APPENDIX A

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March 1, 2022

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RE: Douglas Stephenson v. Superintendent Greene SCI, et al
Case Number: 21-2407
District Court Case Number: 2-18-cv-01329

ENTRY OF JUDGMENT

Today, **March 01, 2022** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

ALD-085

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-2407**

DOUGLAS STEPHENSON, Appellant

VS.

SUPERINTENDENT GREENE SCI; ET AL.

(W.D. Pa. Civ. No. 2-18-cv-01329)

Present: JORDAN, RESTREPO, and SCIRICA, Circuit Judges

Submitted are:

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

(2) Appellant's motion for appointment of counsel;

(3) Appellant's motion for preliminary discovery, sets of interrogatories, request for production of documents, and memorandum brief in support;

(4) Appellant's motion for bail; and

(5) Appellant's motion for an evidentiary hearing

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing applications for a certificate of appealability are denied because jurists of reason would not debate the District Court's decision to deny Appellant's habeas petition. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Slack v.

McDaniel, 529 U.S. 473, 484 (2000)). Reasonable jurists would agree that Claims 2 and 7-10 (as identified in the District Court) are unexhausted and procedurally defaulted, and that Appellant has not shown cause and prejudice or a fundamental miscarriage of justice sufficient to overcome the default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). We agree with the District Court that Appellant has not shown that Martinez v. Ryan, 566 U.S. 1, 9 (2012), excuses the procedural default of these claims. See id. at 9 (holding that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit"); see also Norris v. Brooks, 794 F.3d 401, 405 (3d Cir. 2015) (holding that Martinez applies only to "initial-review collateral proceedings"); Davila v. Davis, 137 S. Ct. 2058, 2065 (2017) (recognizing that Martinez does not extend to claims of ineffective assistance of appellate counsel). For substantially the reasons provided by the District Court, jurists of reason also would not debate that Appellant was not denied the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Appellant's motions for the appointment of counsel, preliminary discovery, bail, and an evidentiary hearing are denied.

By the Court,

s/L. Felipe Restrepo
Circuit Judge

Dated: March 1, 2022
Sb/cc: Douglas Stephenson
Ronald M. Wabby, Jr. Esq.

A True Copy:

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

APPENDIX B

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

DOUGLAS STEPHENSON,	)	
	)	
Petitioner,	)	Civil Action No. 2:18-cv-1329
	)	
v.	)	
	)	Magistrate Judge Patricia L. Dodge
ROBERT GILMORE, *et al.*,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Pending before the Court is the Petition for a Writ of Habeas Corpus (ECF No. 6) filed by state prisoner Douglas Stephenson ("Petitioner"). It is respectfully recommended that the Court deny each of Petitioner's claims and deny a certificate of appealability.

II. REPORT[1]

A. Introduction

At the conclusion of a trial held in August 2011 in the Court of Common Pleas of Allegheny County, a jury found Petitioner guilty of second-degree (felony) murder, robbery, and conspiracy to commit robbery. Petitioner challenges his convictions and sentence in this federal habeas case, which he has filed under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214.

[1] Respondents attached as exhibits to their Answer (ECF No. 13) the relevant state-court filings and decisions. The documents shall be cited to by their exhibit and Bates stamp number as follows: "Resp's Ex. __ at ___." Respondents also submitted Petitioner's original state court record, which includes the transcripts from his trial, preliminary and sentencing hearings, and the hearing held in his state collateral proceeding under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 PA. CONS. STAT. § 9541 *et seq.*

Petitioner indicated in his Petition that his claims were set forth in the documents he attached to it. (ECF No. 6 at 6-12.) Those attachments list the claims Petitioner raised on direct appeal (ECF No. 6-1 at 1), in his *pro se* PCRA petition (*id.* at 5-75), and in his counseled, amended PCRA petition (*id.* at 2). Also listed is a new claim Petitioner raises for the first time in this habeas proceeding (*id.* at 76-77). Respondents in their Answer (ECF No. 13) refer to Petitioner's claims by numbering them 1 through 10, and that same identifying method is used herein.

Each of Petitioner's claims will be set forth in the following section, but to briefly summarize, Claim 1 is the claim Petitioner raised in his direct appeal to the Superior Court of Pennsylvania; Claims 2 through 6 are the claims he raised in his counseled, amended PCRA petition; Claims 7 through 9 are claims he raised in the *pro se* PCRA petition he submitted to initiate his state collateral proceeding that his counsel subsequently decided not to pursue; and Claim 10 is a claim he appears not to have raised to the state courts at any point. (ECF No. 6-1 at 1-77.)

For the reasons set forth below, it is recommended that the Court deny Claim 1 because it is a state-law claim that is not cognizable under § 2254; deny Claims 3, 4 and 5 because the Superior Court's adjudication of them withstands AEDPA's standard of review; deny Claims 2, 6 and 7 because they are procedurally defaulted and there are no grounds that would allow Petitioner to avoid the default; and deny Claims 8, 9 and 10 because they are procedurally defaulted and also have no merit.

B. Relevant Background

Around 1:45 a.m. on July 7, 2009 Travis Hawkins (also known as "Twerk") shot and killed the victim in this case, James Williams, Jr. At the time, the victim was working as a jitney

driver in the Sheraden neighborhood of Pittsburgh. The Commonwealth introduced evidence at Petitioner's trial that he encouraged Hawkins to rob the victim, handed Hawkins the gun, approach the victim's vehicle along with Hawkins, and punched the victim when he tried to defend himself.

The police initially had no suspects. Dana Williams and her friends Dominique and Taneshia Clark (the "Clark sisters") witnessed the crimes, but they did not report what they knew to the police for several months.

On October 9, 2009 Dana Williams, accompanied by her brother, went to the police station to report that she witnessed the robbery and shooting. During an interview conducted on that date by Detectives Evans and Boose, Dana Williams identified Petitioner, who she and the Clark sisters knew as "CK," from a photo array. She wrote on his photograph: "He was involved; he punched the guy in the car." (Trial Tr. at 148.)

Dana Williams also agreed to give a taped statement. (Resp's Ex. 15 at 314-25.) She said that on July 7, 2009 she and the Clark sisters were hanging outside a house in Sheraden with Hawkins, Petitioner, and other individuals when the victim stopped his Jeep nearby. (*Id.* at 315-16.) According to Williams, Petitioner was "hyping up" Hawkins to rob the victim. (*Id.* at 316-17.) Williams said she saw Petitioner hand Hawkins a gun and then they approached the victim's vehicle. (*Id.* at 317-18.) Hawkins went to the driver's side of the vehicle and pulled a gun on the victim while Petitioner approached on the passenger's side. (*Id.* at 318-19.) Williams said that the victim attempted to wrestle the gun from Hawkins' hands and Petitioner opened the passenger's side door and began punching the victim in the head. (*Id.*) She said that Hawkins shot the victim during the struggle. (*Id.* at 319.) Afterwards, Williams said, the victim attempted

to drive away but crashed his vehicle. (*Id.*) Hawkins, Petitioner, and everyone else that was hanging out with them ran from the scene after the shooting. (*Id.* at 319-21.)

Williams stated that Taneshia Clark told her the day after the shooting that they were not to tell anyone what they had witnessed. She said that Taneshia Clark warned her that Hawkins "said we're the only one[s] who know. So, if his name gets involved, he knows who to come to." (*Id.* at 324.)

Detectives interviewed the Clark sisters separately on October 15, 2009. They identified Petitioner from a photo array and wrote on his picture that he was on the passenger's side of the victim's car. (Trial Tr. at 183, 192-93, 202, 212-13.) The Clark sisters each gave taped statements that corroborated what Dana Williams had reported. (Resp's Ex. 15 at 326-46.) Taneshia Clark said that Petitioner was leaning into the passenger's side of the victim's vehicle when Hawkins shot him. (*Id.* at 331, 335.) Dominque Clark said that Petitioner and "his friends were pumping up [Hawkins] to act like he was going over there to rob" the victim. (*Id.* at 340.) She said that Petitioner's arm was in the victim's vehicle when Hawkins shot him. (*Id.* at 340-44.)

Hawkins confessed on October 16, 2009. In the taped statement (*id.* at 308-313) he gave on that date, Hawkins said that he told Petitioner that he was going to rob the victim. (*Id.* at 310.) According to Hawkins, Petitioner told him not to do it, but then he "heard someone in the crowd" encouraging him to carry out the robbery. (*Id.* at 310.) Hawkins admitted that he approached the victim's vehicle and indicated to him that he was robbing him. Hawkins said he accidentally shot the victim while the victim was trying to wrestle the gun from his hands. (*Id.*) When asked if someone else may have been on the passenger's side of the car, Hawkins replied: "I don't know. I was too scared. I was too focused on trying to grab the gun." (*Id.* at 311.)

The Commonwealth charged Hawkins and Petitioner with criminal homicide, robbery, and conspiracy to commit robbery. The Commonwealth proceeded on the theory that Hawkins was the shooter and Petitioner his co-conspirator and accomplice.

Petitioner and Hawkins' preliminary hearing, at which Dana Williams and Detectives Evans testified, was held on November 13, 2009. Dana Williams' preliminary hearing testimony was consistent with her October 9, 2009 taped statement. She testified that she saw Petitioner hand Hawkins a gun and then the two of them approach the victim's Jeep. (Preliminary Hr'g Tr. at 12-14.) She further testified that Hawkins, while standing at the driver's side of the vehicle, pointed a gun at the victim, who then started to fight back. (*Id.* at 14.) Williams said that Petitioner opened a passenger's side door and began punching the victim in the head and that she heard the gunshot. (*Id.* at 14-15.) The prosecutor asked Dana Williams why she waited more than three months to report to the police what she witnessed on July 7, 2009. (*Id.* at 15.) She answered: "I was scared." (*Id.*)

Petitioner and Hawkins' first trial was held in October 2010. The trial court declared a mistrial after Hawkins caused a disruption. It also severed the trials of Petitioner and Hawkins.

