51-CR-0306772-1990

BEFORE: STEVENS, P.J., GANTMAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED SEPTEMBER 20, 2012**

Appellant, Mark A. Brown, appeals from a judgment of sentence entered in the Philadelphia Court of Common Pleas on December 6, 2010, to life imprisonment without parole following his convictions for murder in the first degree[1] and arson.[2] Appellant contends he should receive a new trial because the trial court vacated his conviction for corrupt organizations[3] pursuant to a federal court order, creating issues of fundamental fairness and procedural and substantive due process. We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 2502(a).

[2] 18 Pa.C.S. § 3301(a).

[3] 18 Pa.C.S. § 911.

Appendix "G"

In 1988, Appellant was selling crack cocaine from a house in the Germantown section of Philadelphia. Trial Ct. Op., 6/15/11, at 3.[4] Trial evidence and testimony established the existence of a drug distribution ring. ***Id.*** By October 1988, the ring was short of funds and suspicion of theft settled on the eventual murder victim. ***Id.*** at 4. A female courier for the drug ring testified that, on Appellant's orders, she lured the victim to a drug house where he was stabbed and beaten to death by associates of Appellant. ***Id.*** She also testified that these men acted on Appellant's instructions, although Appellant was not present at the time of the murder. ***Id.*** The house that contained the victim's body was set on fire. ***Id.***

Following a jury trial, on November 21, 1990, Appellant was found guilty of murder in the first degree, arson, and corrupt organizations. ***Id.*** at 1. On April 27, 1994, the trial court sentenced Appellant to life imprisonment without parole on the first-degree murder charge with no additional penalty for the arson. ***Id.*** The court also sentenced Appellant to a consecutive prison term of forty-three to eighty-six months for corrupt organizations. ***Id.***

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[4] The trial court's Pa.R.A.P. 1925(a) opinion states that its facts are taken from an unpublished opinion of this Court. ***Commonwealth v. Brown***, 457 EDA 2009 (unpublished memorandum) (Pa. Super. August 17, 2010). This Court, in turn, adopted the facts from the May 23, 1994 trial court opinion in support of the original judgment of sentence. This 1994 trial court opinion, however, is not in the record. The trial court also notes that the trial transcript is not in the record. Trial Ct. Op., 6/15/11, at 3 n.2. In fact, the majority of the record is missing.

The subsequent procedural history is as follows:

> On April 5, 1995, [this] Court affirmed [Appellant's] judgment of sentence. On January 6, 1997, [Appellant] filed his first Post Conviction Relief Act[5] ("PCRA") Petition. This petition was dismissed by the PCRA Court and affirmed by [this] Court on June 22, 1999. On December 11, 2000, [Appellant] filed a second PCRA Petition which was dismissed by the PCRA Court on December 7, 2001. On July 10, 2002, [Appellant's] subsequent appeal to [this] Court was dismissed for failure to file a brief. On January 8, 2004, [Appellant] filed a third PCRA Petition which was dismissed as untimely on October 27, 2004. [Appellant] did not appeal this dismissal.
>
> On September 18, 2008, . . . the United States District Court for the Eastern District of Pennsylvania granted [Appellant's] Petition for Writ of *Habeas Corpus* regarding the conviction for [corrupt organizations. The district court vacated the charge] because, at the time of [Appellant's] conviction, the Corrupt Organizations Act did not incorporate infiltration of an illegitimate enterprise.[6] [The district court recommended that:]
>
> > the Commonwealth of Pennsylvania . . . release [Appellant] from his present confinement unless the Commonwealth

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[5] 42 Pa.C.S. §§ 9541-9546.

[6] In ***Commonwealth v. Besch***, 674 A.2d 655 (Pa. 1996), our Supreme Court held that the Pennsylvania Corrupt Organizations Act did not apply to enterprises that were wholly illegitimate, but only to legitimate, lawful businesses that were infiltrated to be used for illegitimate purposes. ***Id.*** at 659. Prior to ***Besch***, "the Superior Court had held on multiple occasions that the statutory term 'enterprise,' . . . comprised both legitimate and illegitimate enterprises." ***Commonwealth v. Williams***, 936 A.2d 12, 18 (Pa. 2007) (citing, *e.g.*, ***Commonwealth v. Yacoubian***, 489 A.2d 228, 231 (Pa. Super. 1985)). Shortly after the ***Besch*** decision, the Pennsylvania General Assembly amended the corrupt organizations statute to target both legitimate and wholly illegitimate enterprises. ***See Williams***, 936 A.2d at 18.

