CLD-110

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-1882**

TERRANCE WASHINGTON, Appellant

VS.

SUPERINTENDENT SOMERSET SCI, ET AL.

(E.D. Pa. Civ. No. 2:18-cv-05638)

Present: AMBRO, SHWARTZ and BIBAS, 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

Appellant's request for a certificate of appealability is denied because jurists of reason would agree that the District Court properly dismissed his petition for a writ of habeas corpus. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Namely, Appellant's claims that the prosecutor excluded black jurors in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and engaged in prosecutorial misconduct and improper vouching are procedurally defaulted, and Appellant has not shown cause and prejudice or a miscarriage of justice to excuse the default. See, e.g., Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir. 2012); Gattis v. Snyder, 278 F.3d 222, 237 n.6 (3d Cir. 2002). Jurists of reason would agree that Appellant's Fourth Amendment claim is non-cognizable, see Stone v. Powell, 428 U.S. 465, 494 (1976), and that Washington's due process claims lack merit because he failed to show that the alleged evidentiary errors were "of such magnitude as to undermine the fundamental fairness of the entire trial," see Keller v. Larkins, 251 F.3d 408, 413 (3d Cir. 2001). Further, jurists of reason would agree that Washington's claims of ineffective assistance of counsel lack merit because he did not show both that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Hill v. Lockhart, 474 U.S. 52, 59

(1985). Jurists of reason would also not debate that Washington's sentencing-related claims under the Eighth Amendment and Alleyne v. United States, 570 U.S. 99 (2013), as well as his claim of cumulative error, lack merit for substantially the same reasons provided by the District Court. Finally, to the extent Washington raised claims under state laws and rules of evidence, such claims are not cognizable under 28 U.S.C. § 2254. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: March 28, 2022
Tmm/cc: Terrance Washington
Jennifer O. Andress, Esq.

A True Copy:

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

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

TERRANCE WASHINGTON, *Petitioner*	:	**CIVIL ACTION**
v.	:	
SUPERINTENDENT TICE *et al.*, *Respondents*	:	**No. 18-5638**

MEMORANDUM

PRATTER, J. APRIL 1, 2021

BACKGROUND

Terrance Washington was charged with several offenses related to robberies of state-owned liquor stores in 1996. While awaiting trial, Mr. Washington was placed under house arrest and was required to wear an electronic monitoring bracelet. A year later, Mr. Washington cut off his ankle bracelet and committed four more robberies. He was soon arrested and charged in connection with these later robberies as well.

In January 1998, a jury convicted Mr. Washington of "four counts of robbery, two counts of criminal conspiracy, two counts of violations of the Uniform Firearms Act [] and two counts of possessing an instrument of crime." Thereafter, Mr. Washington also pled guilty to "17 additional counts of robbery, conspiracy, [possessing an instrument of crime], and [violations of the Uniform Firearms Act]." Following a plea colloquy, the trial court sentenced Mr. Washington to 35-70 years' imprisonment for all of the robberies committed in 1996 and 1997.

After a lengthy appeals process that included a trip to the Pennsylvania Supreme Court, the Superior Court affirmed the judgment, and the Supreme Court of Pennsylvania denied review. Mr. Washington then filed a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S. §§ 9541 *et seq.* ("PCRA"), which was denied in August 2008. Mr. Washington appealed. The

Superior Court remanded the case to the PCRA court for an evidentiary hearing on two issues, including Mr. Washington's argument that trial counsel had rendered ineffective assistance by failing to notify him of a favorable plea deal that would have resolved all complaints against him. Mr. Washington abandoned one claim, and the PCRA court dismissed the remaining claim, finding that no such "global" plea deal was ever offered. On appeal, the Superior Court affirmed the denial of PCRA relief, and the Pennsylvania Supreme Court denied review. Thereafter, Mr. Washington filed this habeas petition.[1]

LEGAL STANDARD

Federal courts can only grant a writ of habeas corpus if a claim "was 'adjudicated on the merits' in state court." *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 281 (3d Cir. 2018) (citing 28 U.S.C. § 2254(d)). And if the claim was adjudicated on the merits in state court, habeas relief can only issue if adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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).

"If a claim was not adjudicated on the merits in state court, [the court] review[s] legal questions and mixed questions of law and fact *de novo*." *Bennett*, 886 F.3d at 281 (citing *Cone v. Bell*, 556 U.S. 449, 472 (2009)). The state court's factual determinations are presumed to be correct but may be rebutted by clear and convincing evidence. *Id.* at 282 (citing *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001)).

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[1] The foregoing procedural history is drawn from docketed filings in this case.

"As a general rule, federal courts may exercise the power to consider habeas applications only where 'it appears that the applicant has exhausted the remedies available in the courts of the State.'" *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999) (quoting *Walker v. Vaughn*, 53 F.3d 609, 614 (3d Cir. 1995)). This "exhaustion rule" requires a petitioner to "fairly present" federal claims in state court before bringing them in federal court. *Id.* (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). "When a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'" *Id.* (citing 28 U.S.C. § 2254(b)). In that case, a petitioner has procedurally defaulted his or her claims and the federal court may not consider the merits of the claim unless the petitioner "establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse his or her default." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

DISCUSSION

I. Admission of Prejudicial Evidence

Mr. Washington brings two closely-related claims, arguing that the trial court improperly admitted two categories of evidence: "consciousness of guilt" evidence and "common plan, scheme and design" evidence. Mr. Washington argues that introduction of these two categories of evidence violated the Pennsylvania Rules of Evidence and the Due Process Clause of the Fourteenth Amendment. Neither argument has merit.

Preliminarily, Mr. Washington's argument that introduction of this evidence violated the Pennsylvania Rules of Evidence is not cognizable. "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). That includes "violations of state law procedural or evidentiary rules." *Hart v.*

Lawton, No. CIV.A. 13-3363, 2014 WL 5286601, at *2 (E.D. Pa. Oct. 15, 2014) (citing *Estelle*, 502 U.S. at 67).

Thus, Mr. Washington's complaint can only succeed if he can show that admission of this evidence violated the U.S. Constitution—not just state law.[2] But introduction of evidence with "some prejudicial effect" does not violate the Constitution. *See Spencer v. Texas*, 385 U.S. 554, 562 (1967). To violate the Constitution, an erroneous introduction of evidence must compromise "the fundamental elements of fairness in a criminal trial." *Id.* at 563-64. Introducing "consciousness of guilt" evidence does not meet this high bar. *See United States v. Beldini*, 443 F. App'x 709, 720 (3d Cir. 2011) (finding that introduction of consciousness of guilt evidence did not violate the Due Process Clause); *Gant v. Giroux*, No. CV 15-04468, 2017 WL 2825927, at *16 (E.D. Pa. Feb. 27, 2017), *report and recommendation adopted*, 2017 WL 2797911 (E.D. Pa. June 28, 2017) (same).

Similarly, the introduction of common plan, scheme and design evidence was not "so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial." *Bronshtein v. Horn*, 404 F.3d 700, 730 (3d Cir. 2005) (quoting *Lesko v. Owens*, 881 F.2d 44, 52 (3d Cir. 1989)). As Magistrate Judge Rice noted, evidence of Mr. Washington's other crimes was relevant because they followed a distinctive "modus operandi."[3] And during one of these similar robberies, Mr. Washington was recognized by one of

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[2] The Report and Recommendation states in a footnote that Mr. Washington procedurally defaulted his argument that introduction of consciousness of guilt and common plan, scheme, and design evidence violated the Due Process Clause of the Fourteenth Amendment. But Mr. Washington did indeed make this argument on direct appeal. Therefore, the Court does not adopt footnote 4 of the Report and Recommendation.

[3] This modus operandi was that "one individual went in the state store, would go to the back of the store, pick up a packet of wine coolers, walk toward the security guard, put down the wine coolers, pull a gun on the security guard, demand the security guard's gun, make him lie down on the floor, at which point

his victims, who stated on the phone: "I'm being robbed now by Terrance Washington." Because this evidence was relevant to demonstrating that Mr. Washington was the perpetrator of the actual robberies at issue, and was not merely used as unlawful "propensity" evidence, its introduction did not violate the Due Process Clause.

Thus, admission of "consciousness of guilt" and "common plan, scheme, and design" evidence is not a valid basis for Mr. Washington's habeas petition.

II. Ineffectiveness of Counsel—Consolidation

Mr. Washington next argues that his trial counsel was ineffective because counsel should have objected to consolidation of the first four robbery cases into two trials. He notes that a different judge on the same court had previously denied the Commonwealth's consolidation motion, and argues that the later consolidation was misjoinder. The Superior Court held that counsel was not ineffective because consolidation of the cases was required by Pennsylvania law. As noted above, a federal habeas court cannot review a state court's application of state law, so the Court must assume that this holding was correct. What remains is Mr. Washington's argument that consolidation violated his constitutional right to a fair trial.

Consolidation only violates the Constitution if "the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Jimenez*, 513 F.3d 62, 83 (3d Cir. 2008) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). Consolidation caused no prejudice here. Even if the Commonwealth tried each of Mr. Washington's robberies separately, evidence of all four robberies was admissible in each case as common plan, scheme, and design evidence, as discussed above. The end result would have been the same—a jury would have been able to consider evidence from each robbery when

the second defendant" would rob the people in the store's office. Both defendants would then steal the money in the cash registers.

determining whether Mr. Washington was guilty of any particular robbery. Because Mr. Washington did not suffer prejudice from consolidation, he did not suffer prejudice from his counsel's failure to challenge consolidation.

III. Ineffectiveness of Counsel—Failure to Convey Plea Offer

Mr. Washington next argues that counsel was ineffective for failing to convey a "global plea offer," which he argues would have resolved all of his robbery cases. His first piece of evidence as to the existence of this offer is three entries on the criminal docket. These three entries, dated September 3, 1996, December 9, 1996, and January 7, 1998, each read: "offer rejected." Mr. Washington's second piece of evidence is testimony from his trial counsel at an evidentiary hearing, at which his counsel testified that the Commonwealth offered either 20-40 years or 25-50 years for "all the cases," and admitted that he did not discuss the offer with Mr. Washington because Mr. Washington seemed eager to continue to trial. Mr. Washington further argues that had he heard of an offer for up to 60 years for all of his cases, he would have considered it.

But Mr. Washington's argument omits critical pieces of information. During cross-examination, Mr. Washington's trial counsel clarified that "all of the cases" referred to all of his cases from the 1996 robberies, not the four additional robberies he committed while awaiting trial. The PCRA court credited this later clarification from Mr. Washington's trial counsel. *See id.* The PCRA court also ruled that the three docket entries of "offer rejected" were likely clerical errors, a determination that was based on testimony from various witnesses that any time a case was scheduled to go to trial "the matter would be marked 'offer rejected' with the assumption that there had been an offer," even if no such offer had been made. The court also concluded that trial counsel had a reasonable basis for not conveying the offers that were made because Mr. Washington had previously rejected all offers and was eager to go to trial.

It is not enough for Mr. Washington to demonstrate that "reasonable minds reviewing the record might disagree about the finding in question." *Wheeler v. Rozum*, 410 F. App'x 453, 459-60 (3d Cir. 2010) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution-not to correct errors of fact." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Rather, Mr. Washington must show that the PCRA court's determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at 459 (quoting 28 U.S.C. § 2254(d)(2)). He has not done so here. The PCRA court based its conclusion that there was no global plea offer, and that Mr. Washington was not prejudiced, on testimony from several witnesses and examination of an extensive record that included contemporaneous notes from Mr. Washington's trial counsel. Because these findings of fact were not unreasonable, the Court will not disturb the PCRA court's holding.

IV. Excessive Sentence

Mr. Washington next argues that the trial court violated his Eighth Amendment rights by imposing an excessive sentence. He argues that the sentence was excessive because the trial court imposed the seven robbery sentences to run consecutively, not concurrently. The result was a sentence of 35-70 years' imprisonment.

This argument is procedurally defaulted. On direct appeal, Mr. Washington argued that the sentence was "manifestly excessive and clearly unreasonable [because the trial] court failed to consider mitigating factors." He never added an Eighth Amendment challenge to that argument.

And in any case, this claim is meritless. "The Eighth Amendment does not require strict proportionality between crime and sentence in non-capital cases. Rather, it 'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" *James v. Folino*, No. CV 07-2162, 2015 WL 5063782, at *7 (E.D. Pa. Aug. 25, 2015) (quoting *Harmelin v. Michigan*, 501 U.S. 957,

1001 (1991) (Kennedy, J., concurring)). Mr. Washington was convicted of two robberies and pled guilty to robbing 17 additional people. He received a sentence of 35-70 years, which was far below the Commonwealth's argument for a sentence of 55-110 years. And even though the trial court ordered that his seven robbery sentences run consecutively, it ordered the sentences for conspiracy and firearms violations to run concurrently, which meant that he would serve no additional time for those charges. Finally, while Mr. Washington characterizes his offense as merely a "15-month crime spree," during those 15 months Mr. Washington robbed dozens of people at gunpoint, put innocent lives in danger, and showed a complete disregard for the law. The Court cannot say that a sentence of 35-70 years for these numerous acts of armed robbery is grossly disproportionate or constitutes cruel and unusual punishment.

V. Juror Bias

Mr. Washington argues that a juror who stated that members of her family had been victims of a crime "exhibited clear bias & partiality." Mr. Washington argues that the trial court should have removed the juror, and that his trial counsel should have used a peremptory strike to remove the juror.

This argument is procedurally defaulted because he failed to make this argument at trial or on appeal. It is also meritless because Mr. Washington has not shown that the juror was biased. The juror stated that she could put her personal experiences aside. Trial courts have "broad discretion" in ruling on juror bias. *Dennis v. United States*, 339 U.S. 162, 168 (1950). In determining whether a juror is biased, "the Constitution lays down no particular tests." *Id.* at 172. The Superior Court's decision to credit the juror's statement that she was unbiased was not an unreasonable determination of the facts. *See also United States v. Davis*, No. CR 11-123, 2017 WL 1133948, at *4 (E.D. Pa. Mar. 27, 2017) (noting that counsel was not ineffective for not

striking juror from panel where juror said she could be impartial despite having been the victim of a crime). Therefore, this argument is meritless.

VI. *Batson* Challenge

Mr. Washington next argues that the Commonwealth sought to exclude African-American men from the panel by striking two of them from the jury, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

This argument is procedurally defaulted. While Mr. Washington's trial counsel raised this argument during jury selection, Mr. Washington did not pursue the claim on direct appeal or in his PCRA petition.

And even if the claim was not procedurally defaulted, Mr. Washington must show statistical disparities sufficient to demonstrate purposeful discrimination. *See Batson*, 476 U.S. at 96-98; *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993). The strike rate for African-American men was 2/7 or 35%. In the end, African-American men comprised eight percent of the jury pool as well as eight percent of the jury—which cannot be characterized as strong evidence of purposeful discrimination. Therefore, Mr. Washington's *Batson* claim is meritless.

VII. Illegal Search and Seizure

Mr. Washington next argues that the police's search of his girlfriend's home, and seizure of a firearm, violated his Fourth Amendment rights. But this argument was not made on direct appeal, nor is it referenced anywhere in the PCRA opinion. Therefore, this claim is procedurally defaulted and is not cognizable. *See, e.g., U. S. ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1978).