Petitioner's second trial was held in August 2011.[2] Attorney Christy Foreman ("trial counsel") represented him. In contrast to their prior statements, Dana Williams and the Clark sisters testified that they could not remember what occurred during the robbery and shooting of the victim. Therefore, the Commonwealth introduced the taped statements they gave in October 2009, as well as Dana Williams' preliminary hearing testimony, as substantive evidence to prove

[2] The Commonwealth made an offer of a plea agreement prior to Petitioner's second trial. It offered to withdraw the homicide charge in exchange for a guilty plea to robbery and conspiracy to commit robbery and a guideline sentence of six to twelve years' imprisonment. The trial court discussed the offer with Petitioner at the beginning of the trial. Petitioner stated that he had reviewed it with trial counsel and that it was his decision not to accept it. (Trial Tr. at 4-6.)

the truth of the matters asserted therein in accordance with *Commonwealth v. Lively*, 610 A.2d 7 (Pa. 1992), *Commonwealth v. Brady*, 507 A.2d 66 (Pa. 1986), and Rule 803.1 of the Pennsylvania Rules of Criminal Procedure. Hawkins exercised his Fifth Amendment right not to testify and the Commonwealth introduced his taped statement.

The trial court, in the Appellate Rule 1925(a) opinion issued on direct appeal, summarized the evidence introduced at Petitioner's trial as follows:

> The police received a call in the early morning hours of July 7, 2009 that a vehicle had run into a yard at the corner of Zephyr and Ashlyn Streets. (T., p. 33) Investigating officers found a 1998 Jeep Cherokee crashed in the yard with an unresponsive black male slumped over in the driver's seat of the vehicle with the motor running, the vehicle in gear and the headlights on. (T., p. 38) Paramedics called to the scene at 1:55 a.m. found the victim had sustained a fatal gunshot wound to his chest. (T., p. 60) The area was secured and processed as a crime scene. The vehicle was examined for fingerprints and a partial left palm impression print was obtained from the passenger's side window. (T., p. 105) A search and canvas of the neighborhood was performed but there were no witnesses discovered and no additional evidence was recovered. (T., pp. 67-71)
>
> At trial the Commonwealth called Dr. Karl E. Williams of the Allegheny County Medical Examiner's Office who testified that the victim died of a gunshot wound that entered the left side of his chest, went through the right side of the heart, the diaphragm, the liver and then exited the right side of his body. (T., p. 77) Dr. Williams also testified that the victim did not have signs of any bruises, scratches, scrapes or contusions on his head or neck. (Tr., p. 83)
>
> The Commonwealth then called Detective Vonsal Boose who testified that on October 9, 2009, approximately 3 months after the shooting, Dana Williams was brought to the police station by a family member because she purportedly had information concerning the shooting. (T., p. 123) Detective Boose testified that Dana Williams described the events related to the shooting, gave a recorded statement and viewed a photo array. (T., p. 123) Based on information supplied by Dana Williams, two additional witnesses were developed, Dominique Clark and her sister, Taneshia Clark. Both Dominique Clark and Taneshia Clark gave statements to the police on October 15, 2009. (T., pp. 190-193; 209-214)
>
> The Commonwealth called Dana Williams, Dominque Clark and Taneshia Clark to testify at trial. Each of these witnesses testified, however, that they could not recall the events of July 7, 2009. Dana Williams did identify [Petitioner] as "CK" and acknowledged that she had given a statement to the police, but testified repeatedly that she did not recall the events on the night in question. (T., pp. 130-132) Consequently, the tape recording of her interview with police on October 9, 2009 was played for the jury. (T., p. 134) In her taped statement she

stated that co-defendant, Travis Hawkins, (a/k/a "Twerk") approached the victim with a gun. She stated the following:

> "Twerk goes to the jitney driver's side, pulls the gun up to him. The jitney driver tries to pull the gun out of his hand. Basically, they was like tossing like." (*Dana Williams Statement*, October 9, 2009–p. 5)
>
> "As Twerk and the jitney driver was like fighting, not really fighting but he was trying to take the gun out of his hand[]" and "...that's when Twerk pulled the trigger." (*Dana Williams Statement*, October 9, 2009–p. 6)

She further stated that she saw [Petitioner] giving Hawkins the gun used in the robbery. She also stated that [Petitioner] went to the passenger's side and "started punching the driver in the head." (*Dana Williams Statement*, October 9, 2009–p. 6)

Dana Williams' testimony from the preliminary hearing of November 13, 2009 was also read to the jury. (T., pp. 164-173) During this testimony Dana Williams again testified that [Petitioner] handed the gun to Hawkins and that Hawkins then proceeded to the driver's side door of the vehicle at which time a struggle occurred between Hawkins and the victim. She then testified that, "CK walked to the passenger's side, opens the door, and I see him punching the jitney driver in the head," at which point the gun went off. (T., p. 160)

Dominique Clark also acknowledged that she was present on the night of the shooting and that [Petitioner] was present. (T., p. 181) However, she also testified that she either could not recall what transpired or was told what to say and what to write by the police. (T., pp. 182-187) Dominique Clark's statement of October 15, 2009 was then played. She likewise stated that she saw a boy with "his whole body is in the jitney driver's window." (*Dominique Clark Statement*, October 15, 2009–p. 4) She stated that while the victim was struggling with the gunman, "CK and his friend were on the passenger's side." (*Dominque Clark Statement*, October 15, 2009–p. 5) She described that his arm was in the vehicle, but his body wasn't. (*Dominique Clark Statement*, October 15, 2009–p. 8)

The Commonwealth then called Taneshia who also acknowledged being present and identified Hawkins as the shooter, but denied seeing [Petitioner] or seeing [Petitioner] near the passenger's side of the vehicle door and stated that she was told to write on the array that [Petitioner] was on the passenger's side. (T., pp. 199-202)

The Commonwealth then called Detective James McGee who testified to his interview with Taneshia Clark and her description of the events that night. Detective McGee testified that Taneshia Clark stated:

> "At that time Mr. Hawkins, who she referred to as Twerk, and [Petitioner], who she called CK, stated that those two left a group of people, walked down towards where the jitney was.

> Ms. Clark said that Mr. Hawkins approached the driver's side of the vehicle, and [Petitioner] went to the passenger's side of the vehicle. She said as soon as they reached the vehicle, she saw Mr. Hawkins reach in and was tussling with the driver. She said she believed they were tussling over a gun. She never saw it, but she thought it was a gun. At the same time she saw [Petitioner] leaning in the passenger's side of the window also tussling with the driver of the vehicle. She said as soon as they started doing that, she heard one gun shot." (T., pp. 210-11)

The taped statement of Taneshia Clark was then played for the jury. (T., p. 215) In her taped statement she, in fact, stated that she saw Hawkins and [Petitioner] go to the car and that she saw Hawkins and the victim wrestling for the gun. She further said that while Hawkins and the jitney driver were "tussling" over the gun, that [Petitioner] was on the passenger's side of the car and that his upper body was in the car when she heard the gun shot. (*Taneshia Clark Statement*, October 15, 2009–pp. 5-6)

After it was determined that co-defendant, Travis Hawkins, was invoking his Fifth Amendment rights and refusing to testify the Commonwealth played the taped statement of Travis Hawkins. (T., p. 175) In Hawkins' statement of October 16, 2009, after waiving his *Miranda* rights, Hawkins stated that:

> "I went up there and I pointed the gun to the driver, pointed the gun to him; said, Throw it off. He grabbed the gun, he started wrestling with the gun and me, I was scared. So, I tried to pull back with the gun with both hands and then it accidentally shot" (*Travis Hawkins Statement*, October 16, 2009–p. 3)

He also testified that he informed [Petitioner] that he was about to rob the victim and, although he initially changed his mind, he ultimately decided to do it. He testified he didn't know whether someone else was on the passenger's side of the car because "I was too scared. I was too focused on trying to grab the gun." (*Travis Hawkins Statement*, October 16, 2009–p. 4)

The Commonwealth also called Detective John Godlewski, an expert in fingerprint analysis, who testified that the partial left palm impression lifted from the passenger window of the deceased's vehicle belonged to [Petitioner]. (T., p. 114)

The Commonwealth then called Detective James Smith who testified that [Petitioner] had a tattoo on his right hand that said "CK All Day" and also testified that "throw it off" means the same as "stick em up." (T., p. 178)

(Resp's Ex. 6 at 40-44.)

On the criminal homicide count the trial court instructed the jury on the crimes of second-degree murder,[3] third-degree murder, and voluntary manslaughter. (Trial Tr. at 287-93, 306-12.) The jury convicted Petitioner of second-degree murder, robbery, and conspiracy to commit robbery.[4]

On November 7, 2011,[5] the trial court sentenced Petitioner to a term of 6 to 12 years' imprisonment on the conspiracy count to be followed by a term of life imprisonment on the second-degree murder count. (Resp's Ex. 3 at 26; Sent. Hr'g Tr. at 10.) The robbery and second-degree murder counts merged for sentencing purposes. (Sent. Hr'g Tr. at 2.)

At the conclusion of the sentencing hearing trial counsel advised the court that Petitioner "wishes for me to immediately withdraw and not pursue filing his appeal on his behalf[.]" (*Id.* at 10.) The following exchange then occurred:

> [Trial Counsel]: Just logistically, Your Honor, because I do a lot of appeals, would Your Honor like me to file the post-sentence motions to preserve his rights and then the other can amend them or –
>
> The Court: Why don't you have her do that, [Petitioner]? She's more familiar with the case.
>
> [Petitioner]: I agree with that.

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[3] Under Pennsylvania law, "[a] criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony [in this case, a robbery]." 18 PA. CONS. STAT. § 2502(b). A person is an accomplice in the commission of a crime if: "(1) with the intent of promoting or facilitating the commission of the offense, he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it; or (2) his conduct is expressly declared by law to establish his complicity." *Id.*, § 306(c).

[4] Hawkins' trial was held in October 2010 and a jury convicted him of second-degree murder, robbery, and conspiracy to commit robbery. (Resp's Ex. 6 at 39 n.1.) *See also Commonwealth v. Hawkins*, No. 1821 WDA 2014, 2015 WL 8550622, at *4 (Pa. Super. Ct. Dec. 11, 2015).

[5] The transcript for Petitioner's sentencing hearing contains a typographic error that indicates that it was held on November 17, 2011. The hearing was in fact held on November 7, 2011. (*See* Resp's Ex. 26; Resp's Ex. 1 at 3, 9; Resp's Ex. 5 at 35.)

The Court: Once it's filed, I'll appoint someone to take over the case.

(*Id.* at 10-11.)

Trial counsel filed Petitioner's post-sentence motion on November 14, 2011 and argued that the jury's verdict was against the weight of the evidence and that the Commonwealth introduced insufficient evidence to support the jury's verdict. (Resp's Ex. 4 at 27-30.) The trial court denied that motion on November 16, 2011 and on the same date appointed Attorney William Brennan ("direct appeal counsel") to represent Petitioner, who thereafter filed a notice of appeal to the Superior Court. (Resp's Ex. 1 at 10.)

