APPENDIX A

OPINION UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No.21-2959

DATED:03/31/2022

*AMENDED DLD-086

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 21-2959

JESSE BROWN, Appellant

VS.

SUPERINTENDENT FAYETTE SCI; ET AL.

(E.D. Pa. Civ. No. 2-18-cv-04512)

Present: KRAUSE, MATEY and PHIPPS, Circuit Judges

Submitted are:

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

(2) Appellant's amended request for a certificate of appealability

***(3) Appellant's supplemental request for a certificate of appealability**

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability ("COA") is denied because jurists of reason would not debate the District Court's denial of appellant's claims on the merits. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). In

particular, jurists of reason would not debate the court's denial on the merits of appellant's claims that: (1) his trial counsel rendered ineffective assistance or otherwise erred in conceding that appellant unlawfully shot the victim, which counsel conceded by way of arguing that the jury should find appellant guilty only of voluntary manslaughter; (2) there was insufficient evidence to convict appellant of first-degree murder; and (3) trial counsel should have objected, moved for a mistrial, or further impeached the witness Shanique Hawkins on the basis of her statement to police. We reach that conclusion largely for the reasons explained by the Magistrate Judge and the District Court.

We note that the District Court, in denying appellant's Rule 60(b) motion, concluded in the alternative that the motion was barred by the restrictions on filing second or successive habeas petitions. Appellant's motion was not barred by those restrictions because appellant filed it before exhausting appellate remedies as to the denial of his initial habeas petition. See United States v. Santarelli, 929 F.3d 95, 104-05 (3d Cir. 2019). But that point is immaterial because the District Court also concluded that no relief was warranted on the merits, which would not be debatable among jurists of reason.

By the Court,

s/ Paul B. Matey
Circuit Judge

Dated: March 31, 2022

CND/cc: Jesse Brown
All Counsel of Record

A True Copy:

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

APPENDIX B

OPINION UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
2021 U.S.Dist.LEXIS 84700
No.2:18-cv-04512
DATE:05/04/2021

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

JESSE BROWN	:	CIVIL ACTION
v.	:	
MARK CAPOZZA, et al.	:	NO. 18-4512

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

December 5, 2019

Presently before the court is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is incarcerated at the State Correctional Institution located in Indiana, Pennsylvania. For the reasons that follow, the court recommends that the petition be **DENIED**.

I. BACKGROUND

On April 21, 2008, after a jury trial in the Court of Common Pleas of Philadelphia County, petitioner was found guilty of murder, possession of an instrument of crime with intent, and a firearms charge. See No. CP-51-CR-1301955-2006. The same day, petitioner was sentenced to life imprisonment without the possibility of parole. The Pennsylvania Superior Court, citing to the PCRA court's opinion, set forth the factual history underlying this matter as follows:

> On May 13, 2006 the victim in this matter, Tariq Blackwell, was shot and killed by [petitioner] on Porter Street in Philadelphia, Pennsylvania. At [petitioner]'s trial the victim's girlfriend, Jerrica Fulton, testified that she had been on Porter Street with the victim before the shooting occurred. The witness testified that on the morning of May 13, 2006[,] Tariq Blackwell and [petitioner] began to argue when they saw each other on Porter Street. At trial, defense counsel claimed that this argument was the result of [petitioner] pursuing the victim's girlfriend, Jerrica Fulton, the night before this incident took place. Jerrica Fulton did testify that on May 12, 2006 [petitioner] approached her as she was sitting in front of her house and [petitioner] was riding by on his bike .... [petitioner] got off his bike and handed her a piece of paper which stated his name, "Jay" with his phone number

and said, "call anytime." However, Jerrica Fulton also testified that [petitioner] wanted her to give the paper to her mother and that she never informed Tariq Blackwell of the piece of paper [petitioner] handed to her.

Defense counsel confronted the witness on the stand with notes of testimony from a preliminary hearing that took place on November 8, 2006. In the notes, Jerrica Fulton had testified that the argument between [petitioner] and the deceased was over her "boyfriend being jealous." However, at this trial Jerrica Fulton testified that she did not remember making that statement.

Jerrica Fult[o]n's best friend, Shanique Hawkins, also testified at this trial. Shanique Hawkins testified that she was present on May 12, 2006 when [petitioner] gave the piece of paper with his phone number on it to Jerrica Fulton. Shanique Hawkins was not able to hear the words exchanged between [petitioner] and Ms. Fulton but did witness the exchange between the two individuals. Also, Ms. Hawkins was present at the argument that took place later that evening between [petitioner] and Tariq Blackwell, where she heard [petitioner] yell "it ain't over with" as she, Tariq Blackwell and Jerrica walked away.

Later that evening, Tariq Blackwell, Jerrica Fulton and Shanique Hawkins were standing in front of a store on 7th and Ritner Street[s]. [Petitioner] was also standing in front of the store with another individual. Jerrica Fulton testified that Tariq Blackwell went up to the individual that was with [petitioner] because they knew each other. Shortly after, a verbal argument ensued between [petitioner] and Tariq Blackwell. Jerrica Fulton and Shanique Hawkins told Tariq Blackwell to walk away from the argument and he did. However, [petitioner] continued arguing as the individuals walked away. Shanique Hawkins testified that [petitioner] yelled "it ain't over with" as they turned the corner to return to her home for the evening.

The next day on May 13, 2006 at approximately 10:00 a.m. Jerrica Fulton and Tariq Blackwell walked towards Porter Street to go to the store. Jerrica Fulton testified that as they approached the corner of Marshall and Porter Street[s] she could see [petitioner], his friend Terry and an unidentified female standing on the other side. Immediately, [petitioner] and Tariq Blackwell began to exchange words. Tishea Green, an eyewitness to the shooting confirmed that she also witnessed [petitioner] and Tariq Blackwell get into a verbal argument. Tishea Green was on her way to work and walking on Porter Street when she witnessed the verbal argument and saw the deceased approach [petitioner] and say, "I heard you were looking at my girlfriend in a type of way that you weren't supposed to. You said something to her." Then, Tishea Green testified that she saw the deceased punch [petitioner] in his face. After [petitioner] was punched in the face the two began to wrestle and held each other in a bear hug. Jerrica Fulton testified less than five seconds after she saw [petitioner] pull out a gun, but did not

> see him fire it because she fell to the floor. Both witnesses testified that they heard several gunshots, but neither saw [petitioner] shoot Tariq Blackwell.
>
> Police Officer Michael Duffy testified at this [sic] trial and stated that when he arrived at the scene of the shooting at approximately 12:30 p.m., he observed "a black male lying in the middle of the highway who appeared to be shot." Officer Duffy went to Jefferson Hospital where Tariq Blackwell was pronounced dead. In the hospital Officer Duffy was approached by Jerrica Fulton and was given the piece of paper with [petitioner]'s name and phone number on it. Officer Duffy testified that he was able to ask Jerrica Fulton a few questions to ascertain who the shooter was in this incident. Jerrica Fulton told Officer Duffy [petitioner] had shot Tariq Blackwell, about the incident as she had witnessed it and how the argument started.

Commonwealth v. Brown, 2017 WL 3865778, No. 1229 EDA 2014 (Pa. Super. Ct. Sept. 5, 2017) (not precedential).

Petitioner appealed to the Pennsylvania Superior Court, which affirmed the trial court's decision on September 16, 2009. Commonwealth v. Brown, 986 A.2d 1249 (Table) (Pa. Super. Ct. 2009). Petitioner then sought discretionary review with the Pennsylvania Supreme Court, which was denied on July 21, 2010. Commonwealth v. Brown, 986 A.2d 1249 (Table) (Pa. 2010), appeal denied, 998 A.2d 958 (Pa. 2010).

On August 19, 2010, petitioner filed a pro se petition for state collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq. The PCRA court appointed counsel, who subsequently filed a number of amended PCRA petitions. After issuing notice pursuant to Pa. R. Civ. P. 907, the PCRA court dismissed the PCRA petition as meritless on March 21, 2014. Petitioner appealed the dismissal to the Pennsylvania Superior Court, at which time he requested to proceed pro se. After a hearing pursuant to Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998), petitioner's request was granted.

The PCRA court ordered petitioner to submit a Rule 1925(b) statement of matters complained on appeal.

Petitioner filed his 1925(b) statement on June 2, 2014, arguing that trial counsel had been ineffective for failing to: (1) investigate and call character witnesses, and (2) object when petitioner's sister was removed from the courtroom. See Commonwealth v. Brown, No. 1229 EDA 2014, *4 (C.P. Phila. July 22, 2014). On July 22, 2014, the PCRA court issued an opinion rejecting petitioner's claims on the merits. The Superior Court subsequently remanded the case.

On September 16, 2015, PCRA counsel filed a supplemental 1925(b) statement, alleging that trial counsel was also ineffective for: (1) presenting a diminished capacity defense without defendant/petitioner's consent, (2) challenging the sufficiency of evidence with respect to first degree murder (as opposed to voluntary manslaughter), and (3) failing to object to a false statement from Shanique Hawkins. See Commonwealth v. Brown, 1229 EDA 2014, *9 (C.P. Phila. Mar. 21, 2016).

The PCRA court issued a supplemental opinion on March 21, 2016, denying the new claims as waived and meritless. The PCRA dismissal was affirmed on September 5, 2017. Commonwealth v. Brown, 2017 WL 3865778 (Pa. Super. Ct. Sept. 5, 2017). Petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on January 22, 2018. Commonwealth v. Brown, 179 A.3d 454 (Table) (Pa. 2018).

The instant pro se habeas petition was filed on October 1, 2018 ("Pet."; Doc. 1").[1] The petition includes an accompanying memorandum of law ("Pet'r's Mem. of Law"; Doc. 1 at

[1] "[A] pro se prisoner's habeas petition is deemed filed at the moment he delivers it to

16-30).[2] Petitioner submitted a revised petition on November 6, 2018 ("Rev. Pet."; Doc. 5). The revised petition raises the following grounds for relief:

1. Trial counsel violated petitioner's right against self-incrimination by improperly conceding petitioner's guilt in his closing argument.

2. The evidence was insufficient to support a first-degree murder conviction.

3. Trial counsel was ineffective for failing to object to Hawkins' testimony.

(Rev. Pet. ¶ 11.)

The revised petition requests a hearing on the three claims. (Rev. Pet. ¶ 17.) Petitioner also filed a brief on December 14, 2018. ("Pet.'r's Brief"; Doc. 11). The brief essentially raises the same arguments as the revised petition, but instead of a due process claim that trial counsel violated petitioner's right against self-incrimination by conceding petitioner's guilt during trial, the brief asserts a due process violation for trial counsel presenting a diminished capacity defense without petitioner's consent. (Pet.'r.'s Brief at 8.) Petitioner also requests a new trial. Id. at 22.

Respondents filed a response to the revised petition on October 30, 2019, arguing that the petition should be denied because the claims are procedurally defaulted and meritless. ("Resp."; Doc. 30).

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prison officials for mailing to the district court." Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). The court presumes that the petition was delivered on the date it was executed by petitioner. See Baker v. United States, 670 F.3d 448, 451 n.2 (3d Cir. 2012).

[2] On the same day, petitioner filed a Motion for Stay and Abeyance (Doc. 2; "Motion"). The Motion was denied without prejudice by the undersigned on April 9, 2019. (Doc. 20.) The court denied petitioner's Motion because petitioner has not presented evidence that a subsequent PCRA was pending in the state courts, and the state court docket did not reflect any such pending PCRA. Id. At the time of the filing of this R&R, no subsequent PCRA had been filed.

II. DISCUSSION

A. Habeas Corpus Standards

Petitioner's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The provisions of AEDPA relevant to the instant matter provide as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court emphasized that "AEDPA's standard is intentionally difficult to meet." Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (quotation omitted). In other words, habeas review exists as "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979)).

With respect to § 2254(d)(1), the Third Circuit has determined that the "'contrary to' and 'unreasonable application of' clauses should be accorded independent meaning." Werts v. Vaughn, 228 F.3d 178, 197 (3d. Cir. 2000) (citing Williams v. Taylor, 529 U.S. 362, 405 (2000)). A federal habeas petitioner is entitled to relief under the "contrary to" clause only if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a

set of materially indistinguishable facts." Williams, 529 U.S. at 413. Under this clause, the relevant question is "whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is 'contrary to' the governing rule." Matteo v. Sup't SCI Albion, 171 F.3d 877, 885 (3d Cir.) (quoting O'Brien v. Dubois, 145 F.3d 16, 24 (1st Cir. 1998)), cert. denied, 528 U.S. 824 (1999). To establish that the state court decision is "contrary to" the federal precedent, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Id. at 888 (citations omitted).

If the state court decision correctly identified the Supreme Court rule governing the claim, the next step of the inquiry is the "unreasonable application" clause. Under this clause, the relevant question is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409. Relief should not be granted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo, 171 F.3d at 890.