VIII. Illegal Sentencing

Mr. Washington next argues that his sentence was illegal because he was never told that he would be subject to a mandatory minimum sentencing provision and because the mandatory

minimum sentence violated *Alleyne v. United States*, 570 U.S. 99 (2013). Mr. Washington's argument that he was not informed that he would be subject to a mandatory minimum is directly contradicted by the record. Moreover, the Pennsylvania Supreme Court held that *Alleyne* was not retroactive, and, as a result, it did not apply to Mr. Washington on collateral review. *Commonwealth v. Washington*, 142 A.3d 810, 819 (Pa. 2016). This decision was not an unreasonable application of *Alleyne*; indeed, the Third Circuit Court of Appeals has also held that *Alleyne* is not retroactive. *See United States v. Winkelman*, 746 F.3d 135, 136 (3d Cir. 2014). The Court must follow this precedent.

IX. Involuntary Plea—Consecutive Sentence

Mr. Washington also argues that his plea was involuntary because counsel failed to inform him what a "consecutive" sentence meant, or to warn him that he could be sentenced to consecutive sentences.

The Superior Court rejected Mr. Washington's argument, noting that he was informed that he faced a maximum penalty of 570 years in prison and $1 million in fines. Thus, even if Mr. Washington was not informed of the intricacies behind how his sentence could be calculated, he understood the bottom line: if he pled guilty, he faced up to 570 years in prison. Accordingly, the Superior Court's determination that Mr. Washington's plea was knowing and voluntary was not contrary to federal law, nor was it an unreasonable determination of the facts. *See, e.g.*, *Phillips v. Superintendent of SCI-Huntingdon*, No. CIVA 05-3042, 2007 WL 626055, at *8 (E.D. Pa. Feb. 22, 2007) ("[E]ven if Phillips's attorney failed to adequately explain to him the possibility of mandatory consecutive sentences . . . [Petitioner was aware] that his sentences on various charges could run consecutively and that his maximum sentence could be as much as 47 years. . . .").

X. Involuntary Plea—Elements of Crimes Charged

Mr. Washington's next argument is that his plea was involuntary and unknowing because his trial counsel failed to explain to him the elements of the crimes for which he was charged, and the trial court did not include the elements of those crimes on the record at his plea colloquy.

This argument is not persuasive. Mr. Washington's plea colloquy took place less than two weeks after his jury trial. During that trial, the elements of the charges were read out loud to the jury in Mr. Washington's presence. And even if this were not so, Mr. Washington testified at the plea colloquy that his attorney had explained the charges to him, including the elements of the crimes he was charged with. Finally, while a defendant must "possess an understanding of the law in relation to the facts" for a plea to be voluntary, *McCarthy v. United States*, 394 U.S. 459, 466 (1969), a defendant need not understand each element of each crime he is charged with, *see United States v. Hlushmanuk*, No. CIV.A. 14-3044, 2014 WL 5780814, at *7 (E.D. Pa. Nov. 6, 2014). It is only necessary that the colloquy show that the defendant pled guilty to facts sufficient to meet each element. *See id.* Mr. Washington did so. For these reasons, Mr. Washington's claim on this point is meritless.

XI. Inappropriate Comments by the Prosecutor

Mr. Washington also argues that the prosecutor made "inappropriate, unsubstantiated & unconstitutional comments" during closing argument. Mr. Washington points to two specific comments. First, the prosecutor stated: "I don't have to prove—it's not my burden to prove it beyond a reasonable doubt, but to a mathematical certainty." Second, the prosecutor asked the jury to consider whether the woman who identified Mr. Washington as the robber evidenced "any type of deception or hesitation." The prosecutor then stated: "I submit that [she] didn't." Mr. Washington argues that this was inappropriate vouching.

Neither of these comments "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 182 (1986). The Superior Court held that the jury was unlikely to have been swayed by the prosecutor's comment about the burden of proof because the jury later received extensive instructions that made it clear that each element had to be proven beyond a reasonable doubt. This was not an unreasonable application of the law.

Mr. Washington's argument about inappropriate vouching is also procedurally defaulted. And even if it were not, the prosecutor did not engage in inappropriate vouching. Vouching occurs when the prosecutor assures that the witness is credible based on evidence not before the jury. *See, e.g.*, *Buel v. Vaughn*, 166 F.3d 163, 176 (3d Cir. 1999). Here, the prosecutor merely asked the jury to refer to the evidence that they had already seen, including the witness's statements and demeanor, and to consider whether the witness demonstrated "any type of deception or hesitation." Therefore, this argument is without merit.

XII. Cumulative Error

Finally, Mr. Washington argues that the cumulative effect of multiple errors undermined his due process rights. This claim is procedurally defaulted. And even if it were not, Mr. Washington has failed to show any violation occurred, much less a set of violations that cumulatively undermines the fundamental fairness of the trial. *See Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008). Therefore, this argument is also unavailing.

CONCLUSION

For the forgoing reasons, the Court denies Mr. Washington's Petition for Writ of Habeas Corpus. The Court adopts Magistrate Judge Rice's Report and Recommendation in part and modifies the Report and Recommendation in part, as detailed in this memorandum. Because

Mr. Washington has not made "a substantial showing of the denial of a constitutional right," a certificate of appealability will not issue. 28 U.S.C. § 2253(c)(2). An appropriate order follows.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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

TERRANCE WASHINGTON, *Petitioner*	:	CIVIL ACTION
v.	:	
SUPERINTENDENT TICE *et al.*, *Respondents*	:	No. 18-5638

ORDER

AND NOW, this 1st day of April, 2021, upon careful and independent consideration of *pro se* Petitioner Terrance Washington's Petition for Writ of Habeas Corpus (Doc. No. 1), Mr. Washington's Memorandum in Support (Doc. No. 5), Respondents' Response in Opposition (Doc. No. 14), Mr. Washington's Reply in Support (Doc. No. 21), Magistrate Judge Timothy R. Rice's Report and Recommendation (Doc. No. 31), Mr. Washington's Objections to the Report and Recommendation (Doc. No. 35), Respondents' Reponses to Petitioner's Objections (Doc. No. 43), Mr. Washington's Reply (Doc. No. 43), and the state court record, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED IN PART AND MODIFIED IN PART** only insofar as footnote 4 in the Report and Recommendation is not adopted.
2. The petition for Writ of Habeas Corpus is **DISMISSED** with prejudice.
3. There is no probable cause to issue a certificate of appealability.
4. The Clerk of the Court shall mark this case **CLOSED**, including for statistical purposes.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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

TERRANCE WASHINGTON, Petitioner,	:	CIVIL ACTION
v.	:	
SUPERINTENDENT TICE, et al., Respondents.	:	No. 18-5638

REPORT & RECOMMENDATION

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

March 9, 2020

Petitioner Terrance Washington, a prisoner at the State Correctional Institution in Somerset, Pennsylvania, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging a variety of constitutional violations. I respectfully recommend dismissing Washington's claims with prejudice as noncognizable, procedurally defaulted, or meritless.

FACTUAL AND PROCEDURAL HISTORY

Washington was charged with offenses related to several 1996 armed robberies of state liquor stores. Crim Dkts. CP-51-0711021-1996, CP-51-CR-711091, CP-711141-1996, CP-51-1009712-1996. While released on electronic monitoring pending trial, Washington cut his ankle bracelet and committed four additional robberies, including at least one of a liquor store he had previously robbed. N.T. 2/24/1998 at 25; see also Release Order, attached as Exhibit A; Bail Revocation Order, attached as Exhibit B. He was arrested and charged with offenses related to those robberies. Crim Dkts. CP-51-CR-1107481, CP-51-CR-1107621, CP-51-CR-1107651, CP-51-CR-1107671.

On January 12, 1998, a jury convicted Washington of offenses related to two of the 1996 gun-point robberies. See N.T. 1/12/1997 at 158-60. On January 21, 1998, Washington pled

guilty to six other robberies. N.T. 1/21/1998 at 21-28. On February 24, 1998, he was sentenced to a total of 35-to-70 years incarceration for all convictions and pleas.[1] N.T. 2/24/1998 at 38.

The procedural history of Washington's direct appeals and post-conviction proceedings is convoluted, but in October 2005, the Superior Court affirmed Washington's judgment of sentence and in June 2006, the Supreme Court of Pennsylvania denied review.[2] See Commonwealth v. Washington, 3344 EDA 2003 (Pa. Super. Oct. 14, 2005) ("Direct App. Op."); Commonwealth v. Washington, 902 A.2d 1241 (Pa. 2006).

Washington filed a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S. § 9541 et seq. ("PCRA"), which was denied in August 2008. After remanding the case to the PCRA court for an evidentiary hearing on two issues, the Superior Court affirmed the denial of PCRA relief in July 2018. See Commonwealth v. Washington, 532 EDA 2011 (Pa. Super. May 12, 2015) ("PCRA App. Op. I"); Commonwealth v. Washington, 2125 EDA 2017 (Pa. Super. July 20, 2018) ("PCRA App. Op. II"). The Pennsylvania Supreme Court denied review in December 2018.[3] Crim. Dkt. CP-51-0711021-1996 at 17.

Washington timely filed this federal habeas petition on December 26, 2018. See Hab. Pet. (doc. 1) at 1.

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1 Due to an administrative error, Washington was not officially sentenced in one of his cases until December 17, 1998. N.T. 12/17/1998 at 5. No additional time was added, however, because the original sentence contemplated the charges in that case. Id.

2 Although the parties disputed whether Washington filed a timely appeal, the state courts reinstated his appellate rights, allowing an appeal in 2003. See Direct App. Op. at 3.

3 In July 2016, the Pennsylvania Supreme Court determined Alleyne v. United States, 570 U.S. 99 (2013) did not apply retroactively to Washington's case on collateral review. See Commonwealth v. Washington, 37 EAP 2015 (Pa. July 19, 2016); Alleyne, 570 U.S. at 103 ("any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury").

DISCUSSION

Before seeking federal relief, a habeas petitioner must exhaust all available state court remedies, see 28 U.S.C. § 2254(b)(1), "thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights," Baldwin v. Reese, 541 U.S. 27, 29 (2004) (citations omitted). If a petitioner has failed to exhaust his state court remedies and the state court would now refuse to review a claim on procedural grounds, the claim is procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Bey v. Superintendent Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017).

A court may consider a procedurally defaulted claim only if a petitioner demonstrates: (1) a legitimate cause for the default and actual prejudice from the alleged constitutional violation; or (2) failure to review the claim would cause a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. PCRA counsel ineffectiveness may excuse procedural default only if: (1) the claim involves trial counsel ineffectiveness; and (2) the underlying claim is "substantial," i.e., has "some merit." Martinez v. Ryan, 566 U.S. 1, 14, 17–18 (2012). To establish a fundamental miscarriage of justice, a petitioner must present "new reliable evidence" of his actual innocence, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." Schlup v. Delo, 513 U.S. 298, 321–24 (1995).

If the state courts have denied a claim on its merits, I can grant relief only if the state court's decision: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "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). This is a "difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal quotations omitted). State court factual

determinations "are presumed correct absent clear and convincing evidence to the contrary." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)).

For claims of ineffective assistance of counsel, petitioners must establish: (1) deficiency, meaning "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). I must be "highly deferential" and "indulge a strong presumption" that counsel's challenged actions were strategic. Id. at 689. The relevant inquiry is not whether counsel was prudent, appropriate, or perfect, Burger v. Kemp, 483 U.S. 776, 794 (1987), rather, the focus is on ensuring the proceedings resulting in a petitioner's conviction and sentence were fair, see Strickland, 466 U.S. at 684–85.

If the state court addressed counsel's effectiveness and applied the correct legal standard, Washington must show that determination was objectively unreasonable. Woodford v. Visciotti, 537 U.S. 19, 25 (2002). Review of such ineffectiveness claims is "doubly deferential," requiring me to give "both the state court and the defense attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 15 (2013). "[I]t is not enough to convince a federal habeas court that, in its independent judgment," the state court misapplied Strickland. Bell v. Cone, 535 U.S. 685, 699 (2002).

I. Prejudicial Evidence

Washington claims the trial court violated the Pennsylvania Rules of Evidence and his Fourteenth Amendment Due Process rights by admitting evidence that he cut his ankle bracelet and committed additional robberies while awaiting trial.[4] Pet. Mem. at 12-13. The Superior

[4] Washington procedurally defaulted this claim by failing to challenge the evidentiary determination on federal constitutional grounds in state court. See Direct App. Op. at 4-7;

Court addressed this claim on direct appeal, Direct App. Op. at 4-7, and Washington attacks the state court's decision on several bases.

First, he argues the trial court misapplied the Pennsylvania Rules of Evidence. Pet. at 6-7. Such state court determinations of state law are not cognizable. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Second, he contends the Superior Court's opinion is inconsistent because it describes the evidence's admission as both correct and as harmless error. Pet. Mem. at 6. Legal inconsistency is not a cognizable claim. See 28 U.S.C. § 2241(c). Regardless, the opinion merely explains that, even if admitting the evidence had been an abuse of discretion, any error would have been harmless based on the overwhelming evidence against Washington. Direct App. Op. at 6-7.

Finally, the state courts' decision was not contrary to or an unreasonable application of Supreme Court law. Admitting evidence that has "some prejudicial effect" does not violate due process. Spencer v. State of Tex., 385 U.S. 554, 562 (1967). Only trial errors that compromise the fundamental fairness of a criminal proceeding are prohibited. Id. at 563-64. ("the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"). Admitting evidence of flight, also known as "consciousness of guilt" evidence, does not compromise a trial's fundamental fairness.[5] Smith v. Nish, No. 07-1279, 2008 WL 4616850, at *11 n.8 (W.D.

Baldwin v. Reese, 541 U.S. 27, 33 (2004) (exhaustion requires putting the state court on notice of the federal basis of the claim). In an abundance of caution, I address the claim on the merits nonetheless. § 2254(b)(2) (claims can be dismissed on their merits).

5 Moreover, the trial court provided Washington more protection than was constitutionally required by demanding proof that Washington had been convicted of contempt for evading a bench warrant before admitting the evidence of flight. N.T. 1/9/1998 at 19; see also United States v. Pungitore et al., 910 F.2d 1084, 1151 (3d Cir. 1990) (noting evidence of flight can be admissible even if it was not "triggered by an actual indictment" because "the act of departure . . . is itself evidential").

Pa. Oct. 16, 2008) (citing Riggins v. Nevada, 504 U.S. 127, 149 (1992)); see also Johnston v. Love, 940 F. Supp. 738, 773 (E.D. Pa. 1996), aff'd, 118 F.3d 1576 (3d Cir. 1997) (citing United States v. Bamberger, 456 F.2d 1119, 1126 (3d Cir. 1972), cert. denied, 413 U.S. 919 (1973)).

II. Excessive Sentence

Washington argues the trial court abused its discretion and violated the Eighth Amendment's prohibition against cruel and unusual punishment by ordering 5-to-10-year consecutive sentences for seven of his robbery convictions.[6]

The Superior Court held that the trial court did not abuse its discretion because its sentence was not "manifestly excessive" based on the mandatory minimum sentencing statute in force at that time. Direct App. Op. at 14. Its decision was not contrary to Supreme Court law or an unreasonable determination of facts. See James v. Folino, No. 07-2162, 2015 WL 5063782, at *7 (E.D. Pa. Aug. 25, 2015) ("The Eighth Amendment does not require strict proportionality between crime and sentence in non-capital cases. Rather, it 'forbids only extreme sentences that are grossly disproportionate to the crime.'") (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

Washington was convicted of two robberies, pled guilty to robbing 17 additional people, and received a sentence of 35-to-70 years of imprisonment, Commonwealth v. Washington, No. 448 EDA 99, at 1, 22 (Pa. Ct of Common Pl. June 30, 2004), which was well below the Commonwealth's request of 55-to-110 years. Id. at 22-23. Although the trial court directed Washington's seven robbery sentences to run consecutively, it ordered the sentences for conspiracy and firearms violations to run concurrently, effectively adding no time for those charges. N.T. 2/24/1998 at 39. The trial court also sentenced Washington on only one robbery

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6 Again, I will address the merits of Washington's federal claim even though it appears to have been procedurally defaulted. § 2254(b)(2).

per criminal case, even though several of the cases charged more than one robbery. Id. ("I still cut you a break. I could have sentenced you on every single count of robbery to five to ten years.").