Petitioner asserted only one claim in his counseled direct appeal—that the jury's verdict was against the weight of the evidence ("Claim 1") because of (1) the inconsistencies between Dana Williams' and the Clark sisters' trial testimony and their prior statements, and (2) the only physical evidence linking him to the crime was a partial palm print on the outside of the victim's Jeep and the Commonwealth's expert could not say when it was placed there. (Resp's Ex. 6 at 44-47; Resp's Ex. 7 at 54, 69-73; Resp's Ex. 9 at 106-09.) The Superior Court denied Claim 1 on the merits in *Commonwealth v. Stephenson*, No. 1978 WDA 2011, slip op. (Pa Super. Ct. Aug. 6, 2013) ("*Stephenson I*") (Resp's Ex. 9 at 101-08.)

The Supreme Court of Pennsylvania denied a petition for allowance of appeal on November 26, 2013. (Resp's Ex. 16 at 144.) Petitioner's judgment of sentence became final on February 24, 2014 at the expiration of the 90-day period for filing a petition for a writ of certiorari to the United States Supreme Court. That is the date the one-year statute of limitations began to run for the purposes of filing a PCRA petition in state court, 42 PA. CONS. STAT. § 9545(b)(3), and a federal habeas petition with this Court, 28 U.S.C. § 2244(d)(1)(A); *see also Gonzalez v. Thaler*, 565 U.S. 134, 149-50 (2012) (a judgment becomes final at the conclusion of direct review or the expiration of time for seeking such review).

On or around April 2, 2014 Petitioner initiated his state collateral proceeding by filing a 61-page *pro se* PCRA petition. (Resp's Ex. 1 at 13; Resp's Ex. 14 at 148-208.) The trial court, now the PCRA court, appointed Attorney Thomas N. Farrell ("PCRA counsel") to represent him. In his counseled, amended PCRA petition Petitioner raised the following five claims:

- Trial counsel was ineffective for permitting the Commonwealth to present Hawkins' taped statement, which was introduced in violation of Petitioner's rights under the Confrontation Clause ("Claim 2");
- Trial counsel was ineffective "for failing to request a full and proper instruction advising that the jury cannot use certain statements made by witnesses as substantive evidence but they are only to be used as impeachment" ("Claim 3");
- Trial counsel was ineffective for failing to object to written instructions being sent to the jury, in lieu of oral instructions, which violated Pa. R. Crim. P. 646(C)(4)" ("Claim 4");
- "The trial court gave an illegal sentence of conspiracy to commit robbery when, under the facts of this case, criminal conspiracy merged for purposes of sentencing with the crime of second-degree murder" ("Claim 5"); and
- Trial counsel "gave ineffective assistance for failing to object and/or request a cautionary instruction when testimony was elicited by the prosecutor that the police had a prior photograph of Petitioner and fingerprints of Petitioner, which showed that Petitioner was previously involved in criminal activity" ("Claim 6").

(Resp's Ex. 15 at 281.)

The PCRA held an evidentiary hearing on May 2, 2016 at which trial counsel testified. (PCRA Hr'g Tr. at 6-28.) Following the hearing the PCRA court issued an order in which it denied on the merits each of the claims Petitioner raised in the amended PCRA petition (Claims 2 through 6). (Resp's Ex. 17 at 381.)

Petitioner filed an appeal with the Superior Court and the PCRA court issued its Appellate Rule 1925(b) opinion. (Resp's Ex. 19 at 387-401.) Importantly, Petitioner *did not raise*

Claim 2 or Claim 6 to the Superior Court in his subsequently appeal. In his counseled brief to the Superior Court Petitioner raised only Claims 3, 4 and 5. (Resp's Ex. 20 at 403.)

In *Commonwealth v. Stephenson*, No. 819 WDA 2016, slip op. (Pa. Super. Ct. Nov. 20, 2017) ("*Stephenson II*") the Superior Court denied on the merits the three claims before it (Claims 3, 4 and 5). (Resp's Ex. 22 at 484-87.) It adopted in full the reasoning given by the PCRA court in its Appellate Rule 1925(b) opinion and added a short supplement to the disposition of the illegal sentence claim (Claim 5). (*Id.* at 486-87.) The Supreme Court of Pennsylvania denied a petition for allowance of appeal on June 4, 2018. (Resp's Ex. 26 at 538.)

Thereafter, Petitioner, who is proceeding *pro se* in this Court, filed the pending Petition For a Writ of Habeas Corpus. (ECF No. 6.)[6] He raises Claims 1 through 6. He also raises the following three claims that he brought in his *pro se* PCRA petition but not in his subsequent counseled, amended PCRA petition. Those claims are:

- Direct appeal counsel was ineffective for failing to raise the claim that the trial court erred in overruling the defense's objection to the admission of Dana Williams' preliminary hearing testimony ("Claim 7") (ECF No. 6-1 at 31-67);

- Trial counsel was ineffective for failing to object when the prosecutor stated in his closing argument that the jurors should not believe the feigned memory loss of Dana Williams and the Clark sisters and that they changed their stories because they were afraid ("Claim 8") (*Id.* at 68-72); and

[6] Rule 2(c) of the Rules Governing Section 2254 Cases In the United States District Courts provides that in a state prisoner's petition for a writ of habeas corpus he or she "must: (1) specify *all the grounds for relief* available to the petitioner; [and] (2) state the facts supporting each ground[.]" (Emphasis added). Petitioner used the standard form for 2254 petitions when he filed his Petition and it contains similar instructions. It also contains the warning that "if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date." (ECF No. 6 at 6.) That warning is given because of the significant procedural limitations imposed by AEDPA, including its one-year statute of limitations, 28 U.S.C. § 2244(d), which is calculated on a claim-by-claim basis. *Fielder v. Varner*, 379 F.3d 113, 118-22 (3d Cir. 2004).

- Trial counsel was ineffective for failing to object when the trial court gave a jury instruction regarding flight and concealment to the jury ("Claim 9") (*Id.* at 73-75.)

In his final claim, "Claim 10," Petitioner contends that the trial court's instruction regarding accomplice liability violated his due process rights and, therefore, trial counsel was ineffective for failing to object to it. (*Id.* at 76-77.)

Respondents assert in their Answer (ECF No. 13) that the Court must deny as procedurally defaulted any claim that Petitioner did not also raise to the Superior Court. They further assert that none of Petitioner's claims have merit and also that Claim 1 is not cognizable under § 2254 because it is purely a state-law claim.

Petitioner filed a Partial Reply (ECF No. 19) within which he also requested additional time to file a complete reply. The Court granted his request (ECF No. 20) and he subsequently filed a Reply (ECF No. 22) and a Memorandum of Law (ECF No. 33).[7] Petitioner acknowledges that most of his claims are procedurally defaulted but asserts that under the rule of *Martinez v. Ryan*, 566 U.S. 1 (2012) the Court should excuse the default of any procedurally defaulted claim and review it *de novo*.

III. Discussion

A. Jurisdiction

The Court has jurisdiction under 28 U.S.C. § 2254, the federal habeas statute applicable to prisoners in custody pursuant to a state-court judgment. It permits a federal court to grant a

[7] To the extent that Petitioner is attempting to raise new claims in his voluminous Replies (ECF Nos. 19, 22) or in his Memorandum of Law (ECF No. 33), he cannot do so. Rule 15 of the Federal Rules of Civil Procedure applies to habeas cases, *see, e.g., Siegel v. Giroux*, No. 1:15-cv-297, 2019 WL 1014730, *16-18 (W.D. Pa. Mar. 4, 2019) (citing *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) and *Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221, 237 (3d Cir. 2017)), and Petitioner did not move to file an amended petition. Therefore, the only claims before the Court are the ones that are raised in his Petition.

state prisoner a writ of habeas corpus "on the ground that he or she is in custody in violation of the Constitution...of the United States." 28 U.S.C. § 2254(a). Errors of state law are not cognizable. *Id.*; *see, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

It is Petitioner's burden to prove that he is entitled to the writ. *See, e.g., Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 848-49 (3d Cir. 2017). There are other prerequisites that he must satisfy before he can receive habeas relief on his claims (for example, the burden imposed upon him by the standard of review enacted by AEDPA, which is discussed below), but, ultimately, Petitioner cannot receive federal habeas relief unless he demonstrates that he is in custody in violation of his federal constitutional rights. 28 U.S.C. § 2254(a); *see, e.g., Vickers*, 858 F.3d at 849.

B. Exhaustion and Procedural Default

The "exhaustion doctrine" requires that a state prisoner raise his federal constitutional claims in state court through the proper procedures before he litigates them in a federal habeas petition. 28 U.S.C. § 2254(b), (c); *see, e.g., Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997). It is "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). It "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts[.]" *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Importantly, the Supreme Court has held that a petitioner must have "invoke[d] one complete round of the State's established appellate review process[,]" in order to satisfy the exhaustion requirement. *Id.* at 845. In Pennsylvania, this requirement means that a petitioner in a non-capital case such as this one must have first presented every federal constitutional claim

raised in his federal habeas petition to *the Superior Court either on direct or PCRA appeal. Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004).

Petitioner failed to raise six of his claims (Claims 2 and 6-10) to the Superior Court. He cannot return to state court and attempt to litigate these claims now because they are barred by state waiver rules and/or by the PCRA's one-year statute of limitations. Therefore, he has procedurally defaulted these claims. As the United States Court of Appeals for the Third Circuit has explained:

> Petitioners who have not fairly presented their claims to the highest state court have failed to exhaust those claims. *O'Sullivan v. Boerckel*. If, however, state procedural rules bar a petitioner from seeking further relief in state courts, "the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.' 28 U.S.C. § 2254(b)." *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999). Even so, this does not mean that a federal court may, without more, proceed to the merits. Rather, claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner "establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default." *Id. See also Coleman*, 501 U.S. at 731, 111 S. Ct. 2546.

Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000).

As noted by the Court of Appeals in *Lines*, when a claim is procedurally defaulted a petitioner can overcome the default if he demonstrates "cause for the default and actual prejudice as a result of the alleged violation of federal law[.]" *Coleman*, 501 U.S. at 750. "'Cause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him[.]" *Id.* at 753 (emphasis in original).

The general rule is that, because there is no federal constitutional right to counsel in a PCRA proceeding,[8] a petitioner cannot rely upon PCRA counsel's ineffectiveness to establish

[8] Because Petitioner did not have a federal constitutional right to counsel during his PCRA proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), he cannot receive habeas relief on a stand-alone claim that his PCRA counsel was ineffective, a fact codified by statute at 28 U.S.C.
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the "cause" necessary to overcome the default of a federal habeas claim. *Id.*; *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017).