> provides him with a new sentencing hearing within ninety (90) days of the court's order . . . . Since it appears that the vacating of the sentence for the violation of the [Corrupt Organizations Act] **may** upset the trial court's sentencing scheme, the [district] court further **recommends** that the remand be for resentencing on all the remaining Bills of Information.

> The remaining convictions for arson and murder were not otherwise addressed. On January 7, 2009, in compliance with the [district] court's order, [the trial court] entered a verdict of Not Guilty to the charge of corrupt organizations and vacated [that] sentence. All other dispositions and sentences remained the same. [Appellant] was not represented by counsel at [the resentencing] hearing and subsequently appealed to [this] Court on that ground. On August 17, 2010, [this] Court vacated the judgment of sentence of January 7, 2009, and remanded the matter back to [the trial court] for appointment of counsel and resentencing. . . . On December 6, 2010, [Appellant], now represented by counsel, was resentenced by [the trial court] to life imprisonment without parole on his first degree murder conviction.

Id. at 1-3 (internal citations and footnotes omitted). Appellant timely filed a notice of appeal on January 3, 2011, and timely filed a court-ordered Pa.R.A.P. 1925(b) statement.

Appellant raises the following issues:

> [Appellant] should receive a new trial due to fundamental fairness, and as a matter of procedural and substantive due process protected by the United States Constitution and the Constitution of Pennsylvania, where [Appellant's] conviction on the charge of Corrupt Organization [sic] has been set aside, but where [Appellant] had been found guilty on other charges, including Murder in the First Degree and Arson, and where the trial of all charges was inextricably intertwined and

> considered by the jury as part of one prosecution, including the same set of jury instructions being given to the jury on **all** charges and where the prosecution's closing argument also sought to inextricably intertwine all the charges against this [Appellant] and all to the [Appellant's] gross prejudice. Under the circumstances, this is unfair to [Appellant] and [Appellant] should be granted a new trial.

Appellant's Brief at 9 (citation omitted). According to Appellant, "The evidence at trial greatly focused on the Corrupt Organizations aspect of the charges." ***Id.*** at 10. This evidence included the location of the headquarters of the drug distribution ring, the manufacture of crack cocaine at that location, and sales and financial information. ***Id.*** Moreover, Appellant asserts, the evidence concerning the missing money as a motive for murder "specifically comes into trial because of the Corrupt Organizations Act charged." ***Id.*** at 10-11.

Appellant cites to ***Commonwealth v. Cassidy***, 620 A.2d 9 (Pa. Super. 1993), to support his claim for a new trial. Appellant relies on a footnote that states in relevant part: "Where a defendant is convicted in one trial of both corrupt organization[s] **and** the predicate offenses, but some of the predicate offenses are subsequently overturned, in that case the corrupt organization[s] charge would have to be re-tried because the verdict might have been premised upon the overturned conviction." Appellant's Brief at 13-14 (quoting ***Cassidy***, 620 A.2d at 12 n.4 (citation omitted)) (emphasis added). Thus, Appellant contends that, because certain evidence would not have been admitted but for the corrupt organizations charge, and this

evidence led to his conviction for first-degree murder and arson, these latter convictions were premised on the corrupt organizations charge. Appellant's Brief at 14. We hold Appellant is not entitled to relief.

As a prefatory matter, and because of the unique procedural posture, we address whether Appellant can raise a claim for a new trial on direct appeal from a sentencing proceeding. In ***Commonwealth v. Lesko***, 15 A.3d 345 (Pa. 2011), the trial court resentenced a defendant after a federal court granted his *habeas corpus* petition. ***Id.*** at 357. The defendant had been convicted of first-degree murder and sentenced to death, and the trial court again sentenced the defendant to death. ***Id.*** at 357-58. The defendant appealed unsuccessfully; he filed a PCRA petition and was granted a new trial. ***Id.*** at 358. Our Supreme Court reversed the PCRA court, reasoning that:

> The new sentencing proceeding and its result are the cause of the defendant's continuing restraint; and that proceeding is sufficiently distinct from the initial sentencing proceeding that collateral review of issues specific to the resentencing is consistent with the plain intent and purpose of the PCRA. But, the calculus is entirely different when the defendant seeks to invoke the new sentencing judgment as a basis to pursue, as of right, issues that do not arise from the resentencing proceeding. . . . [T]he nature of federal *habeas* review, and the limited role played by the lower federal courts in "reviewing" final state criminal judgments, corroborates that a limited grant of federal *habeas* sentencing relief does not give rise to a "right" to full-blown serial PCRA review of a trial whose result (conviction) has long been final.