This claim is meritless.

III. Biased Juror

Washington claims the trial court erred by failing to excuse a biased juror, and counsel was ineffective for failing to strike the juror. Pet. Mem. at 19-20.

During voir dire, a juror stated that she and her family had been crime victims 13 years earlier, and her brother and nephew were victims a few months before. N.T. 1/8/1998 at 125. Nonetheless, the juror said she would "be able to put that aside." Id. at 128. She also testified that she could follow the court's instruction that Washington was presumed innocent, and she would not hold her prior experiences against Washington if he decided not to testify. Id. at 127-28. She was seated without objection. Id. at 128, 166.

This claim is procedurally defaulted. Washington failed to argue at trial or on appeal that the trial court should have excused the juror, and he no longer has the right to raise this claim in state court based on adequate and independent state grounds, his claim is procedurally defaulted. See Coleman, 501 U.S. at 750; Pa. R.A.P. 302 (issues not raised before trial court are waived); Pa R.A.P. 903 (allowing one right to appeal to Superior Court within 30 days of trial court's final order). Washington also fails to show cause and prejudice to excuse the default of this claim.[7]

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[7] Washington seems to argue he has cause for the default because PCRA counsel was ineffective for failing to raise this claim. Reply (doc. 29) at 2-3. Because Washington waived his claim of trial court error, it was not appropriate for PCRA review. See 42 Pa. C.S. § 9543(a)(3). Regardless, the trial court did not abuse its discretion in not excusing the juror because the juror stated she could be fair and impartial. See Dennis v. United States, 339 U.S. 162, 168 (1950) (trial court has "broad discretion" in ruling on issues of juror bias).

In his PCRA proceedings, Washington asserted trial counsel was ineffective for failing to strike the juror for bias. PCRA App. Op. I at 7. The Superior Court denied this claim, reasoning that Washington failed to show he was prejudiced because the juror's responses showed she was not biased. Id. at 8-9. This decision was not contrary to Supreme Court law or an unreasonable determination of the facts given that the juror stated that she could put her experiences aside. See Strickland, 466 U.S. at 687 (ineffectiveness claim fails if petitioner cannot show prejudice); Dennis, 339 U.S. at 172 (impartiality "is not a technical conception"; "it is a state of mind" and "the Constitution lays down no particular tests" for determining impartiality); United States v. Davis, No. 11-123, 2017 WL 1133948, at *4 (E.D. Pa. Mar. 27, 2017) (counsel not ineffective for failing to strike juror who said she could be fair and impartial despite her prior experience as a crime victim).[8]

This claim is procedurally defaulted and meritless.

IV. Batson Claim

Washington claims the prosecution undermined his right to an impartial jury by intentionally excluding African-American men in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Hab. Pet. at 12.

Although Washington's trial counsel raised a Batson objection during jury selection, there is no evidence he pursued the claim on appeal and it is not addressed in the Superior Court's 2005, 2015, or 2018 opinions, or the Pennsylvania Supreme Court's 2016 opinion. See Direct App. Op., PCRA App. Op. I, PCRA App. Op. II, Alleyne Op. The claim is procedurally

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[8] Washington argues Rosales-Lopez v. United States, 451 U.S. 182 (1981) and United States v. Calabrese, 942 F.2d 218 (3d Cir. 1991) support his claim. Reply at 3. Rosales-Lopez, however, requires courts to inquire about racial bias when there are "special circumstances," 451 U.S. at 192, and Calabrese requires courts to base implied bias determinations on individual analysis, 942 F.2d at 224. Neither case applies here. Moreover, the Superior Court determination is not contrary to either case.

defaulted. There also is no evidence that Washington or any of his PCRA attorneys raised an ineffectiveness claim based on counsel's failure to appeal the Batson issue during collateral review.

Any argument that the procedural default of this claim should be excused due to the ineffectiveness of PCRA counsel fails because the claim is not "substantial." Martinez, 144 U.S. at 14. Courts apply a burden-shifting analysis to determine whether the state violated the Equal Protection Clause in exercising a peremptory challenge. Abul-Jamal v. Horn, 520 F.3d 272, 279 (3d Cir. 2008), vacated on other grounds, Beard v. Abu Jamal, 558 U.S. 1143 (2010); Jones v. Ryan, 987 F.2d 960, 972 (3d Cir. 1993). First, courts determine whether a defendant has established a prima facie case of purposeful discrimination. Batson, 476 U.S. at 96-98. A defendant must identify a "pattern" of strikes that is "sufficient to permit the trial judge to draw an inference that discrimination has occurred."[9] Johnson v. California, 545 U.S. 162, 170 (2005). If a prima facie case has been established, the prosecutor must give a neutral explanation for the strikes at issue. Batson, 476 U.S. at 97. If a neutral explanation is offered, the judge decides whether the defendant has shown purposeful discrimination. Id. at 96-98.

The Commonwealth used peremptory challenges on two of the three African-American males on the jury panel. N.T. 1/8/1998 at 161-62. Washington's counsel lodged a Batson challenge immediately after the Commonwealth struck the second man, arguing the Commonwealth sought to improperly exclude African-American men. N.T. 1/8/1998 at 163. Counsel noted that the 37-person panel contained 12 African-Americans and that his client was

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[9] Batson described two possible patterns that could show a prima face case: a pattern of strikes against black jurors and a pattern of prosecutor questions and statements during voir dire. Batson, 476 U.S. at 97. Caselaw also has encouraged the use of statistics in identifying patterns of discrimination. Jones, 987 F.2d at 971 ("statistical disparities are to be examined in determining whether a prima facie case has been established") (citing Castaneda v. Partida, 430 U.S. 482 (1977)).

African-American. Id. The trial court found Washington failed to identify a pattern of discrimination. Id. This decision was not contrary to, or an unreasonable application of, Batson, or an unreasonable determination of the facts.

Of the 12 jurors seated, five were African-American (men and women), four were white, one was Hispanic, one was of Arabic descent, and one was of Indian descent. See N.T. 1/8/1998 at 163. The two alternates were women – one white and one African-American. Id. Further, the strike rate for African-American men was only 2/7 (35%) and African-American men comprised eight percent of the jury pool for Washington's trial and eight percent of the jury. "This is not an instance where all, or even most, of Petitioner's racial group was excluded" and it is therefore "simply not strong enough to make out a prima facie Batson showing."[10] Howard, 56 F. Supp. 3d at 723. This claim is procedurally defaulted and meritless.

V. Common Plan, Scheme and Design Evidence

Washington contends the trial court violated due process and equal protection by allowing the Commonwealth to present evidence related to the other robberies as part of a common scheme or plan after another judge had previously denied a motion to consolidate the

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[10] Counsel also failed to make a prima face showing of race discrimination. Because the Commonwealth used four of its seven peremptory strikes against African-Americans, its "strike rate" was 58%. The Third Circuit has "never found an inference of discrimination based on a strike rate even as low as 66.67%." Howard v. Horn, 56 F. Supp. 3d 709, 723 (E.D. Pa. 2014) (citing Abu-Jamal, 520 F.3d at 293). Moreover, there were 14 black venirepersons (not 12 as trial counsel asserted at trial), which means African-American jurors comprised 38% of the jury pool. The percentage excluded by the Commonwealth's peremptory strikes, however, is only 4 out of 14, or 29%, which is lower than the 38% of African-Americans in the jury pool. In at least one other case, a petitioner with arguably stronger statistical evidence than this conceded it was insufficient to establish a prima facie case. Stidham v. Varano, No. 08-3216, 2009 WL 1609423, at *14 (E.D. Pa. June 9, 2009) ("Given the mixed inferences which these numbers could potentially demonstrate, we understand why Petitioner conceded in his brief before the Superior Court that this statistical data alone was insufficient to establish a prima facie Batson claim.").

robbery charges.[11] Pet. Mem. at 17-20.

This claim is noncognizable because it involves the trial court's determination of state evidentiary law. § 2254(b)(2); Estelle, 502 U.S. at 67-68. It also is meritless. Due process requires exclusion of relevant evidence related to other crimes only if its introduction would be "fundamentally" unfair. Ciucci v. Illinois, 356 U.S. 571, 573 (1958) (finding no due process violation when defendant was tried and convicted separately for the murder of each family member even though he had killed his family all at once). Pennsylvania law allowing evidence of other crimes to prove a "common plan" parallels federal law and passes constitutional muster. See Pa. R. Evid. 404(b)(2); Ross v. Maroney, 372 F.2d 53, 56-57 (3d Cir. 1967). Nonetheless, such evidence may "be so prejudicial that it violates the 'fundamental conceptions of fairness.'" Allison v. Superintendent Waymart SCI, 703 F. App'x 91, 98 (3d Cir. 2017) (citing Dowling v. United States, 493 U.S. 342, 352 (1990)); see also 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.'").

Evidence of Washington's other robberies was not "so conspicuously outweighed by its inflammatory content, so as to violate [his] constitutional right to a fair trial." Bronshtein, 404 F.3d at 730. The evidence was relevant based on the distinctive nature of Washington's crimes.

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[11] By January 1997, Washington had been charged with robbing four stores: one on May 31, 1996, one on June 6, 1996, and two on June 17, 1996. N.T. 1/29/1997 at 11. In February 1997, the trial court denied a Commonwealth motion to consolidate all four robbery charges. See 2/10/1997 Order, attached as Exhibit C; N.T. 1/29/97 at 5. In June 1997, before Washington's first case was scheduled to begin, a different trial judge ruled that evidence of Washington's other crimes could be admitted to show motive, intent, common scheme, plan, and identity. N.T. 6/16/1997 at 38-39. Washington, however, failed to appear for that trial and eventually Washington's four cases based on the 1996 robberies were consolidated into two trials. N.T. 1/8/1997 at 6, 13.

"[I]n each of the robberies one individual went in the state store, would go to the back of the store, pick up a packet of wine coolers, walk toward the security guard, put down the wine coolers, pull a gun on the security guard, demand the security guard's gun, make him lie down on the floor, at which point the second defendant" would come into the store, go up to the office, and rob the individuals in the office. N.T. 6/16/1997 at 35. "[B]oth defendants [then] would go to the cash register and require the individuals to open the registers and take the money." Id. This pattern established Washington's "modus operandi," id. at 14, and was not offered simply to establish Washington's bad character or his propensity for bad acts. See N.T. 1/8/1998 at 24-25 (allowing evidence from other robberies including a gun found during Washington's arrest and subsequent witness identification but excluding a gun recovered from car outside of the arrest location).

The evidence also was relevant to identification. During Washington's 1997 robbery spree, one of his victims recognized him from a prior crime. "[S]he was on the phone at the store, [and] as soon as he walked in the store she said, 'I'm being robbed now by Terrance Washington.'" N.T. 1/8/1998 at 16. Because the evidence was highly relevant to establishing a common plan and identification and not "conspicuously outweighed by inflammatory content," Bronshtein, 404 F.3d at 730, Washington cannot establish a due process violation.[12]

Although it is unclear whether Washington properly raised this claim before the state

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[12] Washington's "law of the case" claim is even weaker, assuming it is cognizable. The "law of the case" doctrine prevents one panel of an appellate court from reconsidering questions that another panel has decided on a prior appeal in the same case. In re City of Philadelphia Litig., 158 F.3d 711, 717–18 (3d Cir. 1998) (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)). The legal issue must have actually been decided, "either expressly or by implication; it does not apply to dicta." See In re City of Philadelphia Litig., 158 F.3d at 718 (citing Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 988 F.2d 414, 429 (3d Cir.1993)). Here, the state trial court judges ruled on different legal issues, i.e., consolidation for trial and admission of other acts evidence.

courts, it was discussed by the trial court in 2004 as part of its consolidation analysis. Commonwealth v. Washington, 448 EDA 99, at 17 (Pa. Ct. of Common Pl. June 30, 2004). The Superior Court adopted this analysis, PCRA App. Op. I at 7 n.3, and the reasoning is not contrary to, or an unreasonable application of, Supreme Court law. Allison, 703 F. App'x at 98.

VI. Ineffectiveness—Consolidation

Washington argues trial counsel was ineffective for failing to object to the consolidation of his robbery cases because the trial court had previously denied the Commonwealth's consolidation motion. Pet. Mem. at 22.

The Superior Court found counsel was not ineffective because Washington was not prejudiced. PCRA App. I at 7. The court reasoned that the consolidation of the cases was required and proper under Pennsylvania law. See id. at 7 n.3 (citing 6/30/2004 PCRA Op. at 14-18)). This finding is not contrary to, or an unreasonable application of, Supreme Court law or based on an unreasonable determination of facts.

Consolidation violates the Constitution only if "it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." United States v. Lane, 474 U.S. 438, 446 n.8 (1986); see also United States v. Jimenez, 513 F.3d 62, 83 (3d Cir. 2008) ("an error involving misjoinder . . . requires reversal only if the misjoinder results in actual prejudice"). Because evidence of all four robberies was admissible in each of his robbery cases, see supra Section V, Washington cannot show he was prejudiced by consolidating two of them in a single trial. Jimenez, 513 F.3d at 83; see also Strickland, 466 U.S. at 694 (must show prejudice by counsel's ineffectiveness). The claim is meritless.

VII. Failure to Convey Plea Offer

Washington argues counsel was ineffective for failing to convey a global plea offer for his robbery cases. Pet. Mem. at 30.

Although failure to convey a plea offer may constitute deficient performance under Strickland, Washington must prove not only that there was an offer and it was not conveyed, but that he "suffered prejudice as a result of the deficient performance." D'Amico v. Balicki, 592 F. App'x 76, 80 (3d Cir. 2014). Washington must show "that he himself—not a reasonable defendant in his place—would have accepted the offer had it been communicated to him." Wheeler v. Rozum, 410 F. App'x 453, 458 (3d Cir. 2010).

The Superior Court found Washington failed to show that the Commonwealth made a global plea offer, PCRA App. Op. II at 11, that counsel failed to convey any offers that did exist, id. at 14, or that he was prejudiced, id. at 16. This determination is not contrary to, or an unreasonable application of, Strickland, and it was not based on an unreasonable determination of facts. Although the Commonwealth had extended a plea offer, it did not encompass all the crimes because the 1997 robberies were still in the preliminary hearing stage. PCRA App. II at 6 (citing N.T. 6/29/2017 at 63); see also N.T. 6/29/2017 at 64 ("[T]here is no offer on the whole package, then that doesn't cover everything? Oh, yeah. It didn't."). Washington also failed to prove that he would have accepted any global offer. N.T. 6/29/2017 at 93 (counsel's notes stated Washington "dug his heels in and now refuses to plead. His only hope is to plead before [Judge] Temin, but I have no reason to believe he will even consider it.").

This claim is meritless.

VIII. Illegal Search and Seizure

Washington alleges the police's search and the seizure of a firearm from his girlfriend's home violated his Fourth Amendment rights. Pet. Mem. at 28.

Washington concedes that he raised this issue in a pre-trial motion to suppress, which

was denied following a two-day hearing in June 1997. Pet. Mem. at 30. He failed to appeal.[13] See 12/22/03 Preliminary Statement of Matters Complained of On Appeal, attached as Exhibit E; 4/26/04 Supplemental Statement of Matters, attached as Exhibit F.

