No. 22-

IN THE

Supreme Court of the United States

MAURICE ANDREWS,

Petitioner,

v.

DISTRICT ATTORNEY MONTGOMERY COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Maurice Andrews was convicted of conspiracy to commit third degree murder in state court after the trial court provided a jury instruction which did not contain any of the correct elements for the charge. Trial counsel failed to notice, and Post-Conviction Relief Act counsel failed to challenge that performance in collateral proceedings. Andrews filed a habeas petition under 28 U.S.C. § 2254 and alleged that he received the ineffective assistance of counsel from PCRA counsel. The magistrate judge found that the instruction was similar to the correct instruction and that Andrews could not show prejudice. The district court adopted the report and recommendation. The Third Circuit denied Andrews a certificate of appealability, finding he did not receive the ineffective assistance of counsel even if the instruction was incorrect because the evidence supported a conviction.

A habeas petitioner who challenges trial counsel's failure to object to a partially incorrect jury instruction must show prejudice. The Court, however, has never addressed the question of whether a habeas petitioner who receives a jury instruction which does not contain any of the essential elements of the offense must still make a showing of prejudice or whether such an instruction amounts to structural error requiring a new trial. Therefore, the question presented is:

Whether, in the context of habeas proceedings under 28 U.S.C. § 2254, the failure of trial counsel to object to a jury instruction which does not contain any of the correct elements for the offense charged amounts to structural error which does not require a showing of prejudice in order for the petitioner to receive relief?

PARTIES TO THE PROCEEDING

Andrews filed his habeas petition against Kevin Steele, the District Attorney of Montgomery County, Pennsylvania, John Wetzel, the Secretary of the Pennsylvania Department of Corrections, and Tom McGinley, the Superintendent of State Correctional Institution – Coal Township. The Montgomery County District Attorney's Office represented the respondents in the district court and the Third Circuit Court of Appeals. The Pennsylvania Attorney General's Office usually represents the Pennsylvania Department of Corrections in litigation and was listed as a party in the Third Circuit, but it did not have any involvement in the litigation in the lower courts.

STATEMENT OF RELATED PROCEEDINGS

Commonwealth of Pennsylvania v. Maurice Andrews, CP-46-CR-4380-2013, Montgomery County Court of Common Pleas. The trial court entered its judgment of sentence on October 7, 2014.

Commonwealth of Pennsylvania v. Maurice Andrews, 598 EDA 2015, Pennsylvania Superior Court. The Pennsylvania Superior Court affirmed the trial court's judgment of sentence on April 15, 2016.

Commonwealth of Pennsylvania v. Maurice Andrews, CP-46-CR-4380-2013, Montgomery County Court of Common Pleas. The court dismissed a Post-Conviction Relief Act ("PCRA") Petition on June 23, 2017.

Commonwealth of Pennsylvania v. Maurice Andrews, 2325 EDA 2017, Pennsylvania Superior Court. The Superior Court affirmed in part and reversed in part the order dismissing the PCRA Petition on September 6, 2018. The Superior Court remanded for further proceedings.

Commonwealth of Pennsylvania v. Maurice Andrews, CP-46-CR-4380-2013, Montgomery County Court of Common Pleas. Following the remand, the trial court dismissed an amended PCRA petition on April 25, 2019.

Commonwealth of Pennsylvania v. Maurice Andrews, 1492 EDA 2019, Pennsylvania Superior Court. The Superior Court affirmed the denial of an Amended PCRA Petition on May 11, 2020.

Maurice Andrews v. District Attorney Montgomery County, et al., Civ. No. 20-04326, United States District Court for the Eastern District of Pennsylvania. The district court adopted the magistrate judge's report and recommendation and denied the habeas petition on January 28, 2022.

Maurice Andrews v. District Attorney Montgomery County, et al., No. 22-1339, United States Court of Appeals for the Third Circuit. The Third Circuit issued an order denying a motion for the issuance of a certificate of appealability on June 21, 2022. The Third Circuit denied a timely application for rehearing on August 24, 2022.

Maurice Andrews v. District Attorney of Montgomery County, Pennsylvania, et al., No. 22A292, Supreme Court of the United States. Justice Alito granted an extension of the time to file a petition for writ of certiorari from November 22, 2022, to December 22, 2022.

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Petitioner Maurice Andrews ("Andrews") respectfully petitions the Court for a writ of certiorari to review the Order of the Third Circuit affirming the denial of his federal habeas petition which he filed under 28 U.S.C. § 2254.

DECISIONS BELOW

The citation to the Third Circuit Order denying the certificate of appealability is *Maurice Andrews v. District Attorney Montgomery County; Superintendent Coal Township SCI; Attorney General of Pennsylvania*, No. 22-1339 (3d Cir. March 9, 2022). It is included in the Appendix at 1a – 3a. The citation to the District Court Order adopting the report and recommendation of the United States Magistrate Judge and denying the habeas petition is *Maurice Andrews v. Montgomery County DA, et al.*, Civ. No. 20-4326, 2022 WL 267589 (E.D.Pa. 2022). The order is included in the Appendix at 4a – 5a. The report and recommendation of the United States Magistrate Judge is included in the Appendix at 6a – 54a. It can also be found at 2021 WL 6753659. Finally, the Third Circuit's Order denying rehearing is included in the appendix at 55a – 56a.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this matter pursuant to 28 U.S.C. § 2554. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Third Circuit denied the motion for the issuance of a certificate of appealability on June 21, 2022. Andrews requested an extension, which was granted, and then filed a timely petition for rehearing on August 3, 2022. The Third Circuit denied the petition for rehearing on August 24, 2022, giving Andrews until November 22, 2022, to file this Petition for Writ of Certiorari. Justice Alito granted an application for an extension and allowed Andrews until December 22, 2022, to file the Petition. This Petition is timely-filed on or before December 22, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF CASE

On October 7, 2014, Petitioner Maurice Andrews was convicted of conspiracy to commit third degree murder, third degree murder, and related charges in the Montgomery County, Pennsylvania Court of Common Pleas. The trial court sentenced Andrews to an aggregate sentence of 35 to 70 years' incarceration. The jury acquitted Andrews of first degree murder and conspiracy to commit first degree murder, but it convicted on third degree murder because trial counsel stood silent while the court provided the jury with incorrect elements for the most important remaining charge of conspiracy to commit third degree murder. Without any possible strategy that could have supported his ineffective performance, trial counsel failed to request the correct instructions for the charge, directly leading to Appellant's wrongful conviction.