Id. at 362. The ***Lesko*** Court also held that "the answer to whether the federal civil collateral order entered in this case operates to reopen the final Pennsylvania judgment concerning the verdict of guilt is clear. It does not." ***Id.*** at 365.

In ***Commonwealth v. McKeever***, 947 A.2d. 782 (Pa. Super. 2008), the defendant pleaded guilty to various offenses including criminal conspiracy, drug crimes, and corrupt organizations. ***Id.*** at 783. He filed a direct appeal, but discontinued it in late 1995. ***Id.*** at 785. After our Supreme Court's 1996 decision in ***Besch***, the defendant filed a PCRA petition in 2003. ***Id.*** This Court affirmed the dismissal of that petition and the defendant filed a petition for federal *habeas corpus* relief. ***Id.*** The U.S. District Court for the Eastern District of Pennsylvania granted relief and remanded for the trial court to vacate the charge and sentence for corrupt organizations. ***Id.*** The defendant then moved, *inter alia*, to withdraw his guilty plea. ***Id.*** at 784. The trial court denied the motion, vacated the corrupt organizations sentence, but left the other sentences undisturbed. ***Id.*** The defendant appealed to this Court, which affirmed. ***Id.***

The defendant subsequently filed a PCRA petition, which was dismissed. ***Id.*** In affirming the PCRA court, this Court reasoned:

> [W]hile it is correct that [the defendant] had an absolute constitutional right to appeal his judgment of sentence entered after the Eastern District Court's grant of *habeas corpus* relief, ***see*** Pa. Const. Art. V, § 9, in that direct appeal, he was permitted to raise issues pertaining only to the re-sentencing procedure itself; his underlying claims of

> trial error regarding his non-vacated convictions could not be addressed on direct appeal from re-sentencing. ***See Commonwealth v. Gaito***, 277 Pa.Super. 404, 419 A.2d 1208, 1211, 1211 n.4 (1980).

Id. at 785-86. This Court therefore held that the non-corrupt-organizations convictions in ***McKeever*** and their sentences became final in 1995 when the defendant discontinued his direct appeal. ***Id.*** at 785, 786.

Appellant's instant issue on appeal fails because a claim for a new trial and challenges to the admission of evidence are not within the scope of an appeal from a resentencing pursuant to a federal *habeas corpus* petition. ***See Lesko***, 15 A.3d at 362. Guilt was established for the non-corrupt organizations charges in 1990, more than twenty years ago, and Appellant's last PCRA petition was dismissed in 2004. Trial Ct. Op. at 1-2. Moreover, this situation is analogous to ***McKeever***, in which this Court held that only issues pertaining to the resentencing procedure could be raised on appeal from that resentencing. ***See McKeever***, 947 A.2d at 785-86 (citations omitted).

Given that a large portion of the record is missing, we address the merits out of an abundance of caution. ***See Yount v. Pa. Dept. of Corr.***, 966 A.2d 1115, 1119 (Pa. 2009) (holding that, although merits of issue were not fully litigated below, "in the narrow circumstances of this case, no party will be prejudiced; we grant[ ] appeal and afford[ ] both parties argument on the merits of the dispositive issue.").

When deciding whether to grant a new trial, the standard of review is as follows:

> A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings.

Commonwealth v. Cousar, 928 A.2d 1025, 1035-36 (Pa. 2007) (citation omitted).

In ***Commonwealth v. Williams***, 936 A.2d 12 (Pa. 2007), our Supreme Court partially reversed the Court of Common Pleas,[7] which had granted the defendant's PCRA petition, vacated his corrupt organizations conviction and granted a new trial on the other charges in the case, including three counts of first-degree murder. ***Id.*** at 14-15. The PCRA court held this result was necessary because counsel had failed to raise the ***Besch*** decision as an issue on direct appeal. ***Id.*** at 17. The PCRA court

[7] Because ***Williams*** was a death-penalty case, the Supreme Court directly reviewed the grant of post-conviction relief under 42 Pa.C.S. § 9546(d) and Pa.R.Crim.P. 910. ***Williams***, 936 A.2d at 17 n.13.

determined that the corrupt organizations "evidence admitted at trial was substantial and highly prejudicial, and opined that it would not have been admissible if not for the [corrupt organizations] charges." ***Id.***

Our Supreme Court affirmed the PCRA court's decision to vacate the corrupt organizations charge, but reversed the grant of a new trial on the other charges. ***Id.*** at 37. The ***Williams*** Court reasoned that:

> ***Besch*** did not address derivative evidentiary claims, nor did the majority in that case grant a global new trial. Thus, direct appeal counsel could not invoke ***Besch*** . . . as controlling support for a claim that [the defendant] was entitled to a global new trial on the non-[corrupt organizations] charges, based on the spillover prejudicial effect of [corrupt organizations] evidence.