This claim is noncognizable because Washington had a full and fair opportunity to litigate it before the state courts by raising his pre-trial suppression motion and by appealing if he so wished. Stone v. Powell, 428 U.S. 465, 494 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."); U.S. ex rel. Hickey v. Jeffes, 571 F.2d 762, 766 (3d Cir. 1978).

IX. Illegal Sentencing

Washington argues that his sentence is illegal because it was imposed pursuant to a mandatory minimum statute that was later found unconstitutional under Alleyne, 570 U.S. 99. Pet Mem. at 33-34. He also claims the Commonwealth failed to provide notice that mandatory minimum sentences applied, undermining the validity of his plea. Id.

In July 2016, the Pennsylvania Supreme Court found Alleyne was not retroactive and, therefore, did not apply to Washington on collateral review. Commonwealth v. Washington, 37 EAP 2015, at 16 (Pa. July 19, 2016). This decision is not contrary to, or an unreasonable application of, Alleyne. See United States v. Winkelman, 746 F.3d 135, 136 (3d Cir. 2014) (Alleyne is not retroactive).

Washington's claim that the Commonwealth failed to provide notice of its intention to

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[13] Washington claims he exhausted this issue in his PCRA appeal. See Hab. Pet. at 19. The issue is not addressed by the Superior Court in the opinion he cites, see PCRA App. Op. Further, because he waived the claim on direct appeal, it was not appropriate for PCRA review. See 42 Pa. C.S. § 9543(a)(3).

seek a mandatory minimum sentence also is meritless because it is contradicted by the record. See 8/2/1996 Charging Documents (noting the applicable mandatory minimum sentence), attached as Exhibit G.

X. Involuntary Plea – Consecutive sentencing

Washington claims his plea was involuntary and unknowing because counsel failed to advise him of the meaning of "consecutive" sentences and warn him that his sentences could be imposed consecutively. Pet. Mem. at 44.

An involuntary and unknowing guilty plea violates due process. McCarthy v. United States, 394 U.S. 459, 466 (1969). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Id. The representations at a plea hearing, and any findings made by the judge, "constitute a formidable barrier in any subsequent collateral proceedings [and solemn] declarations made in open court carry a strong presumption of verity." Zilich v. Reid, 36 F.3d 317, 320 (3d Cir. 1994) (quoting Blackledge v. Allison, 461 U.S. 63, 73–74 (1977)).

The Superior Court rejected "Washington's claim that counsel's ineffectiveness caused him to tender an unknowing and involuntary plea." PCRA App. I. at 15. It noted that Washington was informed of the maximum penalty that can be imposed. Id. (citing Commonwealth v. Persinger, 615 A.2d 1305, 1308 (Pa. 1992) and N.T. 1/21/1998 at 30 (Washington's maximum possible penalty was 570 years and one million dollars in fines)). The Superior Court's decision regarding Washington's "consecutive sentencing" claim is not

contrary to Supreme Court law, nor is it based on an unreasonable determination of facts.[14] See Phillips v. Superintendent of SCI-Huntingdon, No. 05-3042, 2007 WL 626055, at *8 (E.D. Pa. Feb. 22, 2007) (noting that "even if [Petitioner's] attorney failed to adequately explain to him the possibility of mandatory consecutive sentences .... in light of the advisories that he received from the court that demonstrated that his sentences on various charges could run consecutively and that his maximum sentence could be as much as 47 years . . . [his] plea was voluntary and knowingly entered into"); cf. Jamison v. Klem, 544 F.3d 266, 273 (3d Cir. 2008) (plea was unknowing when defendant did not know the mandatory minimum sentence).

Even assuming counsel failed to explain the nuances of consecutive and concurrent sentencing, Washington was advised of the maximum possible effect that consecutive sentencing could have. N.T. 1/21/1998 at 9, 30. Unlike the petitioner in Jamison, 544 F.3d at 277, the Commonwealth's recommendation could not have misled Washington because it was far greater than the sentence imposed. N.T. 2/24/1998 at 16, 28 (requesting a total sentence of 55-to-110 years).

This claim is meritless.

XI. Involuntary Plea – Elements

Washington also claims his plea was involuntary and unknowing because counsel failed to explain the elements of the crimes with which he was charged, and the trial court failed to put those explanations on the record at his plea colloquy. Pet. Mem. at 46.

The Superior Court found that Washington's plea was voluntary and knowing. PCRA App. Op. I at 15. For constitutional purposes, a plea "cannot be truly voluntary unless the

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14 Washington also argues the plea colloquy failed to follow Pennsylvania criminal procedure. Reply at 8. Violations of state law, however, are noncognizable. Estelle, 502 U.S. at 67-68.

defendant possesses an understanding of the law in relation to the facts." McCarthy, 394 U.S. at 466. There is no requirement, however, that the judge explain or identify each element. Andrews v. Superintendant, SCI-Houtzdale, No. 16-742, 2017 WL 7360386, at *5 (M.D. Pa. Mar. 30, 2017), report and recommendation adopted, 2018 WL 701887 (M.D. Pa. Feb. 2, 2018); Taylor v. Piazza, No. 07-5211, 2008 WL 8820645, at *7 (E.D. Pa. Sept. 26, 2008), report and recommendation approved, 2012 WL 1900589 (E.D. Pa. May 25, 2012). The colloquy must show only that the defendant understood the charges against him and pled guilty to facts sufficient to meet each element. United States v. Hlushmanuk, No. 14-3044, 2014 WL 5780814, at *5 (E.D. Pa. Nov. 6, 2014); see also Brown v. Rozum, No. 12-2021, 2014 WL 3670326, at *14 (M.D. Pa. July 23, 2014) (denying habeas claim when written colloquy stated petitioner had been advised of charges and in-court colloquy showed he pled guilty to pointing a gun at the victim and taking cash).

Washington has failed to set forth a credible claim that he did not understand the charges against him. He testified that his attorney had explained the charges and that he was satisfied with his attorney's performance. See N.T. 1/21/1998 at 10-11 (Washington's attorney had "explain[ed] the elements of the crime the District Attorney would be required to prove in order for [him] to be convicted at trial."), 28 (Washington was "satisfied with the representation of [his] lawyer"); Zilich, 36 F.3d at 320 ("Solemn declarations made in open court carry a strong presumption of verity."). Washington's allegation that counsel failed to explain the elements of his charges is contradicted by his written colloquy. 1/21/1998 Written Guilty Plea Colloquy, attached as Exhibit H, at 1.

This claim is meritless.[15]

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[15] Washington's plea colloquy took place less than two weeks after his jury trial, in which the same elements of the charges against him were explained to the jury in his presence. N.T.

XII. Prosecutorial Misconduct

Washington claims the prosecutor's comments at trial violated due process. Pet. Mem. at 50.

A prosecutor's improper comments violate due process and warrant a new trial only if there is a strong likelihood that the jury's decision was influenced by the comments. Darden v. Wainwright, 477 U.S. 168, 182 (1986). It "is not enough that the prosecutor['s] remarks were undesirable or even universally condemned;" rather, the prosecutor's comments must "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 181.

Washington challenges two comments. The first is that the prosecutor incorrectly described the Commonwealth's burden of proof as "to a mathematical certainty" rather than "beyond a reasonable doubt" during closing argument. Pet. Mem. at 50. The Superior Court found the jury was unlikely to have been misled by the comment given the extensive jury instructions regarding the burden of proof. PCRA Op. I at 16. This conclusion is not contrary to, or an unreasonable application of, Supreme Court law. Darden, 477 U.S. at 182.

Washington's second complaint is that the Commonwealth attorney "vouched" for prosecution witnesses. Pet. Mem. at 53. This claim is procedurally defaulted because it was not

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1/12/1998 at 142-47. Washington even received the benefit of hearing the elements of one of his charges twice, when it was repeated in response to a jury question. Id. at 155-56. Further, the Commonwealth explained at length the facts it would be able to prove at trial and noted the overwhelming evidence it would have introduced, including fingerprints, identification witnesses, and video from the June 6, 1996 robbery, N.T. 1/21/1998 at 13, identification witnesses, video, and recovery of the security guard's weapon stolen during the June 17, 1996 robbery along with another weapon and evidence of stolen currency found at the same location Washington was arrested in 1996, id. at 15, identification witnesses from the June 20, 1997 robbery, id. at 16, identification witnesses from the August 9, 1997 robbery and the Buick Century in which Washington was seen leaving the crime scene, id. at 17, identification witnesses from the September 6, 1997 robbery and identification witnesses from the September 12, 1997 robbery, including one witness who recognized Washington before he began to rob the store because she had been present during a prior robbery, id. at 18.

presented to the state courts. See Direct App. Op.; PCRA App. Op. I; PCRA App. Op. II.

Regardless, it is meritless. See 28 U.S.C. § 2254(b)(2). Vouching occurs when the prosecutor personally bolsters the credibility of a government witness. United States v. Walker, 155 F.3d 180, 184 (3d Cir.1998) (citing Lawn v. United States, 355 U.S. 339, 359 n.15 (1958)). Washington must show: (1) the prosecution assured the jury that a government witness was credible; and (2) this assurance was based on information other than the evidence before the jury. Lam v. Kelchner, 304 F.3d 256, 271 (3d Cir. 2002); see also Buel v. Vaughn, 166 F.3d 163, 176 (3d Cir. 1999) (in analyzing whether a prosecutor offered an unconstitutional "expression of personal opinion about the credibility of witnesses," a judge must consider "whether the [prosecutor's] comments suggested that the prosecutor had knowledge of evidence other than that which was presented to the jury") (internal citations omitted).

The prosecutor argued that the jury should believe the women who identified Washington as the robber. N.T. 1/12/1998 at 136. He asked the jury to consider their incentive to testify and whether the jury had heard "any type of deception or hesitation." Id. He argued: "I submit that they didn't." Id. This is not vouching. The prosecutor's argument was rationally based on the evidence and the reasonable inferences therefrom, and does not suggest the prosecutor had inside knowledge pertaining to the witnesses. See United States v. Jackson, No. 14-3712, 2017 WL 727144, at *8 (3d Cir. Feb. 24, 2017) ("the role of the prosecutor [is] to argue in summation what inferences to draw from the evidence") (internal quotations omitted).

XIII. Cumulative Error

Finally, Washington argues the cumulative effect of these multiple errors undermined his due process rights. Pet. Mem. at 53.

Washington defaulted this claim because he did not raise it in the state courts and he is now barred from doing so. See Pa. R.A.P. 903; 42 Pa. C.S. § 9545(b)(1); Coleman, 501 U.S. at

735 n.1; see also Collins v. Sec'y, Pa. Dep't of Corr., 742 F.3d 528, 543 (3d Cir. 2014) (cumulative error is an independent claim that must be separately exhausted).

Regardless, it is meritless. See 28 U.S.C. § 2254(b)(2). "Individual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008) (citations omitted). To make such a showing, a petitioner must "establish actual prejudice." Id. The record contains overwhelming evidence of Washington's 1996 and 1997 robberies. N.T. 1/21/1998 at 12-20. It also establishes that Washington cut his ankle bracelet and fled before trial.[16] N.T. 6/29/2017 at 9-10, 23-24. Washington has failed to show any violation that approaches constitutional dimensions and has not established prejudice from any trial court errors.

Accordingly, I make the following:

16 The record also suggests Washington proffered false evidence to the Pennsylvania Superior Court by using a forged affidavit to pursue a claim that counsel failed to present an alibi witness. N.T. 1/9/1998 at 19. This claim was dropped when the alleged affiant appeared in person at the PCRA evidentiary hearing ordered on remand. Id.

RECOMMENDATION

AND NOW, on March 9, 2020, it is respectfully recommended that the petition for a writ of habeas corpus be DISMISSED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability.[4] The petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

[4] Jurists of reason would not debate my recommended procedural or substantive dispositions of the petitioner's claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Therefore, no certificate of appealability should be granted. See id.

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[J-73-2016]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 37 EAP 2015
	:	
Appellee	:	Appeal from the Judgment of Superior Court entered on 5/12/15 at No. 532 EDA 2011 reversing the order entered on 8/6/08 in the Court of Common Pleas, Philadelphia County, Criminal Division, at Nos. CP-51-0711021, 0711141, and 1009712-1996 and CP-51-CR-1107481, 1107621, 1107651 and 1107671-1997
v.	:	
TERRANCE WASHINGTON,	:	
Appellant	:	
	:	
	:	SUBMITTED: April 7, 2016

OPINION

CHIEF JUSTICE SAYLOR **DECIDED: July 19, 2016**

The controlling question presented is whether the Supreme Court of the United States' decision in *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151 (2013), applies retroactively to attacks upon mandatory minimum sentences advanced on collateral review.

This discretionary appeal has a prolix factual and procedural history, commencing with numerous armed robberies perpetrated by Appellant in 1996. Appellant was charged with almost two dozen robbery offenses as well as related crimes, and he was convicted upon a jury trial relative to many of the charges and after pleas concerning others. In 1998, the common pleas court imposed an aggregate sentence of 35 to 70 years' imprisonment, with the aggregate minimum encompassing

look up

multiple mandatory minimum sentences under Section 9712 of the Sentencing Code. *See* 42 Pa.C.S. §9712(a).

The provisions of Section 9712 require imposition of a five-year mandatory minimum sentence for crimes of violence involving the visible possession of a firearm placing a victim in fear of death or serious bodily injury. *See id.* Of particular relevance here, the statute specifies that its prescriptions "shall not be an element of the crime," and that the applicability "shall be determined at sentencing," with factual matters being resolved by the sentencing court "by a preponderance of the evidence." *Id.* §9712(b).

Appellant did not initially pursue a direct appeal. He later obtained appellate review *nunc pro tunc*, however. That appeal was unsuccessful, and the judgments of sentence became final in 2006.

Later that year, Appellant filed a timely petition under the Post Conviction Relief Act, 42 Pa.C.S. §§9541 – 9546 (the "PCRA"). Notably, Appellant did not raise a Sixth Amendment challenge to the above directives of Section 9712(b). The PCRA court dismissed the petition, and several procedural irregularities ensued, which were addressed in a 2011 order of the Superior Court according Appellant the right to appeal from the dismissal of the post-conviction petition.

In 2013, the Supreme Court of the United States issued its *Alleyne* decision, overruling its prior precedent. *Alleyne* held that any fact that, by law, increases the penalty for a crime must be treated as an element of the offense, submitted to a jury, rather than a judge, and found beyond a reasonable doubt. *See Alleyne*, ___ U.S. at ___, 133 S. Ct. at 2163. The effect was to invalidate a range of Pennsylvania sentencing statutes predicating mandatory minimum penalties upon non-elemental facts and requiring such facts to be determined by a preponderance of the evidence at sentencing. *See, e.g., Commonwealth v. Hopkins*, ___ Pa. ___, ___, 117 A.3d 247,

262 (2015) (holding that Section 6317 of the Crimes Code, 18 Pa.C.S. §6317 -- which predicates a mandatory minimum sentence upon a fact to be determined by a preponderance at sentencing -- was constitutionally infirm, under *Alleyne*).

The Superior Court disposed of Appellant's appeal from the denial of post-conviction relief via memorandum opinion in 2015, affirming in relevant part. Although Appellant had not raised a pertinent Sixth Amendment claim, the majority acted of its own accord to discuss the *Alleyne* decision. At the outset, the majority highlighted its previous holding that Section 9712 was "unconstitutional in its entirety." *Commonwealth v. Washington*, No. 532 EDA 2011, *slip op.* at 14 (Pa. Super. May 12, 2015) (citing *Commonwealth v. Valentine*, 101 A.3d 801, 811-12 (Pa. Super. 2013)). Nevertheless, in light of Appellant's failure to raise and preserve the *Alleyne* issue before the PCRA court, the majority deemed that determination to be inapplicable. *See id.* Notably, the majority couched its reasoning in terms of retroactivity jurisprudence. *See id.* (quoting, indirectly, *Commonwealth v. Cabeza*, 503 Pa. 228, 233, 469 A.2d 146, 148 (1983) ("[W]here an appellate decision overrules prior law and announces a new principle, unless the decision specifically declares the ruling to be prospective only, the new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of adjudication up to and including any direct appeal.")).