The Commonwealth alleged that Andrews and his co-defendant planned a killing and then ambushed the decedent. But this is a case in which the evidence was thin. No forensic or video evidence connected Andrews to the shooting. Instead, there were essentially four parts to the Commonwealth's case. First, the Commonwealth presented the self-serving testimony of a jailhouse informant who had innumerable convictions for *crimen falsi* and pending charges. Second, a co-defendant testified against Andrews. That person also had *crimen falsi* and clearly sought to escape the consequences of the fact that the Commonwealth had overwhelming evidence that he was the one who had committed the shooting in this case. Third, the Commonwealth presented vaguely suspect cell phone records and phone conversations which showed

that Andrews traveled from Pottstown to Harrisburg on the night of the shooting and to Philadelphia a week or so later. Fourth, Andrews allegedly asked his mother to get rid of a gun which may not have had anything to do with this case.

None of this evidence showed that Andrews committed a murder or conspired to commit one. Instead, the evidence overwhelmingly showed that the co-defendant killed the decedent and then sought to pin the murder on Andrews to avoid a life sentence. That co-defendant very clearly realized the strength of the evidence against him as he gave multiple contradictory statements to police. He was successful in this regard due to the deficient performances of Andrews's lawyers.

The verdict and the jury's questions showed that the jury did not accept the Commonwealth's theory of the case. From the beginning, the Commonwealth argued that the defendants specifically agreed to kill the decedent. Accordingly, they were charged with first degree murder and conspiracy to commit first degree murder. The Commonwealth could not prove its theory, and during deliberations, the jurors asked questions which suggested they were strongly considering a mere presence defense. They then rejected the Commonwealth's theory and found Andrews guilty of third degree murder and conspiracy to commit the same rather than first degree murder.

The state courts denied Andrews's direct appeal, and he filed a timely Post-Conviction Relief Act petition alleging that he received the ineffective assistance of counsel. PCRA counsel's performance, however, was similarly deficient. Instead of raising legitimate issues in

state court post-conviction proceedings, PCRA counsel filed a woefully deficient three-page document in which he failed to raise any serious claims. The state courts understandably denied the PCRA petition.

Andrews retained the undersigned counsel and filed a timely habeas petition pursuant to 28 U.S.C. § 2254 alleging that PCRA counsel provided the ineffective assistance of counsel by failing to challenge the similarly deficient performance of his trial counsel. Most importantly, trial counsel was ineffective in failing to ensure that the jury received the correct instruction for conspiracy to commit third degree murder instead of an instruction which provided the wrong *mens rea* and allowed the jury to convict him of all charges for non-criminal conduct. These claims were subject to procedural default. Andrews argued that the default should have been excused pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), because PCRA counsel failed to recognize and raise meritorious claims. Had PCRA counsel done so, Andrews would have received a new trial.

The district court referred the petition to a magistrate judge. The magistrate judge issued a report and recommendation concluding that the petition should be denied on December 22, 2021. Andrews filed timely objections on December 23, 2021. The district court adopted the report and denied the petition on January 28, 2022. Andrews filed a timely notice of appeal and moved for a certificate of appealability. The Third Circuit denied the application for a certificate of appealability on June 21, 2022. Following the grant of an extension, Andrews petitioned for rehearing on August 3, 2022. The Third Circuit denied that petition on August 24, 2022. Justice

Alito granted Andrews an extension to file this Petition on or before December 22, 2022, and this timely Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. Introduction

The Court should grant a writ of certiorari on the issue of whether a habeas petitioner alleging that they received the ineffective assistance of counsel in a state court trial must show prejudice where trial counsel failed to object to incorrect jury instructions which failed to provide the jury with any of the essential elements for the offense. The Court has found that the failure to instruct on one undisputed element for which there was overwhelming evidence does not require a new trial, but the Court left open the question of whether structural error and presumed prejudice result when a trial court provides none of the correct elements. *See Neder v. United States*, 527 U.S. 1 (1999). The Court should grant this petition to resolve that question and find that a petitioner who received none of the correct, essential elements for an offense need not show prejudice in order to obtain a new trial in habeas proceedings premised on a claim of ineffective assistance of counsel.

First, the trial court in fact failed to instruct the jury on any of the correct elements for conspiracy to commit third degree murder. Instead, the trial court made up an entirely novel instruction which criminalized legal conduct. Trial counsel failed to notice and in response to the trial court's egregious error, he did nothing. Following the conclusion of his direct appeals, Andrews retained

post-conviction relief act counsel who likewise failed to notice the error. Instead, that lawyer filed a frivolous three-page petition relating to a potential witness that the trial attorney did not call to testify.

Second, the failure to challenge the erroneous instruction on the part of trial counsel and PCRA counsel led to a structural error so great that it should result in a new trial regardless of whether Andrews can show prejudice. Given the lack of credible evidence presented by the Commonwealth, the lower courts erred in finding that Andrews failed to show prejudice, but even so, this Court has found that some Constitutional errors are so significant that no prejudice or harmless error analysis is necessary. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993) (finding wholly deficient reasonable doubt instruction requires new trial without harmless error analysis on direct appeal); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (holding racial discrimination in selection of grand jury automatically requires reversal even in collateral proceedings). Other types of error require an appellant or habeas petitioner to show that the error affected the outcome of the case, but unlike a trial with no jury instructions, those errors generally do not always result in an unfair trial. *See Chapman v. California*, 386 U.S. 18 (1967); *Neder*, 527 U.S. at 4.