In *Martinez v. Ryan*, 566 U.S. 1 (2012) the Supreme Court announced a narrow, but significant, exception to this rule. In relevant part, it held that in states like Pennsylvania, where the law requires that claims of ineffective assistance of trial counsel be raised for the first time in a collateral proceeding,[9] a petitioner may overcome the default of a *claim of trial counsel's ineffectiveness* if the petitioner demonstrates: (1) the defaulted claim of trial counsel's ineffectiveness is "substantial" and (2) PCRA counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984) for (3) failing to raise that claim in the "initial review collateral proceeding" (meaning *to the PCRA court*). *Martinez*, 566 U.S. at 17. The holding in *Martinez* is limited to defaulted claims asserting that *trial counsel was ineffective. See, e.g., Davila*, 137 S. Ct. at 2062-70. It does not apply to any other type of defaulted claim. *Id.*

The Court of Appeals has explained that a claim that trial counsel was ineffective is "substantial" if it has "some merit." *Workman v. Sup't Albion SCI*, 915 F.3d 928, 938 (3d Cir. 2019). The evaluation is the same one that a federal court undertakes when it considers whether to grant a certificate of appealability. *Id.*; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, a petitioner "must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should be resolved in a different manner or that the issues presented were

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§ 2254(i), which expressly provides that "[t]he ineffectiveness of counsel during Federal or State collateral post-conviction proceedings shall not be ground for relief in a proceeding arising under section 2254." *See also Coleman*, 501 U.S. at 752-53 ("There is no constitutional right to an attorney in state post-conviction proceedings.... Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") PCRA counsel's alleged ineffectiveness is relevant only to the extent that it is one of the factors that must be established in order to avoid a default under *Martinez*.

[9] In Pennsylvania, a defendant may not litigate ineffective assistance of trial counsel claims on direct appeal. Such claims must be raised in a PCRA proceeding. *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002).

adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Martinez*, 566 U.S. at 14, which cited *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).

The Supreme Court in *Martinez* defined "initial-review collateral proceeding" as a collateral proceeding that provides the first occasion to raise a claim of trial counsel's ineffective assistance. *Id.* at 9. In Pennsylvania, that is the proceeding before the PCRA court. The Supreme Court's decision in *Martinez* was influenced by the fact that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id.* at 10. The Supreme Court held that because this concern is not present in "*appeals* from initial-review collateral proceedings," a petitioner may not use attorney error in a collateral appeal as cause to excuse a procedural default. *Id.* at 16 (emphasis added); *Norris v. Brooks*, 794 F.3d 401, 404-05 (3d Cir. 2015) (*Martinez* "applies only to attorney error causing procedural default during initial-review collateral proceedings, not collateral appeals").

Petitioner relies upon *Martinez* to overcome the procedural default of Claims 2 and 6-10. Its application to each of his defaulted claims is discussed below.[10]

C. Standard of Review

In 1996, Congress made important amendments to the federal habeas statutes with the enactment of the AEDPA. Among other things, AEDPA "modified a federal habeas court's role

[10] A noted above, a petitioner may also avoid the default of a claim by demonstrating that the federal habeas court's failure to consider it will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *see, e.g., Lines*, 208 F.3d at 160. This type of "gateway" actual innocence claim requires newly presented evidence of "actual innocence" that is "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error[.]" *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *see also McQuiggin v. Perkins*, 569 U.S. 383 (2013); *House v. Bell*, 547 U.S. 518 (2006); *Reeves v. Fayette, SCI*, 897 F.3d 154, 157 (3d Cir. 2018). The Supreme Court has cautioned that "tenable actual-innocence gateway pleas are rare[.]" *McQuiggin*, 569 U.S. at 386. Petitioner does not direct the Court to any newly presented evidence of his innocence, and this case is not one of those rare cases where the actual-innocence gateway would apply to permit him to avoid the default of any of his claims.

in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone,* 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403-04 (2000)). It reflects the view that habeas corpus is 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) (internal quotations and citation omitted).

A finding of fact made by a state court always has been afforded considerable deference in a federal habeas proceeding. AEDPA continued that deference and mandates that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*

AEDPA also put into place a new standard of review, which is codified at 28 U.S.C. § 2254(d). It applies "to any claim that was adjudicated on the merits" by the Superior Court[11] and, in relevant part, it prohibits a federal habeas court from granting relief unless the petitioner established that the Superior Court's "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[.]

28 U.S.C. § 2254(d)(1).[12] For the purposes of § 2254(d), a claim has been "adjudicated on the merits in State court proceedings" when the state court (here, the Superior Court) made a

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[11] When applying § 2254(d), the federal habeas court considers the "last reasoned decision" of the state courts. *Simmons v. Beard*, 590 F.3d 223, 231-32 (3d Cir. 2009) (quoting *Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008)); *Brown v. Sup't Greene SCI*, 834 F.3d 506, 512 (3d Cir. 2016).

[12] Section 2254(d)(1) applies to questions of law and mixed questions of law and fact. Here, Claims 3, 4 and 5 (which are the only cognizable claims Petitioner raised to the Superior Court) present mixed questions of law and fact and, therefore, the Court applies the standard of review

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decision that finally resolves the claim based on its substance, not on a procedural, or other, ground. *See, e.g., Richter*, 562 U.S. at 98-100; *Robinson v. Beard*, 762 F.3d 316, 324 (3d Cir. 2014).

If, when evaluating a claim, the Court determines that the petitioner has satisfied his burden under § 2254(d), the Court must then "proceed to review the merits of the claim *de novo* to evaluate if a constitutional violation occurred." *Vickers*, 858 F.3d at 849 (citing *Lafler v. Cooper*, 566 U.S. 156, 174 (2012)).[13] That is because "a federal court can only grant the Great Writ if it is 'firmly convinced that a federal constitutional right has been violated[.]'" *Id.* (citing *Williams*, 529 U.S. at 389, and *Horn v. Banks*, 536 U.S. 266, 272 (2001) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review...none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]")).

In applying § 2254(d)(1), this Court's first task is to ascertain what law falls within the scope of the "clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1). It is "'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Dennis v. Sec'y,*

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at § 2254(d)(1) to them. *See Jermyn v. Horn*, 266 F.3d 257, 305-06 & n.24 (3d Cir. 2001). Another provision of AEDPA's standard of review, codified at § 2254(d)(2), provides that a petitioner must demonstrate that the state court's adjudication of a claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." This provision applies when a petitioner "challenges the factual basis for" the state court's "decision rejecting a claim[.]" *Burt v. Titlow*, 571 U.S. 12, 18 (2013). The standard of review set forth at § 2254(d)(2) is not applicable to this case because the state court's decision to deny Claim 3, 4 or 5 was not premised upon a finding of fact made by it.

[13] These steps "sometimes merge in cases in which the federal habeas court determines that the state court engaged in an 'unreasonable application' of clearly established Supreme Court precedent because it will be apparent from the explication of why the state court unreasonably applied that precedent that, under any reasonable application, a constitutional violation did occur." *Vickers*, 858 F.3d at 849 n.8.

Pennsylvania Dep't of Corr., 834 F.3d 263, 280 (2016) (en banc) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)). It "includes only 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *White v. Woodall*, 572 U.S. 415, 420 (2014) (quoting *Howes v. Fields*, 565 U.S. 499, 505 (2012), which quoted *Williams*, 529 U.S. at 412).

Once the "clearly established Federal law, as determined by the Supreme Court of the United States," is ascertained, this Court must determine whether the Superior Court's adjudication of the claim at issue was "contrary to" that law. *Williams*, 529 U.S. at 404-05 (explaining that the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1) have independent meaning). A state-court adjudication is "contrary to...clearly established Federal law, as determined by the Supreme Court of the United States" § 2254(d)(1), "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," *Williams*, 529 U.S. at 405, or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent," *id.* at 406.

A "run-of-the-mill" state-court adjudication applying the correct legal rule from Supreme Court decisions to the facts of a particular case will not be "contrary to" Supreme Court precedent. *Williams*, 529 U.S. at 406. Therefore, the issue in most federal habeas cases is whether the adjudication by the state court survives review under § 2254(d)(1)'s "unreasonable application" clause.

"A state court decision is an 'unreasonable application of federal law' if the state court 'identifies the correct governing legal principle,' but 'unreasonably applies that principle to the facts of the prisoner's case.'" *Dennis*, 834 F.3d at 281 (quoting *Williams*, 529 U.S. at 413). To satisfy his burden under this provision of AEDPA's standard of review, Petitioner must do more

than convince this Court that the Superior Court's decision was incorrect. *Id.* He must show that it "'was *objectively* unreasonable.'" *Id.* (quoting *Williams*, 529 U.S. at 409) (emphasis added by Court of Appeals). This means that Petitioner must demonstrate that the Superior Court's decision "*was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*" *Richter*, 562 U.S. at 103 (emphasis added). As the Supreme Court noted:

> It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *See Lockyer, supra*, at 75, 123 S. Ct. 1166. If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Id. at 102.

If the Superior Court did not adjudicate a claim on the merits, the Court must determine whether that was because Petitioner procedurally defaulted it. If the claim is not defaulted, or if Petitioner established grounds to excuse his default, the standard of review at § 2254(d) does not apply and the Court reviews the claim *de novo*. *See, e.g., Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). However, in all cases, and regardless of whether the standard of review at § 2254(d) applies to a specific claim, the state court's factual determinations are presumed to be correct under § 2254(e)(1) unless the petitioner rebuts that presumption by clear and convincing evidence. *Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010); *Nara v. Frank*, 488 F.3d 187, 201 (3d Cir. 2007) ("the § 2254(e)(1) presumption of correctness applies regardless of whether there has been an 'adjudication on the merits' for purposes of § 2254(d).") (citing *Appel*, 250 F.3d at 210).

D. The *Strickland* Standard

The majority of Petitioner's claims (Claims 2-4, 6, 8-10) assert that trial counsel provided him with ineffective assistance. In one claim (Claim 7) he asserts that direct appeal counsel was ineffective. These claims are governed by the standard set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* recognized that a defendant's Sixth Amendment right to the assistance of counsel for his defense entails the right to be represented by an attorney who meets at least a minimal standard of competence.[14] 466 U.S. at 685-87. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]" *Titlow*, 571 U.S. at 24.