Id. at 27. Moreover, the court reasoned that a range of evidence heard by the jury pertaining to the corrupt organizations charge "would have been admissible under Pa.R.E. 404(b)(2)." ***Id.*** at 30. The rule reflects that:

> [E]vidence of "other crimes, wrongs, or acts" may be admitted when relevant for a purpose other than criminal character/propensity, including: **proof of motive**, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. This list is not exhaustive. For instance, this Court has recognized a *res gestae* exception to Rule 404(b) which allows admission of other crimes evidence when relevant to furnish the context or complete story of the events surrounding a crime.

Id. at 31 (citations omitted and emphasis added).

In ***Commonwealth v. Fisher***, 769 A.2d 1116 (Pa. 2001), the defendant was convicted, among other offenses, of first-degree murder after he entered an apartment and shot a sleeping man in the chest. ***Id.*** at 1120.

Our Supreme Court held that testimony regarding the defendant's belief that the victim had deceived him in a drug deal was admissible as evidence of motive. ***Id.*** at 1128. The Court reasoned:

> While evidence of prior bad acts is inadmissible to show that a defendant acted in conformity with those past acts or to show a criminal propensity . . . such evidence may be admitted to prove, *inter alia*, motive, intent, or identity. Where the evidence is relevant, the mere fact that testimony of another crime may be prejudicial does not *per se* preclude its introduction into evidence. Such evidence may be significant and admissible to establish that: the victims were known drug dealers; the victims recently cheated the appellant in a drug deal; and the appellant had killed the victims in revenge for cheating him.
>
> At [the defendant's] trial, the witness's testimony was offered to establish [the defendant's] motive for the killing and was, therefore, proper.

Id. (citations omitted).

In ***Commonwealth v. Sherwood***, 982 A.2d 483 (Pa. 2009), the defendant, who beat his four-year-old stepdaughter to death, appealed from his convictions of first-degree murder, aggravated assault, and endangering the welfare of children. ***Id.*** at 486. Among other issues, he challenged the admission of evidence regarding his prior bad acts. ***Id.*** at 491. Our Supreme Court held that the victim's complaints that the defendant had hit her, as well as testimony from someone who had witnessed the defendant striking the victim "were relevant to help establish the chain of events and pattern of abuse that eventually led to the fatal beating." ***Id.*** at 497 (citations omitted). The Court held that the "prior bad acts were also

relevant to show intent, lack of mistake or accident, ill will, malice, and the nature of [defendant's] relationship with [the victim]." ***Id.***

Instantly, Appellant's reliance on ***Cassidy*** is unavailing. In ***Cassidy***, this Court declined to grant a new trial for a corrupt organizations conviction when the defendant had been acquitted of all the predicate offenses. ***Cassidy***, 620 A.2d at 14. This Court also posited a scenario in ***Cassidy*** in which a new trial on the corrupt organizations charge would be required if the convictions for the underlying crimes that were the foundation for the corrupt organizations charge were reversed. ***Id.*** at 12 n.4 (citation omitted). Unlike ***Cassidy***, however, the instant trial court only vacated Appellant's corrupt organizations conviction, and left the predicate-crime convictions undisturbed. ***See*** Trial Ct. Op. at 2-3. Notably, the federal court, in granting Appellant's *habeas corpus* petition, vacated only the corrupt organizations conviction in light of the ***Besch*** decision. ***Brown v. Kerestes***, 2008 WL 4570562, at *8 (E.D. Pa. September 18, 2008). The federal court found that all of Appellant's evidentiary claims were time barred. ***Id.***