The error that occurred here falls within the narrow class of errors so severe that they amount to structural error and require the reversal of a conviction even in collateral proceedings. A number of State Supreme Courts and the Ninth Circuit have reached this conclusion, and this Court should do the same. Where the jury instructions for a crime fail to correctly provide any of the necessary,

disputed elements of the offense to the jury, a petitioner should not have to show prejudice in order to prevail on a petition under 28 U.S.C. § 2254 because there is no actual jury verdict on which to perform a prejudice analysis. Here, the trial court provided none of the correct elements and allowed the jury to convict Andrews based on lawful conduct, and no one challenged the mistake in state court. Therefore, the Court should issue the writ of certiorari to clarify that a structural error occurred and the lower courts should have presumed that Andrews suffered prejudice.

II. The Jury Instructions Did Not Contain Any of the Correct Elements for Conspiracy to Commit Third Degree Murder

First, the trial court gave two jury instructions for conspiracy to commit third degree murder which were both simply wrong. During the initial charge, the court instructed as follows:

> Now this defendant is also charged with the crime of criminal conspiracy to commit the crime of third degree murder. As I previously instructed you in the context of third degree murder, the Commonwealth doesn't have to prove for third degree murder a specific intent to kill, or even a specific intent to harm. The Commonwealth need only establish a killing with malice. In order to find the defendant guilty of conspiracy to commit third degree murder you must be satisfied that the following elements have been proven beyond a reasonable doubt:

> First, that the defendant agreed with Michael Hinton that one or both of them would isolate, confront or accost Victor Baez in Pottstown in the early morning hours, while unlawfully armed with loaded handguns. Second, that the defendant and Michael Hinton intended to isolate and confront or accost the victim in the early morning hours for the purpose of settling an ongoing feud or for the motive which the Commonwealth alleges here. Third, that the defendant or Michael Hinton committed one or more of the overt acts upon which you unanimously agree in the furtherance of their conspiracy.
>
> Again, for third degree murder, malice is established where the defendant's intentional act indicates that he consciously disregarded an unjustified or an extremely high risk that his actions might cause death or serious bodily harm. If you find that the Commonwealth has proven each of these elements beyond a reasonable doubt then you should find the defendant guilty of conspiracy to commit third degree murder; otherwise, you should find him not guilty.

(N.T. 6/26/14, 188 – 89).

In response to a question from the jury, the court instructed:

> First, that the defendant, Mr. Andrews, agreed with Michael Hinton that one or more of them

> would create an unjustified high risk and knowingly disregarded that risk understanding that their actions might cause death or serious bodily. The evidence that was submitted as it concerns this element was this: It is alleged that Mr. Andrews agreed with Michael Hinton that one or both of them would confront Mr. Victor Baez in Pottstown, Pennsylvania in the early morning hours of March 22nd of year 2013 having been armed with loaded handguns. Second, that the defendant and Michael Hinton shared the intention of creating the unjustified risk – the unjustified risk, ladies and gentlemen, means that persons armed with loaded handguns for the purpose of discussing or confronting any situation with another individual, the Commonwealth submits, creates a high risk that harm and/or death may occur. The third element, that the defendant or Michael Hinton committed one or more overt acts upon which you unanimously agree in furtherance of their conspiracy.

(N.T. 6/26/14, 12 – 13).

Neither of these are the correct jury instruction for conspiracy to commit third degree murder under Pennsylvania law because they both allowed the jury to convict based on lawful conduct. Conspiracy requires an agreement to commit an illegal act, and conspiracy to commit third degree murder requires an agreement to commit a violent illegal act with malice. *See Commonwealth v. Carr*, 227 A.3d 11 (Pa. Super. 2020) (discussing elements of conspiracy to commit third degree

murder and noting requirement of agreement to commit assault); *Commonwealth v. Rodriguez*, 2016 WL 2754022 at *2 (Pa. Super. 2016) (describing elements of conspiracy to commit third degree murder) (unpublished). The trial court should have therefore instructed the jury that it had to find 1) an agreement between the defendants, 2) to commit a violent act with malice (such as a violent assault without caring whether the decedent died), and 3) an overt act in furtherance of the agreement. *See Commonwealth v. Fisher*, 80 A.3d 1186 (Pa. 2013).

The trial court did not instruct the jury properly either time. Instead, the trial court essentially instructed the jury that it needed to find only 1) an overt act, and 2) an agreement to have a discussion with the decedent regardless of whether the defendants acted with malice. More specifically, the first instruction allowed the jury to convict for an agreement to "isolate, confront, or accost." There was no requirement that the defendants commit a violent assault with malice. Likewise, the second instruction was not correct. It did not accurately describe malice as it provided the definition of ordinary recklessness instead. *See Commonwealth v. Domek*, 167 A.3d 761 (Pa. Super. 2017) (trial counsel provided ineffective assistance in failing to object to ordinary recklessness instruction in Aggravated Assault on protected class case); *Commonwealth v. Packer*, 146 A.3d 1281, 1285 (Pa. Super. 2016) (Malice requires "almost certain death or injury.") It also described the alleged evidence for the jury and again allowed for a conviction based on agreeing to "discuss[] or confront[] any situation" while in possession of a firearm.

Obviously, agreeing to discuss a situation with someone while in possession of a firearm is not the same thing as an agreement to commit a violent assault without caring whether or not death occurs. Both versions of the instruction were wrong, and they both allowed for a conviction based on perfectly legal behavior. Neither required malice. The trial court described malice later, but it did not explain how that definition relates to the elements of conspiracy to commit third degree murder. Thus, the instruction was entirely wrong both times. It did not require an agreement to commit a crime – for this charge, a violent assault. It did not require the correct *mens rea* – malice. And it did not require an overt act in furtherance of an agreement to commit a crime.

The charge therefore did not contain any of the elements necessary for a finding of third degree murder. The district court and the Third Circuit erred to the extent they concluded that the instruction was correct or that it was close enough, and trial counsel should have objected. That leaves the question of what legal standard Andrews must meet in order to prevail in a habeas petition based on an ineffective assistance of counsel claim.