With respect to 28 U.S.C. § 2254(d)(2), the petitioner must demonstrate that the state court's factual determination was "objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). If a reasonable basis existed for the factual findings reached in the state courts, habeas relief is not warranted. Burt v. Titlow, 571 U.S. 12, 17 (2013); Campbell v. Vaughn, 209 F.3d 280, 290-91 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001). Additionally, § 2254(d)(2) should be

considered in conjunction with 28 U.S.C. § 2254(e)(1), which provides that "a determination of a factual issue made by a State court shall be presumed to be correct." The petitioner bears the burden of "rebutting the presumption of correctness by clear and convincing evidence." Id. See also Rountree v. Balicki, 640 F.3d 530, 538 (3d Cir.) ("State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by clear and convincing evidence.") (quotation omitted), cert. denied, 565 U.S. 992 (2011); Simmons v. Beard, 590 F.3d 223, 231 (3d Cir. 2009) ("Under the § 2254 standard, a district court is bound to presume that the state court's factual findings are correct, with the burden on the petitioner to rebut those findings by clear and convincing evidence.").

A federal habeas court may not consider a petitioner's claims of state law violations, but must limit its review to issues of federal law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); Engle v. Isaac, 456 U.S. 107, 120 n.19 (1982) ("If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable."); Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997) ("[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.").

B. Ineffective Assistance of Counsel Standards

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court set forth a two-prong test that a petitioner must satisfy before a court will find that counsel did not provide the effective assistance guaranteed by the Sixth Amendment. Under this test, a petitioner must show: (1) that counsel's performance was deficient; and (2) counsel's deficient performance

caused the petitioner prejudice. Id. at 687-96. See also Harrington, 562 U.S. at 86 (same); Premo v. Moore, 562 U.S. 115 (2011) (same). The United States Supreme Court observed that "[s]urmounting Strickland's high bar is never an easy task." Harrington, 562 U.S. at 105 (quotation omitted). See also Collins v. Sec'y, Pa. Dep't of Corrs., 742 F.3d 528, 544 (3d Cir. 2014) (discussing Strickland).

To show deficient performance, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. In evaluating counsel's performance, a reviewing court should be "highly deferential" and must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (citation omitted). The Court has cautioned that the appropriate "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Premo, 562 U.S. at 122 (quoting Strickland, 466 U.S. at 690).

The United States Supreme Court explained the prejudice requirement for an ineffective assistance of counsel claim as follows:

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the

> proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Harrington, 562 U.S. at 104 (citations omitted). See also Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (holding that the prejudice requirement of Strickland "requires a 'substantial,' not just 'conceivable,' likelihood of a different result" (citation omitted)). It follows that "counsel cannot be deemed ineffective for failing to raise a meritless claim." Preston v. Sup't Graterford SCI, 902 F.3d. 365, 379 (3d Cir. 2018) (quoting Ross v. Dist. Attorney of Allegheny, 672 F.3d 198, 211 n.9 (3d Cir. 2012)).

Additionally, where, as here, the state court already has rejected an ineffective assistance of counsel claim, a federal court must defer to the state court's decision in accordance with 28 U.S.C. § 2254(d). As the Supreme Court stated,

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington, 562 U.S. at 105 (citations omitted). See also Woods, 135 S. Ct. at 1376 (when considering claims of ineffective assistance of counsel, AEDPA review must be "'doubly deferential' in order to afford 'both the state court and the defense attorney the benefit of the doubt'") (quoting Titlow, 571 U.S. at 15).

C. Exhaustion and Procedural Default Standards

It is well-established that a petitioner must present all of his claims to a state's intermediate court before a district court may entertain a federal petition for habeas corpus. 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 845, 847 (1999); Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir.), cert. denied, 568 U.S. 1036 (2012). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir. 1992). A petitioner must demonstrate that the claim raised in the federal petition was "fairly presented" to the state courts. Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)). See also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (same). To be fairly presented, "a habeas petitioner 'must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.'" Laird v. Horn, 159 F. Supp. 2d 58, 69 (E.D. Pa. 2001) (quoting McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999)), aff'd, 414 F.3d 419 (3d Cir. 2005), cert. denied, 546 U.S. 1146 (2006). "The habeas petitioner carries the burden of proving exhaustion of all available state remedies." Boyd v. Waymart, 579 F.3d 330, 367 (3d Cir. 2009) (quoting Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997)).

When a petitioner is unable to obtain state court review of his claims because of noncompliance with state procedural rules, the doctrine of procedural default generally bars federal habeas corpus review. Martinez v. Ryan, 566 U.S. 1, 9-10 (2012); Coleman v. Thompson, 501 U.S. 722, 729-32 (1991). The Third Circuit Court of Appeals explained:

> Procedural default occurs when a claim has not been fairly presented to the state courts (i.e., is unexhausted) and there are no additional state remedies available to pursue . . . ; or, when an issue is properly asserted in the state system but not addressed on the merits because of an independent and adequate state procedural rule[.]

Rolan, 680 F.3d at 317 (citations omitted). See also Bey v. Sup't Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017) (same). "A state [procedural] rule provides an adequate and independent basis for precluding federal review if (1) the rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) their refusal is consistent with other decisions." Nara v. Frank, 488 F.3d 187, 199 (3d Cir. 2007) (citations omitted).

Upon a finding of procedural default, review of a federal habeas petition is barred unless the habeas petitioner can show cause for the procedural default and actual prejudice arising therefrom, or that a fundamental miscarriage of justice will result if the claim is not considered. Coleman, 501 U.S. at 750. Petitioner can demonstrate cause for procedural default if he can show that some objective factor external to the defense impeded or prevented his ability to comply with the state procedural rules. Caswell, 953 F.2d at 862. The cause must be "something that cannot fairly be attributed to [the petitioner]." Coleman, 501 U.S. at 753. To show prejudice, petitioner must present evidence that this factor did more than merely create a possibility of prejudice; it must have "worked to [petitioner's] actual and substantial disadvantage." Murray v. Carrier, 477 U.S. 478, 494 (1986) (emphasis in original) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). The "fundamental miscarriage of justice" exception to procedural default is concerned only with "actual" innocence and petitioner must show that in light of new evidence it is more likely than not that no reasonable juror would have convicted him absent the claimed error. Schlup v. Delo, 513 U.S. 298, 327-28 (1995). See also

Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004) (finding that a credible allegation of actual innocence constitutes a miscarriage of justice that enables a federal court to hear the merits of otherwise procedurally defaulted habeas claims), cert. denied, 543 U.S. 1070 (2005).

D. Petitioner's Claims

Claim 1 Trial counsel violated petitioner's privilege against self-incrimination

Petitioner's first claim for relief is that his privilege against self-incrimination was violated when trial counsel conceded petitioner's guilt during his closing statement. (Rev. Pet. ¶ 11.) Petitioner asserts this claim as a Fourteenth Amendment due process claim. Id. In support of this claim, petitioner provides the following facts:

> The petitioner was charged with multiple degree of murder that the burden was on the prosecution to prove a pecific [sic] degree. The petitioner was prejudiced [sic] trial counsel closing argument in wich [sic] he stated, "you notice I'm not saying anything about self-defense, because it isn't a self-defense issue. It's a killing. It's an illegal killing, and I agree with that one hundred percent, but it is not first-degree murder." (N.T. 4/18/08 at 3.) So what kind of murder is it? He told the jury that its not a first-degree and not an [sic] self-defense issue, so the jury don't know what kind of murder it is, he all so [sic] stated, "straight out talking to you. Killing, my client did it, but it is not first-degree murder." (N.T. 4/18/08 at 14, 5-7.) He also stated, "I would admit to you right off the bat that Jesse Brown shot Tariq Blackwell. I don't think on the basis of evidence that you heard there is any reasonable doubt about that." (N.T. 4/18/08 at 6, 21-25.)

Id.

Petitioner did not raise this claim on direct appeal or PCRA review. Instead, petitioner stated in his supplemental 1925(b) statement that trial counsel was ineffective for raising a diminished capacity defense without the consent of petitioner. The state courts noted that there was "no evidence in the record that a diminished capacity defense was presented." Brown, 2017 WL 3865778, at *6 (citing Brown, 1229 EDA 2014, *7 (C.P. Phila. July 22, 2014)). The

Superior Court noted that petitioner failed to direct the court to "evidence in the record supporting such a defense." Id. Therefore, the court concluded that petitioner was not entitled to relief. Id.[3]

Here, petitioner never "fairly presented" his claim regarding his privilege against self-incrimination to the state courts. Petitioner did raise a due process claim relating to counsel asserting a diminished capacity defense. Brown, 2017 WL 3865778, at *6. But these are two different legal claims. As discussed supra, a petitioner must demonstrate that the claim raised in the federal petition was "fairly presented" to the state courts. Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)). See also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (same). To be fairly presented, "a habeas petitioner 'must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.'" Laird, 159 F. Supp. 2d at 69.

Although, petitioner uses the same arguments to support a claim for counsel raising a diminished capacity defense as he does for his claim for violation against self-incrimination, these claims are separate legal theories. Accordingly, petitioner has not exhausted his state court remedies as to this claim. Petitioner's first claim is now procedurally defaulted because such a claim could be raised only in a second PCRA petition which is now barred by the one-year statute of limitations. See 42 Pa. Cons.Stat. Ann. § 9545(b); Whitney, 280 F.3d at 240, 251 ("It is now clear that this one-year limitation is a jurisdictional rule that precludes

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[3] The court agrees with the state courts' holdings that trial counsel raising a diminished capacity defense without petitioner's defense lacks merit. There is no indication in the record that trial counsel ever raised a diminished capacity defense.

consideration of the merits of an untimely PCRA petition, and it is strictly enforced in all cases, including death penalty appeals."). This court cannot excuse the procedural default because petitioner has shown neither cause for the default nor that the federal court's failure to consider the claim will result in a fundamental miscarriage of justice. Nevertheless, the court will discuss petitioner's first claim on the merits.

Petitioner cannot establish that counsel's statements of trial acknowledging that petitioner shot the victim amounts to a violation against petitioner's privilege against self-incrimination. Petitioner's claim of ineffectiveness fails for lack of merit because trial counsel never conceded that petitioner committed first degree murder. Rather, counsel stated that this was "voluntary manslaughter." Had trial counsel attempted to deny that petitioner killed the victim at all, counsel would have lost all credibility with the jury. When taken in the context of trial counsel's remarks, it is clear that trial counsel advocated to the jury that petitioner's acts amounted to, at most, voluntary manslaughter, and not first-degree murder. In Strickland, the Supreme Court held that courts must give deference to strategic choices made by trial counsel "[b]ecause advocacy is an act and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." 466 U.S. at 681. Accordingly, petitioner's claim of trial counsel ineffectiveness fails for lack of merit. See e.g. Holland v. Folino, 2015 WL 1400600 (E.D. Pa. Mar. 26, 2015) (holding that trial was not ineffective for asserting during his opening statement that petitioner was not guilty of first-degree murder and the "Commonwealth's 'best case'" was involuntary manslaughter); see also U.S. v. Oliver, 379

F. Supp. 2d 754, 762 (E.D. Pa. 2005) (holding that trial counsel did not concede guilt, but rather declined to contest Petitioner's guilt relating to a robbery).

Claim 2 Sufficiency of Evidence

Petitioner's second claim challenges the sufficiency of the evidence against him. In support of this claim, petitioner argues that "[t]he evidence is insufficient to support First-Degree Murder," because the evidence surrounding the case shows a lack of malice. (Rev. Pet. ¶ 11.) Further, petitioner includes definitions of malice, first degree murder, third degree murder and voluntary manslaughter in his revised petition. Id. Petitioner also cites to the factual history of this case and provides several excerpts of testimony given by Jerrica Fulton.[4] Id. Petitioner offers the following facts in support:

> All of the supporting facts shows [sic] that this is voluntary manslaughter, the killing is slef-defense [sic], the defendant was not the provoker the killing is lack of malice. The killing is (Chance-Medley). Chance-Medley R. Killing in self-defense in a sudden fight. Also called manslaughter by Chance-Medley. A killing other than in self-defense that occurs during a sudden and unpredicted encounter that gets out of hand. A sudden and unexpected fight; sudden affray; suclker [sic] brawl; especially one in wich [sic] a participant is killed. The defendant is entitled to voluntary manslaughter. The defendant's Fourteenth Amendment, due process was violated. The defendant was not the provoker or aggressor, making killing lack of malice.

Id.