Under *Strickland*, it is Petitioner's burden to establish that his "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. The Supreme Court has emphasized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]'" *Titlow*, 571 U.S. at 22 (quoting *Strickland*, 466 U.S. at 690); *Richter*, 562 U.S. at 104 ("A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance.") (quoting *Strickland*, 466 U.S. at 689). Counsel cannot be deemed ineffective for failing to raise a meritless claim. *See, e.g., Preston v. Sup't Graterford SCI*, 902 F.3d 365, 379 (3d Cir. 2018).

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[14] Since the Fourteenth Amendment guarantees a criminal defendant pursuing a first appeal as of right certain "minimum safeguards necessary to make that appeal 'adequate and effective,'" *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)), including the right to the effective assistance of counsel, *id.* at 396, the ineffective assistance of counsel standard of *Strickland* applies to a claim that direct appeal counsel was ineffective. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *United States v. Cross*, 308 F.3d 308, 315 (3d Cir. 2002).

Strickland also requires that Petitioner demonstrate that he was prejudiced by counsel's alleged deficient performance. This places the burden on him to establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

The Supreme Court in *Strickland* noted that although it had discussed the performance component of an effectiveness claim prior to the prejudice component, there is no reason for an analysis of an ineffectiveness claim to proceed in that order. 466 U.S. at 697. If it is more efficient to dispose of an ineffectiveness claim on the ground that the petitioner failed to meet his burden of showing prejudice, a court need address only that prong of *Strickland. Id.*

E. Petitioner's Claims

Claim 1

Petitioner asserts in Claim 1 that the jury's verdict was against the weight of the evidence and that the trial court abused its discretion in denying this claim. (ECF No. 6-1 at 1.) The Superior Court denied Claim 1 on the merits in *Stephenson I.* (Resp's Ex. 9 at 106-09.)

This Court has no authority to review the Superior Court's decision or grant Petitioner relief on Claim 1 because it is purely a state law claim that is not cognizable in federal habeas corpus.[15] *See Tibbs v. Florida*, 457 U.S. 31, 37-45 (1982) (weight of evidence claims raise questions of credibility; it is different from a claim that the evidence was insufficient to support the conviction); *McKinnon v. Sup't, Great Meadow Corr. Facility*, 422 F. App'x 69, 75 (2d Cir.

[15] In contrast, a claim that prosecution introduced insufficient evidence to support the jury's verdict implicates a petitioner's due process rights and thus is cognizable in a federal habeas case. *Jackson v. Virginia*, 443 U.S. 307 (1979). A challenge to the weight of the evidence, which is the claim Petitioner raised to the Superior Court and to this Court in his Petition "'concedes that there is sufficient evidence to sustain the verdict.'" *Rainey v. Varner*, 603 F.3d 189, 199 (3d Cir. 2010) (quoting *Commonwealth v. Widmer*, 744 A.2d 745, 751-52 (Pa. 2000)).

2011) ("the argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus[.]"); *see, e.g., Anger v. Wenerowicz*, No. 2:11-cv-1421, 2012 WL 5208554, *2 (W.D. Pa. Sept. 10, 2012) (a claim that the verdict was against the weight of the evidence "is simply not a cognizable claim in federal habeas proceedings as it raises solely a state law claim."), report and recommendation adopted by 2012 WL 5208654 (W.D. Pa. Oct. 22, 2012); *Davis v. Lavan*, No. 2:04-cv-456, 2004 WL 2166283, *9 (E.D. Pa. Sept. 23, 2004) (same).

Therefore, it is recommended that the Court deny Claim 1 because it is state law claim that is not cognizable under § 2254.

Claims 2, 6 and 7

In Claim 2 Petitioner contends that trial counsel was ineffective for not objecting to the admission of Hawkins' taped statement on the grounds that it violated his rights under the Confrontation Clause. (ECF No. 6-1 at 2, 23-30.) In Claim 6 he asserts that trial counsel was ineffective for not objecting to references to the photo arrays and fingerprint comparisons because the jury could have inferred from that evidence that he was previously involved in criminal activity. (ECF No. 6-1 at 2, 16-22.)

Petitioner raised Claims 2 and 6 in his counseled, amended PCRA petition. (Resp's Ex. 15 at 304-05.) The PCRA court denied them on the merits.[16] (Resp's Ex. 17 at 381; Resp's Ex. 19 at 398-400). Because Petitioner did not raise Claims 2 and 6 in his subsequent appeal to the Superior Court (Resp's Ex. 20) they are procedurally defaulted. *See, supra,* § III.B.

[16] The PCRA Court denied Claim 2 because it held that trial counsel had a reasonably strategic basis for not objecting to the admission of Hawkins' statement. (Resp's Ex. 19 at 398-400.) It denied Claim 6 because it determined that Petitioner did not demonstrate that he was prejudiced by counsel's alleged ineffective assistance. (Resp's Ex. 17 at 381.)

Petitioner cannot overcome his default of Claim 2 or 6 under the rule of *Martinez*. That is because those claims were litigated before the PCRA court, which was the "initial-review collateral proceeding." PCRA counsel's decision not to pursue them on appeal cannot establish "cause" to avoid their default. *Martinez*, 566 at 16; *Norris*, 794 F.3d at 404-05. Thus, *Martinez* is not applicable to Claim 2 or 6.

In Claim 7 Petitioner contends that direct appeal counsel was ineffective for failing to raise the claim that the trial court erred in permitting, over the defense's objection, the admission of Dana Williams' preliminary hearing testimony. (ECF No. 6-1 at 31- 67.) Claim 7 is one of the claims that Petitioner brought in his *pro se* PCRA petition which PCRA counsel opted not to raise in the amended PCRA petition. It is procedurally defaulted because Petitioner did not fairly present it to the state court in his PCRA proceeding. *See, supra,* § III.B.

Petitioner cannot rely upon *Martinez* to overcome the default of Claim 7 because it is a claim that *direct appeal counsel* was ineffective. The Supreme Court expressly held in *Davila* that *Martinez* only applies to default claims that trial counsel was ineffective and does not extend to defaulted claims that appellate counsel was ineffective.[17] *Davila* 137 S. Ct. at 2064-70.

Based upon the foregoing, it is recommended that the Court deny Claims 2, 6 and 7 because Petitioner procedurally defaulted them and there are no grounds that permit him to avoid his default.

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[17] Petitioner in his Reply (ECF No. 22) argues that direct appeal counsel, Attorney Brennan, should also be viewed as "post-sentencing counsel," presumably because Petitioner believes that will permit the application of *Martinez* to claims that Attorney Brennan was ineffective. He claims that Attorney Brennan was ineffective for failing to challenge the trial court's decision to deny the post-sentence motion without providing him time to file an amendment to it. Petitioner did not raise this claim in his Petition and, therefore, the Court cannot consider it. Even if the claim was properly before the Court, it lacks merit because Petitioner has not demonstrated how he was prejudiced by what occurred.

Claim 3

As explained above, at Petitioner's trial the Commonwealth introduced the October 2009 taped statements given by Dana Williams and the Clark sisters, as well as Dana Williams' preliminary hearing testimony, as substantive evidence to prove the truth of the matters asserted therein. The trial court instructed the jurors that they could consider those prior inconsistent statements as both substantive and impeachment evidence, explaining:

> Now, you have heard evidence that witnesses made statements on earlier occasions that were inconsistent with their present testimony. You may, if you choose, regard this evidence as proof of the truth of anything the witness said in an earlier statement. You may also consider this evidence to help you judge the credibility and the weight of the testimony given by the witness at the time of trial.

(Trial Tr. at 283-84.)

The problem with this instruction is that Detectives Evans and McGee, during their trial testimony, recounted prior inconsistent statements made by Dana Williams and Taneshia Clark that were neither recorded in any manner or adopted by them and, therefore, could only be considered for their impeachment value under Pa. R. Evid. 803.1. Specifically, Detective Evans testified that Dana Williams told him she was afraid of retaliation[18] (Trial Tr. at 146, 152) and Detective McGee testified that Taneshia Clark told him that Petitioner leaned into the passenger's side of the vehicle and was "tussling with" the victim (*id.* at 211).[19] (*See also* Resp's

[18] During her trial testimony Dana Williams stated that she was not afraid to testify against Petitioner and that she just did not "want to be here." (Trial Tr. at 138.)

[19] In her taped statement Taneshia Clark stated only that Petitioner was on the passenger's side of the vehicle and was leaning into it. She stated that *Hawkins* and the victim were "tussling over the gun" and that she did not see what Petitioner was doing. (Resp's. Ex 15 at 330-31.) It was Dana Williams who stated, both in her October 9, 2009 taped statement and during her preliminary hearing testimony, that she saw Petitioner punching the victim during the robbery. (Resp's Ex. 15 at 318-19; Preliminary Hr'g Tr. at 14-15.) On cross-examination Detective McGee acknowledged that Taneshia Clark's taped statement did not contain the information that Petitioner tussled with the victim. (Trial Tr. at 216.)

Ex. 19 at 393-95.) In Claim 3 Petitioner contends that trial counsel was ineffective for failing to object to the above-quoted instruction and ensure that the jury was informed that it could consider the prior inconsistent statements introduced through the detectives' testimony only for impeachment purposes. (ECF No. 6 at 2; Resp's Ex. 20 at 417-21.)

The PCRA court denied Claim 3 on the merits, determining that Petitioner failed to demonstrate that he was prejudiced by trial counsel's alleged ineffectiveness. (Resp's Ex. 19 at 396-97.) In reaching this conclusion, the PCRA summarized Dana Williams' and the Clark sisters' out-of-court statements that *were properly admitted as substantive evidence* and concluded that Petitioner "failed to establish that, but for the failure to request the jury instruction as alleged, that there is a reasonable probability that the outcome of the proceedings would have been different." (*Id.* at 396-97.) In *Stephenson II* the Superior Court adopted in the full the PCRA court's disposition of Claim 3. (Resp's Ex. 22 at 486-87.)

The state court's adjudication of Claim 3 withstands AEDPA's deferential standard of review. It applied the *Strickland* standard when it evaluated this claim.[20] (Resp's Ex. 19 at 395-97.) Therefore, its adjudication was not "contrary to" *Strickland* under § 2254(d)(1). *See, e.g., Williams*, 529 U.S. at 406.