III. Structural Error Occurs When a Jury Instruction Contains None of the Correct Elements

Second, in considering whether Appellant received the ineffective assistance of counsel from trial counsel and PCRA counsel, the district court and Third Circuit should have found that Andrews did not have to show prejudice because the instruction did not contain any of the correct elements for the crime charged. This Court should grant the writ of certiorari and find that the failure to give all

of the correct elements for an offense is such a significant structural error that the error requires a finding of presumptive prejudice and the grant of a new trial. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993) (wholly deficient reasonable doubt instruction requires new trial without harmless error analysis); *but see Neder v. United States*, 527 U.S. 1 (1999) (finding harmless error in failure to instruct jury on materiality element where materiality not in dispute); *Baxter v. Superintendent Coal Township SCI*, 998 F.3d 542 (3d Cir. 2021) (partially faulty reasonable doubt instruction did not warrant new trial in collateral proceedings where evidence overwhelming). Essentially, the Court should apply the *Sullivan* standard of structural error for a faulty reasonable doubt instruction that applies on direct appeal to the habeas context because failing to instruct a jury on all of the key elements of an offense is such an egregious error that there can be no confidence whatsoever that a jury properly convicted a defendant. This is true no matter how strong a reviewing court, which did not sit through the trial, finds the evidence to be.

The Court has never squarely addressed this issue with respect to jury instructions on the elements of an offense. The Court, however, has held that a defective reasonable doubt instruction requires reversal on direct appeal where trial counsel has preserved the issue. *Sullivan*, 508 U.S. at 280 ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.") The Court found that the omission of one undisputed element does not require a new trial in *Neder*, but it has never addressed a case in which the instruction contained none of the required elements. Second, the Courts of Appeals

have mostly interpreted *Neder* as requiring prejudice in all collateral challenges to jury instructions, but many State Supreme Courts have recognized the gravity of the error and found structural error. Third, the Court should follow the rationale of *Sullivan* to the logical conclusion that where the jury has not actually reached a verdict, there is no valid conviction on which to perform harmless error or prejudice analysis. Therefore, a habeas petitioner should not have to show prejudice in order to prevail in § 2254 proceedings where the trial court failed to properly instruct the jury on any of the essential elements of an offense. Without receiving a proper instruction on the law, it is impossible for the jury to apply the law to the facts.

The Court's precedents suggest that this level of error should result in a new trial. For example, the Court has recognized that harmless error does not occur when a trial court provides a jury with a constitutionally defective reasonable doubt instruction. *Sullivan*, 508 U.S. at 276. There, the trial judge had instructed the jury using an instruction that had already been found unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990). On direct appeal, the Supreme Court of Louisiana affirmed, finding that although the instruction was constitutionally deficient, harmless error had occurred. *Id.* at 277. The Court granted certiorari and reversed. *Id.* at 281 – 82.

The Court emphasized that the most important element of the Sixth Amendment is "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Id.* at 277. Accordingly, a judge may enter a directed verdict for the defendant where the prosecution fails to introduce sufficient evidence to prove an offense, but a judge may never enter a directed verdict in favor

of the prosecution no matter how strong the evidence. *Id.* The Court applied this requirement against the states. *Id.* at 277 (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

Most importantly, the Due Process Clause requires that the "prosecution bears the burden of proving all elements of the offense charged," and each of those elements must be proven beyond a reasonable doubt. *Id.* at 277 – 78. The Court has always been hesitant to find new categories of structural error, so it acknowledged that harmless error occurs even in the case of many constitutional errors. At the same time, *Sullivan* recognized the "illogic of harmless-error review" in the case of a defective reasonable doubt instruction. *Id.* at 280.

The Sixth Amendment requires "an actual jury finding of guilty," and where there is no proper jury verdict of guilt beyond a reasonable doubt, there "is no object, so to speak, upon which harmless-error scrutiny can operate." *Id.* Appellate speculation about a hypothetical jury's action cannot satisfy the requirement of the Sixth Amendment or else it would also permit a trial judge to enter a directed verdict in favor of the prosecution. *Id.* Where an appellate court must guess as to what a properly instructed jury might have done, the wrong entity has found the defendant guilty. *Id.* at 281. Therefore, such an error is never harmless.

The Court took a step back in *Neder*, which was a case very unlike the present case. There, the Court found that a claim relating to the failure to instruct the jury on one uncontested element of an offense for which there was overwhelming evidence is subject to harmless error review. *Neder*, 527 U.S. at 4. In *Neder*, the defendant was

charged with various federal fraud offenses. The district court erred in failing to instruct the jury that materiality was an element of the offenses charged. *Id.* The Court found that harmless error review applied because the failure to instruct the jury on only one particular element would not always result in an unfair trial. *Id.* at 9.

In *Neder*, for example, the missing element was not actually disputed. *Id.* 16. Neder failed to report over $5 million in income from loans that he obtained, and the failure to report those loans so clearly established materiality that Neder did not even attempt to argue immateriality to the jury. *Id.* Instead, he argued that the loan proceeds were not income because he planned to repay them. *Id.* at 16 – 17. He also argued that he acted without the requisite *mens rea* because he had consulted with an accountant and lawyer and received bad advice. *Id.* Thus, the Court concluded that the reviewing court could properly find harmless error because the sole missing element was not even contested.

Neder did not involve a situation in which a trial court failed to instruct on any of the essential elements of an offense and all of the elements were contested. Instead, it dealt only with a situation in which the missing element was not contested. Nonetheless, Justice Scalia dissented. He emphasized the fact that "the Constitution does not trust judges to make determinations of criminal guilt." *Id.* at 32. Justice Scalia also reached the question left open by the opinion of "how many elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty." Ultimately, allowing a conviction under these circumstances amounts to a directed verdict, and a directed verdict is never

permissible in a criminal case. *Id.* at 37 – 38. Justice Scalia would have still required a finding of prejudice in collateral attacks on convictions, but like the majority opinion, the dissent addressed only the situation in which one uncontested element has been omitted. Here, all of the elements were wrong.