Petitioner did not raise this claim on direct appeal or in his PCRA petition. Instead, petitioner stated in his supplemental 1925(b) opinion that trial counsel was ineffective

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[4] Petitioner cites to the testimony of Jerrica Fulton from the November 8, 2006 preliminary hearing where Jerrica Fulton testified that the victim hit petitioner. (Rev. Pet. ¶ 11 (citing N.T. 11/8/06 at 13.)) Additionally, petitioner cites to an excerpt from Ms. Fulton's testimony during the April 16, 2008 trial where she testified that the victim "was a very jealous person..." Id. (citing N.T. 4/16/08 at 228.) Petitioner also cited to testimony from Tishea Green which also confirmed that the victim hit petitioner, and shots were fired after that." Id. (citing N.T. 4/17/08 at 66-67.)

for not challenging sufficiency of the evidence. See Brown, 1229 EDA 2014, *5 (C.P. Phila. March 21, 2016). But an ineffective assistance of counsel claim is not the same as the underlying substantive claim. See Gattis v. Snyder, 278 F.3d 222, 237 n.6 (3d Cir. 2002) (ineffective assistance claim raised in Delaware Supreme Court involved different legal theory than substantive claim raised in federal court, thus exhaustion requirement not satisfied), cert. denied, 537 U.S. 1049; Senk v. Zimmerman, 886 F.2d 611, 614 (3d Cir.1989) (claim that counsel failed to challenge a jury instruction concerns his attorney's performance and only indirectly implicates the underlying claim.) Thus, petitioner never "fairly presented" his claim of sufficiency of the evidence to the state courts. Accordingly, petitioner has not exhausted his state court remedies as to this claim.

Petitioner's second claim is now procedurally defaulted because such a claim could be raised only in a second PCRA petition which is now barred by the one-year statute of limitations. See 42 Pa. Cons.Stat. Ann. § 9545(b); see also Whitney, 280 F.3d at 240, 251 ("It is now clear that this one-year limitation is a jurisdictional rule that precludes consideration of the merits of an untimely PCRA petition, and it is strictly enforced in all cases, including death penalty appeals."). This court cannot excuse the procedural default because petitioner has shown neither cause for the default nor that the federal court's failure to consider the claim will result in a fundamental miscarriage of justice. Nevertheless, this court will discuss petitioner's second claim on the merits.

The federal constitutional standard for evaluating a due process claim based upon a sufficiency of the evidence claim is found in Jackson v. Virginia, 443 U.S. 307 (1979). Under Jackson, the federal court is to determine whether, "after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original). A habeas petitioner is entitled to relief only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 324. As the Supreme Court stated, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curium) (citing Cavazos v. Smith, 565 U.S. 1 (2011)). In addition, federal review of a sufficiency of the evidence claim under Jackson must be based on state law, that is, the substantive elements of the crime must be defined by applicable state law. Jackson, 443 U.S. at 324 n.16. The credibility of witnesses, the resolution of conflicts of evidence, and the drawing of reasonable inferences from proven facts all fall within the exclusive province of the fact-finder and, therefore, are beyond the scope of federal habeas sufficiency review. Id. at 319.

Under Pennsylvania law, "[a] criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." See 18 Pa.C.S.A. § 2502(a). Further, an intentional killing is a "[k]illing by means of position, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." Id. § 2502(d). As the Commonwealth points out in their Response, the specific intent to kill required for a conviction of first-degree murder "can be established through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim's body." Commonwealth v. Mattison, 82 A.3d 386, 392 (Pa. 2013). Malice may likewise be inferred from the use of a deadly weapon upon a vital part of the body.

Commonwealth v. Yanoff, 690 A.2d 260, 264 (Pa. Super. Ct. 1997). Petitioner shot the victim six times, hitting him in the chest and the back. Thus, the evidence is sufficient to support a first-degree murder conviction.

Further, the court's review of the record demonstrates that the state courts noted that the evidence against petitioner was "overwhelming" and further stated that petitioner "faced evidence which included testimony by three eyewitnesses, a photo found on his phone of him [ ] brandishing a matching gun, and testimony that [petitioner] had spent months under an assumed identity." Brown, 2017 WL 3865778, at *6 (citing Commonwealth v. Brown, 1229 EDA 2014 (Mar. 21, 2016) (Brown, 1229 EDA 2014, at *8).

Considering the Jackson standard, the evidence presented was sufficient to support petitioner's first-degree murder conviction. Again, the evidence presented to the jury was overwhelming. The testimony was sufficient evidence from which a rational factfinder could find petitioner guilty of the crimes of which he was convicted beyond a reasonable doubt. Petitioner has not established that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law. Nor was the decision based on an unreasonable determination of the facts in light of the evidence presented in the state courts. Petitioner's second claim should be denied.

Claim 3 Trial counsel was ineffective for failing to object to Shanique Hawkins' Testimony

Petitioner's third ground for relief alleges that petitioner's trial counsel was ineffective for failing to object to Ms. Hawkins' testimony during trial. (Rev. Pet. ¶ 11.) In support of this claim, petitioner states the following:

> Shanique Hawkins made an [sic] statement on 8-30-06, she stated on 5-12-06 that she observed a black male gave Jerrica Fulton a piece of paper with a phone number and the name Jay on it and she ID the defendant Jesse Brown as the person.

Id.

Further petitioner states in support of this argument that:

> [A]t trial, the D.A. ask Ms. Hawkins "did you actually see the defendant physically hand it to her" and Ms. Hawkins answers No. (N.T. 4/17/08 at 106.) And if you will review the record (Jerrica Fulton statement) Trial Transcripts (N.T. 4/16/08 at 222.) and (N.T. 4/16/08 at 223.) Ms. Fulton states twice that, "nobody was not [sic] out there, when she received the piece of paper," making Shanique Hawkins's statement that she had given to the police, a false and misleading statement. The defendant's Fourteenth Amendment, due-process was violated.

Id.

While petitioner raised this claim on PCRA review, the state courts found it waived because this claim was only raised in petitioner's supplemental 1925(b) statement. The PCRA court and Superior Court addressed this issue in their respective opinions and found this claim to be meritless. Brown, 2017 WL 3865778, at *6. Specifically, regarding petitioner's third claim, the PCRA court noted, and the Superior Court agreed, that petitioner "fails to explain in his brief how counsel should have challenged her statement." Id. Thus, the Superior Court agreed with the PCRA court that no relief was warranted. Id.

Petitioner's third claim is procedurally defaulted because the state courts determined it waived under state law. See Nara, 488 F.3d at 199. Courts in this circuit have found that failure to comply with Pa. R. App. P. 1925(b) constitutes adequate and independent ground for the purposes of the procedural default doctrine. Brown v. Mazurkiewicz, 2012 WL 954632, at *22 (W.D. Pa. Jan. 11, 2012), Report and Recommendation Approved and Adopted, 2012 WL 954628 (W.D. Pa. Mar. 20, 2012). See, e.g., Miles v. Tomaszewski, 2004 WL

2203726, at *3-4 (E.D. Pa. Sept. 14, 2004), Report and Recommendation Approved and Adopted, 2004 WL 2457732 (E.D. Pa. Oct. 27, 2004) (Sánchez, J.). Based upon this court's independent review, the court agrees that Pa. R. App. P. 1925(b) provides an adequate and independent state procedural ground to preclude habeas review.[5]

In any event, even if petitioner's failure to comply with Pa. R. App. P. 1925(b) did not constitute an independent and adequate state ground, petitioner has not established that the Superior Court's alternative holding was contrary to, or an unreasonable application of, clearly established federal law, or that it resulted in a decision based on an unreasonable determination of facts in light of the evidence presented.

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[5] A state procedural rule will constitute an adequate and independent state ground, precluding federal review, when "(1) the rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) their refusal is consistent with other decisions." Nara, 488 F.3d at 199. In relevant part, Pa. R. App. P. 1925(b)(4)(ii) requires an appellant to "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." If the requirement is not met, the Rule is clear that issues "not raised in accordance with the provisions of this paragraph (b)(4) are waived." Pa. R. App. P. 1925(b)(4)(vii). Thus, the court finds that the rule speaks in unmistakable terms, satisfying the first criterion under Nara.

In this case, the only appellate court that reviewed petitioner's direct appeal found the issue waived, so the second criterion is met. The fact that the Superior Court continued to make an alternative finding does not impact this determination. See Harris v. Reed, 489 U.S. 255, 265 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.").

The application of this rule is likewise consistent with other state decisions. See, e.g., M.G. v. L.D., 155 A.3d 1083, 1099 (Pa. Super. Ct. 2017) (finding appellant "forfeited appellate review" for failing to "articulate a specific argument in his 1925(b) statement that the trial court could identify"), allocatur denied, 169 A.3d 522 (Pa. 2017); Commonwealth v. Johnson, 51 A.3d 237, 247 (Pa. Super. Ct. 2012) (observing that the Pennsylvania Supreme Court "adopted a bright-line rule that a failure to specify [examples of the prejudice asserted] in a Rule 1925(b) statement results in waiver"). For these reasons, the court finds that the Superior Court's determination that petitioner's claim was waived for failure to comply with Rule 1925(b)(4)(ii) is an adequate and independent state procedural ground precluding habeas review.

In the instant case, as noted by the state courts, petitioner cannot establish that counsel's performance was ineffective. The state courts determined that this claim was meritless because petitioner did not provide a basis for how counsel should have challenged Ms. Hawkins' statement. Brown, 2017 WL 3865578, *6 (Pa. Super. Ct. 2017). This court agrees with the PCRA court that petitioner has not demonstrated that trial counsel was ineffective for not objecting to Ms. Hawkins' testimony. Petitioner has not shown why the testimony given by Ms. Hawkins was objectionable. Therefore, trial counsel cannot be ineffective for failing to raise a meritless claim. See Werts v. Vaughn, 228 F. 3d 178, 202-03 (3d Cir. 2000).

Moreover, this court must be mindful of the "doubly deferential" standard when a state court has already ruled that counsel was not ineffective. As detailed above: "Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Harrington, 562 U.S. at 115. See also Woods, 135 S. Ct. at 1376 (when considering claims of ineffective assistance of counsel, AEDPA review must be "'doubly deferential' in order to afford 'both the state court and the defense attorney the benefit of the doubt'") (quoting Titlow, 571 U.S. at 15).

Considering these deferential standards, and after carefully reviewing the record in the state court proceedings, this court finds that the record supports the state courts' conclusion that trial counsel was not ineffective for failing to object to Ms. Hawkins' testimony. Petitioner's third claim should be denied.

E. Request for an Evidentiary Hearing

In petitioner's brief, he asserts that this matter should be given a "hearing on the issues." (Rev. Pet. ¶ 17.) The Supreme Court set forth the following standard for federal courts to determine whether to grant an evidentiary hearing:

> [A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.

Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (internal citations omitted).

In the instant case, an evidentiary hearing is not required. As discussed supra, petitioner's first two claims are defaulted. His claims are also all meritless, in addition to being subject to highly deferential review by this court. Accordingly, taking into account these standards, petitioner is not entitled to an evidentiary hearing.

III. CONCLUSION

Accordingly, the court makes the following:

RECOMMENDATION

AND NOW, this 5th day of December, 2019, the court respectfully recommends that the petition for writ of habeas corpus be **DENIED**, the request for an evidentiary hearing be **DENIED**, and that no certificate of appealability ("COA") be granted.[6]

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[6] The COA should be denied because petitioner has not shown that reasonable jurists could debate whether the instant petition should be resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. See Miller-El, 537 U.S. at 336.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JESSE BROWN, Petitioner, v. MARK CAPOZZA, *SUPERINTENDENT SCI-FYT*; LAWRENCE KRASNER, *PHILADELPHIA D.A.*; and JOSH SHAPIRO, *PENNSYLVANIA ATTY GEN.*; Respondents.	:	No. 2:18-cv-04512

ORDER

AND NOW, this 21st day of December, 2021, for the reasons set forth in the Opinion issued this date, as well as in the Opinion issued on May 4, 2021, *see* ECF No. 39, **IT IS ORDERED THAT**:

1. Brown's motion for relief, ECF No. 42, is **DENIED and DISMISSED**.

2. To the extent that it is dismissed as a successive petition under 28 U.S.C. § 2244, a certificate of appealability is **DENIED**.[1]

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

[1] As discussed in the Opinion, the motion is properly construed under Federal Rule of Civil Procedure 59(e) and is currently on appeal. To the extent, however, that the petition may be construed as a successive petition, there is no basis for a certificate of appealability.

APPENDIX C

OPINION SUPERIOR COURT OF THE EASTERN DISTRICT OF PENNSYLVANIA
986 A.2d 1249(Pa.Super.2009)
No.1472 EDA 2008
DATE:09/16/2009

J. S39010/09

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

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JESSE BROWN, Appellant	: : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1472 EDA 2008

Appeal from the Judgment of Sentence April 21, 2008
In the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-1301955-2006

BEFORE: BENDER, BOWES and CLELAND, JJ.

MEMORANDUM: **FILED SEPTEMBER 16, 2009**

Jesse Brown (Appellant) appeals from the judgment of sentence entered following his convictions for first degree murder, a firearms violation and possessing an instrument of crime. Appellant claims that the trial court erred in admitting certain evidence and in denying a request for a mistrial after a Commonwealth witness made a passing reference to mug shots. For the reasons that follow, we affirm.

The trial court summarized the procedural and factual history of this case as follows:

> Jesse Brown (hereinafter "Appellant") appeared before this court on April 15 through April 18 and on April 21, 2008 for a motion to suppress and jury trial. Following the trial, Appellant was found guilty of murder in the first degree, violation of 6106 of the Uniform Firearm Act, a third degree felony, and guilty of possessing an instrument of crime with intent. Appellant was

sentenced to the mandatory sentence of life without the possibility of parole on the charge of murder in the first degree. On the charge of Violation of Section 6106, the court imposed a concurrent sentence of three to six years incarceration. Appellant was given no further penalty on the charge of possession of an instrument of crime.