The only remaining question for this Court is whether the state court's adjudication was an "unreasonable application of" *Strickland* under § 2254(d)(1). To demonstrate this, Petitioner

[20] Pennsylvania courts typically articulate *Strickland's* standard in three parts, while federal courts set it out in two. The legal evaluation is the same, and the differences merely reflect a stylistic choice on the part of state courts. *See, e.g., Commonwealth. v. Mitchell*, 105 A.3d 1257, 1266 (Pa. 2014) ("this Court has divided [*Strickland's*] performance component into sub-parts dealing with arguable merit and reasonable strategy. Appellant must, therefore, show that: the underlying legal claim has arguable merit; counsel had no reasonable basis for his act or omission; and Appellant suffered prejudice as a result."); *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1117-18 (Pa. 2012) ("In order to obtain relief on a claim of ineffectiveness, a PCRA petitioner must satisfy the performance and prejudice test set forth in *Strickland*").

must do more than convince this Court that the state court's decision was incorrect. *See, e.g., Dennis*, 834 F.3d at 281. As set forth above, he must demonstrate that its decision was objectively unreasonable, which means that it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Petitioner has not met this difficult burden.

Dana Williams' and the Clark sisters' October 2009 taped statements and Dana Williams' preliminary hearing testimony were admitted as substantive evidence of his guilt. Given the strength of this evidence, it was objectively reasonable for the state court to conclude that Petitioner was not prejudiced by trial counsel's failure to request an instruction that their prior inconsistent statements introduced through the detectives' testimony could be considered only for impeachment purposes. *See, e.g., Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999) ("It is firmly established that a court must consider the strength of the evidence in deciding whether the *Strickland* prejudice prong has been satisfied.") This is particularly true given that Dana Williams, in her taped statement and her preliminary hearing testimony, said that she saw Petitioner hand Hawkins the gun, approach the victim's Jeep with Hawkins, and punch the victim during the robbery. She also indicated that she did not come forward with what she knew about the crimes for several months because the perpetrators would know who had identified them and she was afraid.

In conclusion, the Court should deny Claim 3 because the state court's adjudication of it withstands review under § 2254(d)(1)

Claim 4

Approximately an hour and a half into deliberations, the jury submitted the following question: "If guilt is found for felony robbery, are all murder charges still open? If so, could you

please redefine all of them." (Trial Tr. at 304.) In response, the trial court sent the following note to the jury:

> Dear Mr. Foreperson and Members of the Jury, each of the three counts that the defendant is charged with are separate and distinct charges. You have to decide guilty or not guilty on each count separately. If you feel it is necessary to be recharged on criminal homicide, please inform my tipstaff[.]

(Id. at 305-06.) The jurors then informed the court that they wished to hear again the instructions pertaining to criminal homicide. (*Id.*) The trial court brought them back into the courtroom and instructed them on second and third degree murder and voluntary manslaughter. (*Id.* at 306-12.)

In Claim 4 Petitioner asserts that trial counsel provided him with ineffective assistance because she should have objected when the trial court sent its note to the jury, which he contends amounted to an improper written jury instruction in violation of Rule 646(C)(4) of the Pennsylvania Rules of Criminal Procedure. (ECF No. 6-1 at 2; Resp's Ex. 20 at 422-24.) That Rule provides that the trial court may only permit members of the jury to have written copies of the portion of the judge's charge on the elements of offenses for use during deliberations.

Petitioner raised Claim 4 in his PCRA proceeding and the Superior Court denied it on the merits in *Stephenson II*, adopting in full the PCRA court's disposition of it. (Resp's Ex. 22 at 486.) The PCRA court held that Petitioner did not establish any of the prongs of an ineffective assistance of counsel claim. (Resp's Ex. 19 at 398.) In reaching this conclusion, the PCRA court rejected Petitioner's contention that the trial court's note violated state law, explaining:

> Clearly the response to the jurors' question was not an instruction given in violation of Pa. R. Crim. P. 646(C)(4). There was no instruction on the law given to the jury in the note. It simply advised them that they were to deliberate on each count separately as previously instructed and to advise the court if they needed further clarification or reinstruction. In response to the note the jury requested the reinstruction and were, therefore, brought back to the courtroom for further instruction. Consequently, there was no violation of Rule 646(C)(4). In addition, Petitioner has failed to present any evidence demonstrating that he was in any way prejudiced by the note that was given to the jury. Therefore, counsel was not ineffective in failing to object to the note.

(*Id.*)

As Respondents correctly point out, the state court's determination that trial court's note did not violate Rule 646(C)(4) is not subject to review by this Court. *See, e.g., Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004) ("Federal courts reviewing habeas claims cannot 'reexamine state court determinations on state-law questions.'") (*quoting Estelle*, 502 U.S at 67-68). *See also Real v. Shannon*, 600 F.3d 302, 310 (3d Cir. 2010). Thus, this Court must conclude that any objection to the trial court's note would have been denied as meritless. And, since trial counsel cannot be deemed ineffective for failing to raise a meritless objection, there is no basis for to conclude that the state court's adjudication of Claim 4 was either "contrary to" or "an unreasonable application of" of *Strickland*. 28 U.S.C. § 2254(d)(1).

Accordingly, it is recommended that the Court deny Claim 4 because it is bound by the state court's determination that the trial court's note did not violate Rule 646(C)(4) and because the state court's adjudication withstands review under § 2254(d)(1).

Claim 5

Petitioner asserts in Claim 5 that the trial court gave an illegal sentence on his conviction for conspiracy to commit robbery because it should have merged with that imposed on his second-degree murder conviction. (ECF No. 6-1 at 2; Resp's Ex. 20 at 432-40.)

Pennsylvania law provides that "[n]o crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense." 42 PA. CONS. STAT. § 9765. This statue is an adoption of the "same elements" test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), which held: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only

one, is whether each provision requires proof of a fact which the other does not." *See also Commonwealth v. Wade*, 33 A.3d 108, 116, 121 (Pa. Super. Ct. 2011) ("Our merger statute merely codified the adoption...of the *Blockburger* test and upholds the long-standing merger doctrine relative to greater and lesser-included offenses.")

A petitioner's double jeopardy rights can be implicated in some merger claims. However, whether a sentence should have merged is typically an issue of state law. *See, e.g., McLoud v. Deppisch*, 409 F.3d 869, 873-77 (7th Cir. 2005); *see also Gillespie v. Ryan*, 837 F.2d 628, 632 (3d Cir. 1988) (observing that "it appears that the decision in [*Missouri v. Hunt*er, 459 U.S. 359, 366 (1983)], equating the multiple punishment analysis under the double jeopardy clause with an analysis of the substantive criminal law, leaves virtually no room for federal relief for state prisoners based on the multiple punishment prong of the double jeopardy clause."); *Wade*, 33 A.3d at 118 n.7 (noting that in most merger claims the issue is one of statutory construction and not constitutional jurisprudence).

Here, Petitioner asserts that the trial court's failure to merge his conspiracy to commit robbery sentence with that imposed on his second-degree murder conviction violated the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Supreme Court held that the Sixth Amendment requires juries to find beyond a reasonable doubt the existence of "any fact that increases the penalty for a crime" beyond "the prescribed statutory maximum." 530 U.S. at 490. Petitioner argues the jury was instructed that it could convict him of second-degree murder under the theories that he was a co-conspirator or an accomplice. He contends that since the jury was not asked specifically as to what theory it used to convict him of second-degree murder, the trial court could not "increase his sentence" by also imposing a sentence for the crime of conspiracy to commit robbery. (Resp's Ex. 20 at 439.)

In *Stephenson II* the Superior Court adopted in full the PCRA court's resolution of Claim 5. (Resp's Ex. 22 at 486.) The PCRA court held that "[t]he holding in *Apprendi* is inapplicable in this case. There was no enhancement of the sentence based on a fact not found by the jury. Whether or not Petitioner was found guilty of second-degree murder as a co-conspirator or an accomplice is unrelated to his conviction for criminal conspiracy-robbery." (ECF No. 19 at 401.) The Superior Court supplemented the PCRA court's holding by adding:

> [Petitioner's] argument rests on the premise that the felony offense underlying his second-degree murder conviction was conspiracy to commit robbery and, therefore, his sentence for conspiracy must merge with his murder sentence. This argument is meritless for several reasons, but two are worth mentioning. First, conspiracy to commit robbery is not a felony offense that can underlie a second-degree murder conviction. *See* 18 Pa.C.S. §§ 2502(b),...2502(d)[.] Second, [Petitioner] was convicted of robbery in this case, and that offense merged with his murder conviction for sentencing purposes. *See* Order of Sentence, 11/7/11. Thus, [Petitioner's] argument that his conspiracy to commit robbery conviction should also merge is meritless.

(Resp's Ex. 22 at 486-87.)

The state court's decision to deny Claim 5 was not "contrary to" *Apprendi*, since it did not apply a rule that contradicts the holding of that case or confront "a set of facts that are materially indistinguishable from" those of that case and yet reach a different result. *Williams*, 529 U.S. at 405-06. The state court's adjudication of Claim 5 was not an "unreasonable application of" *Apprendi* either, since it was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103; *see White v. Woodall*, 572 U.S. 415, 426 (2014) ("Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error.")

Based upon the foregoing, it is recommended that the Court deny Claim 5 because the state court's adjudication of it withstands review under § 2254(d)(1).

Claims 8, 9 and 10

In Claim 8, 9 and 10, Petitioner raises ineffective assistance of trial counsel claims that he did not fairly present in his PCRA proceeding.[21] Accordingly, these claims are procedurally defaulted. *See, supra,* § III.B. Since they are claims of trial counsel's ineffective assistance that PCRA counsel did not litigate before the PCRA court, Petitioner could overcome the default under *Martinez* if he demonstrated that the claim was "substantial" and that PCRA counsel was ineffective for failing to raise it. *Id.* Respondents submit that Petitioner has not satisfied the *Martinez* factors. They also contend that the Court could simply review Claims 8, 9 and 10 *de novo* and deny them on that basis. *Lambrex v. Singletary*, 520 U.S. 518, 525 (1997) (the court may avoid the more complex issue of procedural default and evaluate the claim on the merits if it is more efficient to do so).

In Claim 8 Petitioner argues that trial counsel was ineffective for failing to object when the prosecutor stated in his closing argument that the jurors should not believe the feigned memory loss of Dana Williams and the Clark sisters and that they changed their stories because they were afraid. (ECF No. 6-1 at 68-72; Trial Tr. at 263-65.) Petitioner argues that the prosecution essentially vouched for the credibility of the witness's prior inconsistent statements and trial counsel should have objected and requested a cautionary instruction or moved for a mistrial. (*Id.* at 72.)

During his arguments, the prosecutor stated:

[21] Petitioner raised Claims 8 and 9 in his *pro se* PCRA petition but PCRA counsel opted not to raise them in the amended PCRA petition.