The Ninth Circuit presumed prejudice in a pre-*Neder* habeas case. *See Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995). There, the Ninth Circuit found that failing to instruct the jury on all of the elements of the charge requires automatic reversal. The *Harmon* Court found that where the jury "was free to convict [the defendant] without finding that the State provided any of the requisite elements of the crime[,]" there was no way that the Court could determine the extent to which the convictions were actually affected by the failure to instruct. *Id.* at 966. The Ninth Circuit agreed that the evidence against the defendant was overwhelming, but that did not change the result. The Court concluded: "We cannot judge the defendant guilty; that role is reserved for the jury." *Id.*

Likewise, many State Supreme Courts have reached the same conclusion based on their own State Constitutions. For example, the Wyoming Supreme Court has found that a failure to give an instruction on an essential element of a criminal offense is fundamental error. *See Messer v. State*, 96 P.3d 12, 15 (Wyo. 2004). The Florida appellate courts have reached the same conclusion at least when the error is raised on direct appeal. *Cazeau v. State*, 873 So.2d 528, 529 (Fla. 4th DCA 2004). Michigan has found structural error in failing to instruct on all elements. *See People v. Duncan*, 610 N.W.2d 551 (Mich. 2000). And Kansas applies harmless error analysis but essentially requires a

concession and overwhelming guilt. *State v. Hargrove*, 293 P.3d 787 (Kansas Ct. App. 2013); *see also State v. Shorter*, 945 N.W. 2d 1 (Iowa 2020) (finding prejudice is presumed, but state may try to rebut it). At least three other states have reached similar conclusions. *See Jordan v. State*, 420 P.3d 1143 (Ak. 2018) (omitting *mens rea* element was structural error on plain error review); *Harrell v. State*, 134 So.3d 266 (Miss. 2014) ("We hold that it is always and in every case reversible error for the courts of Mississippi to deny an accused the right to have a jury decide guilt as to each and every element."); *State v. Kousounadis*, 986 A.2d 603 (N.H. 2009) (finding missing element is structural error). Each of these states has recognized that there is no real verdict to analyze when the jury has not been provided with the elements of the offense in question.

Finally, this Court has recognized that the meaning of prejudice may depend on the nature of the claim. For example, the test for prejudice for a *Padilla* claim is different from the test for prejudice in an ordinary *Strickland* claim. Under *Strickland*, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). The Court subsequently found that the failure to advise a defendant of the potential collateral immigration consequences before allowing a defendant to enter into a guilty plea that leads to deportation could amount to the ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356 (2010). The test for prejudice in that context, however, is not whether there is a likelihood that the actual verdict would have been different. *See Lee v. United States*, 137 S.Ct. 1958 (2017). In other words, a petitioner

need not show that they would have won at trial. Instead, the petitioner must show that they would not have entered into the guilty plea had they received accurate advice regarding the potential immigration consequences. If a different standard for showing prejudice based on the ineffective assistance for failure to advise of potential immigration consequences, then certainly a lower standard should apply in a case like this where the jury did not receive the proper elements of a homicide offense.

This case is very different from *Neder* because the trial court failed to properly instruct the jury on any of the elements and reduced the requisite *mens rea*. The jury instruction was not just missing one undisputed element. It was entirely deficient because it did not provide any of the actual elements of the offense charged, so the Court should find presumptive prejudice. It did not require an agreement to commit a crime, the correct *mens rea*, or an overt act in furtherance of the actual agreement to commit a conspiracy.

There is no real difference here between failing to properly define reasonable doubt and giving the jury a pair of instructions that allowed them to convict someone of entering into an agreement to have a confrontation. A confrontation can easily be nothing more than an argument or a discussion; it does not necessarily require an agreement to commit a violent assault with malice, and malice was never defined for the jury in the context of the conspiracy instruction.

Ultimately, the logic of *Sullivan* applies here. When the prosecution obtains a conviction from a jury that has not been instructed on the law, it means that no

one involved in the trial itself has made a decision on whether the prosecution has proven the actual elements of the case. *Sullivan*, 508 U.S. at 280. Jury deliberations are secret, and it is impossible to know what the jurors were thinking when they voted to convict or acquit of various charges. For this reason, inconsistent verdicts are generally allowed.

At the same time, where the jury has not been instructed on any of the elements of the offense and a reviewing court then concludes either that harmless error has occurred or that a habeas petitioner has not suffered prejudice, it means that the reviewing court must make credibility determinations and factual findings that the jurors themselves never made. *Id.* In most cases, as in this one, the reviewing court must perform that function without the benefit of seeing or hearing the actual evidence, making it impossible for the court to make any meaningful determination as to what even a hypothetical properly-instructed jury might have done.

This case illustrates the point. The conviction was based almost entirely on the testimony of a cooperating co-defendant who admitted to a conspiracy to commit murder in order to save himself from an inevitable life sentence. The jurors acquitted of first degree murder and conspiracy to commit first degree murder, so it is likely that they did not fully believe the testimony of that witness. Indeed, the jury received a special instruction to view that testimony with skepticism because the witness was an accomplice in the crime charged. That instruction was wrong and not objected to, also, but the jury was advised to receive the testimony with caution.

The district court and the Third Circuit, however, concluded that Andrews failed to show prejudice from the improper instruction because the evidence, if believed, supported the conviction. Those courts, however, did not have the benefit of hearing or seeing the witness. Thus, the reviewing courts concluded that Andrews definitely would have been convicted even had he received a correct instruction despite the fact that the courts had absolutely no way of actually assessing the credibility of the key witness or much of the other evidence.

Where a jury instruction is relatively close or the missing element or elements are not in dispute, it is reasonable to respect the jury's verdict and require a petitioner to show prejudice in the context of an ineffective assistance of counsel claim. That is the point this Court made in *Neder* because in that case, there is a jury verdict to respect. It is not unreasonable to let the judge make a decision on an uncontested element. That type of decision usually requires a colloquy of the defendant, but the absence of such a colloquy may not be such a big deal.