Jerrica Fulton testified that she was the girlfriend of Tariq Blackwell. (N.T. 4-16-08, at p. 159). On May 12, 2006, Ms. Fulton along with Mr. Blackwell and her best friend Shonique Hawkins traveled to a Chinese food store located on 7th Street and Ritner Street. (N.T. 4-16-08, at p. 160). Appellant approached Jerrica Fulton and gave her his phone number on a piece of paper. (N.T. 4-16-08, at p. 186-189). The paper said, "Jay. Call any time. (215) 285-9977." Her boyfriend, Mr. Blackwell may have observed this and an argument ensued between him and Appellant. (N.T. 4-16-08, at p. 166).

The next day, May 13, 2006, Ms. Fulton and Mr. Blackwell were walking in the area of 6th Street and Porter Street, when Mr. Blackwell spotted Appellant on the corner with another male. (N.T. 4-16-08, at p. 171). Mr. Blackwell went over and another argument followed, eventually escalating into a fist fight. (N.T. 4-16-08, at p. 171). At some point Appellant pulled out a gun, and while he and Mr. Blackwell were "bear hugging" each other, he fired that gun. (N.T. 4-16-08, at p. 174-176). Appellant fired that gun at least six times. (N.T. 4-17-08, at p. 39). Tariq Blackwell sustained two gunshot wounds, one to the chest and one to the back. (N.T. 4-16-08, at p. 15-16). He was taken to Jefferson Hospital, where he was pronounced dead within an hour of sustaining those gunshot wounds. (N.T. 4-17-08, at p. 13).

Ms. Fulton testified that after the incident, she went to Jefferson Hospital. (N.T. 4-16-08, at p. 179). There, she encountered Officer Duffy. (N.T. 4-16-08, at p. 182). He questioned her, she told him that she witnessed the shooting and that she was Mr. Blackwell's girlfriend. (N.T. 4-16-08, at p. 181-183). Ms. Fulton eventually came forward with the piece of paper that Appellant had given her the previous evening and gave it to Officer Duffy. (N.T. 4-16-08, at p. 186-187). Several months later Ms. Fulton was interviewed again by different detectives. (N.T. 4-16-08, at p. 192). She told these detectives

> that Appellant shot her boyfriend and that she would be able to pick him out. (N.T. 4-16-08, at p. 205). The detectives then showed Ms. Fulton an array of photographs. (N.T. 4-16-08, at p. 205). She identified Appellant as the shooter. (N.T. 4-16-08, at p. 205). Appellant was subsequently arrested.

Trial Court Opinion (T.C.O.), 12/19/08, at 1-3. In this appeal, Appellant presents two questions for our review:

> I. Is the Defendant entitled to a new trial as a result of Court error where the Court improperly admitted evidence of the Defendant's subsequent possession of a firearm and where same was irrelevant and in the alternative, where the probative value of same was outweighed by unfair prejudice?
>
> II. Is the Defendant entitled to a new trial as the result of Court error where the Court denied the Defendant's Motion for Mistrial after the Defendant's photograph was identified as a "mug shot" by a civilian witness?

Brief for Appellant at 3.

In the first question presented for our review, Appellant challenges the introduction of a photograph showing Appellant holding a firearm that may have been the same type as that used in the shooting.[1] "In reviewing the trial court's rulings, we are guided by the rule of law that the admissibility of evidence is a matter addressed to the sound discretion of the trial court, which may only be reversed upon a showing that the court abused its discretion." ***Commonwealth v. Mayhue***, 639 A.2d 421, 431 (Pa. 1994). "An abuse of discretion is not merely an error of judgment, but the

misapplication or overriding of the law or the exercise of a manifestly unreasonable judgment based upon partiality, prejudice or ill will." ***Commonwealth v. McGinnis***, 675 A.2d 1282, 1285 (Pa. Super. 1986) (quotation marks omitted).

Appellant first claims that the evidence should not have been admitted because it was not relevant, and in support of this claim he cites ***Commonwealth v. Marshall***, 743 A.2d 489 (Pa. Super. 1999). In ***Marshall***, the defendant objected to the introduction of his gun at trial because at the time of the shooting, the gun had been confiscated from him and was actually in the possession of the police. The trial court overruled the objection and on appeal, we reversed, concluding,

> it was *impossible* for appellant's gun to have been the murder weapon since the gun was in police custody eighty days before the murder and remained in police custody on the actual day of the murder. Appellant's gun was in no way linked to the crime scene. . . . Herein, appellant's gun was possessed by the police at the time of the homicide. Therefore, it was not relevant to show that appellant possessed the means to commit the murder. Moreover, the gun was clearly prejudicial since it was the same caliber as the murder weapon.

Id. at 492-93. Appellant's reliance on ***Marshall*** is misplaced.

Whereas the gun in ***Marshall*** could not have been the murder weapon, the testimony at trial in the instant case established that the gun in the image may have been the murder weapon. At trial, Officer John Cannon

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[1] The Commonwealth claims that this issue is waived due to Appellant's failure to object at trial. However, as noted by the trial court, Appellant filed

of the Philadelphia Police Department testified as an expert in the areas of firearms identification and ballistics identification. N.T., 4/17/08, at 28. Officer Cannon testified that based on his examination of the bullet fragments and shell casings found at the crime scene, he had determined that the weapon used was a .40 caliber Glock handgun. ***Id.*** at 38-39, 44. Officer Cannon further testified that the gun that Appellant was holding in the picture was a Glock handgun, though he could not determine the caliber from the photo. ***Id.*** at 45. We conclude that this evidence was relevant as it tended to make more likely the fact that Appellant possessed the firearm used in the shooting.

In his first question, Appellant also argues that the trial court erred in admitting the photograph because its probative value was outweighed by the danger of unfair prejudice.[2] In support of this argument, he claims that by the time the photograph was admitted, the defense had already conceded that Appellant had shot the victim and the only issue being contested was the degree of guilt. While this would certainly diminish the probative value of the photograph, Appellant still has failed to demonstrate the prevalence of unfair prejudice.

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a motion *in limine* seeking the preclusion of this evidence.

[2] ***See*** Pa.R.E. 403 (stating, "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Appellant only argues that the introduction of the photograph "tended to smear him." Brief for Appellant at 11. Appellant does not articulate how this evidence tended to smear him, and we find this allegation unsustainable in light of the fact that he had already admitted to illegally carrying a loaded firearm and employing it against an unarmed person at short range. Thus, Appellant's bald claim of prejudice is inadequate to show that the trial court abused its discretion in determining that there was no unfair prejudice and admitting the photograph. T.C.O., 12/19/08, at 5.

In the second question presented for our review, Appellant claims that he was entitled to a mistrial because of a reference made to his "mug shot."

> The denial of a motion for a mistrial is assessed on appellate review according to an abuse of discretion standard. It is primarily within the trial court's discretion to determine whether defendant was prejudiced by the challenged conduct. On appeal, therefore, this Court determines whether the trial court abused that discretion.

Commonwealth v. Padilla, 923 A.2d 1189, 1192 (Pa. Super. 2007).

At trial, the prosecutor questioned Ms. Fulton regarding her identification of Appellant, and more particularly, how many photos made up the photo array that she viewed. She responded: "It was around about eight. It was around about eight mug shots on there." N.T., 4/16/08, at 192. Defense counsel objected and claimed that Appellant was entitled to a mistrial. The trial court denied defense counsel's request, but offered to

issue a curative instruction. Defense counsel rejected the offer for a curative instruction.

In ***Commonwealth v. Young***, 849 A.2d 1152 (Pa. 2004), our Supreme Court surveyed the relevant precedent in this area of the law and stated:

> A review of these cases clarifies that in applying the ***Allen*** test to the facts of a particular matter, a mere passing reference to photographs does not amount to prejudicial error. [***See Commonwealth v. Allen***, 292, A.2d 373 (Pa. 1972)]. Further, they explain that references to prior police contact do not amount to reversible error. Instead, it is only those references that expressly or by reasonable implication also indicate some involvement in prior criminal activity that rise to the level of prejudicial error.

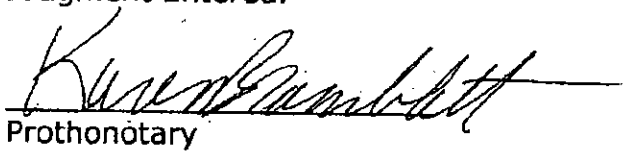
Young, 849 A.2d at 1156 (citations omitted). In ***Young***, the Commonwealth elicited testimony from a police officer regarding a photograph of the defendant that was among those of individuals "who have had contact with the police" and more particularly, that the defendant's photograph was "Police Photo Number 775." ***Id.*** The court found that these remarks, coming from a police officer, did not imply prior criminal conduct. We reach the same conclusion here.

The instant case involved a passing reference from a witness to the crime. There was no indication to the jury that she was somehow familiar with Appellant's criminal history. Rather, the record shows that she simply used the phrase "mug shot" in place of "photograph." This passing reference, while sufficient to establish prior contact between the police and

Appellant, is under our case law insufficient to establish a reasonable implication of prior criminal activity. Accordingly, we conclude that the trial court did not abuse its discretion in denying the request for a mistrial.

Judgment of sentence affirmed.

Judgment Entered.



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Date: SEP 16 2009

APPENDIX D

OPINION SUPERIOR COURT OF THE EASTERN DISTRICT OF PENNSYLVANIA
178 A.2d 134(Pa.Super.2017)
No.1229 EDA 2014
DATE:09/05/2017

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JESSE M. BROWN	:	
Appellant	:	No. 1229 EDA 2014

Appeal from the PCRA Order March 21, 2014
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1301955-2006

BEFORE: BOWES, J., OTT, J. and FORD ELLIOTT, P.J.E.

MEMORANDUM BY OTT, J.: **FILED September 5, 2017**

Jesse M. Brown appeals from the order entered in the Philadelphia County Court of Common Pleas, dated March 21, 2014, dismissing his first petition filed under the Post-Conviction Relief Act ("PCRA").[1] Brown seeks relief from the judgment of sentence of an aggregate term of life imprisonment, imposed on April 21, 2008, following his jury convictions of first-degree murder, a firearms violation, and possessing an instrument of crime ("PIC").[2] On appeal, he raises claims asserting the ineffective assistance of trial counsel. For the reasons below, we affirm.

The PCRA court summarized the factual history as follows:

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[1] 42 Pa.C.S. §§ 9541-9546.

[2] 18 Pa.C.S. §§ 2502, 6106, and 907, respectively.

On May 13, 2006 the victim in this matter, Tariq Blackwell, was shot and killed by [Brown] on Porter Street in Philadelphia, Pennsylvania. At [Brown]'s trial the victim's girlfriend, Jerrica Fulton, testified that she had been on Porter Street with the victim before the shooting occurred. The witness testified that on the morning of May 13, 2006[,] Tariq Blackwell and [Brown] began to argue when they saw each other on Porter Street. At trial, defense counsel claimed that this argument was the result of [Brown] pursuing the victim's girlfriend, Jerrica Fulton, the night before this incident took place.[1] Jerrica Fulton did testify that on May 12, 2006 [Brown] approached her as she was sitting in front of her house and [Brown] was riding by on his bike. ... [Brown] got off his bike and handed her a piece of paper which stated his name, "Jay" with his phone number and said, "call anytime." However, Jerrica Fulton also testified that [Brown] wanted her to give the paper to her mother and that she never informed Tariq Blackwell of the piece of paper [Brown] handed to her.[2]

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[1] Defense counsel confronted the witness on the stand with notes of testimony from a preliminary hearing that took place on November 8, 2006. In the notes, Jerrica Fulton had testified that the argument between [Brown] and the deceased was over her "boyfriend being jealous." However, at this trial Jerrica Fulton testified that she did not remember making that statement.

[2] Jerrica Fult[o]n's best friend, Shanique Hawkins, also testified at this trial. Shanique Hawkins testified that she was present on May 12, 2006 when [Brown] gave the piece of paper with his phone number on it to Jerrica Fulton. Shanique Hawkins was not able to hear the words exchanged between [Brown] and Ms. Fulton but did witness the exchange between the two individuals. Also, Ms. Hawkins was present at the argument that took place later that evening between [Brown] and Tariq Blackwell, where she heard [Brown] yell "it ain't over with" as she, Tariq Blackwell and Jerrica walked away.

Later that evening, Tariq Blackwell, Jerrica Fulton and Shanique Hawkins were standing in front of a store on 7th and Ritner Street[s]. [Brown] was also standing in front of the store with another individual. Jerrica Fulton testified that Tariq

Blackwell went up to the individual that was with [Brown] because they knew each other. Shortly after, a verbal argument ensued between [Brown] and Tariq Blackwell. Jerrica Fulton and Shanique Hawkins told Tariq Blackwell to walk away from the argument and he did. However, [Brown] continued arguing as the individuals walked away. Shanique Hawkins testitifed that [Brown] yelled "it ain't over with" as they turned the corner to return to her home for the evening.