> Think about November 13th of 2009 when Dana Williams, still cooperative, she is testifying at the preliminary hearing under oath. She identifies Twerk as the shooter, just like she said in her taped statement and photo array. She says CK was the other individual involved handing the gun, hyping him up, was at the side of the car participating. She says it on direct examination.
>
> But that's not enough. Defense counsel kept asking her. I would say at least five more times under oath she said CK was the other guy, he was in the car, he was leaning in the car, he was throwing punches, he was participating. I got sick of hearing it. You must have got sick of hearing it over and over again, CK is involved.
>
> Then time passes, one year, two years. Something changes obviously, because you heard these girls' testimony on the stand. Did you believe for a second that Dana Willliams witnessed this murder and doesn't remember a stitch of it? Of course not. It's ridiculous. She remembers it, but she's scared.
>
> What is she scared of? Well, on cross-examination Detective Evans was asked: Well, what is she scared of; do you know? Yes, I do know. How do you know? Because she told me. What did she tell you? She told me she's afraid of retaliation. She has a two-year-old daughter and someone has been killed. I can assure you it is not a good thing, a safe thing to be testifying in a murder trial. She's scared.
>
> Taneshia and Dominique had memory problems, memory losses. The police were lying, I was lying, they told me to say it. They had every excuse in the book. Again, antagonistic. Cooperative in October of 2009, antagonistic on the stand. What changed? Fear. They are afraid at this point.
>
> The testimony that you heard on that stand and the body language that you observed should have told you that they were being untruthful on that stand. You are permitted to rely upon the taped statements and the consistency of the taped statements, and consistency of the photo arrays from October of 2009, in addition to the corroborating evidence of the taped statement of Travis Hawkins, the shooter in this case, the fingerprint that is absolutely—the palm print that is absolutely the defendant's corroborating their taped statement as if the taped statements were testified here in open court. That is substantive evidence for you to apply to the law in this case.

(Trial Tr. at 263-65.)

The Court of Appeals has instructed that in order to find improper vouching, two criteria must be met: (1) the prosecution must assure the jury that the testimony of a government witness is credible, and (2) this assurance must be based on either the prosecutor's personal knowledge or other information that is not before the jury. *Lam v. Kelchner*, 304 F.3d 256, 271 (3d Cir. 2002). It further held that: "On habeas review, however, prosecutorial misconduct such as vouching does not rise to the level of a federal due process violation unless it affects fundamental

fairness of the trial. Thus, habeas relief is not available simply because the prosecutor's remarks were undesirable or even universally condemned. The relevant question for a habeas court is whether those remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 180-81 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutors are allowed latitude within which to argue to the jurors as to how they should view the evidence, and that latitude involves a certain permissible amount of oratorical flair. *See, e.g., Commonwealth v. Chmiel*, 889 A.2d 501, 544 (Pa. 2005).

Petitioner has not established that the prosecutor's arguments were improper. They were premised upon evidence introduced at the trial, and he did not give the jury assurances based on personal knowledge or other information that was not before it. Therefore, trial counsel was not ineffective for failing to raise a meritless objection to the prosecutor's argument. Alternatively, Petitioner has not demonstrated that he was prejudiced because he has not shown that, but for trial counsel's failure to object to the prosecutor's arguments, there is a reasonable probability that the outcome of his trial would have been different.

In Claim 9 Petitioner contends that trial counsel was ineffective for failing to object when the trial court gave the following jury instruction:

> Now, in this case there was evidence that tended to show the defendant fled from the police. The credibility, weight, and effect of this evidence is for you to decide. Generally speaking, when a crime has been committed and a person thinks he is or may be accused of committing it and he flees or conceals himself, such flight or concealment is a circumstance tending to prove the person is conscious of guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case. A person may flee or hide for some other motive, and may do so even though innocent.
>
> Whether the evidence of flight or concealment in this case should be looked at as tending to prove guilt depends upon the facts and circumstances of this case, and especially upon the motives that may have prompted the flight or concealment.

> You may not find the defendant guilty solely on the basis of evidence of flight or concealment.

(Trial Tr. at 282-83.)

Under Pennsylvania law, a flight or concealment jury instruction is appropriate if a person "has reason to know he is wanted in connection with a crime," and proceeds to "flee or conceal himself from the law enforcement authorities." *Commonwealth v. Thoeun Tha*, 64 A.3d 704, 714 (Pa. Super. 2013). "[A] defendant's knowledge may be inferred from the circumstances attendant [to] his flight." *Id.*

Here, the Commonwealth introduced evidence to establish that Petitioner aided Hawkins in the robbery by encouraging Hawkins to commit the crime, handing him the gun, approaching the victim's vehicle, and punching the victim when he tried to defend himself. Petitioner ran from the scene after the shooting and did not turn himself during the three months that the case remained unsolved. Thus, there was a permissible basis for the trial court to give the flight or concealment instruction and trial counsel was not ineffective for failing to object to it. Alternatively, Petitioner has not established that there is a reasonable probability that the outcome of his trial would have been different had trial counsel objected to the instruction. Therefore, he was not prejudiced by trial counsel's alleged deficient performance.

In his final claim, Claim 10, Petitioner argues that trial counsel was ineffective because she did not object to the instruction given on accomplice liability, which he contends violated his due process rights. (ECF No. 6-1 at 76-77.) Specifically, Petitioner takes issue with the following statement made by the trial court during its instruction on second-degree murder: "When two people are partners in a successful or unsuccessful attempt to commit a felony and one of them kills a third person both partners may be guilty of felony murder." (*Id.* at 76, quoting Trial Tr. at 289, 309.) The Petitioner does not reference the other portions of the trial court's instruction

regarding the crime of second-degree murder which set forth the elements the jury had to find in order to convict him of that crime. (Trial Tr. at 290, 309-10.)

Petitioner bases his entire claim for relief in Claim 10 on the alleged similarities between his case and those in *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268 (3d Cir. 2018). That case is distinguishable, however, because the petitioner in it, Bennett, was convicted of *first-degree* murder. Therefore, the Commonwealth was required to prove beyond a reasonable doubt that he had the specific intent to kill. *Bennett*, 886 F.3d at 274. The evidence introduced at his trial established that he supplied the loaded gun to the shooter but remained in the getaway car when the shooter entered a jewelry store to commit a robbery, shooting the clerk and killing her. *Id.* at 273. The trial court instructed Bennett's jury as to accomplice liability that "the act of one is the act of all." *Id.* at 275. That instruction was incorrect when referring to first-degree murder because an accomplice must share the specific intent to kill *mens rea* to be convicted of first-degree murder. *Id.* at 274; *Commonwealth v. Maisonet*, 31 A.3d 689, 693 (Pa. 2011). In fact, during the trial the Commonwealth did not even argue that Bennett had the specific intent to kill. *Id.*

The Court of Appeals in *Bennett* explained that it was "troubled by the likelihood that the instructions as a whole could lead a jury to believe that an accomplice or conspirator to one crime is guilty of first degree murder *despite having no specific intent to kill.*"[22] *Id.* at 285 (emphasis added); *see also Tyson v. Sup't Houtzdale SCI*, 976 F.3d 382, 394 (3d Cir. 2020), petition for cert. filed No. 20-988 (U.S. Dec. 18, 2020) ("This Court has previously held that, when a specific intent instruction is required, a general accomplice instruction lessens the state's

[22] The Due Process Clause of the Fourteenth Amendment requires the government to prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Bennett*, 886 F.3d at 284-85.

burden of proof and is therefore violative of due process.") (citations omitted). It concluded that Bennett was entitled to habeas relief because he demonstrated that there was a reasonable likelihood that the jury instructions relieved the Commonwealth of its burden of proving beyond a reasonable doubt the specific-intent-to-kill element of first-degree murder. *Id.* at 286-88.

Respondents are correct that the holding in *Bennett* is not applicable to this case because Petitioner was convicted of second-degree murder. Thus, the Commonwealth was not required to prove, and did not attempt to prove, that Petitioner acted with the specific intent to kill the victim. Moreover, Petitioner has not established that the instructions given in his case misstated Pennsylvania law as it pertains to second-degree murder and accomplice liability or relieved the Commonwealth of its burden of proving an element of second-degree murder. (*See* Trial. Tr. at 289-90, 308-10); *Commonwealth v. Waters*, 418 A.2d 312, 318 (1980) ("the common design to commit the underlying felony must exist when the act of slaying occurs in order to establish an accomplice's liability for felony-murder."); 14 West's Pa. Prac., Crim. Offenses & Defenses § 1:21 (6th ed.) (Westlaw database updated Mar. 2020). Therefore, there is no basis for this Court to conclude that trial counsel performed deficiently in failing to object to the instructions given in his case, or that he was prejudiced.

Based upon the foregoing, the Court should deny Claim 8, 9 and 10 because they lack merit and/or are procedurally defaulted.

F. Petitioner Is Not Entitled to an Evidentiary Hearing

Petitioner requests that this Court conduct an evidentiary hearing. This is not one of the rare habeas cases in which the Court can or should have a hearing. Claim 1 is not cognizable, and because the Superior Court adjudicated Claims 3, 4 and 5 on the merits, this Court cannot

consider evidence outside the state court record when evaluating them under § 2254(d). *Cullen v. Pinholster,* 563 U.S. 170, 180-86, and 185 n.7 (2011).

As for Claims 2 and 6-10, in cases where the petitioner is not barred from obtaining an evidentiary hearing under *Pinholster* or by 28 U.S.C. § 2254(e)(2),[23] the decision to grant a hearing rests in the discretion of the court. *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010). *See also Lee v. Glunt*, 667 F.3d 397, 406 (3d Cir. 2012). Petitioner's "bald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing." *Campbell v. Burris*, 515 F.3d 172, 184 (3d Cir. 2008) (quoting *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987)). No hearing is required on Claims 2 and 6-10 because the information available in the records allows the Court to dispose of them without one.

G. Certificate of Appealability

AEDPA codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. It provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from...the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]" 28 U.S.C. § 2253(c)(1)(A). It also provides that "[a] certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when

[23] Section 2254(e)(2), as amended by AEDPA, provides that "*[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings*, the court shall not hold an evidentiary hearing" unless certain conditions are met. The Court can assume without deciding that § 2254(e)(2) does not bar it from conducting an evidentiary hearing in this case because even if the Court had the discretion to conduct a hearing Claims 2 and 6-10, there is no basis for it to exercise that discretion.

the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Applying those standards here, jurists of reason would not find it debatable whether each of Petitioner's claims should be denied for the reasons given herein. Accordingly, the Court should not issue a certificate of appealability on any of Petitioner's grounds for relief.