In a responsive memorandum concurring in relevant regards, Judge Bowes characterized the majority's treatment of *Alleyne* as "cursory." *Id.* at 4 (Bowes, J., concurring and dissenting). Judge Bowes initially noted that the Superior Court had held that *Alleyne* violations undermine the legality of sentences, *see, e.g.*, *Valentine*, 101 A.3d at 809 (citing *Commonwealth v. Watley*, 81 A.3d 108, 118 (Pa. Super. 2013) (*en banc*)), such that the conventional rules of issue preservation did not apply, *see Commonwealth v. Fahy*, 558 Pa. 313, 331, 737 A.2d 214, 223 (1999) (explaining that,

"legality of sentence is always subject to review within the PCRA," albeit subject to the enactment's self-contained time limits). Unlike the majority, however, the responsive opinion distinguished issue preservation in the context of direct appellate review from retroactivity analysis on post-conviction review.

In terms of retroactivity impacting the post-conviction stage, Judge Bowes discussed the seminal framework delineated in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality), as follows. Under the *Teague* line of cases, a new rule of constitutional law is generally retrospectively applicable only to cases pending on direct appellate review. *See, e.g., Montgomery v. Louisiana*, ___ U.S. ___, ___, 136 S. Ct. 718, 728 (2016) ("Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced."). In other cases, retroactive effect is accorded only to rules deemed substantive in character, and to "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements" of the adjudicatory process. *Teague*, 489 U.S. at 311, 109 S. Ct. at 1076 (quoting *Mackey v. United States*, 401 U.S. 667, 693, 91 S. Ct. 1171, 1180 (1971) (Harlan, J., concurring)).

Concerning the substantive/procedural dichotomy, substantive rules are those that decriminalize conduct or prohibit punishment against a class of persons. *See Montgomery*, ___ U.S. at ___, 136 S. Ct. at 729-30. Concomitantly, the Supreme Court has made clear that "rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Id.* at ___, 136 S. Ct. at 730 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)) (emphasis in original). As to watershed rules, to date, the Supreme Court of the United States has discerned only one, arising out of the sweeping changes to the criminal justice system brought about by the conferral of the right to counsel upon indigent defendants charged with felonies in

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). *See Beard v. Banks*, 542 U.S. 406, 417, 124 S. Ct. 2504, 2513-14 (2004).[1]

Judge Bowes reasoned that the *Alleyne* ruling was not substantive, since it does not prohibit punishment for a class of offenders nor does it decriminalize conduct. Rather, she described the decision as *procedurally* mandating the inclusion of any facts which will increase a mandatory minimum sentence in an indictment or information, as well as a determination by a fact-finder of those facts beyond a reasonable doubt. Nor did Judge Bowes find that the *Alleyne* decision announced an extraordinary, watershed rule of criminal procedure altering bedrock principles. In these regards, Judge Bowes highlighted that her reasoning was consistent with numerous federal courts which had determined that the new rule announced in *Alleyne* did not apply retroactively on collateral review.[2]

Judge Bowes recognized that *Alleyne* involved not only the identity of the fact-finder but also addressed the burden of proof attaching to law-based sentencing enhancements. She found this to be no different from *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), however, from which *Alleyne* derived, explaining that

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[1] *See generally Schriro*, 542 U.S. at 352, 124 S. Ct. at 2523 (discussing the extraordinary nature of watershed rules and opinion that "it is unlikely that any . . . 'ha[s] yet to emerge'" (quoting, indirectly, *Sawyer v. Smith*, 497 U.S. 227, 243, 110 S. Ct. 2822, 2839 (1990))); *Whorton v. Bockting*, 549 U.S. 406, 417-18, 127 S. Ct. 1173, 1181-82 (2007) (stressing the narrow scope of the procedural right exception to the general rule against retrospective application on collateral review and collecting cases in which such application was disallowed).

[2] *See, e.g.*, *United States v. Reyes*, 755 F.3d 210, 212 (3d Cir. 2014); *In re Mazzio*, 756 F.3d 487, 489-90 (6th Cir. 2014); *Hughes v. United States*, 770 F.3d 814, 819 (9th Cir. 2014); *United States v. Redd*, 735 F.3d 88, 92 (2d Cir. 2013); *In re Payne*, 733 F.3d 1027, 1030 (10th Cir. 2013); *In re Kemper*, 735 F.3d 211, 212 (5th Cir. 2013); *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013).

neither this Court nor the Supreme Court of the United States had found that *Apprendi* should be retroactively applied.[3]

We allowed appeal to consider the issue, as framed by Appellant, of "[a]re the mandatory sentences imposed upon petitioner illegal pursuant to *Alleyne*?" *Commonwealth v. Washington*, ___ Pa. ___, 127 A.3d 1287 (2015). Our review of this legal issue is plenary.

Throughout his brief, Appellant characterizes his sentence as "illegal under *Alleyne*" and stresses that the PCRA provides an avenue for relief from illegal sentences. Brief for Appellant at 16 (citing, *inter alia*, *Commonwealth v. Gordon*, 596 Pa. 231, 234, 942 A.2d 174, 175 (2007), for the proposition that "it seems to be a settled question in Pennsylvania that *Apprendi*-based challenges raise questions related to the legality of a sentence"). Appellant further emphasizes that the *Alleyne* issue arises in the context of a timely-filed PCRA petition, distinguishing instances involving untimely petitions. *See generally Fahy*, 558 Pa. at 331, 737 A.2d at 223 (determining that even challenges to illegal sentences are subject to the PCRA's time limitations).

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[3] *Accord Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) ("[W]e have repeatedly held that *Apprendi*'s rule does not apply retroactively on collateral review."); *Sepulveda v. United States*, 330 F.3d 55, 62 (1st Cir. 2003) ("The *Apprendi* decision is about criminal procedure, pure and simple."); *Coleman v. United States*, 329 F.3d 77, 90 (2d Cir. 2003); *Ellzey v. United States*, 324 F.3d 521, 527 (7th Cir. 2003); *United States v. Brown*, 305 F.3d 304, 310 (5th Cir. 2002); *Curtis v. United States*, 294 F.3d 841, 844 (7th Cir. 2002); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002); *United States v.* Sanchez-Cervantes, 282 F.3d 664, 673 (9th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1259 (11th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 1000-01 (8th Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1236 (9th Cir. 2000). *See generally* Haifeng Peng, *Is Blakely v. Washington Retroactive?*, 27 CARDOZO L. REV. 423, 440 (2005) ("All federal circuits have unanimously concluded that *Apprendi* does not apply retroactively").

Initially, given that this matter arises on post-conviction review, we find it necessary to clarify the interrelationship between retroactivity determinations and the sentence-legality question. In this regard, it is significant that Appellant agrees that *Alleyne* established a new rule of federal constitutional law. *See* Brief for Appellant at 32.[4]

Consistent with Judge Bowes' explanation, a new rule of law does not automatically render final, pre-existing sentences illegal. A finding of illegality, concerning such sentences, may be premised on such a rule only to the degree that the new rule applies retrospectively. In other words, if the rule simply does not pertain to a particular conviction or sentence, it cannot operate to render that conviction or sentence illegal. *Accord Welch v. United States*, ___ U.S. ___, ___, 136 S. Ct. 1257, 1264 (2016) (alluding to the "general bar on retroactivity" for new constitutional rules of a procedural dimension); *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 730 ("[A] trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence."). Appellant's framing of the issue presented, as well as the bulk of his brief, disregards this necessary role of a retroactivity assessment relative to a determination of legality at the collateral review stage.[5]

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[4] This proposition seems indisputable, given that the *Alleyne* Court expressly overruled its prior precedent in *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406 (2002). *See Alleyne*, ___ U.S. at ___, 133 S. Ct. at 2163.

[5] The Commonwealth, on the other hand, aptly summarizes the essential point as follows:

> [A]s of September 2006, there was no precedent from the United States Supreme Court, nor any Pennsylvania Court, that would have prohibited application of the instant mandatory minimum provision. Quite to the contrary, as

(continued...)

There is no question that this Court has had some difficulty defining the contours of "illegality" in the abstract for purposes of the issue preservation doctrine. *Compare Commonwealth v. Foster*, 609 Pa. 502, 524-25 n.21, 17 A.3d 332, 345-46 n.21 (2011) (Opinion Announcing the Judgment of the Court), *with id.* at 534-39, 17 A.3d at 352-54 (Castille, C.J., concurring); *id.* at 539-41, 17 A.3d 355-56 (Saylor, J., concurring); *id.* at 541-42, 17 A.3d at 356-57 (Eakin, J., concurring).[6] Any remaining uncertainty in this regard, however, does not affect our analysis, above and below. Again, if a new constitutional rule does not apply, it cannot render an otherwise final sentence illegal.

As the Commonwealth relates and Judge Bowes apprehended, new constitutional procedural rules generally pertain to future cases and matters that are pending on direct review at the time of the rule's announcement. *See Schriro*, 542 U.S.

(...continued)

> recently as 2002, the United States Supreme Court in *Harris v. United States* had rejected a claim that *Apprendi*, the precursor to *Alleyne*, applied to mandatory minimum sentencing provisions, and explicitly reaffirmed [the Court's previous upholding of] 42 Pa.C.S. §9712. Thus, had a court been presented with defendant's current sentencing claim at any time up to and including September 2006, when his direct appeal ended (*Alleyne* was not decided until 2013), current law would unequivocally have required its rejection. The *Alleyne* rule is therefore new, and cannot apply on collateral review except in "limited circumstances," *Schriro*[, 542 U.S. at 351, S. Ct. at 2522], *i.e.*, unless it is a "substantive or "watershed" rule under *Teague*.

Brief for Appellee at 15 (citations adjusted); *accord id.* at 20 ("The issue is not constitutionality under subsequent law . . . , but whether a sentence that was lawful when imposed must be overturned under a decision reached many years later because [such decision] applies retroactively on collateral review.").

[6] Notably, this Court has otherwise granted allocatur to determine whether an *Alleyne* violation renders a sentence illegal for issue preservation purposes. *See Commonwealth v. Barnes*, ___ Pa. ___, 122 A.3d 1034, 1034-35 (2015) (*per curiam*).

at 351-52, 124 S. Ct. at 2522 (citing *Griffith v. Kentucky,* 479 U.S. 314, 323, 328, 107 S. Ct. 708, 716 (1987)).[7] To determine whether the rule applies retroactively to cases at the collateral review stage, additional analysis is necessary, either per *Teague* and its progeny or under some state-law formulation that is consistent with the authority recognized in *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S. Ct. 1029, 1042 (2008) (explaining that *Teague* "limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*").

In the relevant portion of his brief, Appellant primarily urges this Court to recognize an independent, state-level retroactivity jurisprudence, per *Danforth.* Along these lines, Appellant asserts that the PCRA establishes a remedial scheme for those prisoners who are serving illegal sentences, and that he is entitled to relief under the PCRA "since his mandatory minimum sentences are illegal under *Alleyne.*" Brief for Appellant at 36-37.[8] Appellant also urges that we should adopt a principle supporting retroactive application of new constitutional rules for violations that "implicate[] fundamental fairness and foster[] unreliability and inaccuracy in the fact-finding process." *Id.* at 37. Although this standard seems similar to the watershed-rules aspect

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[7] Notably, the plurality decision of this Court in *Foster* -- in which various Justices discussed the illegal-sentence doctrine as it pertains to issue preservation -- is distinguishable from the present case both in that the case reached this Court at the direct appeal stage, and the matter did not concern a rule couched as a new one of constitutional law. *See Foster*, 609 Pa. at 508, 17 A.3d at 335-36.

[8] This aspect of Appellant's argument is addressed earlier in our opinion, as we have explained that the legality or illegality of Appellant's sentence cannot be adjudged without reference to the legal standards governing retroactive application of new constitutional rules.

of *Teague*, Appellant obviously wishes for this Court to lower the high threshold maintained by the Supreme Court of the United States.

Alternatively, Appellant contends that the rule announced in *Alleyne* is substantive in character or meets the *Teague*-based exception to non-retroactive application of watershed procedural rules, highlighting that *Alleyne*'s holding concerns a defendant's Sixth Amendment right to a jury trial *and* to proof beyond a reasonable doubt. Appellant recognizes that the Supreme Court of the United States has "laid to rest the idea that new rules of criminal procedure which implicate jury trial rights should be applied retroactively." Brief for Appellant at 38 (citing *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523 (denominating a rule allocating decision-making authority as between juries and judges as a "prototypical procedural rule")). He nonetheless maintains that the dual-faceted aspect of *Alleyne*'s holding, also encompassing the matter of the burden of proof, justifies a different outcome.[9] In this regard, Appellant references *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970), as exemplifying the "vital role in the American scheme of criminal procedure" occupied by the reasonable doubt standard of proof. Brief for Appellant at 39 (quoting *Winship*, 397 U.S. at 363, 90 S. Ct. at 1072).

The Commonwealth, on the other hand, takes the position that this Court should continue to adhere to *Teague* rather than recognizing a new state-level retroactivity jurisprudence. *See, e.g.*, *Commonwealth v. Bracey*, 604 Pa. 459, 485-86, 986 A.2d 128, 143-44 (2009) ("*Teague* is acknowledged as setting forth the legal framework for a principled approach to deciding when a pronouncement of law should be given effect to cases pending on collateral review[;] [t]his Court has looked to *Teague* principles when confronted with [such] questions."). The Commonwealth finds that the *Teague*

[9] Appellant correctly relates that *Schriro* did not specifically involve the burden-of-proof dynamic. *See Schriro*, 542 U.S. at 351 n.1, 124 S. Ct. at 2522 n.1.

approach affords appropriate respect to the strong societal interest in finality of judgments, which resides among the legislative purposes underlying the PCRA. *See generally Commonwealth v. Sam*, 597 Pa. 523, 542-43, 952 A.2d 565, 576-77 (2008) (collecting cases stressing the essential role of finality in the criminal justice system and discussing the General Assembly's efforts to foster it via the statutory prescriptions for post-conviction review).

According to the Commonwealth, adoption of Appellant's suggested approach – which the Commonwealth views as a test centered upon fundamental fairness in the abstract – would remove the essential controls on retroactive application of new rules, thus unduly undermining finality. It is for this reason, the Commonwealth observes, that the Supreme Court of the United States has maintained the distinction, in the retroactivity calculus, between general rules embodying due process and extraordinary, bedrock-altering, "watershed" rules. *See Tyler v. Cain*, 533 U.S. 656, 666 n.7, 121 S. Ct. 2478, 2484-85 n.7 (2001) (indicating that not all rules "relating to due process (or even the 'fundamental requirements of due process') alter [the] understanding" of bedrock procedural elements essential to the fairness of a proceeding (citation omitted)).

On this subject, the Commonwealth stresses that watershed rules, at the federal level, to date, encompass only a class of one, *i.e.*, the right to counsel proclaimed in the seminal *Gideon* decision, acknowledged to be "fundamental and essential to a fair trial." *Gideon*, 372 U.S. at 340, 83 S. Ct. at 794 (quoting *Betts v. Brady*, 316 U.S. 455, 465, 62 S. Ct. 1252, 1257 (1942)). In these terms, the Commonwealth explains:

> *Gideon* recognized that this principle was virtually timeless, having been recognized at the foundation of the republic; the Court explained that in enforcing this right it was not breaking new ground, but rather was "returning to . . . old precedents, sounder we believe than the new" in order to

> "restore constitutional principles established to achieve a fairer system of justice." There was also a clear national consensus. Twenty-two States filed amicus briefs denouncing the contrary rule as an "anachronism." The concurring Justices (there was no dissent) made clear that they too embraced the right to counsel as a bedrock principle.