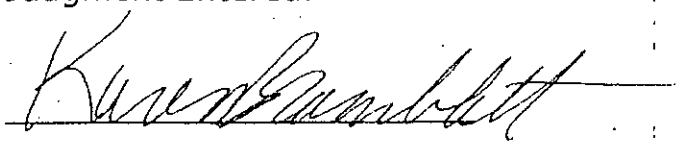
Further, Appellant's contention that the corrupt organizations charge was the sole avenue to admissibility of evidence used to convict him of murder and arson is not supported by the Pennsylvania Rules of Evidence or by case law. ***See*** Pa.R.E. 404(b)(2); ***Williams***, 936 A.2d at 27; ***Fisher***, 769 A.2d at 1128. Testimony regarding the drug operation, the missing

money and the suspicion of theft that fell upon the victim was admissible because it established motive, an enumerated exception to Pa.R.E. 404(b). As such, the instant case is similar to ***Williams***, in which the defendant claimed he was entitled to a new trial because evidence admitted to prove the vacated corrupt organizations conviction purportedly prejudiced him. ***See Williams***, 936 A.2d at 26. Similar to the ***Williams*** Court, we hold that all the evidence admitted at Appellant's trial was "admissible against [him] for reasons independent of the corrupt organization charges . . . or [was] relevant 'other crimes' evidence under Pa.R.E. 404(b)(2)." ***Id.*** at 36. Therefore "all references to this evidence . . . were proper [and Appellant] failed to prove prejudice." ***Id.*** The instant case is also analogous to ***Fisher***, in which our Supreme Court held that testimony regarding the defendant's belief that the victim had deceived him in a drug deal was admissible as evidence of motive. ***See Fisher***, 769 A.2d at 1128. Moreover, as in ***Sherwood*** and ***Williams***, the evidentiary exception to the rule permitted the challenged testimony in the instant case. ***See Sherwood***, 982 A.2d at 497 (holding testimony of previous episodes in which defendant beat victim was admissible to show pattern of abuse); ***Williams***, 936 A.2d at 31. We conclude the trial court did not abuse its discretion in leaving Appellant's sentence for first-degree murder and arson undisturbed on resentencing. ***See Cousar***, 928 A.2d at 1036. Accordingly, we affirm.

Judgment of sentence affirmed.

J. S29037/12

Judgment Entered.



Prothonotary

Date: 9/20/2012

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MARK A. BROWN, Appellant	:	No. 457 EDA 2009

Appeal from the Judgment of Sentence Entered January 7, 2009,
Court of Common Pleas, Philadelphia County,
Criminal Division, at No. CP-51-CR-0306772-1990.

BEFORE: SHOGAN, COLVILLE* and FREEDBERG*, JJ.

MEMORANDUM: **FILED AUGUST 17, 2010**

Appellant, Mark A. Brown, appeals from the judgment of sentence entered on January 7, 2009 in the Philadelphia County Court of Common Pleas. We vacate and remand with instructions.

The trial Court stated the procedural and factual history of this matter as follows:

I. PROCEDURAL HISTORY

1. The Defendant was tried before a jury in November of 1990 on charges of First-Degree Murder, Arson and Corrupt Organizations for the October 24, 1988 death of a black male identified as "Pete" who had been beaten to death and his body set on fire.

2. On November 21, 1990, the jury returned a verdict of guilt on the above-listed charges.

*Retired Senior Judges assigned to the Superior Court.

Appendix "H"

3. The jury was unable to reach an agreement on the imposition of the death penalty and a life sentence was imposed. On April 28, 1994, after post-sentence motions were denied, in addition to the life sentence, the Defendant received a consecutive sentence of forty-three to eighty-six months on the Corrupt Organizations conviction; no further penalty was imposed on the Arson conviction.

4. The Defendant's Judgment of Sentence was affirmed on April 5, 1995. Commonwealth v. Brown, 663 A.2d 245 (Pa. Super. 1995) (Cavanaugh, J., dissenting) (unpublished memorandum).

5. On January 6, 1997, a Petition pursuant to the Post-Conviction Relief Act (hereinafter "PCRA") was filed. The dismissal of the Petition was affirmed by the Pennsylvania Superior Court on June 22, 1999.

6. Defendant filed a second PCRA Petition on December 11, 2000. The PCRA court dismissed the Petition on December 7, 2001. A Notice of Appeal was filed, however on July 10, 2002 the Pennsylvania Superior Court dismissed the appeal for failure to file a brief.

7. A third PCRA Petition, filed on January 8, 2004, was dismissed as untimely on October 27, 2004. A direct appeal was not taken.

8. On October 7, 2008 Judge John P. Fullam of the United States District Court for the Eastern District of Pennsylvania granted the Defendant's Petition for Writ of Habeas Corpus *"to the extent that the conviction for violating the Pennsylvania Corrupt Organization Act,* 18 *Pa. Cons. Stat.* §911 *is VACATED and the matter is REMANDED to the Court of Common Pleas of Philadelphia County for re-sentencing on the remaining charges in the Bills of Information"*[.] The Order further directed the Commonwealth to release the Defendant from prison unless the Commonwealth provided a new sentencing hearing within ninety days.