But the situation is entirely different where the jury did not receive any of the correct elements. Just as in the case of a faulty reasonable doubt instruction, there is no way for a reviewing court to determine that the petitioner did not suffer prejudice or analyze what the jury would have found had it been provided with the correct elements. A petitioner who did not receive any of the correct elements of the offense simply has not been convicted of the offense, so there is there "is no object, so to speak, upon which harmless-error scrutiny can operate." *Neder*, 527 U.S. at 280. Ultimately, harmless error analysis or requiring prejudice, depending on the

context of the challenge, makes sense when the error is not such that it would always render the trial unfair. *See Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017) (requiring showing of prejudice for habeas petitioner claiming ineffective assistance of counsel in failing to object to public trial violation). That analysis does not make any sense, however, "if the error always results in fundamental unfairness." *See id.* (citing *Sullivan*, 508 U.S. at 278 – 89, *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Vasquez v. Hillery*, 474 U.S. 256 (1986)). Even as the *Weaver* Court rejected the public trial challenge in the context of an ineffective assistance of counsel claim, it did note that "prejudice can be shown by a demonstration of fundamental unfairness." The dissent, however, persuasively argued that *Strickland* should not be read as requiring "defendants to prove what this Court has held cannot be proved," and so an error that would be structural on direct appeal should likewise result in presumed prejudice for an ineffective assistance of counsel claim.

This is an important issue which merits review. "The right to trial by jury reflects, we have said, 'a profound judgment about the way in which law should be enforced and justice administered.'" *Sullivan*, 508 U.S. at 281 (citing *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Many state appellate courts and highest courts disagree with the current state of the case law in the Circuit Courts of Appeals, and this Court has not provided a conclusive answer. This case also presents an excellent vehicle for resolving the issue given the extent to which the instructions were egregiously wrong.

In this case, the trial court has entered an order finding Andrews guilty and signed a judgment of sentence, but none of the fact finding necessary for a conviction has occurred because the jury was not properly instructed to do that fact finding. In such a case, where all of the elements are missing and the instruction is so egregiously wrong, a conviction cannot stand. There is no excuse for failing to object under those circumstances, and having a lawyer who allows the trial judge to instruct the jury that it may convict without finding that the government has proven any of the elements of the offense is akin to having no lawyer at all. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (total denial of right to counsel requires new trial); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial conducted by biased judge requires new trial). Accordingly, the Court should grant the petition for writ of certiorari to clarify that when a trial court convicts a criminal defendant of a specific offense without providing any of the necessary instructions for the offense, the structural error that necessarily follows is so great that the defendant need not show prejudice in a habeas proceeding.

CONCLUSION

For the foregoing reasons, Petitioner Maurice Andrews respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 21, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 22-1339

MAURICE ANDREWS,

Appellant

v.

DISTRICT ATTORNEY MONTGOMERY COUNTY;
SUPERINTENDENT COAL TOWNSHIP SCI;
ATTORNEY GENERAL OF PENNSYLVANIA

(E.D. Pa. Civ. No. 2:20-cv-04326)

Present: AMBRO, SHWARTZ, and BIBAS, *Circuit Judges*

Submitted are:

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

(2) Appellees' response

in the above-captioned case.

Respectfully,
Clerk

Appendix A

ORDER

Appellant's request for a certificate of appealability ("COA") is denied because jurists of reason would not debate the denial of his claims. *See* 28 U.S.C. § 2253(c)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We make that determination largely for the reasons explained by the Magistrate Judge. We add only one comment on appellant's first claim that trial counsel should have objected to the trial court's instruction on conspiracy to commit third-degree murder. Appellant takes issue, inter alia, with portions of the instructions that referred to an agreement between appellant and Michael Hinton to "isolate, confront or accost" and to "confront" the victim. Appellant argues that the instructions were deficient because these activities are not necessarily illegal. But the relevant question is whether appellant and Hinton agreed on conduct that satisfies the definition of third-degree murder. *Commonwealth v. Fisher*, 80 A.3d 1186, 1191, 1195 (Pa. 2013). The only evidence of any agreement between appellant and Hinton was that the two armed themselves and then went to Brian's Café because appellant said that he wanted to kill the victim, which appellant then did. (N.T., 6/26/14, 144–45.) That evidence showed an agreement to commit conduct that constituted at least third-degree murder, and there was no evidence from which the jury could have found that appellant and Hinton agreed on conduct that would *not* constitute third-degree murder. Thus, jurists of reason would not debate whether trial counsel had any basis to object to these instructions or whether appellant was prejudiced.

Appendix A

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: June 21, 2022

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DATED JANUARY 28, 2022

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

CIVIL ACTION

NO. 20-4326

MAURICE ANDREWS,

Petitioner,

v.

MONTGOMERY COUNTY DA, *et al.*,

Respondents.

ORDER

AND NOW, this 28th day of January 2022, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus (ECF No. 1), the Montgomery County's District Attorney's Response (ECF No. 15), Petitioner's Reply (ECF No. 16), and after review of United States Magistrate Judge Scott W. Reid's Report and Recommendation (ECF No. 18), and Petitioner's Objections to the Report and Recommendation (ECF No. 19), **IT IS HEREBY ORDERED AND DECREED** that:

Appendix B

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

2. The Petition for Writ of Habeas Corpus is **DENIED** with prejudice;

3. There is no probable cause to issue a certificate of appealability; and

4. The Clerk of the Court shall mark this case as **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Petrese B. Tucker

_____

Hon. Petrese B. Tucker, U.S.D.J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED DECEMBER 21, 2021

IN THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

20-4326

MAURICE ANDREWS,

v.

MONTGOMERY COUNTY DA, *et al.*

REPORT AND RECOMMENDATION

SCOTT W. REID
UNITED STATES MAGISTRATE JUDGE

DATE: DECEMBER 21, 2021

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, on behalf of Maurice Andrews, who is currently incarcerated at the State Correctional Institution at Coal Township. He seeks habeas relief based upon five claims. For the reasons that follow, I recommend that the petition for habeas corpus be **DENIED**.