Brief for Appellee at 23 (citations omitted).

The Commonwealth maintains, however, that *Alleyne* is vastly different. The Supreme Court of the United States, the Commonwealth notes, had twice decided that the sentencing scheme under Section 9712 of the Pennsylvania Sentencing Code was constitutional. *See McMillan v. Pennsylvania*, 477 U.S. 79, 93, 106 S. Ct. 2411, 2420 (1986); *see also Harris*, 536 U.S. at 568-69, 122 S. Ct. at 2420 (reaffirming *McMillan*). The Commonwealth asserts that, in ultimately reversing course, the *Alleyne* Court "said nothing to suggest that it was recognizing anything of 'bedrock' importance." Brief for Appellee at 24. On the contrary, the Commonwealth relates:

> *Alleyne* allows the sentencing court to penalize the same conduct that triggered the mandatory statute as a matter of discretion. [*See Alleyne*, ___ U.S. at ___,] 133 S. Ct. at 2163. The Court remanded for "resentencing consistent with the jury's verdict," allowing the sentencing court to impose the exact same sentence should it so decide. Thus, nothing "fundamental" or "essential" is violated if the sentencing court elects to impose a higher sentence based on the conduct that previously triggered the statutory minimum, since *Alleyne* specifically allows that in discretionary sentencing.
>
> *Alleyne* is no more of a "bedrock" nature than similar new procedural sentencing rules that have been barred under *Teague* even in capital cases. *E.g.*, *Beard v. Banks*, 542 U.S. [at] 416-17[, 124 S. Ct. at 2513] (new rule to ensure that capital sentencing jurors are not prevented from giving effect to mitigating evidence not found unanimously was procedural under *Teague*); *Graham v. Collins*, 506 U.S. [461,] 477[, 113 S. Ct. 892, 903 (1993)] (new rule to ensure

> that capital sentencing jurors could give effect to evidence of mental retardation and abused childhood was procedural and barred by *Teague*); *Sawyer v. Smith*, 497 U.S. 227[, 244 110 S. Ct. 2822, 2832-33] (1990) (new rule preventing misleading of capital sentencing jurors by suggesting that ultimate responsibility for imposing sentence lay elsewhere was procedural and barred by *Teague*).

Brief for Appellee at 24-25. Based on such history, it is the Commonwealth's core position that "*Alleyne* clearly does not have 'the primacy and centrality of the rule adopted in *Gideon*.'" *Id.* at 25 (quoting *Banks*, 542 U.S. at 420, 124 S. Ct. at 2515).

The Commonwealth also maintains that the new *Alleyne* rule is procedural in character, because it merely regulates the manner of determining culpability as opposed to altering the range of conduct or the class of persons that the law punishes. *See id.* at 16 (citing *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 729-30). "[E]very court in the nation to consider this question in a published ruling has held that *Alleyne* does not apply retroactively on collateral review," the Commonwealth highlights. *Id.* at 10; *see also supra* note 2. The Commonwealth urges that we should reach the same conclusion here.[10]

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[10] The Commonwealth also advances several jurisprudential reasons why we should decline to resolve this appeal, such as abstractness of the *Alleyne* rule relative to the substantial punishment which will be imposed on Appellant in all events. The present matter is an important one, however, affecting a large range of cases, this one was selected to resolve the question, and we will therefore proceed to the merits without further treatment of such collateral matters.

From a concurring posture, Justice Todd observes that our approach to the Commonwealth's additional arguments highlights the present case's importance. *See* Concurring Opinion, *slip op.* at 1. Our reasoning, however, is also based upon the fact that appeal was allowed discretely to address the *Alleyne* retroactivity issue. *See Commonwealth v. Washington*, ___ Pa. ___, 127 A.3d 1287 (2015) (*per curiam*) (granting allocatur "limited to" the issue of "[a]re the mandatory sentences imposed upon petitioner illegal pursuant to *Alleyne*"). To the extent that the concurrence suggests that a discretionary appeals court is obliged to exceed the scope of an allocatur grant to engage in a developed resolution of all issues advanced in an (continued...)

There is presently no controversy concerning the proposition that *Alleyne* sets forth a new rule of constitutional law. As to the substantive-procedural distinction, we agree with the Commonwealth that the *Alleyne* rule neither alters the range of conduct or the class of persons punished by the law. *See Montgomery*, ___ U.S. at ___, 136 S. Ct. at 729-30. Rather, the holding allocates the relevant decision-making authority to a jury rather than a judge, while establishing the beyond-a-reasonable-doubt standard as the essential burden of proof. *See Alleyne*, 133 U.S. at ___, ___ S. Ct. at 2155. Again, such matters were also central to the seminal *Apprendi* decision, *see Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2363, which the Supreme Court of the United States has never deemed to be retroactive and which is universally regarded as non-retroactive by the federal courts of appeals. *See supra* note 3; *cf. Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523 (holding that a rule requiring certain facts to be determined by a jury rather than a judge was procedural in nature, for purposes of *Teague*). *See generally Commonwealth v. Riggle*, 119 A.3d 1058, 1067 (Pa. Super. 2015) (determining that the *Alleyne* rule is procedural).[11]

We also have no basis for disagreeing with the Commonwealth that the *Alleyne* rule is not of a groundbreaking, "watershed" character. It remains lawful and, indeed,

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(...continued)
appellee's brief, *see* Concurring Opinion, *slip op.* at 1 (expressing the concern that our opinion "may unnecessarily serve to relax courts' obligation to consider jurisprudential bases for resolution of appeals"), we know of no authority that supports it. Indeed, from our perspective, such an approach to the discretionary review process would render many of this Court's opinions unnecessarily unwieldy.

[11] Most recently, the Supreme Court of the United States has described the essential analysis in addressing the substantive/procedural distinction under *Teague* as a functional one. *See Welch*, ___ U.S. at ___, 136 S. Ct. at 1266. We do not find this overlay to alter our above reasoning or the rationale underlying the many decisions of other courts finding the *Alleyne* rule to be non-retroactive relative to the collateral review stage.

routine for judges to increase sentences, in the discretionary sentencing regime, based on facts that they find by a preponderance of the evidence. *See Alleyne*, ___ U.S. at ___, 133 S.Ct. at 2163 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury[;] [w]e have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Thus, the inherent reliability of judge-determined facts at the sentencing stage is not directly in issue, and we find that this understanding places substantial perspective on the fairness concerns involved. *Cf. Welch*, ___ U.S. at ___, 136 S. Ct. at 1266 ("The chance of a more accurate outcome under [a] new procedure normally does not justify the cost of vacating a conviction whose only flaw is that its procedures 'conformed to then-existing constitutional standards'" (quoting *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075)).

We recognize that, per *Alleyne*, it is no longer permissible for state legislatures to direct judges to apply specified minimum sentences based on preponderance-based judicial findings of fact. Nevertheless, we conclude that such new rule is materially different in character from *Gideon*'s prescription for assistance of counsel, which is presently enshrined as the only recognized watershed rule of criminal procedure. *See Banks*, 542 U.S. at 417, 124 S. Ct. at 2513-14; *see also supra* note 1.

As to Appellant's argument that we should recognize an independent state-level retroactivity jurisprudence grounded on fairness considerations, but lacking the constraints imposed at the federal level, we decline to do so in this case. From our perspective, balancing fairness and finality is essential in considering the appropriate retrospective effect of a new rule of constitutional procedure. *Accord Welch*, ___ U.S. at ___, 136 S. Ct. at 1266 ("The *Teague* framework creates a balance between, first, the need for finality in criminal cases, and second, the countervailing imperative to

ensure that criminal punishment is imposed only when authorized by law."). Appellant's arguments, however, touch on only one side of this equation. Unless and until developed arguments are advanced which persuade this Court that a better equilibrium can be achieved, the *Teague* construct shall remain the default approach, in Pennsylvania, to the retrospective application of new constitutional procedural rules pronounced by the Supreme Court of the United States.

We hold that *Alleyne* does not apply retroactively to cases pending on collateral review, and that Appellant's judgment of sentence, therefore, is not illegal on account of *Alleyne*.

The order of the Superior Court is affirmed.

Justices Baer, Dougherty and Wecht join the opinion.

Justice Todd files a concurring opinion in which Justice Donohue joins.

Justice Dougherty files a concurring opinion.

[J-73-2016] [MO: Saylor, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 37 EAP 2015
Appellee	:	Appeal from the Judgment of Superior Court entered on 05/12/15 at No. 532 EDA 2011 reversing the order entered on 08/06/08 in the Court of Common Pleas Philadelphia County, Criminal Division, at Nos. CP-51-0711021, 0711141, and 1009712-1996 and CP-51-CR-1107481, 1107621, 1107651 and 1107671-1997
v.	:	
TERRANCE WASHINGTON,	:	
Appellant	:	
	:	SUBMITTED: April 7, 2016

CONCURRING OPINION

JUSTICE DOUGHERTY **DECIDED: July 19, 2016**

I join the Majority Opinion, writing only to emphasize two points.

First, on the question whether an "illegal" sentence is at issue here, I agree the proper primary approach, when retroactive relief from an otherwise-final judgment is sought under a new constitutional rule announced by the United States Supreme Court, must be according to the Supreme Court's developed jurisprudence on retroactivity — *i.e.*, *Teague v. Lane*, 489 U.S. 288 (1989) (plurality), and its progeny. I recognize there is broad language in prior cases suggesting *Apprendi*-based[1] claims implicate Pennsylvania law respecting "illegal sentences," and appellant invokes those cases here in an attempt to secure greater retroactive application of the new federal rule

[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

announced in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151 (2013).[2] *See* Majority Opinion, slip op. at 5-6.

Notably, the Court has candidly struggled with the proper contours of the concept of sentencing illegality. A variety of expressions have highlighted the complexity, which includes the fact that a sentencing legality claim "can be offered for a variety of reasons." *Commonwealth v. Spruill*, 80 A.3d 453, 460-61 (Pa. 2013). *See Commonwealth v. Aponte*, 855 A.2d 800, 814-15 (Pa. 2004) (Castille, J., concurring) (advocating treating illegal sentencing claims in "less monolithic fashion" because doctrine may be offered for variety of reasons: to negate waiver on direct appeal, to seek substantive review despite statutory restrictions, to seek extraordinary jurisdiction *nunc pro tunc*, to avoid limitations upon retroactive application of new procedural rules, and to secure collateral review of sentence despite PCRA restrictions) (citing cases).

This case presents a specific claim of sentencing legality: a sentence is described as illegal to allow a new federal constitutional rule to have broader effect on final judgments than required by the United States Supreme Court, which devised the rule. I believe the Majority articulates a necessary limiting principle to the notion of what comprises an "illegal" sentence in this instance: a finding of illegality, concerning an already-final sentence, "may be premised on such a rule only to the degree that the new rule applies retrospectively." *See* Majority Opinion, slip op. at 7.

Second, I write to further stress the terms of the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§9541-9546, under which appellant is proceeding, when assessing both whether his claim implicates an "illegal" sentence and whether the Court

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[2] As the Majority notes, *Alleyne* derives from *Apprendi*.

should afford a broader retrospective application of *Alleyne*'s new rule. On the latter point, appellant avails himself of the state law residual power recognized in *Danforth v. Minnesota*, 552 U.S. 264 (2008), arguing for a state-level, broader Pennsylvania retroactivity rule premised upon generalized policy notions of fairness. *Id.* at 282. Any such argument must come to grips with the PCRA, a legislative expression of Pennsylvania policy. In a case presenting a similar question, this Court stressed:

> [L]itigants who may advocate broader retrospective extension of a new federal constitutional rule would do best to try to persuade this Court both that the new rule is resonate with Pennsylvanian norms *and* that there are good grounds to consider the adoption of broader retroactivity doctrine which would permit the rule's application at the collateral review stage. In the latter regard, the Court would benefit from recognition and treatment of the strong interest in finality inherent in an orderly criminal justice system, as well as the social policy and concomitant limitations on the courts' jurisdiction and authority reflected in the Post Conviction Relief Act.

Commonwealth v. Cunningham, 81 A.3d 1, 9 (Pa. 2013) (footnote omitted) (emphasis original).

The "eligibility for relief" provision of the PCRA does not speak of "illegal sentences," much less sentences argued to be illegal via retroactive operation of non-retroactive, new federal constitutional rules. Rather, the PCRA deems cognizable a claim that the petitioner is serving a sentence "greater than the lawful maximum." 42 Pa.C.S. §9543(a)(2)(vii). Although appellant forwards an artful argument under the statutory language, the argument ultimately fails because it depends upon an assumption that *Alleyne* applies retroactively. Appellant's Brief at 21-22.

The PCRA specifically addresses retroactivity in the context of new constitutional rights, but only in delineating exceptions to the PCRA time-bar; the provision is inapplicable as this petition was timely. *See* 42 Pa.C.S. §9545(b)(iii). In the time-bar exception context, the General Assembly indicated its awareness that courts issue new

constitutional rules on occasion, and those rules may, or may not, affect final judgments. As explained in a concurrence in *Cunningham*:

> Section 9545(b) [of the PCRA] recognizes that new constitutional rights (state or federal) may come into existence after a sentence is final, and indeed, after a defendant's right to PCRA review has been exhausted. The statute allows new constitutional rights to be vindicated, but only after the Court announcing the new right has also held that the right operates retroactively: "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)(iii). This safety valve for vindication of new and retroactive rights is logically limited to pronouncements from the two courts of last resort that can recognize new rights and makes clear that the court of last resort announcing the new right should also issue the holding on the retroactivity of the new right. There is nothing irrational in the statute's accommodation of new constitutional rules in this manner. ...

Id. at 12 (Castille, C.J., concurring).

Appellant plainly is not entitled to PCRA relief. If the United States Supreme Court were someday to hold *Alleyne* to be retroactive, Section 9545 would exist to vindicate that established right.

Is Retroactivity of 'Alleyne' Settled in Pa.?

BY MAX MITCHELL
Of the Law Weekly
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In the past three weeks appellate courts in Pennsylvania have issued sharply opposing opinions on whether the U.S. Supreme Court decision that rendered numerous mandatory minimum sentencing schemes unconstitutional should be applied retroactively. Although the recent state Supreme Court's decision finding against retroactive application will be the law of the land, according to attorneys, the ruling might not be the final say on the issue.

"I think there are going to be ample opportunities for the Supreme Court to revisit the issue," Matthew T. Mangino, a former Lawrence County District Attorney who now has a criminal defense practice, said.

On July 12, a split en banc panel of the Superior Court held in *Commonwealth v. Ciccone* that because Sean Ciccone, who was sentenced under a sentencing regime that *Alleyne v. United States* rendered unconstitutional, challenged the constitutionality of his sentence in a timely filed Post-Conviction Relief Act petition, the court had jurisdiction to correct the sentence. The majority's decision specifically looked into the issue through the lens of the PCRA, and avoided a determination on the factors for retroactive application.

However, one week later, on July 19, the Supreme Court ruled in *Commonwealth v. Washington* that *Alleyne* does not apply retroactively to cases pending on collateral review.

According to Hugh Burns Jr., head of the appeals unit at the Philadelphia District Attorney's Office, which prosecuted Terrence Washington, the defendant in the case, the *Washington* decision directly negates the Superior Court's ruling in *Ciccone*. However, he said that doesn't mean *Ciccone* won't still be used by defense attorneys seeking to challenge a mandatory minimum sentence during the PCRA process.