9. On January 7, 2009, this Court imposed the following

Order:

> Due to ruling by higher court, the finding of guilt on the charge of Corrupt Organization is hereby vacated. The defendant is found Not Guilty of this charge. All other dispositions and sentences remain the same. Finding of guilt on charge of Corrupt Organization is vacated, and defendant found not guilty. Therefore, the sentence imposed on 04/27/94 is also vacated, as to THIS CHARGE ONLY.

10. On January 21, 2009, Defendant contemporaneously filed *a pro se* Notice of Appeal and Statement of Errors Complained of on Appeal pursuant to Appellate Rule 1925(b).

11. On March 17, 2009, the Pennsylvania Superior Court deferred to the trial court for disposition of Defendant's "Application for Appointment of Counsel". On April 20, 2009, Lee Mandell, Esquire was appointed as counsel.

II. FACTUAL HISTORY

> The case involved the prosecution of four persons: Defendant; Michael McCune (Shaheem), Sha Phillip Devon (Sha) and Romero Green (Mario). Each of the other three defendants were found Not Guilty of all charges in the same trial with defendant herein.
>
> The evidence produced at trial was that there existed several drug houses in the Germantown section in the city of Philadelphia. One of these at 5848 Crittenden Street. Across the street was 5855 Crittenden Street, which was the headquarters of a drug distribution ring known as "Grandma's". The Commonwealth alleged and the witnesses testified that crack was made from cocaine, which was imported from New York by the defendant Mark Brown, knows [sic] as "Bigger". The defendant's girlfriend was Veronica "Rat" Robinson. She lived in the 5855 address with her mother and grandmother.

Another person named in the testimony was "Jibber", who was Mark Anthony Chase. He is Bigger's brother. He, also, allegedly operated a certain drug house in the area.

At the time of trial the Commonwealth never produced any evidence of specific sales of narcotics or drugs. There was testimony to the effect that cocaine was imported from New York and sold in batches amounting to $1,500.00 worth of drugs in each batch. The testimony, also, indicated that several batches per day were sold at each of the locations. The Commonwealth did not charge any specific crime in violation of the Drug and Narcotic Act. The Commonwealth, however, did proceed to trial on the theory that selling narcotics was one of the predicate acts, which is required before a conviction of Corrupt Organizations can be maintained. The Commonwealth submitted three possible areas of predicate acts to the jury: Drug Sales; Murder; Arson.

.... The motivation behind the instant killing was the fact that a shortage for the payment of drugs began to occur in the transactions at 5848 Crittenden Street.

About August 7, 1988, Anthony Todd Ford came to Philadelphia from New York and began to work at the drug house. The "deceased" was also brought from New York to sell drugs. There is no evidence of the true identity of the victim other than that he was named "Pete".

By October 1988, the drug house funds were $900.00 short. One of the distributors of the drugs blamed "Sha" for stealing the money. After a confrontation, the suspicion shifted to Anthony Todd Ford. On October 21, 1988 Ford was beaten by four men at the Crittenden crack house over the money shortage. Later, after a confrontation between "Bigger" and Anthony Todd Ford, "Bigger" took a gun

away from Ford. "Bigger" the boss, then permitted Ford to resume managing the house. The focus of responsibility for missing drug funds shifted.

In the early a.m. 10/24/88 prior to the killing, "Sha" forced "Glen" and "Pete" to strip to find the money. They could not find the money.

The suspicion again shifted away from Anthony Todd Ford to "Pete". At that point in time, both Anthony Todd Ford and "Pete" were not too happy about returning back to the drug house.

Tracy Allen was a female courier, who carried drugs from Bigger's brother (Mark Anthony Chase) to Bigger. Tracy received orders from defendant Mark Brown to play up to Pete sexually. After a brief encounter at a local tavern, where they had a drink, Tracy brought Pete back to 5848 Crittenden Street.

At this point in time, Pete was beaten to death. The Commonwealth attempted to show that the instruments used were a 2" by 4" board and a machete and hammer.

Tracy Allen placed the other three defendants at the scene of the murder on the date of the killing. She described the organization as drug dealers and that Bigger was in charge. She stated that Bigger was the one who used the words, "If he (victim Pete) did not give you the information, then Execute him". Bigger was not present at the time Pete was killed .