The next day on May 13, 2006 at approximately 10:00 a.m. Jerrica Fulton and Tariq Blackwell walked towards Porter Street to go to the store. Jerrica Fulton testified that as they approached the corner of Marshall and Porter Street[s] she could see [Brown], his friend Terry and an unidentified female standing on the other side. Immediately, [Brown] and Tariq Blackwell began to exchange words. Tishea Green, an eyewitness to the shooting confirmed that she also witnessed [Brown] and Tariq Blackwell get into a verbal argument. Tishea Green was on her way to work and walking on Porter Street when she witnessed the verbal argument and saw the deceased approach [Brown] and say, "I heard you were looking at my girlfriend in a type of way that you weren't supposed to. You said something to her." Then, Tishea Green testified that she saw the deceased punch [Brown] in his face. After [Brown] was punched in the face the two began to wrestle and held each other in a bear hug. Jerrica Fulton testified less than five seconds after she saw [Brown] pull out a gun, but did not see him fire it because she fell to the floor. Both witnesses testified that they heard several gunshots, but neither saw [Brown] shoot Tariq Blackwell.

Police Officer Michael Duffy testified at this trial and stated that when he arrived at the scene of the shooting at approximately 12:30 p.m., he observed "a black male lying in the middle of the highway who appeared to be shot." Officer Duffy went to Jefferson Hospital where Tariq Blackwell was pronounced dead. In the hospital Officer Duffy was approached by Jerrica Fulton and was given the piece of paper with [Brown]'s name and phone number on it. Officer Duffy testified that he was able to ask Jerrica Fulton a few questions to ascertain who the shooter was in this incident. Jerrica Fulton told Officer Duffy [Brown] had shot Tariq Blackwell, about the incident as she had witnessed it and how the argument started.

PCRA Court Opinion, 7/22/2014, at unnumbered 1-4.

Brown was subsequently arrested and charged with one count each of murder, carrying a firearm without a license, and PIC. On April 21, 2008, a jury found Brown guilty of all charges, including murder in the first degree. The trial court immediately sentenced him to a term of life imprisonment for murder, and a concurrent term of three to six years' imprisonment for the firearms violation.[3] A panel of this Court affirmed Brown's judgment of sentence on September 16, 2009, and the Pennsylvania Supreme Court subsequently denied his petition for review. ***See Commonwealth v. Brown***, 986 A.2d 1249 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 998 A.2d 958 (Pa. 2010).

On August 19, 2010, Brown filed a timely, *pro se* PCRA petition, followed by an amended petition on December 28, 2010. Counsel was appointed on May 6, 2011, and filed four additional amended petitions on September 9, 2011, June 22, 2012, October 19, 2012, and March 15, 2013, respectively. All of Brown's petitions asserted allegations of trial counsel's ineffectiveness. On November 21, 2013, counsel filed a supplement to his fourth amended petition, which included affidavits from three proposed witnesses. On January 24, 2014, the PCRA court issued notice of its intent to dismiss Brown's petition without first conducting an evidentiary hearing pursuant to Pa.R.Crim.P. 907. Brown filed a *pro se* response on February 5,

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[3] No further penalty was imposed for the PIC conviction.

2014, followed by a motion for an evidentiary hearing on March 6, 2014. Thereafter, on March 21, 2014, the PCRA court dismissed Brown's petition. This timely appeal followed.[4]

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[4] On April 24, 2014, the PCRA court ordered Brown to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). After requesting an extension of time until the relevant transcripts were transcribed, counsel filed a concise statement on June 2, 2014. The PCRA court subsequently filed an opinion on July 22, 2014.

The ensuing two-year delay in the disposition of this appeal resulted from the following. On June 12, 2014, the appeal was dismissed by this Court when Brown failed to file a docketing statement. However, the appeal was reinstated on July 9, 2014, after Brown filed a motion for reconsideration. Thereafter, on July 28, 2014, Brown filed a *pro se* motion requesting permission for counsel to withdraw so that he could proceed *pro se*. On August 27, 2014, this Court entered a *per curiam* order remanding the case to the PCRA court to conduct a ***Grazier*** hearing. ***See Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1988). Thereafter, the PCRA court conducted a ***Grazier*** hearing on October 24, 2014, at which time Brown decided not to represent himself *pro se*.

A revised briefing schedule was established by this Court, and counsel failed to timely file a brief on Brown's behalf. Accordingly, on August 19, 2015, this Court, once again, remanded the appeal to the PCRA court to determine whether PCRA counsel had abandoned Brown on appeal. ***See*** Order, 8/19/2015. Meanwhile, counsel filed a supplemental Rule 1925(b) statement on September 16, 2015. On March 14, 2016, this Court entered a *per curiam* order stating the PCRA court failed to comply with our August 19, 2015, order, and directing the PCRA court to file a response within seven days. ***See*** Order, 3/14/2016. The PCRA court did so, and filed a supplemental opinion on March 21, 2016. Thereafter, a revised briefing scheduled was established.

However, on April 18, 2016, Brown filed a second request for a ***Grazier*** hearing. This Court denied the request on May 2, 2016. Subsequently, on June 24, 2016, when PCRA counsel again failed to comply with the briefing schedule, this Court remanded the appeal again to the PCRA court to determine whether counsel abandoned Brown. ***See*** Order,

(Footnote Continued Next Page)

"In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination is supported by the record and free of legal error." ***Commonwealth v. Mitchell***, 141 A.3d 1277, 1283–1284 (Pa. 2016) (internal punctuation and citation omitted). A PCRA court may dismiss a petition "without an evidentiary hearing if there are no genuine issues of material fact and the petitioner is not entitled to relief." ***Id.*** at 1284. (citations omitted).

Where, as here, all of the claims on appeal assert trial counsel's ineffectiveness, we must bear in mind:

> "In order to obtain relief under the PCRA premised upon a claim that counsel was ineffective, a petitioner must establish beyond a preponderance of the evidence that counsel's ineffectiveness 'so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.'" ***Commonwealth v. Payne***, 794 A.2d 902, 905 (Pa. Super. 2002), *quoting* 42 Pa.C.S.A. § 9543(a)(2)(ii). When considering such a claim, courts presume that counsel was effective, and place upon the appellant the burden of proving otherwise. ***Id.*** at 906. "Counsel cannot be found ineffective for failure to assert a baseless claim." ***Id.***
>
> To succeed on a claim that counsel was ineffective, Appellant must demonstrate that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) counsel's ineffectiveness

(Footnote Continued) ———————

6/24/2016. On July 25, 2016, Brown filed an application in this Court for the appointment of new PCRA counsel. This Court denied the application based upon its June 24, 2016, remand to the PCRA court. Thereafter, on August 15, 2016, the PCRA court responded to this Court's remand order, and stated PCRA counsel had not abandoned Brown. Counsel subsequently filed an appellate brief on November 7, 2016.

> prejudiced him. ***Commonwealth v. Allen***, 833 A.2d 800, 802 (Pa. Super. 2003).

Commonwealth v. Michaud, 70 A.3d 862, 867 (Pa. Super. 2013). "To demonstrate prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's actions or inactions, the result of the proceeding would have been different." ***Commonwealth v. Mason***, 130 A.3d 601, 618 (Pa. 2015).

Brown first argues counsel was ineffective for failing to call character witnesses who would have attested to his reputation for non-violence. ***See*** Brown's Brief at 5. Although Brown names only one proposed witness in his brief (Diro Fields), counsel forwarded to the PCRA court affidavits from three proposed witnesses – Diro Fields, Ashley Reed (Brown's sister), and Dorothy Brown (Brown's mother) – who all stated they were known to trial counsel,[5] and available to testify at Brown's jury trial regarding Brown's good reputation for non-violence. ***See*** Affidavits, filed 11/21/2013. Accordingly, Brown contends trial counsel was ineffective for failing to call these witnesses.

Our review of a challenge to counsel's stewardship for failing to present character witnesses is well-settled:

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[5] Specifically, the witnesses averred they were "named in the jury selection transcript." ***See*** Affidavits of Ashley Reed, Dior Fields, and Dorothy Brown, filed 11/21/2013. Our review of the transcript from Brown's *voir dire* supports this claim. ***See also*** N.T., 4/15/2008 at 15; 4/16/2008 at 16.

> The failure to call character witnesses does not constitute per se ineffectiveness. In establishing whether defense counsel was ineffective for failing to call witnesses, appellant must prove:
>
> > (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Treiber, 121 A.3d 435, 463-464 (Pa. Super. 2015) (quotations omitted).

Although the affidavits submitted by Brown's proposed witnesses appear to minimally satisfy his burden of proving the availability and willingness of the witnesses to testify to his good character, we conclude Brown is nevertheless entitled to no relief. Indeed, Brown fails to explain how the absence of these witnesses' testimony was so prejudicial that he was denied a fair trial. ***See id.*** His string citation to several cases, which state character evidence alone can create reasonable doubt, is simply insufficient to establish prejudice under the facts of his case. ***See*** Brown's Brief at 5.[6]

Moreover, the PCRA court also explained Brown "stated that trial counsel was ineffective because [counsel's] reason for not calling [these] character witness[es] was due to a prior drug conviction." PCRA Court

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[6] We emphasize Brown's "argument" on this issue consists of one, half-page, paragraph. ***See*** Brown's Brief at 5.

Opinion, 7/22/2014, at unnumbered 6. Brown appears to confirm this in his brief, but maintains counsel's asserted basis for failing to present character testimony is flawed because "drug convictions are not relevant to character testimony for peacefulness and non-violence." Brown's Brief at 5.

> The Pennsylvania Supreme Court has held:
>
> While character witnesses may not be impeached with specific acts of misconduct, a character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct to test the accuracy of the testimony.

Commonwealth v. Puksar, 951 A.2d 267, 277 (Pa. 2008) (citation omitted). In ***Commonwealth v. Jones***, 636 A.2d 1184 (Pa. Super. 1994), *appeal denied*, 668 A.2d 1125 (Pa. 1995), a panel of this Court determined trial counsel had a reasonable basis for failing to present character witnesses who were aware of the defendant's prior drug activity. The panel opined:

> [I]n the instant case, counsel may well have concluded that potential cross-examination of appellant's character witnesses regarding the drug activity in which appellant was engaged offered dangers which outweighed the doubtful value of their testimony regarding appellant's alleged reputation for non-violence.

Id. at 1190. The same is true here.[7] Consequently, Brown is entitled to no relief on this claim.

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[7] We note that in ***Jones***, ***supra***, the ineffectiveness claim was raised *via* post-trial motions, and the court had conducted a hearing on the defendant's motions. ***See Jones***, ***supra***, 636 A.2d at 1189. Nevertheless, at the hearing, counsel was unable "to recall the specific basis for" failing to present character witnesses. ***Id.*** While no hearing was conducted in the present case, Brown does not dispute that his prior drug conviction was one

(Footnote Continued Next Page)

Next, Brown claims trial counsel was ineffective for failing to object when the public, specifically his sister Ashley Reed, was excluded from the courtroom during his jury *voir dire*. Brown argues the court's actions constituted a structural violation of his Sixth Amendment right to a public trial. Brown's Brief at 5.

The Sixth Amendment to the Constitution provides, in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. CONST., Amend. VI. The United States Supreme Court has held that a defendant's right to a public trial extends to the *voir dire* of prospective jurors. ***Presley v. Georgia***, 558 U.S. 209 (2010).

We conclude Brown is entitled to no relief. First, his proof of this constitutional violation is lacking. The affidavit signed by Brown's sister states the following: "I was [] peacefully attending the first trial when court officials made me and other family members leave the courtroom without authority to do so." Affidavit of Ashley Reed, filed 11/21/2013. Reed did not specify she was excluded during Brown's *voir dire*, and, in fact, the PCRA court stated in its opinion that it had reviewed the record in this matter and found "no evidence that this exclusion occurred." PCRA Court Opinion, 7/22/2014, at unnumbered 7. Our independent review of the transcript

(Footnote Continued) ———————

of the reasons why trial counsel chose not to present character evidence. ***See*** Brown's Brief at 2; Statement of Errors Complained of on Appeal, 6/2/2014, at 1; Fourth Amended Petition for Post-Conviction Relief, 3/15/2013, at 1.

from the two-day *voir dire* supports the court's finding. Furthermore, Brown provides no citation to the notes of testimony in his brief.

Moreover, even assuming, *arguendo*, we were to find the trial court improperly excluded Reed from *voir dire*, Brown has made no attempt to establish he was prejudiced as a result of the court's actions. As our Supreme Court explained:

> [V]arious courts have found a violation of the right to a public trial to be in the nature of a structural error. ***See, e.g., Owens v. United States***, 483 F.3d 48, 63 (1st Cir. 2007). It is well recognized, however, that such violation is a particular type of structural error which is waivable. ***See, e.g., Peretz v. United States***, 501 U.S. 923, 936, 111 S.Ct. 2661, 2666, 115 L.Ed.2d 808 (1991) (*citing* ***Levine v. United States***, 362 U.S. 610, 619, 80 S.Ct. 1038, 1044, 4 L.Ed.2d 989 (1960), for the proposition that "failure to object to closing of courtroom is [a] waiver of [the] right to [a] public trial"). Since Appellant did not object to the [exclusion of the public], the only cognizable aspect of his claim is that of deficient stewardship, as to which he must establish prejudice.