Appendix C

I. Factual and Procedural Background

On June 27, 2014, Maurice Andrews ("Andrews" or "Petitioner") was convicted of third-degree murder, conspiracy to commit third-degree murder, possessing a firearm without a license, and criminal trespass. *Commonwealth of Pennsylvania v. Maurice Andrews*, CP-46-CR-0004380-2013, Crim. Dkt. at 2. The Pennsylvania Superior Court reproduced the trial court's summary of the facts underlying Andrews' conviction as follows:

> "[A]t approximately 1:30 a.m. on March 22, 2013, [Andrews] and his cousin and co-conspirator—Michael Romain Hinton—arrived in the vicinity of Brian's Café, a bar located in Pottstown, Montgomery County, Pennsylvania, with the purpose of confronting Victor "Short Man" Baez. [Andrews] was armed with a 9 [ ] mm Glock handgun, and Hinton was armed with a .357 Smith & Wesson revolver. The pair lay in wait for [Baez], ambushing him when he exited the bar shortly after 2:00 a.m. While [Baez] struggled with Hinton for control of Hinton's revolver, [Andrews] shot [Baez] five times, killing him. Hinton was also hit by [Andrews'] gunfire and was wounded in the leg and hand.
>
> Hinton's .357 Smith & Wesson revolver was discovered lying next to the body of [Baez]. [Andrews'] 9[ ]mm Glock was never recovered. [Andrews] and Hinton fled the scene separately.

> The wounded Hinton was apprehended several hours later on the streets of Pottstown and was transported to Reading Hospital, following which he gave several statements to police in which he implicated [Andrews] as the shooter. [Andrews] left the area following the shooting, and was ultimately arrested in Philadelphia at the home of his Aunt—Danielle "Dee" White—on April 18, 2013. It was the Commonwealth's theory of the case that [Baez] was murdered because [Andrews] had previously engaged in a botched robbery and kidnapping of [Baez's] nephew, and [Andrews] was afraid that [Baez] planned to retaliate against him."

Commonwealth v. Andrews, 145 A.3d 781, 2016 WL 1545593 at *1 (Pa. Super. 2016).

At trial, the Commonwealth presented evidence that:

> "Andrews armed himself with a 9 mm Glock, laid in wait for Baez outside of Brian's Café, and then shot Baez several times. Hinton's testimony detailed how he and Andrews acquired firearms and travelled to Brian's Café with the intention of ambushing Baez. N.T. Trial, 6/25/14, at 142-44. Hinton also testified that Andrews had told him that he was scared that Baez was going to retaliate against him after his failed robbery of Baez's nephew. *Id.* at 139-41. Finally, Hinton described how, when

Baez emerged from Brian's Café, Andrews shot him several times with a 9 mm Glock. *Id.* at 147.

Hinton's testimony was largely corroborated by the Commonwealth's other witnesses. Benjamin Alford, a prisoner on Andrews' cellblock, testified about a conversation he had with Andrews after his arrest. *See id.* at 68-54. Alford testified that Andrews told him that a man named "Vic" had been looking to retaliate against Andrews after Andrews' failed robbery attempt on his nephew. *Id.* at 61-63. Alford then related Andrews' statements about how he waited for "Vic" outside of a bar in Pottstown with his cousin and then shot "Vic" several times. *Id.* Saquanna Harrell, a cousin of Hinton, testified that she took a bus trip with Hinton and Andrews from Norristown to Pottstown on the night Baez was murdered. N.T. Trial, 6/24/14, at 147. Harrell also testified that Andrews led her and Hinton to an abandoned house, where Andrews armed himself and Hinton with firearms. *Id.* at 155-57.

In addition, the Commonwealth also presented telephone records establishing that Andrews' cell phone was in the vicinity of Brian's Café both shortly before and after Baez's death. N.T. Trial, 6/26/14, at 39-45. Several 9 mm shell casings were found at the scene of the murder and a 9 mm bullet was recovered from Baez's

> body. Additionally, Andrews' aunt, Dee White, testified that she observed Andrews with a handgun that was similar in appearance to a 9 mm Glock shortly after the murder. N.T. Trial, 6/25/14, at 41-43."

145 A.3d 781, [WL] at *6.

On October 7, 2014, Andrews was sentenced to an aggregate term of thirty-five to seventy years' incarceration, including consecutive sentences of twenty to forty years' incarceration for third-degree murder and fifteen to thirty years for conspiracy to commit third-degree murder, as well as a concurrent sentence of one to two years for firearms not to be carried without a license.[1] *Id.* at 2. On October 15, 2014, Andrews, through counsel, filed a timely post-sentence motion which was denied by the trial court on February 6, 2015. *Id.* Andrews then appealed his conviction to the Superior Court of Pennsylvania. *Id.* The Superior Court affirmed the trial court's decision in an unpublished opinion on April 15, 2016. *See generally id.* Andrews did not appeal to the Pennsylvania Supreme Court.

---

1. Andrews was also sentenced to one to two years' incarceration for possession with intent to distribute and one to two years' incarceration for possession of a firearm with an obliterated serial number. These sentences stemmed from guilty pleas entered by Andrews and were ordered to run consecutively to his sentences for third-degree murder and conspiracy to commit third-degree murder, bringing his total aggregate sentence to thirty-seven to seventy-four years' incarceration. N.T. 10/7/14 at 32.

Appendix C

On February 15, 2017, Andrews filed a counseled and timely Post-Conviction Relief Act ("PCRA") petition pursuant to 42 Pa. C.S.A. §§ 9541-9546. Crim. Dkt. at 18. In his PCRA petition, Andrews alleged that trial counsel erred by: failing to properly preserve the issue on appeal of whether the sentence was excessive by not filing a 2119(f) statement[2] or raising a substantial question; not requesting a jury instruction on voluntary manslaughter; and failing to interview Mark White, a potential witness who had previously provided statements which tended to disprove or contradict the Commonwealth's theory of motive and testimony of some of the Commonwealth's witnesses. The PCRA court denied Andrews' petition without a hearing. Crim. Dkt. at 19. Andrews appealed the PCRA court's decision to the Superior Court which affirmed in part and vacated in part on September 6, 2018. *Id.* at 20. Andrews then filed an amended PCRA petition on December 6, 2018. *Id.* at 21. The PCRA court held an evidentiary hearing and again denied Andrews' PCRA petition on April 25, 2019. *Id.* at 22. On May 21, 2019, Andrews filed a timely notice of appeal to the Superior Court. *Id.* at 23. Almost a year later, on May 11, 2020, the Superior Court affirmed the denial of Andrews' PCRA petition. *Commonwealth v. Andrews*, 2020 Pa.