IV. CONCLUSION

Based upon the forgoing, it is respectfully recommended that the Court deny each claim raised in the Petition (ECF No. 6) and deny a certificate of appealability as to each claim. Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal. *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017); *Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Dated: February 23, 2021

/s/ Patricia L. Dodge
PATRICIA L. DODGE
United States Magistrate Judge

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

DOUGLAS STEPHENSON,	)	
	)	
Petitioner,	)	
v.	)	**Civil Action No. 18-1329**
	)	
ROBERT GILMORE, et al.,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION and ORDER

Douglas Stephenson (Petitioner) has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his state court convictions for second-degree (felony) murder, robbery, and conspiracy to commit robbery. ECF No. 6. The case was referred to Magistrate Judge Patricia L. Dodge in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D. Magistrate Judge Dodge issued a Report and Recommendation, ECF No. 35, filed February 23, 2021, recommending that the Petition for Writ of Habeas Corpus be denied and that a certificate of appealability be denied. Petitioner timely filed Objections on March 15, 2021. ECF No. 37. As explained below, the Court finds that Plaintiff's Objections do not undermine the recommendation of the Magistrate Judge.

Discussion

The factual background and extensive procedural background of this case is presented at length in the Magistrate Judge's Report and will not be repeated here. ECF No. 35, at 2-14. As explained by the Magistrate Judge, Petitioner raised ten claims set forth in his Petition, attachments to his Petition, his attached pro se PCRA petition, and in his attached counseled amended PCRA petition. ECF No. 35, at 2.

Claim 1

In Claim 1, which was raised in his direct appeal to the Superior Court of Pennsylvania, Petitioner asserted that the jury's verdict was against the weight of the evidence. The Magistrate Judge recommended that the Court deny Claim 1 because it is a state-law claim that is not cognizable under § 2254. Petitioner claims that the Magistrate Judge failed to review his claim "in its whole body of work," the focus of which is Petitioner's claim that the "prosecution did introduce insufficient evidence to support the Jury's verdict, violating Petitioner's Sixth (6) Amendment rights." ECF No. 37, at 4. The remainder of his argument is recounting how his counsel were ineffective at various stages of the proceeding, thus providing cause for any procedural default. ECF No. 37, at 5-8. Petitioner's attempt to transform his claim from the state law claim actually asserted - that the verdict was against the weight of the evidence - into a due process claim that that the prosecution introduced insufficient evidence to support the jury's verdict fails. This is not the claim he raised to the Superior Court in his Petition. In any event, there is no merit to a claim that the prosecution introduced insufficient evidence to support the jury's verdict, as it is clear that the evidence submitted was sufficient to support the jury's verdict.

Claims 2, 6, and 7

In Claims 2 and 6, Petitioner contends that trial counsel was ineffective for not objecting to the admission of his co-defendant's taped statement on the grounds that it violated his rights under the Confrontation Clause, and trial counsel was ineffective for not objecting to references to the photo arrays and fingerprint comparisons because the jury could have inferred from that evidence that he was previously involved in criminal activity. In Claim 7 Petitioner contends that direct appeal counsel was ineffective for failing to raise the claim that the trial court erred in

permitting, over the defense's objection, the admission of a witness's preliminary hearing testimony. The Magistrate Judge found that Claims 2, 6 and 7 are procedurally defaulted and that there are no grounds that would allow Petitioner to avoid the default. Petitioner's Objections do not undermine the Magistrate Judge's recommendations.

Claim 3

In Claim 3, Petitioner asserts trial counsel was ineffective for failing to object to a jury instruction that the jurors could consider prior inconsistent statements as both substantive and impeachment evidence. He also asserts counsel's ineffectiveness for not insisting that that the jury be instructed that it could only consider prior inconsistent statements introduced through law enforcement's testimony solely for impeachment purposes. As noted by the Magistrate Judge, the PCRA court denied Claim 3 on the merits, determining that Petitioner failed to demonstrate that he was prejudiced by trial counsel's alleged ineffectiveness. The PCRA Court applied Strickland v. Washington, 466 U.S. 668 (1984), to its evaluation of Claim 3. The Magistrate Judge correctly concluded that the PCRA Court's application of Strickland was not objectively unreasonable; that is, the analysis was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." ECF No. 35, at 28 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Accordingly, Petitioner's Objection is overruled.

Claim 4

In Claim 4, Petitioner asserts that trial counsel was ineffective for failing to object when the trial court sent a note to the jury in response to a jury question. Petitioner contends the note amounted to an improper written jury instruction in violation of Rule 646(C)(4) of the

Pennsylvania Rules of Criminal Procedure. The Superior Court found that there was no violation of Rule 646(C)(4), therefore counsel was not ineffective for failing to object to the jury note. The Magistrate Judge thus correctly concluded that the Superior Court's adjudication of Claim 4 was not contrary to, or an unreasonable application of, Strickland. Accordingly, Petitioner's Objection to Claim 4 is overruled.

Claim 5

As to Claim 5, which is a challenge that the sentencing court incorrectly failed to merge his conspiracy to commit robbery sentence with his second-degree murder conviction ,in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). Petitioner's Objection does not undermine the Magistrate Judge's conclusion that the state court's decision was not contrary to or an unreasonable application of Apprendi. Therefore, Petitioner's Objection to Claim 5 is overruled.

Claims 8, 9 and 10

Claims 8, 9 and 10, all assert ineffective assistance of trial counsel claims that were not presented in his PCRA petition.

In Claim 8, he argues that trial counsel was ineffective for failing to object to the prosecutor's statement in his closing argument that the jurors should not believe certain witnesses' trial testimony that they did not remember statements they made prior to trial. He argued that the prosecutor improperly vouched for the credibility of the prior statements. In resolving Claim 8, the Magistrate Judge reviewed the applicable law regarding a prosecutor improperly vouching for the credibility of a witness, in conjunction with the rule that prosecutorial misconduct on habeas review does not amount to a due process violation unless the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due

process." Darden v. Wainwright, 477 U.S. 168, 180-81 (1986). The Magistrate Judge concluded:

> Petitioner has not established that the prosecutor's arguments were improper. They were premised upon evidence introduced at the trial, and he did not give the jury assurances based on personal knowledge or other information that was not before it. Therefore, trial counsel was not ineffective for failing to raise a meritless objection to the prosecutor's argument. Alternatively, Petitioner has not demonstrated that he was prejudiced because he has not shown that, but for trial counsel's failure to object to the prosecutor's arguments, there is a reasonable probability that the outcome of his trial would have been different.

ECF No. 35, at 35. The Court agrees with the Magistrate Judge's conclusion and overrules Petitioner's Objection to Claim 8.

In Claim 9, Petitioner argues that trial counsel was ineffective for failing to object to a jury instruction regarding evidence tending to show that Petitioner fled or concealed himself and that such evidence tends to prove the person is conscious of guilt. The Court agrees with the Magistrate Judge's conclusion that there was a permissible basis for the trial court to give the flight or concealment instruction, and that trial counsel was not ineffective for failing to object to the instruction. In addition, Petitioner has not established that there is a reasonable probability that the outcome of his trial would have been different had trial counsel objected to the instruction. Because he was not prejudiced by trial counsel's alleged deficient performance, Petitioner's Objection to Claim 9 is overruled.

In Claim 10, raised for the first time in Petitioner's Habeas Petition, he argues that trial counsel was ineffective for failing to object to the jury instruction given on accomplice liability, which he contends violated his due process rights. Petitioner argues that his case is similar to Bennett v. Superintendent Graterford SCI, 886 F.3d 268 (3d Cir. 2018), in which Bennet was convicted of first-degree murder, a crime that required the Commonwealth to prove beyond a reasonable doubt that Bennet had the specific intent to kill, and thus he could not be convicted of

first-degree murder based on accomplice liability alone. In Bennett, the instructions as a whole were determined to leave open the possibility that an accomplice or conspirator to one crime is guilty of first-degree murder despite having no specific intent to kill. In that case, Bennet demonstrated that there was a reasonable likelihood that the jury instructions relieved the Commonwealth of its burden of proving beyond a reasonable doubt the specific-intent-to-kill element of first-degree murder as to Bennet. Here, however, the Commonwealth was not required to prove, and did not attempt to prove, that Petitioner acted with the specific intent to kill the victim. Therefore, there being no basis to conclude that trial counsel was ineffective for failing to object to the instructions, and no basis to conclude that Petitioner was prejudiced by the instructions, Petitioners' Objection to Claim 10 is overruled.

ORDER

After de novo review of the pleadings and the documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 9th day of July 2021,

IT IS HEREBY ORDERED that Petitioner's Objections are overruled, Claims 1 through 10 are denied, and the Petition is DENIED.

IT IS FURTHER ORDERED that the Report and Recommendation, ECF No. 35, filed on February 23, 2021, by Magistrate Judge Dodge, is adopted as the Opinion of the Court as supplemented by this Memorandum Opinion. A certificate of appealability is DENIED, as jurists of reason would not disagree with the analysis of the Report.

IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, if the petitioner desires to appeal from this Order he must do so within thirty days by filing a notice of appeal as provided in Rule 3, Fed. R. App. P.

Marilyn J. Horan
United States District Court Judge

cc: Douglas Stephenson, pro se
KG-4514
SCI Greene
169 Progress Drive
Waynesburg, PA 15370
(via U.S. First Class Mail)

All Counsel of Record via ECF

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

DOUGLAS STEPHENSON,	)	
	)	
Petitioner,	)	
v.	)	**Civil Action No. 18-1329**
	)	
ROBERT GILMORE, et al.,	)	
	)	
Respondents.	)	

JUDGMENT

AND NOW, this 9th day of July 2021, it is hereby **ORDERED, ADJUDGED AND DECREED** that final judgment is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure in favor of Respondents and against Petitioner.

BY THE COURT:

Marilyn J. Horan
United States District Court Judge

cc: Douglas Stephenson, pro se
KG-4514
SCI Greene
169 Progress Drive
Waynesburg, PA 15370
(via U.S. First Class Mail)

All Counsel of Record via ECF

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **21-2407**

DOUGLAS STEPHENSON,
Appellant

v.

SUPERINTENDENT GREENE SCI;
DISTRICT ATTORNEY ALLEGHENY COUNTY;
ATTORNEY GENERAL PENNSYLVANIA

(D.C. Civ. No. 2-18-cv-01329)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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*Judge Scirica's vote is limited to panel rehearing only.

BY THE COURT,

s/ L. Felipe Restrepo
Circuit Judge

Date: June 17, 2022
Sb/cc: All Counsel of Record
Douglas Stephenson