Commonwealth v. Rega, 70 A.3d 777, 786-787 (Pa. 2013) (some citations and footnote omitted). Here, Brown has utterly failed to demonstrate he was prejudiced by the purported exclusion of his sister from *voir dire*. Therefore, this issue is meritless.

Brown raises three additional claims of trial counsel's ineffectiveness, namely for: (1) failing to assert Brown's innocence and argue self-defense; (2) presenting a diminished capacity defense without Brown's consent; and (3) failing "to pursue sufficiently prior inconsistent statements of Tishea Green and to challenge Shanique Hawkin's statement to police." Brown's

Brief at 6. However, these issues were not included in Brown's June 2014 Rule 1925(b) concise statement, Rather, Brown raised these claims for the first time in the supplemental statement he filed on September 16, 2015, after this Court remanded the appeal to the PCRA court to determine if counsel had abandoned Brown. ***See supra*** n.3. ***See also*** Order, 8/19/2015.

It is axiomatic that "in order to preserve their claims for appellate review, [a]ppellants must comply whenever the [PCRA] court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P.1925" and "[a]ny issues not raised in a Pa.R.A.P.1925(b) statement will be deemed waived." ***Commonwealth v. Castillo***, 888 A.2d 775, 780 (Pa. 2005), *quoting* ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998). Moreover, Rule 1925 provides for the filing of a supplemental concise statement only "upon application" of the trial court and "for good cause shown." Pa.R.A.P. 1925(b)(2). Indeed, this Court has explicitly stated an appellant must seek the trial court's permission before filing a supplemental statement. ***See Commonwealth v. Ray***, 134 A.3d 1109, 1115 (Pa. Super. 2016) (*pro se* defendant's untimely concise statement filed **after** trial court's opinion did not preserve issues for review when he "failed to file a corresponding motion seeking permission to supplement his previously-filed Notice [of issues on appeal] by filing a Pa.R.A.P. 1925(b) statement *nunc pro tunc*.").

Here, the PCRA court noted in its opinion that Brown failed to seek its permission to file the September 16, 2015, supplemental statement. The court explained: "While this matter was remanded by the Superior Court for a determination of counsel's involvement, it was not an invitation to amend the [Rule] 1925(b) statement that was ordered by this Court to be filed no later than May 15, 2014." PCRA Court Opinion, 3/21/2016, at 5. Consequently, the PCRA court concluded Brown's last three issues were waived.

We are constrained to agree. When the case was remanded by this Court in August of 2015, counsel did not request permission from the PCRA court to file a supplemental concise statement. Rather, it appears counsel informed the PCRA court by email that Brown wanted counsel to continue to represent him, and wanted him to amend the concise statement. ***See*** Response to Order, 3/18/2016, email from counsel dated 9/14/2015. The email, however, was not a request of the PCRA court for permission to file a supplemental statement.[8] Therefore, Brown's additional claims are waived on appeal.

Nevertheless, we note the PCRA court addressed these additional claims in its opinion, and concluded they were meritless. See PCRA Court Opinion, 3/21/2016, at 6-9. Were we to review these issues on appeal, we

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[8] Moreover, counsel's email does not allege any "good cause" for doing so. ***See*** Pa.R.A.P. 1925(b)(2).

would agree. With respect to Brown's contention that counsel was ineffective for failing to assert Brown's innocence and present a self-defense argument, the PCRA court concluded the evidence against Brown was "overwhelming[,]" noting Brown "faced evidence which included testimony by three eyewitnesses, a photo found on his phone of him [] brandishing a matching gun, and testimony that [Brown] had spent months under an assumed identity." PCRA Court Opinion, 3/21/2016, at 8. Accordingly, the PCRA court concluded "trial counsel's decision to argue for a voluntary manslaughter conviction [was] reasonable in light of the overwhelming evidence against [Brown]." ***Id.*** Furthermore, we note Brown fails to explain what evidence would have supported a claim of self-defense. ***See*** Brown's Brief at 6. Therefore, we would find this claim fails.

Next, with respect to Brown's assertion that trial counsel presented a diminished capacity defense without his permission, the PCRA court found "no evidence in the record that a diminished capacity defense was presented." PCRA Court Opinion, 3/21/2016, at 7. Brown again fails to direct this Court to the evidence in the record supporting such a defense. ***See*** Brown's Brief at 6. Again, we would conclude warrants no relief.

Lastly, with respect to Brown's assertion that counsel was ineffective for failing to challenge the statements of Tishea Green and Shanique Hawkins, we note Brown failed to raise the issue of Green's prior inconsistent statement in either his original, or untimely supplemental concise statement. Moreover, with regard to Hawkins's statement, Brown

fails to explain in his brief how counsel should have challenged her statement. ***See*** Brown's Brief at 6. Accordingly, were we to address these final three claims, we would agree with the PCRA court that no relief is warranted.

Therefore, because we find no error or abuse of discretion on the part of the PCRA court in dismissing Brown's petition, we affirm the order on appeal.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/5/2017

APPENDIX E

OPINION UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PETITION FOR REHEARING
No.21-2959
DATED:05/17/22

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2959

JESSE BROWN,
Appellant

VS.

SUPERINTENDENT FAYETTE SCI; ET AL.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. Civ. No. 2-18-cv-04512)
District Judge: Honorable Joseph F. Leeson, Jr.

PETITION FOR REHEARING

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

The petition for rehearing filed by appellant Jesse Brown in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court. It is now hereby **ORDERED** that the petition for rehearing is **DENIED**.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: May 17, 2022

CND/cc: Jesse Brown
All Counsel of Reocrd

APPENDIX F

OPINION/ORDER PENNSYLVANIA SUPREME COURT
EASTERN DISTRICT
179 A.3d 454
460 EAL 2017
DATED:01/22/2018

COMMONWEALTH OF PENNSYLVANIA, Respondent v. JESSE M. BROWN, Petitioner
SUPREME COURT OF PENNSYLVANIA
645 Pa. 260; 179 A.3d 454; 2018 Pa. LEXIS 470
No. 460 EAL 2017
January 22, 2018, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

Petition for Allowance of Appeal from the Order of the Superior Court.Commonwealth v. **Brown**, 178 A.3d 134, 2017 Pa. Super. Unpub. LEXIS 3311 (Sept. 5, 2017)

Opinion

{645 Pa. 261} ORDER

PER CURIAM

AND NOW, this 22nd day of January, 2018, the Petition for Allowance of Appeal is **DENIED**.

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

~~Exhibit "C"~~

JESSE BROWN

v.

MARK CAPOZZA, et al.

CIVIL ACTION

NO. 18-4512

Appendix-G

OBJECTIONS TO THE REPORT & RECOMMENDATION

Upon a finding of procedural default, review of a federal habeas petition is barred unless the habeas petitoner can shows cause for the procedural default and Actual prejudice Arising therefrom, or that A fundamental miscarriage of justice will result if the claim is not considered. Coleman, 501 U.S. at 750. Court Appointed P.C.R.A. Counsel Richard T. Brown file an supplemental 1925(b) statement on 9-16-15 And Mr. Brown failed to file an corresponding Motion seeking permission to supplement previously-filed Notice of issue on Appeal by filing a PA.R.A.P. 1925(b) statement nunc pro tunc. This got the Petitioner's issues waived. The Petitioner's claims was noncompliance with state procedural rules, Making, Trial Counsel violated Petitioner's privilege Against self-incrimination claim, Sufficiency of Evidence Claim, And Trial Counsel was ineffective for failing to object to Shanique Hawkins testimony claim should be good for federal habeas Corpus review. See Martinez v. Ryan, 566 U.S. 1, 9-10 (2012); Coleman v. Thompson, 501 U.S. 722, 729-32 (1991). The Petitioner's claims have not been fairly presented to the state Courts the Claims was properly asserted in the state system but not Addressed on the Merits because of an independent And Adequate state procedural rule And is unexhausted And there are no Additional State remedies Available to pursue.

Upon a finding of procedural default, review of a federal habeas petition is barred unless the habeas petitioner can show cause for the procedural default and actual prejudice arising therefrom. Court-Appointed P.C.R.A. Counsel Richard T. Brown file an 1925(b) statement on 6-2-14 on behalf of the Petitioner with issues of: (1) investigate and call character witnesses, and (2) Object when petitioner's sister was removed from the courtroom. The issues had no merits. If you see Exhibit-A you will see Petitioner's Amended Petition for Post-Conviction Collateral Relief file on 12-28-10 with the issue Counsel was ineffective for Failure to Maintain Client's Innocence along with other issues this shows that Mr. Brown over look the Petitioner's Claims. Mr. Brown gave the Petitioner effective Assistance and/or inadequate representation. See. Com v. Albert, 561 A.2d 736 (Pa. 1989); Com v. Ollie, 450 A.2d 1026 (Pa. 1982) Petitioner's brief was completely lacking in substance and did not give Appellate Court opportunity to assess legitimacy of underlying claims. 42 Pa.C.S.A. §9541 et seq.; U.S.C.A. Const. Amend 6. The majority holds the Appellant's claim of ineffective Assistance of counsel is, under the case law and within the Meaning of § 1180-4(b)(2) "extraordinary circumstances" which justify failure to raise the issue of ineffectiveness at the earliest possible time. Majority appinion At. 433. See. Com v. Watlington, 420 A.2d 431.

Wheres Court Appointed P.C.R.A. Counsel Richard T. Brown representation fell below An objective standard of reasonablenee when Mr. Brown file an Supplemental 1925(b) Statement on 9-16-15 Mr. Brown failed to file an corresponding Motion seeking perimission to supplement previously-filed Notice of issue on Appeal by filing a Pa. R.A.P. 1925(b) statement nunc pro tunc, this have goting the Petitioner's claims waived and without merit. The Petitioner was prejudice because Petitioner's Claims was not fair presented to the state court, this is showing that Richard T. Brown did not give the Petitioner effective Assistance this violate the Sixth Amendment. See. Strickland v. Washington, 466 U.S. 668 (1984). Evidentiary Hearing should be granted on the Course and conduct of Richard T. Brown.

Claim I Trial Counsel violated petitioner's privilege Against Self incrimination

Federal Court States: That if trial Counsel Attempted to deny that petitoner Killed the victim At All, Counsel Would have lost Credibility with the jury. Objections there was not Overwhelming evidence if you see Preliminary Hearing transcript Jerrica Fulton was Ask; Q. You didn't see my client fire the gun, did you? A. NO. (N.T., 11-8-06 Pg 24, 16-18) Tishea Green was Ask At trial Q. Did you ever see A gun? A. NO. Q Never saw A gun? A. NO. (N.T. 4-17-08, Pg 67. 9-12) And if you see Exhibit-B you will See Tishea Green Statement She Stated that Tariq Brother or Cousin was out there So there was 2 unKnown People that was out there At time of Shooting. Furthermore, Office Cannon opined that the Murder Weapon was A Glock, the Officer in observing the Aforementioned Photograph of the Petitoner with A firearm believed that the gun in the Photo was A Block (N.T., 4-17-08, p. 45-46). There was no evidence that they were one And the same gun; infact, Officer Cannon testified that there were several different models of Glocks And from the photo, it Could not be determined which model that particular gun was. There was no evidence At All that the weapon in the photograph could have possibly been the Murder weapon. Dr. Hood opined that Cause of death two gunshot wounds of the back And Chest And (N.T., 4-17-08, p. 25). Victim was not Shot Six times. Petitoner Object that there is Overwhelming evidence Against him. Federal Court States: Thats there no evidence in the record that A diminished Capacity defense was presented. the Court was right. The Petitoner was self-incrimination when trial Counsel Jay S. Gottlieb Stated to the jury: "I would Admit to you right off the bat the Jesse Brown Shot Tariq Blackwell. I don't think on the basis of evidence that you heard there is Any reasonable doubt About that." (N.T. 4-18-08, pg. 6, 21-25). U.S. Const. Amend. VI provides that in All Criminal prosecutions, the Accused shall enjoy the right to have the Assistance of Counsel for his defence. The Supreme Court has instructed that the U.S. Const. Amend. VI recognizes the right to the Assistance of Counsel because it envisions Counsel's playing A role that is Critical to the Ability of the Adversarial system to produce just results. Even if defense Counsel may have made demonstrable errors, the Kind of testing envisioned by the U.S. Const. Amend. VI has occurred. But if the process loses its Character As A confrontation between Adversaries, the Constitutional guarantee is violated.