Mandatory continues on Page 13

Court, however, generally has looked to the ***Teague*** doctrine in determining retroactivity of new federal constitutional rulings.").
In ***Cunningham***, the Court acknowledged that "this practice is subject to potential refinement" and "is not necessarily a natural model for retroactivity jurisprudence as applied at the state level." ***Cunningham, supra*** at 8. However, it ultimately applied the ***Teague*** formulation. In ***Teague***, the Supreme Court *sua sponte* addressed the issue of retroactivity and stated, "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." ***Teague, supra*** at 300-01. The Court continued,

It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. ***See, e.g., Rock v. Arkansas***, 483 U.S. 44, 62, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987) (*per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf); ***Ford v. Wainwright***, 477 U.S. 399, 410, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Eighth Amendment prohibits the execution of prisoners who are insane). To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.*Id.* at 301 (emphasis in original); ***see also Hughes, supra*** at 780.
I have little hesitation in finding that ***Alleyne*** was a new constitutional rule as it expressly overruled ***Harris v. United States***, 536 U.S. 545 (2002), and implicitly abrogated ***McMillan v. Pennsylvania***, 477 U.S. 79 (1986). Of course, whether the constitutional rule announced is new is merely the first step in examining the retroactive effect of a United States Supreme Court decision. The ***Teague*** Court explained that new constitutional rules "generally should not be applied retroactively to cases on collateral review." ***Teague, supra*** at 305-06. In ***Penry v. Lynaugh***, 492 U.S. 302 (1989), *abrogated on other grounds by* ***Atkins, supra***, the Supreme Court more fully delineated the law governing retroactivity.

In ***Teague***, we concluded that a new rule will not be applied retroactively to defendants on collateral review unless it falls within one of two exceptions. Under the first exception articulated by Justice Harlan, a new rule will be retroactive if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" ***Teague, supra***, at 307, 109 S.Ct., at 1073 (quoting ***Mackey***, 401 U.S., at 692, 91 S.Ct., at 1179 (Harlan, J., concurring in judgments in part and dissenting in part)). Although ***Teague*** read this exception as focusing solely on new rules according constitutional protection to an actor's primary conduct, Justice Harlan did speak in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed. This Court subsequently held that the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, ***Ford v. Wainwright, supra***, 477 U.S., at 410, 106 S.Ct., at 2602 (insanity), or because of the nature of their offense, ***Coker v. Georgia***, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (rape) (plurality opinion). In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty.***Penry, supra*** at 329-30; ***see also Schriro v. Summerlin***, 542 U.S. 348, 352 n.4 (2004).
As noted, the United States Supreme Court has utilized a substantive and procedural rule dichotomy in analyzing retroactivity. Substantive rules are those that decriminalize conduct or prohibit punishment against a class of persons. ***See Hughes, supra*** at 781. Concomitantly, the Supreme Court has made clear that "rules that regulate only the manner of determining the defendant's

culpability are procedural." ***Schriro, supra*** at 353 (citation omitted) (emphasis in original). A constitutional criminal procedural rule will not apply retroactively unless it is a watershed rule that implicates the fundamental fairness and accuracy of the criminal proceeding.
A procedural rule is considered watershed if it is necessary to prevent an impermissibly large risk of an inaccurate conviction and alters the understanding of the bedrock procedural elements essential to the fairness of a proceeding. ***See Whorton, supra*** at 418. The only rule explicitly recognized by the United States Supreme Court as a watershed criminal procedural rule was announced in ***Gideon v. Wainwright***, 372 U.S. 335 (1963),5 *i.e.*, the right to counsel during a felony criminal prosecution. ***Whorton, supra*** at 419.
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Gideon v. Wainwright, 372 U.S. 335 (1963), involved a case arising from Florida *habeas* review.
Instantly, the ***Alleyne*** ruling does not prohibit punishment for a class of offenders nor does it decriminalize conduct. Rather, ***Alleyne*** procedurally mandates the inclusion of facts in an indictment or information, which will increase a mandatory minimum sentence, and a determination by a fact-finder of those facts beyond a reasonable doubt. ***Alleyne***, therefore, is not substantive. Nor do I find ***Alleyne*** to consist of a watershed procedural rule. ***See also United States v. Reyes***, 755 F.3d 210 (3rd Cir. 2014); ***United States v. Redd***, 735 F.3d 88, 91-92 (2d Cir.2013); ***In re Payne***, 733 F.3d at 1029-30; ***In re Kemper***, 735 F.3d 211, 212 (5th Cir. 2013); ***Simpson v. United States***, 721 F.3d 875 (7th Cir. 2013).
In this regard, I find the United States Supreme Court decision in ***Schriro, supra*** and its discussion of ***Ring v. Arizona***, 536 U.S. 584 (2002), instructive. Preliminarily, ***Ring*** involved a successful ***Apprendi***6 challenge to a death penalty statute. ***Alleyne***, it should be remembered, relied heavily on the ***Apprendi*** rationale. The High Court, in considering whether ***Ring*** applied retroactively, ruled that whether a judge or jury determined the facts essential to the increased punishment, beyond a reasonable doubt, was not material to the fundamental fairness or accuracy of capital sentencing. ***See Schriro, supra***. Therefore, the distinction between whether a judge or jury determines the facts at issue does not result in the procedure announced in ***Alleyne*** being a watershed rule.
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Apprendi v. New Jersey, 530 U.S. 466 (2000).
I acknowledge that the ***Alleyne*** decision involves not just a change in who determines the facts essential to punishment, but also the burden of proof that is to be applied.7 This, however, is no different from ***Apprendi***, which no Pennsylvania court has found retroactive, and has not been held retroactive by the United States Supreme Court. Moreover, ***Alleyne*** does not create an entirely new procedure. Rather, it merely applies long-standing jury trial procedures into the setting of mandatory minimums, *i.e.*, including facts in an indictment (or information) and requiring proof beyond a reasonable doubt of those facts. Although submission to a jury of certain facts may lead to more acquittals of the now "aggravated crime," it does not undermine the underlying conviction or sentence of the "lesser crime." This is because, in Pennsylvania, absent the jury finding the applicable facts, the defendant could receive the identical sentence for the "lesser crime." Hence, the fundamental fairness of the trial or sentencing is not seriously undermined.
7
In ***Ring v. Arizona***, 536 U.S. 584 (2002), the judge was already required to determine the aggravating facts beyond a reasonable doubt.
For the aforementioned reasons, I respectfully dissent from the majority's decision to grant an evidentiary hearing as to the alibi claim and distance myself from its discussion regarding waiver and ***Alleyne*** retroactivity. I concur in result as to the remaining claims.

Footnotes

> counsel cannot plead a man guilty, or not guilty, against his will. But counsel may and must give the client the benefit of his professional advice on this crucial decision, and often he can protect the client adequately only by using a considerable amount of persuasion to convince the client that one course or the other is in the client's best interest. Such persuasion is most often needed to convince the client to plead guilty in a case where a not guilty plea would be totally destructive.***Copeland***, 554 A.2d at 60. To establish counsel's ineffectiveness based upon the failure to communicate a plea offer, the defendant must establish that "(1) an offer for a plea was made; (2) trial counsel failed to inform him of such offer; (3) trial counsel had no reasonable basis for failing to inform him of the plea offer; and (4) he was prejudiced thereby." ***Copeland***, 554 A.2d at 61.

Here, Washington has presented evidence of a docket sheet entry, dated January 7, 1998, which stated "Offer rejected." The docket sheet demonstrates that there is arguable merit to Washington's ineffectiveness claim, based upon the failure to communicate a plea offer. ***See Copeland***, 554 A.2d at 60 (recognizing that "[d]efense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant's chances at trial").

In ***Copeland***, as in this case, the trial court conducted no evidentiary hearing on the defendant's ineffectiveness claim. ***Id.*** at 61. Therefore, this Court deemed it necessary to remand for an evidentiary hearing:

> When an arguable claim of ineffective assistance of counsel has been made, and there has been no evidentiary hearing in the court below to permit the defendant to develop evidence on the record to support the claim, and to provide the Commonwealth an opportunity to rebut the claim, this Court will remand for such a hearing.***Id.*** (citations omitted).

Because the PCRA court conducted no hearing on Washington's PCRA Petition, we reverse the PCRA court's denial of relief on this issue, and remand for an evidentiary hearing on Washington's claim of ineffective assistance of counsel for failure to communicate a plea offer. At the evidentiary hearing on remand, Washington will have the burden of proving that "(1) an offer for a plea was made; (2) trial counsel failed to inform him of such offer; (3) trial counsel had no reasonable basis for failing to inform him of the plea offer; and (4) he was prejudiced thereby." ***See Copeland***, 554 A.2d at 61 (setting forth the defendant's burden in establishing ineffective assistance of counsel based upon the failure to communicate a plea offer).

Washington next claims that trial counsel rendered ineffective assistance by failing to investigate and call Harper as a witness. Brief for Appellant at 37. Washington argues that Harper would have provided alibi testimony that Washington was with her on June 6, 1996 and June 17, 1996. ***Id.***

To prevail on a claim that trial counsel rendered ineffective assistance by failing to call a witness, the defendant must show that (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on defendant's behalf; and (5) the absence of the witness's testimony prejudiced the defendant. ***Commonwealth v. Dennis***, 17 A.3d 297, 302 (Pa. 2011).

Here, Washington asserts that his trial counsel was aware of Harper, and that she was included on a list of possible witnesses read into the record at the beginning of jury selection. Brief for Appellant at 37; ***see also*** N.T., 1/8/98, at 52. Washington attached to his appellate brief and included with his Amended PCRA Petition a document signed by Harper, stating that she would have presented alibi testimony on Washington's behalf, and that she was available to testify at Washington's trial. Brief for

Appellant, Attachment D.

Based upon the foregoing, we conclude that the PCRA court improperly dismissed this claim without first conducting an evidentiary hearing. Accordingly, we reverse the PCRA court's denial of relief on this issue, and remand for an evidentiary hearing as to whether counsel rendered ineffective assistance by failing to call Harper as a trial witness.

In his next claim of error, Washington argues that his counsel rendered ineffective assistance by failing to lodge an objection and request a curative instruction in response to the prosecutor's eliciting misleading identification testimony from Forte and Huggins. Brief for Appellant at 42. Washington challenges the prosecutor's in-court reenactment, which purportedly demonstrated the elapsed time during each witness's identification of Washington's photograph. ***Id.*** at 42-45, 46. According to Washington, although each witness stated that it took several minutes to identify Washington's photo, the in-court demonstration reflected an elapsed time of only seconds. ***Id.*** at 46. Washington asserts that trial counsel had a duty to object or request a curative instruction that the demonstration was not accurate. ***Id.***

Washington presents no legal authority supporting his claim that the prosecutor's in-court demonstration constituted reversible error. Thus, Washington has not established arguable merit to his claim, or that counsel lacked a reasonable basis for not objecting to the demonstration. Because Washington failed to plead and prove all prongs necessary to an ineffectiveness claim, we cannot grant him relief. ***See Reaves***, 923 A.2d at 1128 n.10.

Washington next argues that his trial counsel rendered ineffective assistance by allowing him to tender an unknowing and involuntary open guilty plea on January 21, 1998, and by failing to file a motion to withdraw that guilty plea. Brief for Appellant at 48. Washington claims that

> [t]he entry of the guilty plea was not knowing, intelligent, or voluntary on account of the Commonwealth proceeding under a mandatory sentencing provision and failing to give requisite notice and because the guilty plea colloquy did not delve into the nature of the charges.***Id.*** Specifically, Washington asserts that the Commonwealth failed to notify him that it would seek the mandatory minimum sentence of five years, set forth at 42 Pa.C.S.A. § 9712(a), and that he did not understand the nature of the charges against him. Brief for Appellant at 51.

In reviewing Washington's challenge to the application of 42 Pa.C.S.A. § 9712(a), we are cognizant that in ***Alleyne v. United States***, 133 S. Ct. 2151 (2013), the United States Supreme Court held that

> [a]ny fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.***Alleyne***, 133 S. Ct. at 2155. Applying ***Alleyne***, this Court has concluded that 42 Pa.C.S.A. § 9712 is unconstitutional in its entirety. ***Commonwealth v. Valentine***, 101 A.3d 801, 811-12 (Pa. Super. 2013).

To be entitled to the retroactive application of a new constitutional rule, a defendant must have raised and preserved the issue in the court below:

> [W]here an appellate decision overrules prior law and announces a new principle, unless the decision specifically declares the ruling to be prospective only, the new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of adjudication up to and including any direct appeal.***Commonwealth v. Newman***, 99 A.3d 86, 90 (Pa. Super. 2014) (quoting ***Commonwealth v. Cabeza***, 469 A.2d 146, 148 (Pa. 1983)); ***see also Commonwealth v. Miller***, 102 A.3d 988, 996 (Pa. Super. 2014) (stating that ***Alleyne*** does not

Pennsylvania Constitution[,] guaranteeing due process and effective assistance of counsel[,] were violated?[5.] Did the PCRA court err by dismissing the PCRA [P]etition where trial counsel was ineffective for failing to object and request a curative instruction where the prosecutor elicited misleading testimony from Commonwealth witness Yvette Forte and Lynette Huggins ["Huggins"] and where [Washington's] Sixth and 14th Amendment rights under the United States Constitution and Article I, [S]ection [N]ine of the Pennsylvania Constitution[,] guaranteeing due process and effective assistance of counsel[,] were violated?[6.] Did the PCRA [c]ourt err by dismissing the PCRA [P]etition where trial counsel was ineffective for failing to object to the Commonwealth proceeding under the mandatory sentencing act as a result of its failure to give the requisite notice and for failure to file a motion to withdraw [Washington's] guilty plea as his guilty plea was not knowingly, voluntarily or intelligently entered into and[,] as a result[, Washington's] Sixth and 14th Amendment rights under the United States Constitution and Article I, [S]ection [N]ine of the Pennsylvania Constitution[,] guaranteeing due process and effective assistance of counsel[,] were violated?[7.] Did the PCRA Court err by dismissing the PCRA [P]etition where trial counsel was ineffective for fail[ing] to object to the overly prejudicial comment made by the prosecutor during closing arguments that the Commonwealth does not have to prove guilt beyond a reasonable doubt and where [Washington's] Sixth and 14th Amendment rights under the United States Constitution and Article I, [S]ection [N]ine of the Pennsylvania Constitution[,] guaranteeing due process and effective assistance of counsel[,] were violated?Brief for Appellant at 4-6 (numbers added).

Under the applicable standard of review, we determine whether the ruling of the PCRA court is supported by the record and free of legal error. ***Commonwealth v. Spotz***, 47 A.3d 63, 75 (Pa. 2012). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

Washington first claims that his trial counsel rendered ineffective assistance when he failed to object "and demand that Judge [] Brinkley uphold the prior ruling made by Judge [] DeFino denying the Commonwealth's [M]otion to consolidate." Brief for Appellant at 21. According to Washington, on January 29, 1997, Judge DeFino heard oral argument on the Commonwealth's Motion to consolidate for trial robberies committed on May 31, 1996, June 6, 1996, and two robberies committed on June 17, 1996. ***Id.*** at 25. Washington states that Judge DeFino denied the Motion to consolidate, as well as a motion to sever filed by his co-defendant, Howard Cain ("Cain"). ***Id.*** (citing N.T., 2/11/97, at 2). Notwithstanding, on the first day of trial, the prosecutor informed the trial judge, Judge Brinkley, that the prior ruling allowed the May 31, 1996 robbery and one of the June 17, 1996 robberies to be tried together. Brief for Appellant at 26 (citing N.T., 1/8/98, at 5-6). Washington now asserts that trial counsel rendered ineffective assistance by not correcting this error and notifying Judge Brinkley of the prior ruling. Brief for Appellant at 26.