... Some time later, after Tracy left the house, she returned to find that the firemen were there and that the fire inside the house had burned the body of Pete. After that she went to a Park Avenue address where she met with Bigger, Romero, Sha and Shaheen [sic]. She heard Bigger say, "This is not the way I wanted it down". Tracy told him that she did not want to be involved in the organization, whereupon Bigger told her: "What happened to

> Peter could happen to you". After this threat, Tracy did not come forward to the police department until July 11, 1989.
>
> *(May 23, 1994 Trial Court Opinion in support of Judgment of Sentence; the Superior Court adopted the trial court's factual and procedural summary in affirming the Judgment of Sentence on April 5, 1995.)*

Trial Court Opinion, 8/5/09, at 1-5 (footnotes omitted).

On appeal, Appellant raises one issue:

> Did the Trial Court err when it failed to appoint counsel for Defendant before the resentencing hearing held on January 7, 2009?

Appellant's Brief at 3. As this issue presents a question of law, our standard of review is plenary, and our scope of review is *de novo*. ***Commonwealth v. Mallory***, 596 Pa. 172, 184-185, 941 A.2d 686, 694 (2008).

It is well settled that the Sixth and Fourteenth Amendments to the United States Constitution require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded that defendant the right to assistance of appointed counsel. ***Scott v. Illinois***, 440 U.S. 367, 373-374 (1979). Moreover, it is also well settled that the Sixth Amendment provides defendants with the right to counsel at all critical stages of a criminal proceeding, including the pretrial stages, trial, and **sentencing**. ***Mempa v. Rhay***, 389 U.S. 128, 134 (1967) (emphasis added).

As noted above, the United States District Court for the Eastern District of Pennsylvania ordered Appellant to be resentenced. Upon review of the instant appeal, we conclude that, while the trial court merely vacated a portion of Appellant's prior sentence and imposed no additional terms, that is of no moment. Neither party could have known what sentence the trial court would impose at the January 7, 2009 sentencing hearing. As noted above, this was a sentencing hearing concerning multiple felonies, and Appellant had the right to counsel at this critical stage. ***Mempa***, 389 U.S. at 134. The fact that a portion of the prior sentence was merely vacated with no additional terms does not minimize the error, and we point out that the denial of the right to counsel cannot be considered harmless. ***Commonwealth v. Kent***, 797 A.2d 978, 980 (Pa. Super. 2002) (citing ***Commonwealth v. Payson***, 723 A.2d 695, 699-700 (Pa. Super. 1999)). Accordingly, we vacate the judgment of sentence entered on January 7, 2009, and we remand this matter to the trial court for the appointment of counsel at resentencing.

Judgment of sentence vacated. Case remanded for the appointment of counsel at resentencing. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

AUG 17 2010

Date:

J.S46018/94

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF PENNSYLVANIA

v.

MARK BROWN,

Appellant : No. 1920 Philadelphia 1994

Appeal from the Judgment of Sentence of April 28, 1994 in the Court of Common Pleas, Criminal Division, Philadelphia County, at No. 9003-683-685-686-687.

BEFORE: ROWLEY, P.J., and CAVANAUGH and HOFFMAN, JJ.

DISSENTING MEMORANDUM BY CAVANAUGH, J.:

FILED APR - 5 1995

Because my review of the record persuades me that the conduct of the prosecuting attorney throughout the course of appellant's trial consisted of a clear pattern of improper prejudicial tactics and prosecutorial overreaching sufficiently egregious to deny appellant a fair trial, I must dissent from the majority's affirmance of the judgment of sentence. I would vacate said judgment and remand for a new trial.

The trial court conceded that the prosecutor repeatedly ignored its rulings, interjected improper comments, made reference to inadmissible evidence and conducted the examination of witnesses in such a way as to put improper information before the jury and that these tactics necessitated repeated curative instructions to the jury to disregard the prosecutor's comments and conduct. It cannot go unremarked that the prosecutor continued to engage in these tactics despite the court's repeated admonishments to desist and that after one such incident wherein the prosecutor couched a question to a witness in prejudicial terms intended to elicit evidence which the court had previously ruled inadmissible,

Appeal x "3"

the court cited the prosecutor for contempt.[1]

The majority relies on Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992) to negate appellant's claim that the prosecutor's pattern of misconduct throughout the proceedings deprived appellant of a fair trial. In Williams, our Supreme Court held "we have found no misconduct on the part of the prosecutor, and no number of failed claims may collectively attain merit if they could not do so individually." Williams at 278, 615 A.2d at 722 (emphasis in original). I find the instant case distinguishable, as there were, in my view, repeated instances of misconduct which were sufficiently egregious to taint the proceedings.