The Strickland test, requiring A showing of prejudice caused by Counsel's ineffectiveness, is Applicable (1) in cases where the record reflects that An Attorney's errors or omissions occurred during an inept Attempt to present A defense; By trial Counse Jay S. Gottlieb states to the jury: Jesse Brown shot Tariq Blackwell. I don't think on the basis of evidence that you heard there is Any reasonable doubt About that. The Petitoner received ineffective Assistace of counsel At A critica stage in the proceedings And was deprived of A fair trial As record shows, or (2) that he or she engaged in An unsuccessful tactical maneuver that was intended to assist the defendant in obtaining A favorable ruling. The Petitoner did not get voluntary manslaughter Petitoner got Murder in the first-degree, Mr. Gottlieb did not direct Appeal his ~~mean~~ main argument, evidentiary hearing should be granted on the course And conduct of Jay S. Gottlieb. Even when no theory of defense is Available, if the decision to stand trail has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt. See. Com v. Motley, 289 A.2d 724 (PA. Super. 1972); DeLuca v. Lord, 77 F.3d 578 (3rd Cir. 1996); U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991). Whether the Petitoner received ineffective Assistance of counsel is A legal question reviewed de novo. This claim got default because P.C.R.A. Counsel Richard T. Brown fail to file An PA. R.A.P. 1925(b) statement nunc pro tunc. Evidentiary Hearing should be granted on the course And conduct of P.C.R.A. counsel Richard T. Brown And Trial Counsel Jay S. Gottlieb.

Claim 2 Sufficiency of Evidence

Commonwealth states that the specific intent to kill required for a conviction of first-degree murder can be established through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim's body. Model Penal Code §210.3, Comment 1 (1980), States: Despit the fact that the homicide was intentional, it was said to have been without malice because it was committed in the heat of passion generated by adequate provocation. The following conditions must be satisfied for use of deadly force by the accused to be justified on grounds of self-defense: (1) the accused must not have been the aggressor Com v. McComb, 341A.2d 496 (1975) And must have been otherwise free from fault in provoking or continuing Com v. Walley, 353A.2d 396 (1976). the incident; Com v. Mehmeti, 462A.2d 657 (1983). The facts in the case And Jerrica Fulton Preliminary Hearing testiomny clearly establishes the the Petitoner was not the "Aggressor" or the "provker" And the Petitoner was free from continuing the incident. (2) the accused must have reasonably believed he was in imminent danger of death or serious bodily injury; Com v. Miller, 170 A.2d 128 (1934). The Petitoner was in serious of bodily injury when Tariq Blackwell spotted the Petitoner and cross the street and hit and bear-hugg the Petitoner out of no where As facts and testiomny clearly establishes, the Petitoner don't know Mr. Blackwell's intentions and he don't Know what Mr. Blackwell has, that put the Petitoner in fear of serious bodily injury. (3) the accused must not have violated a duty to retreat Com v. Breyessee, 28A.2d 824 (1894). or to avoid the danger which could have been accomplished with safety Com v. Roundtree, 269A.2d 709 (1970). By Tariq Blackwell bear-hugg the Petitoner, the Petitoner could not retreat and by Mr. Blackwell want up to the Petitoner, the Petitoner had no time to avoid the danger Mr. Blackwell put the Petitoner safety in immediate danger, or so called "Chance-Medley." See. Com v. McGuire, 409A.2d 313 (1979) Also see. Com v. Fisher, 497A.2d 719 (1985). So you just can established first-degree Murder because of A deadly weapon on a vital part of the victim's body this is objectively unreasonable See. Coleman v. Johnson, 566 U.S. 650, 651 (2012). The Substantive elements of the crime is defined by Applicable State Law. See. Jackson, 443 U.S. at 324 n. 16.

P.C.R.A. Counsel Richard T. Brown default this claim by not filing an supplemental 1925(b) statement corresponding Motion seeking perimission to supplement previously-filed Notice of issue on Appeal by filing A Pa.R.A.P. 1925(b) statement nunc protunc. Trial Counsel Jay S. Gottieb fail to raise this Claim on direct Appeal, Evidentiary Hearing should be granted on the Course And Conduct of Mr. Brown And Mr. Gottieb. Commonwealth established first-degree Murder because of A deadly Weapon on A vital part of the victim's body the Petitoner object

Claim 3 Trial counsel was ineffective for failing to object to Shanique Hawkins' Testimony.

Federal Court states: That this claim is defaulted and Petitoner did not show why the testimony given by Ms. Hawkins wa objectionable. objections is because P.C.R.A. Counsel Richard T. Brown fail to file An Pa.R.A.P. 1925(b) statement nunc protunc that why this claim was not fairly presented to the State Courts Martinez v. Ryan, 566 U.S. 1, 9-10 (2012). Mr. Brown also fail to show Ms. Hawkins testimony was objectionable. P.C.R.A. Counsel Richard T. Brown left the Petitoner's brief completely lacking in substance. See. Com. v. Albert, 561 A.2d 736 (Pa. 1989); And see Criminal Law in case 641.13(1) And 641.13(7). Mr. Brown gave the Petitoner inadequte representation at P.C.R.A. proceeding. When Shaniq Hawkins was ASK by (D.A.) Ms. Pescatore At trial Q. You didn't Actually See the Defendant physically hand it to her? A. NO. Right than An there trial Counsel Jay S. Gottlieb Should had object to the false testimony And ASK for A Mistrial under the false statement just like he did when Jerrica Fulton said Mug Shots (N.T., 4-1608, P.192). This MAKE Shanique Hawkins Objectionable. Rules of Court, Rule 268(9). States: "A conviction wich obtained through the use of false evidence or testimony Know to be such by the prosecution, is A denial of due-process. See. U.S. v. Vozella, 124 F.2d 38 (2nd Cir 1997); DeMarco v. U.S., 928 F.2d 1074 (11th Cir 1991); Ryle v. Kansas, 317 U.S. 213 (1942). This MAKE trial Counsel ~~ineffective~~ Jay S. Gottlieb ineffective for failing to object to Shanique Hawkins false statement. Trial Counsel Jay S. Gottlieb undermined the truth-determining process that no reliable Adjudication of guilt or innocence could have taken place in an particular case was at trial wheres there was an statement made by Shanique Hawkins

At trial showing that Ms. Hawkins made an false statement and Mr. Gottlieb failed to object to the false statement and ask for an Mistrial violated the Petitoner's Sixth and Fourteenth Amendment, the Petitoner did not have equal protection of law at trial failure of justice if Mr. Gottlieb had object to the fale statement and ask for an Mistrial, there are an reasonable probability that... the outcome of the trial proceeding would have been different. See Strickland v. Washington, 466 U.S. 668 (1984). Knowing the use of fale testimony reasonable likelihood that the false testimony could have affected the judgment of the jury. Objection to P.C.R.A. Counsel Richard T. Brown did not file an Pa.R.A.P. 1925(b) statement nunc pro tunc and fail to explain in Petitoner's brief how counsel should have challenged her statement, Statement should been challenged by trial Counsle Jay S. Gottlieb object to Ms. Hawkins false statement and ask for an Mistrial. Evidentiary Hearing should be granted on the Course and Conduct of Mr. Brown and Mr. Gottlieb

CONCLUSION

In light of the foregoing, the Petitoner presented sufficient, Credible evidence Evidentiary Hearing should be granted.

Date: 12-16-19

Petitoner
Jesse Brown

Jesse Brown #HN1283
S.C.I. Pine Grove
191 Fyock Road
Indiana, PA. 15701

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

JESSE BROWN
v.
MARK CAPOZZA, et al.

CIVIL ACTION
NO. 18-4512

Exhibit-C

OBJECTIONS AMENDED TO THE REPORT & RECOMMENDATION

AND NOW COMES, Jesse Brown ASKing Federal Court permission to except this Amended Objections to the Report And Recommendation Petitoner Avers the following: Report And Recommendation was filed on 12-5-19 Petitoner filed An Objections to the Report And Recommendation on 12-18-19, in hopes, that this Court will excepts this Amended Objections to the Report and Recommendation.

CLAIM. 1 Trial Counsel violated Petitoner's privilege Against Self incrimination

Court-Appointed P.C.R.A. Counsel Richard T. Brown fail to file An PA.R.A.P. 1925(b) statement nunc pro tunc this is why that this Claim has not been fairly presented to the state courts And All state Appellate Court refused to review the Petitoner's claim on the Merits. See. Bey v. Supt-Green SCI, 856 F.3d 230, 236 (3d Cir. 2017), And see. Martinez v. Ryan, 566 U.S. 1, 9-10 (2012); Coleman v. Thompson, 501 U.S. 722, 729-32 (1991). Reason why this Claim is default. Mr. Brown fail to participate Meaningfully And violated the representation requirement of the Act. 19 P.S. §1180-12 (Repealed); And that did not give Appellate court the opportunity to Assess legitimacy of underlying claims. 42 PA.C.S.A. §9541 et seq.; U.S.C.A. Const. Amend. 6. See. Criminal Law 641.13(7) in Albert's Court, 561 A.2d 736 (PA. 1989).

Court-Appointed P.C.R.A. Counsel Richard T. Brown representation fell below an objective standard of reasonableness when Mr. Brown fail to file an corresponding Motion seeking permission to Supplement previously-filed Notice of issue on Appeal by filing a Pa. R.A.P. 1925(b) statement nunc pro tunc. Mr. Brown error was so serious and not functioning got Petitoner's claim default and not got Petitoner's claim fairly presented to the States Courts. This violated Petitoner's Sixth Amendment See. Strickland v. Washington, 466 U.S. 668 (1984). And by not Mr. Brown filing an Pa. R.A.P. 1925(b) statement nunc pro tunc did prejudice the Petitoner, and if Mr. Brown had file an Pa. R.A.P. 1925(b) statement nunc pro tunc fairly presented Petitoner's claim to the States Courts probability that... the outcome of the P.C.R.A. proceeding would have been different. Objections to the default reason for default P.C.R.A. Counsel Richard T. Brown fail to file an Pa. R.A.P. 1925(b) statement nunc pro tunc.

Federal Court States: That if trial Counsel Attempted to deny that petitoner Killed the victim At All, Counsel would have lost credibility with the jury. Objection, there was not over whelming evidence. See Attachment. You will see trial transcripts will shows that Jerrica Fulton or Tishea Green have not seen the Shooting and you will see Tishea Green statement that there was Tariq brother or Cousin out there but you will see Jerrica Fulton statement that it was her And Tariq just there so it was two unKnown people out there this is circumstancesul evidence. Officer Cannon testified that there were several different Models of Glocks and from Photo it could not be determined (N.T., 4-17-08, p.45-46). More circumstancesul evidence. Trial Cousel Jay S. Gottlieb had no reasonable basis to plea the Petitoner guitly. An Attorney who Adopts And Acts upon a belief that his client should be convicted fails to function in any meaningful sense as the government's Adversary. A deficient relationship between an Attorney And his client May effect a breach in the duty of loyalty owing from Attorney to Client And there by cause a deprivation of Adequate counsel. Case law does not, however, go so far as to require that when a lawyer-client relationship display hostility between the parties raising A potential claim of inadequate representation, that the performance of Counsel in those situations will be scrutinized with a more critical eye than other claims of ineffectiveness arising in the Sixth Amendment context.

ATTACHMENT

Q.You didn't see my client fire the gun,did you?

A.No.

(N.T.,11/8/06,Pg.24,16-18)

Alos attach to **Exhibit-B**,and you will see the trial transcript from trial on April 17,2008 the transcripts Ms.Pescatore asking Tishea Green about a gun,the transcript refle the following:

Q.Did you ever see a gun?

A.No.

Q.Never saw a gun?

A.No.

(N.T.,4/17/08,Pg.67,9-12)

Attach to **Exhibit-B**,is an statement made by Tishea Green made on 5-13-06 the same day of the incident,Ms.Green was ask about who she recognize any people that was arguing?and she stated:"Yse,I saw,Riq,and I saw two other guys,and I saw Riq's Girlfriend,Jerrica,and Tariq Brother or Cousin,they all were on the sidewalk it sounded like Tariq was arguing with one of the guys about his Girlfriend."

Attach to **Exhibit-B**,is an statement made by Jerrica Fulton on 5-13-06 the same day of the incident,Ms.Fulton was ask:

Q.Was there anyone else out there that you know of that saw what happened?

A.It was just me and Tariq were there that I saw.

That mean that it was a unknown person that was out there that could have been the shooter the record(s) support that the (2) two witnesses Jerrica Fulton and Tishea Green have not seen the shooting and an statement made by Tishea Green shows that there was a unknown person that was out there that could have been the shooter,the evidence are not overwhelming,the evidence are circumstancesul and there are no reasonable basis for Mr.Gottlieb action or inaction for presented a diminished capacity defense.It is only in the most clear-cut of cases that the reason for the conduct of

Attachment Attachment

See. Com v. Washington, 880A.2d 536(2003), And see. U.S. v. Nassida, 2017 U.S. Dist. Lexis 66141, Also see. Frazer v. U.S., 18 F.3d 778 (9th Cir 1993). Objection to trial Counsel JAY S. Gottlieb trial Strategy. Petitoner was incrimination when Mr. Gottlieb stated to the jury: "I would Admit to you right off the bat that Jesse Brown shot Tariq Blackwell. I don't think on the basis of evidence that you heard there is Any reasonable ~~doubt~~ doubt about that." (N.T., 4-18-08, Pg. 6, 21-25). Mr. Gottlieb Also states: "Straight out talking to you. Killing, My Client did it, but it is not first degree Murder." (N.T. 4-18-08, Pg. 14, 5-7). By trial Counsl JAY S. Gottlieb failure to litigate An Voluntary Manslaughter defense on A post-sentence Motion And/or direct Appeal where Mr. Gottlieb performance had fell below Any objetive standard of reasonableness where Mr. Gottlieb fail to Appeal his Main Argument, Mr. Gottlieb's performance being deficient by An unprofessional standard... Wheres Mr. Gottlieb's trial tactics and strategy had no rational basis in obaining A favorable outcome in the Petitoner's behalf And Wheres Mr. Gottlieb strategy was so insufficient where As it Amounted to no defense at All but An open guilty plea to the jury And in open court Against the Petitoner's wishes And Against the weight of the evidence.