To be eligible for relief based on a claim of ineffective assistance of counsel, a PCRA petitioner must demonstrate, by a preponderance of the evidence, that (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or omission; and (3) there is a reasonable probability that the result of the proceeding would have been different absent such error. ***Commonwealth v. Pander***, 100 A.3d 626, 630 (Pa. Super. 2014). "Where the petitioner fails to plead or meet any elements of the above-cited test, his claim must fail." ***Id.*** (quoting ***Commonwealth v. Burkett***, 5 A.3d 1260, 1272 (Pa. Super. 2010)).

> A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. Whether the facts rise to the level of arguable merit is a legal determination.The test for deciding whether counsel had a reasonable basis for his action or inaction is whether no competent counsel would have chosen that action or inaction, or, the alternative, not chosen,

> offered a significantly greater potential chance of success. Counsel's decisions will be considered reasonable if they effectuated his client's interests. We do not employ a hindsight analysis in comparing trial counsel's actions with other efforts he may have taken.Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.***Commonwealth v. Stewart***, 84 A.3d 701, 706-07 (Pa. Super. 2013) (*en banc*) (internal citations and quotation marks omitted); ***accord Pander***, 100 A.3d at 630-31.

While Washington asserts that there is arguable merit to his ineffectiveness claim based upon the failure to challenge the consolidation of the charges for trial, he does not argue or demonstrate prejudice resulting from trial counsel's alleged ineffectiveness. The failure to satisfy any prong of the ineffectiveness test requires rejection of the claim. ***Commonwealth v. Reaves***, 923 A.2d 1119, 1128 n.10 (Pa. 2007). Because Washington has failed to demonstrate prejudice resulting from trial counsel's alleged ineffectiveness, we are unable to grant him relief on this claim.3 *See* ***id.***

Washington next claims that his trial counsel rendered ineffective assistance by failing to exercise a peremptory strike, or strike for cause, an allegedly biased juror, who ultimately served on Washington's jury. Brief for Appellant at 30. Washington points out that during *voir dire*, the juror explained that, in the past two months, her brother and six-year-old nephew had been held up at gunpoint. ***Id.*** The juror also indicated that, about thirteen years prior, she and her family had been "shot at." ***Id.*** Washington asserts that, when asked whether she could be impartial, the juror responded as follows:

> I'll be able to put that aside. I don't know about-just remembering my nephew seeing his father being held with a gun on his head, you know-***Id.*** at 32 (emphasis and citation to record omitted). Washington contends that his counsel had no reasonable basis for not striking that juror, and that prejudice resulted because "[t]his juror had obviously been traumatized by her family members having a gun held to them and was then asked to complete the impossible task of remaining impartial while hearing facts about individuals having guns held to them." ***Id.***

The party seeking exclusion of the juror has the burden of establishing that the juror was not impartial. ***Commonwealth v. Duffey***, 855 A.2d 764, 770 (Pa. 2004). Our review of the Notes of Testimony of *voir dire* discloses that the juror indicated that she would not have a problem following the court's instructions and applying the presumption of innocence. N.T., 1/7/98, at 127. Moreover, Washington cites no evidence demonstrating that the juror was biased or evidence that he suffered prejudice resulting from counsel's failure to strike the juror. Accordingly, we cannot grant Washington relief on this claim. *See* ***Reaves***, 923 A.2d at 1128 n.10.

Next, Washington claims that the PCRA court improperly rejected his assertion of trial counsel's ineffectiveness, where trial counsel had failed to communicate a plea offer by the Commonwealth. Brief for Appellant at 34. According to Washington, the docket sheets for three of his cases, CP 9607-1102, CP 9610-0971 and CP 9711-762, include a notation that a plea offer had been rejected. Brief for Appellant at 34. Washington argues that no offer was communicated to him, and that the PCRA court improperly failed to grant him an evidentiary hearing on this issue. ***Id.*** Washington contends that he should be permitted to withdraw his guilty plea in order to consider the earlier offer. ***Id.*** Washington cites, *inter alia*, ***Commonwealth v. Copeland***, 554 A.2d 54 (Pa. Super. 1988), in support of his assertion that relief is due. Brief for Appellant at 35.

In ***Copeland***, this Court recognized that

> [t]he decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. This decision must finally be left to the client's wishes;

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TERRANCE WASHINGTON, Appellant
SUPERIOR COURT OF PENNSYLVANIA
2015 Pa. Super. Unpub. LEXIS 1345
No. 532 EDA 2011
May 12, 2015, Decided
May 12, 2015, Filed

Notice:

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

Editorial Information: Prior History

Appeal from the PCRA Order entered on August 6, 2008, in the Court of Common Pleas of Philadelphia County, Criminal Division, No(s): CP-51-CR-0711021-1996, CP-51-CR-0711091-1996, CP-51-CR-0711141-1996, CP-51-CR-1009712-1996, CP-51-CR-1107481-1997, CP-51-CR-1107621-1997, CP-51-CR-1107651-1997, CP-51-CR-1107671-1997.

Judges: BEFORE: BOWES, PANELLA and MUSMANNO, JJ. MEMORANDUM BY MUSMANNO, J. Panella, J., joins the memorandum. Bowes, J., files a concurring and dissenting memorandum.

Opinion

Opinion by: MUSMANNO

Opinion

MEMORANDUM BY MUSMANNO, J.:

Terrance Washington ("Washington") appeals from the August 6, 2008 Order1 dismissing his Petition for Relief under the Post-Conviction Relief Act ("PCRA"). *See* 42 Pa.C.S.A. §§ 9541-9546. We reverse the Order of the PCRA court and remand with instructions.

The PCRA court set forth the history underlying the instant appeal as follows:

> [Washington] was arrested and charged in connection with several robberies of state liquor stores committed in 1996. While awaiting trial, [Washington] was placed on house arrest with electronic monitoring. [Washington] removed his electronic ankle monitor and committed additional robberies. Following a two-day jury trial in January 1998, [Washington] was found guilty of four counts of robbery, two counts of criminal conspiracy, two counts of violations of the Uniform Firearms Act (VUFA) and two counts of possessing an instrument of crime (PIC). On January 21, 1998, [Washington] entered an open guilty plea on 17 additional counts of robbery, conspiracy, PIC, VUFA, and theft of firearms. On February 24, 1998, [the trial court] sentenced [Washington] to an aggregate sentence of 35 to 70 years [of] state incarceration.[Washington's] [P]etition to [M]odify [S]entence was denied on March 5, 1998. No direct appeal was filed. On December 14, 1998, [Washington] filed a *pro se* [M]otion to file an appeal *nunc pro tunc*, alleging that counsel failed to file a timely [requested] direct appeal. On January 5, 2000, [Washington] filed a PCRA [P]etition, which was subsequently denied. On appeal from that denial, [the Pennsylvania Superior Court] remanded the matter for a determination of which cases required the reinstatement of [Washington's] direct appeal rights *nunc pro tunc*, since [Washington's] December 1998 [M]otion should have been treated as a timely PCRA [P]etition. On October 14, 2003, [Washington's] direct appeal rights were reinstated for seven of his eight cases.... [The Pennsylvania Superior Court] affirmed [Washington's] convictions and sentence on October 14, 2005. [***See Commonwealth v. Washington***, 890 A.2d 1109 (Pa. Super. 2005) (unpublished memorandum).] [Washington's] [P]etition for allowance of appeal to the Pennsylvania Supreme Court was denied on June 27, 2006. [***See Commonwealth v. Washington***, 902 A.2d 1241 (Pa. 2006).]On January 24, 2006, [Washington] filed a second *pro se* PCRA [P]etition, his 1998 *pro se* [M]otion having been treated as his first PCRA [P]etition.2 On July 24, 2007, [the PCRA court] conducted a ***Grazier*** hearing, and determined that [Washington] could proceed *pro se*. On October 9, 2007, [Washington] filed a *pro se* amended [P]etition. On May 12, 2008, [the PCRA court] sent [Washington] a [Pa.R.Crim.P.] 907 Notice, notifying him that his [P]etition would be dismissed because it lacked merit. On August 6, 2008, after review of the PCRA [P]etition, the Commonwealth's Motion to dismiss, [and Washington's] reply to the [Rule] 907 Notice, [the PCRA court] dismissed [Washington's] PCRA [P]etition as [being] without merit. [Washington] filed a Notice of Appeal directly with [the Superior Court], [which] returned the appeal to [Washington] since he had filed it in the wrong court. [Washington] then sent his Notice of Appeal to the Court of Common Pleas. On November 5, 2008, the Court of Common Pleas Criminal Post-Trial Unit returned the appeal to [Washington], indicating that it was untimely filed and that he "must file a PCRA to have [his a]ppeal [r]ights reinstated."PCRA Court Opinion, 6/29/11, at 1-3 (footnote added).

Washington subsequently petitioned for PCRA relief, seeking the reinstatement of his right to appeal the PCRA court's August 6, 2008 Order. The PCRA court dismissed Washington's PCRA Petition as untimely filed. On appeal, this Court reversed, reinstating Washington's right to appeal the PCRA court's August 6, 2008 Order. ***Commonwealth v. Washington***, 47 A.3d 1255 (Pa. Super. 2012) (unpublished memorandum). Washington thereafter filed the instant appeal of the PCRA court's Order.

Washington presents the following claims for our review:

> [1.] Did the PCRA [c]ourt err in dismissing the PCRA [P]etition where trial counsel rendered ineffective assistance of counsel ... by failing to object and demand that Judge Genece Brinkley ["Judge Brinkley"] uphold the prior ruling made by Judge Anthony DeFino ["Judge DeFino"] denying the Commonwealth's [M]otion to consolidate and where [Washington's] right to a fair trial, effective assistance of counsel and due process pursuant to the Sixth and 14th Amendments of the United States Constitution and Article I, [S]ection [N]ine of the Pennsylvania Constitution [were violated]?[2.] Did the PCRA [c]ourt err by dismissing the PCRA [P]etition where trial counsel was ineffective for failing to exercise a peremptory strike or make a motion to strike for cause a biased juror that was improperly allowed to serve on [Washington's] jury panel and where [Washington's] right to a fair trial, effective assistance of counsel and due process pursuant to the Sixth and 14th Amendments of the United States Constitution and Article I, [S]ection [N]ine of the Pennsylvania Constitution were violated?[3.] Did the PCRA [c]ourt err by failing to have an evidentiary hearing as to [Washington's] claim that trial counsel was ineffective and by failing to communicate a plea offer by the Commonwealth and where [Washington's] Sixth and 14th Amendment rights under the United States Constitution and Article I, [S]ection [N]ine of the Pennsylvania Constitution guaranteeing due process and effective assistance of counsel were violated?[4.] Did the PCRA [c]ourt err by fail[ing] to hold an evidentiary hearing where trial counsel was ineffective for failure to investigate and call witness Zenata Harper ["Harper"] and where [Washington's] Sixth and 14th Amendment rights under the United States Constitution and Article I, [S]ection [N]ine of the

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continued from **1**

"I wouldn't be surprised if that happened," Burns said. "The case is there, and people will certainly argue it."

According to Burns, however, the two decisions are "legally irreconcilable," so *Washington* is clearly the law of the land.

"Ciccone attempts to explain that it's not relying on the law governing new rules and whether or not they can be applied retroactively on collateral review, but instead they're relying on the PCRA process," Burns said. "But the only thing those cases could apply to is the PCRA, so it doesn't do much good to say 'We are not looking at collateral review, but only PCRA cases.'"

Mangino agreed that *Washington* likely makes the central holding in Ciccone moot, but he said the Superior Court's ruling could still be used to argue for retroactive application of *Alleyne*.

In *Washington*, the high court unanimously held that, because *Alleyne* allocates decision-making authority to a jury rather than a judge, it is procedural in nature, and therefore does not require retroactive applicability under the U.S. Supreme Court's 1989 ruling in *Teague v. Lane*. That case established that U.S. Supreme Court rulings should not be applied retroactively unless they are either substantive changes or "watershed" rulings.

However, towards the end of the opinion in *Washington*, Chief Justice Thomas G. Saylor, writing for the court, indicated that the Supreme Court may consider no longer using the test outlined in *Teague*, saying, "Unless and until developed arguments are advanced which persuade this court that a better equilibrium can be achieved, the *Teague* construct shall remain the default approach."

Mangino said the Ciccone decision was a "shot across the bow," and could be used to argue that some judges feel the *Teague* test overlooks certain fairness issues. He noted that the majority in Ciccone had called *Alleyne* "cataclysmic" and said it wreaked havoc on mandatory minimum sentencing in Pennsylvania.

"What we're hearing from the Supreme Court and the Superior Court is this is how we're going to do it for now, but if we can be convinced otherwise this could change," Mangino said. "It would be surprising to see the court change its mind so quickly, but I think the court has left the issue open

One of the last times the state Supreme Court cited *Teague* was in its *Commonwealth v. Cunningham* ruling, which said juvenile lifers would not be able to retroactively apply a U.S. Supreme Court decision making mandatory life without parole for juveniles unconstitutional.

The *Cunningham* ruling against retroactive application was overturned by the U.S. Supreme Court's decision in *Montgomery v. Louisiana*, which was released in January. That decision meant more than 500 Pennsylvania prisoners would need to be resentenced, and rocked the criminal justice system in Pennsylvania, which had the highest population of inmates sentenced to life while they were juveniles.

Burns said *Alleyne* and the case it relied on were much clearer that the issue being addressed was simply procedural, and the decision that *Montgomery* made retroactive was much more ambiguous about its applicability. Burns also noted that courts across the country were split on how to apply the ban against mandatory life sentences for juveniles, but courts have consistently determined that *Alleyne* should not be applied retroactively.

"There's not a lot of gray area here," Burns said. "I'm certain [the U.S. Supreme Court] explicitly said that [the *Alleyne* line of cases] are purely procedural. The Pa. Supreme Court's decision is about as sure as you can get."

Attorney John Belli, who represented Washington, did not return a call seeking comment.

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V&S

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to suffer adjacent segment disease, resulting in a herniation at C4-5.

Ancherani's physiatrist causally related his injuries and treatment to the accident.

Ancherani stopped working after June 8, 2016. His expert in vocational rehabilitation determined that he had a reduced remaining work-life of 9.7 years. He sought to recover about $315,000 in past and future lost wages. ride his motorcycle, play catch with his son, or go to amusement parks. He talked about attempting to go to the beach with his family and being unable to do anything. He sought damages for past and future pain and suffering and for loss of enjoyment of life, embarrassment, humiliation, and disfigurement.

Ancherani's wife testified about how the couple's marital relations had suffered and that she performs the brunt of household duties. She said that when she comes home

Government Employees Insurance Co.'s expert in spinal surgery opined that Ancherani's C6-7 herniation was aggravated and made more symptomatic by the accident and that the surgery was reasonable and appropriate. However, after six months of treatment, Ancherani returned to his pre-accident baseline condition, the expert said. According to the expert, Ancherani did not suffer adjacent segment disease, since the C4-5 disc is not adjacent to the C6-7 disc, and the syndrome only occurs 10 years

$9,599 in past lost wages and no lost wages for the future. The expert noted that Ancherani, despite his physical condition, was still able to work. The expert cited a state court justice who had lost his leg in the Vietnam War but was still able to perform his job duties.

Ancherani was determined to receive $154,500.

This report is based on information that was provided by defense counsel. Plainitffs' counsel did not respond to the reporter's