Prior to and during trial, the prosecutor averred that the Commonwealth's chief witness, Tracy Allen, had, as part of a

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[1]The prosecutor asked his witness on re-direct "Counsel asked you what she was doing when she was reading the tape or speaking into the tape. When she was doing that, was she actually naming the names of the murderers?" Defense counsel objected and at sidebar moved for a mistrial. The court denied the motion but stated of record:

> Yes. As I remember the tenure of the question is did she say and name the names of the murderers, not only is the question improper, it is trying to get the contents of the statement into the record. It is also trying to conclude for the jury that that in fact she named actual murderers, giving an impression what she said was absolutely true and that her naming of certain names amounted to what is absolutely gospel that this jury should base a finding of fact. I am saying right now you are in contempt of my orders. I fine you one hundred dollars, sir, right here and now. You do it once more, the fine's five hundred dollars, for the next time you spend the weekend in prison. That is my ruling.

I note this exchange occurred toward the end of the trial, but that it accurately reflects the type of tactics the prosecutor employed repeatedly throughout the course of the entire trial.

negotiated plea arrangement, pled guilty to third degree murder before Judge Lisa Richette, sentencing for which would be deferred until after Ms. Allen testified for the Commonwealth against appellant. The prosecutor elicited testimony from Ms. Allen that there was no agreement as to the length of sentence she might receive. In reality, Judge Richette deferred not the sentence, but the actual adjudication of guilt and stated on the record that Ms. Allen would absolutely not receive the maximum possible penalty if indeed the Commonwealth chose to go forward with the adjudication of guilt after the completion of her testimony in the present case. Although a copy of the "plea agreement" was furnished to appellant's defense counsel, the transcript of the colloquy in which Judge Richette deferred Ms. Allen's adjudication of guilt was not disclosed until after Ms. Allen had testified. The prosecution's excuse for failing to disclose the details of said colloquy was that it was part of the public record.

> It is well settled that the Commonwealth has a duty not to conceal the existence of a promise or of an agreement to recommend a specific sentence or leniency for a crucial prosecution witness. Such agreements have a significant bearing on the witnesses' motive for testifying and hence their credibility. Thus they should be fully, fairly and honestly disclosed when they come into question at trial.

Commonwealth v. Hartey, 424 Pa.Super. 29, 621 A.2d 1023 (1993) (citations omitted and emphasis added). The court found the failure to disclose the colloquy to be a discovery violation of Brady material and allowed appellant's defense counsel to re-open cross-examination of Ms. Allen as a remedy. However, such remedy was, in my view, insufficient to cure the harm where the resulting

testimony had a distinct likelihood of confusing the jury and where timely disclosure was crucial for the defense to prepare effective cross-examination of the Commonwealth's chief witness.

The prosecutor also failed to disclose until mid-trial the existence of a tape recording of Ms. Allen reading the statement she gave the police regarding her involvement in the crime. The importance of the tape is clear. During cross examination, appellant's defense counsel repeatedly pointed out inconsistencies between Ms. Allen's trial testimony and her statement to the police. Ms. Allen repeatedly explained away these inconsistencies by averring that while she had signed her statement, she never read it, and therefore, did not have an opportunity to correct misstatements contained therein. She maintained that any inaccuracies in the statement were due to the transcriber's misunderstanding of her recital of the details. The tape recording of Ms. Allen reading her statement clearly would have been a basic tool for defense counsel's effective cross-examination of Ms. Allen and appellant was prejudiced by it's late disclosure. The prosecutor averred that he was unaware of the tape's existence and disclosed it as soon as he found out about it. However, whether the prosecutor knew of the tape's existence prior to his disclosure of it is, ultimately, irrelevant:

> The good faith, or lack thereof, of the prosecutor is not determinative [of a Brady violation] because the concern is not punishment of society for misdeeds of the prosecutor, but avoidance of an unfair trial to the accused...

Commonwealth v. Wallace, 500 Pa. 270, 276, 455 A.2d 1187, 1190

(1983). Here, there can be no question that the unavailability of the tape during defense counsel's cross-examination of the Commonwealth's chief witness effectively diluted the impact of that cross-examination. When the aforementioned instances of late disclosure are considered collectively with the record evidence of dozens of instances of improper questions and comments by the prosecutor, it becomes evident that the appellant's right to a fair trial was denied. I would vacate the judgment of sentence and remand for a new trial.