The Petitoner was prejudice by the Action or omission of Mr. Gottlieb had Mr. Gottlieb want with A not guitly plea, where evidence shows that Jerrica Fulton And Tishea Green had not seen the shooting And there was two unknown people that was out there At time of Shooting evidence is circumstancesul there is A reasonable probability that... the outcome of the trial proceeding would have been different. ~~Sixth~~ Sixth Amendment was violation under Strickland v. Washington, 466 U.S. 668 (1984). Evidentiary Hearing should be granted on the Course And Conduct of Mr. Brown and Mr. Gottlieb.

Claim 2 Sufficiency of Evidence

Court-Appointed P.C.R.A. Counsel Richard T. Brown got this Claim default because Mr. Brown fail to file An Pa. R. A. P. 1925(b) statement nunc pro tunc that why this Claim was not fairly presented to the state court, State court refusal to review this claim on the merit. See. Bey v. Sup't Green SCI, 856 F.3d 230, 236 (3rd Cir 2017). Petitoner Objects to the default, reason for default is deficient performance by P.C.R.A. Counsel Richard T. Brown.

Commonwealth states as a use of a deadly weapon on a vital part of the victim's body malice may likewise be inferred. Objections; Deadly force is force that, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury. "Serious bodily injury" is bodily injury that creates a substantial risk of death or that cause serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. According to this definition, force is not deadly force simply because it happens to kill or seriously injury. For example, a slap in the face that freakishly and unexpectedly leads to death is not deadly force. A defendant use deadly force when he or she knows that his or her actions, under the circumstances in which he or she commits them, are readily capable of causing death or serious bodily injury. By the evidence, it should never had want to the jury as a First or Third Degree Murder. The evidence was insufficient to establis malicious killing beyond a reasonable doubt, but evidence was sufficient for jury as to whether killing was, justifiable or whether it constituted voluntary manslaughter. See Preliminary Hearing transcripts (N.T., 11-8-06, Pg 27, 3-25); (N.T., 11-8-06, Pg 28, 2-25); (N.T., 11-8-06, Pg 29, 2-25); And (N.T., 11-8-06, Pg 30, 2-25). The D.A., Ms. Fairman, States: "it's enough to go to the jury of first degree murder. We would be entitled to that presumption that he used a deadly weapon on a vital part of the body." (N.T., 11-8-06, Pg. 29, 9-12). Wheres that is not enough to go to the jury as first degree murder because The Supreme Court has also recongnized while this inference is well recognized in our law it will not be permitted to support a finding of malice where the direct evidence presented in the Commonwealth's case proves the contrary. See. Com v. Caye, 348 A.2d 136 (Pa 1975); Com v. McGuire, 409 A.2d 313 (Pa. 1979); And Com v. Carbone, 544 A.2d 462 (Pa. Super. 1988). This is state law under Jackson, 443 U.S. at 324 n. 16 and this is objectively unreasonable. See. Coleman v. Johnson, 566 U.S. 650, 651 (2012).

Appendix-H

UNITED STATES DISTRICT COURT
FOR THE EASTERN **DISTRICT OF** PENNSYLVANIA
DIVISION

JESSE BROWN
Petitioner

VS.

MARK CAPOZZA, et al.,
Respondent

DOCKET# 2:18-cv-04512

NOTICE OF APPEAL

Notice is hereby given that Jesse Brown, petitioner above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the order denying petitioner's application for a writ of habeas corpus entered in this proceeding on _____, 20____. 60(b)(6) Motion File on _____, 20____.

DATE: 10-15-21

Respectfully submitted

SIGN: Jesse Brown
NAME: Jesse Brown
DOC#: HN1283
ADDRESS: 10745 Route 18
Albion, PA. 16475-0002

(H)

Appendix-I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JESSE BROWN,
Petitioner,

v.

MARK CAPOZZA, *SUPERINTENDENT SCI-FYT*;
LAWRENCE KRASNER, *PHILADELPHIA D.A.*; and
JOSH SHAPIRO, *PENNSYLVANIA ATTY GEN.*;
Respondents.

No. 2:18-cv-04512

OPINION

Motion for Relief, ECF No. 42- Denied and Dismissed

Joseph F. Leeson, Jr.
United States District Judge

December 21, 2021

On May 4, 2021, this Court denied and dismissed Petitioner Jesse Brown's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction in the Philadelphia County Court of Common Pleas of first-degree murder, possessing an instrument of crime, and carrying an unlicensed firearm. Now pending is Brown's motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b)(6), challenging this Court's conclusion that the habeas claims were procedurally defaulted and lacked merit. For the reasons set forth herein, in the Opinion denying the § 2254 motion, and in Magistrate Judge Thomas J. Rueter's Report and Recommendation ("R&R"), Brown's motion for relief is denied and dismissed.

I. BACKGROUND

This Court's Opinion on Brown's 2254 motion summarized the factual background as follows:

I

> In brief summary, *see* R&R 1-3, evidence was produced from multiple eyewitnesses that the day before the shooting, Brown had a verbal argument with the now-deceased victim regarding a note Brown handed to the deceased's girlfriend containing his phone number. Brown and the deceased had another argument the following day, which turned into a physical altercation. Eyewitnesses testified at trial that the deceased punched Brown in his face and the two began to wrestle. During the fight, Brown pulled out a gun. A witness testified that although she did not actually see Brown shoot the deceased, she heard multiple gunshots "less than five seconds"[1] after Brown pulled out the gun. When the police arrived, the deceased was lying in the street with gunshot wounds. The deceased was taken to the hospital and pronounced dead. Evidence was also presented in the form of a photograph from Brown's phone showing him brandishing a matching gun.

Opinion 5, ECF No. 39 (citing R&R, ECF No. 31). The Opinion, which adopted Magistrate Judge Thomas J. Rueter's R&R after de novo review of Brown's objections thereto, outlined Brown's habeas claims and explained that none of these claims were raised on direct appeal. *See id.* This Court concluded that each claim was procedurally defaulted and, because each of the claims lacks merit, Brown could not establish that he was prejudiced by PCRA counsel's failure to raise the claims or that the miscarriage of justice exception saves his default. *See id.* at 6-11. This Court also agreed with Magistrate Judge Rueter that an evidentiary hearing was not required. *See id.* 11 (citing *Morris v. Beard*, 633 F.3d 185, 196 (3d Cir. 2011) (holding that no evidentiary hearing is required where the record refutes the petitioner's factual allegations or otherwise precludes relief)).

Brown thereafter filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). *See* ECF No. 42.[2] Brown disagrees with the Court's conclusion that his procedural default cannot be excused because his habeas claims lack merit and, also, that he

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1 *See* Notes of Testimony 176:9-24 (Fulton N.T. __), Trial, April 16, 2008.

2 Before the motion for relief became ready for review, Brown filed a notice of appeal with the Third Circuit Court of Appeals. *See* ECF Nos. 49, 51-52. The Circuit Court has stayed its decision pending this Court's resolution of Brown's motion for relief. *See* ECF No. 52.

was not entitled to an evidentiary hearing. *See id.* The motion for relief essentially repeats and restructures Brown's habeas claims as layered ineffectiveness claims to excuse his procedural default. *See id.*; *see also* ECF No. 54. The Government's response to the Rule 60(b) motion is that the motion constitutes a successive petition that must be dismissed and that the motion should be denied because Brown fails to establish any extraordinary circumstance justifying relief. *See* ECF No. 50.

II. STANDARDS OF REVIEW

A. Motions under Rule 60 of the Federal Rules of Civil Procedure

"Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b) of the Federal Rules of Civil Procedure provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). A "movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. The movant bears a heavy burden of proof that extraordinary circumstances are present. *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991); *United States v. Rota*, No. 94-0003-1, 1999 U.S. Dist. LEXIS 562, *5 (E.D. Pa. 1999).

B. Motions under Rule 59(e) of the Federal Rules of Civil Procedure

Rule 59(e) allows a litigant to file a motion to alter or amend a judgment within twenty-eight days from entry of the judgment. *See* Fed. R. Civ. P. 59(e). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). "Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . ; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). "It is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through--rightly or wrongly." *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (internal quotations omitted); *see also Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (holding that "courts will not address new arguments or evidence that the moving party could have raised before the decision issued"). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." *Continental Casualty Co. v. Diversified Indus.*, 884 F. Supp. 937, 943 (E.D. Pa. 1995).

C. Successive Motions under 28 U.S.C. § 2255

Motions filed under 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution or laws of the United States or are otherwise subject to collateral attack. *Davis v. United States*, 417 U.S. 333, 343 (1974); *O'Kereke v. United States*, 307 F.3d 117, 122-23 (3d

Cir. 2002). But, a "second or successive motion must [first] be certified as provided in section 2244 [28 U.S.C. § 2244] by a panel of the appropriate court of appeals...." 28 U.S.C. § 2255(h); 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Where a petitioner fails to obtain prior authorization from the court of appeals, the district court lacks jurisdiction. *See Pelullo v. United States*, 487 Fed. App'x 1, 2 n.2 (3d Cir. 2012); *United States v. Rodriguez*, 327 Fed. App'x 327, 329 (3d Cir. 2009) (holding that the "district courts lack jurisdiction over second or successive § 2255 motions without proper authorization from a panel of the court of appeals").

III. ANALYSIS

A. Brown's motion is properly considered pursuant to Rule 59(e) and is denied.

A Rule 60(b) motion differs from a Rule 59(e) motion based on the length of time that has passed since the habeas proceedings. *See Banister*, 140 S. Ct. at 1710. A Rule 60(b) motion is often distant in time and attacks an already completed judgment. *See id.* "By contrast, a Rule 59(e) motion is a one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention, before taking a single appeal." *Id.* Brown's motion for relief, dated May 25, 2021, was filed three weeks after the Opinion denying and dismissing his § 2254 motion was entered and before his notice of appeal was filed. The motion is therefore properly reviewed pursuant to Rule 59(e). *See Turner v. Evers*, 726 F.2d 112, 114 (3d Cir. 1984) (holding that it is "the function of the motion, not its caption" that controls).

Brown's motion does not, however, allege an intervening change in the law or newly discovered evidence. Brown has also failed to show the need to correct a clear error of law or

fact or to prevent manifest injustice. To the extent Brown asserts this Court found his habeas petition did not challenge PCRA counsel's ineffectiveness for failing to claim that trial counsel was ineffective for not objecting to the allegedly false testimony of Ms. Hawkins, *see* Mot. 51, he is incorrect. The R&R and this Court's Opinion specifically listed this separate habeas claim and addressed the merits thereof. *See* Opn. 5-6, 10-11; R&R 5, 19-22. Brown's remaining arguments are essentially an attempt to relitigate the prior decision, which is not a proper basis to grant relief. The motion for relief is denied pursuant to Rule 59(e).

B. The motion would also be denied and dismissed pursuant to Rule 60(b)(6).

Should this Court apply Rule 60(b)(6), as the motion requests, relief is denied because Brown merely challenges this Court's legal findings. *See Martinez-Mcbean v. Gov't of V.I.*, 562 F.2d 908, 912 (3d Cir. 1977) (holding that even if the court committed legal error, Rule 60(b)(6) would not provide a basis to reopen because the "correction of legal errors committed by the district courts is the function of the Courts of Appeals"); *United States v. Eleazer*, No. 12-408-02, 2014 U.S. Dist. LEXIS 63510, at *6 (E.D. Pa. May 8, 2014) (denying the Rule 60(b)(6) motion because the arguments raised therein were essentially a reiteration of those presented in the § 2255 motion).

Moreover, to the extent that Brown's ineffective assistance of counsel claims in the motion to vacate were denied on the merits, *see* Opn. 6-11, the motion to vacate was a first petition for second or successive purposes. The instant motion for relief would therefore be a successive § 2254 motion. "When a motion is filed in a habeas case under a Rule 60(b) or 60(d) label, the district court must initially determine whether the motion is actually a 'second or successive' habeas petition within the meaning of § 2244(b)." *Davenport v. Brooks*, No. 06-5070, 2014 U.S. Dist. LEXIS 51047, at *10-11 (E.D. Pa. Apr. 14, 2014). "[C]ase law