2. Rule 2119(f) of the Pennsylvania Rules of Appellate Procedure requires that "[a]n appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in a separate section of the brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of the sentence." 210 Pa. Code Rule 2119(f).

Super. Unpub. LEXIS 1551, 2020 WL 2315610 (Pa. Super. 2020). Andrews did not seek allowance of appeal in the Pennsylvania Supreme Court.

Andrews timely filed the present petition for habeas corpus relief on September 4, 2020, requesting that this Court reverse his conviction and order the Commonwealth to either re-try him or release him (doc. 1) ("Hab. Pet."). He argues the following five grounds for relief: (1) "PCRA counsel was ineffective in state post-conviction proceedings in failing to claim that trial counsel was ineffective when he failed to object to a flawed jury instruction with respect to conspiracy to commit third degree murder"; (2) "PCRA [counsel] also failed to raise the issue that trial counsel was ineffective in failing to object when the trial judge told the jury that the Commonwealth's evidence would support a conviction in response to a hypothetical question"; (3) "ineffective assistance of counsel when trial counsel failed to object to the judge informing the jury that Mr. Hinton was [his] accomplice as a matter of law"; (4) "PCRA counsel was ineffective in failing to raise the issue that trial counsel should have requested a self-defense or defense of others jury instruction"; and (5) "trial counsel was ineffective in failing to raise the issue of voluntary manslaughter". *Id.* at 23-24.

II. Legal Standard

A. The AEDPA Standard of Review

Only one of Petitioner's habeas claims was reviewed on the merits in the state courts and as such, it must now be evaluated under a deferential standard of review

established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, this Court's review is limited in nature and relief may only be granted if: (1) the State courts' adjudication of the claim "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

A state court's adjudication of a claim is contrary to Supreme Court precedent if the state court applied a rule that contradicts the governing law set forth by the Supreme Court or if the state court confronts a set of facts which are materially indistinguishable from a decision of the Supreme Court and the state court arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision constitutes an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule but unreasonably applies it to the facts of the case. *Id.* at 407-08.

State court factual determinations "are presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (*citing* 28 U.S.C. § 2254(e)(1)). Thus, federal courts are faced with a "difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131

S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (internal quotations omitted).

B. Procedural Default

Petitioner also raises four claims which he admittedly failed to raise in state court. Hab. Pet. at 42. He concedes that these claims are procedurally defaulted but argues that this Court should excuse this procedural hurdle. *Id.*

A habeas petitioner must exhaust all available state court remedies before seeking federal habeas relief, "thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004); *see also* 28 U.S.C. § 2254(b)(1)(A). If a petitioner has failed to exhaust his state court remedies and the state court would now refuse to review the claim based on a state procedural rule, then the claim is procedurally defaulted. *See Davila v. Davis*, 137 S. Ct. 2058, 2064, 198 L. Ed. 2d 603 (2017); *Coleman v. Thompson*, 501 U.S. 722, 731-32, 735 n.1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

A habeas claim also is procedurally defaulted if the state court's decision rests "upon a state-law ground that 'is independent of the federal question and adequate to support the judgement.'" *Cone v. Bell*, 556 U.S. 449, 465, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009) (citations omitted).

A federal court may, however, consider a procedurally defaulted claim if a petitioner demonstrates: (1) a legitimate cause for the default and actual prejudice from

the alleged constitutional violation; or (2) a fundamental miscarriage of justice from a failure to review the claim. *Coleman*, 501 U.S. at 750.

Because Petitioner can no longer raise any of his five claims in state court, his claims are procedurally defaulted. *See id.* at 735 n.1; 42 Pa. C.S. § 9545(b) (PCRA petition "shall be filed within one year of the date the judgment becomes final"); *Trevino v. Thaler*, 569 U.S. 413, 421, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) (a conviction that rests upon a defendant's state law "procedural default," such as a failure to raise a claim of error at the time or in the place that state law requires, constitutes independent and adequate state ground); *Savath v. Capozza*, No. 18-CV-3398, 2019 U.S. Dist. LEXIS 91486, 2019 WL 4308640, at *6 (E.D. Pa. May 29, 2019) (failure to timely file a brief under state procedural rules constituted independent and adequate state court grounds to warrant procedural default).

Petitioner contends that the defaults were caused by the ineffectiveness of his PCRA counsel. *See Hab. Pet.* at 42. Counsel's failure to raise a claim in state court may establish cause for a procedural default if the petitioner raised the ineffectiveness claim in the state courts or the petitioner can show cause for failing to raise it. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000); *Martinez v. Ryan*, 566 U.S. 1, 8, 13-14, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

Furthermore, even if PCRA counsel was the cause for Petitioner's failure to assert that his trial and appellate counsel were ineffective, Petitioner must show that his

ineffectiveness claims have "some merit." *Martinez*, 566 U.S. at 14, 17-18; *see also Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 377 (3d Cir. 2018) (A claim has some merit if "reasonable jurists could debate" over its merit or the claim "is 'adequate to deserve encouragement to proceed further.'") (*citing Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

Petitioner can also establish that a fundamental miscarriage of justice would take place should his claims not be considered. *See Schlup v. Delo*, 513 U.S. 298, 321-24, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). To establish a fundamental miscarriage of justice, a petitioner must present "new reliable evidence" of his actual innocence, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence". *Id.* at 324.

C. Standard for Ineffective Assistance of Counsel

For claims of ineffective assistance of counsel, federal habeas petitioners must establish: (1) deficiency, meaning "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner must satisfy both prongs to prevail.

When assessing the first prong of *Strickland*, the court should make every effort to "eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Moreover, the court must be "highly deferential" and "indulge a strong presumption" that counsel's challenged actions were strategic. *Id.* The question is not whether counsel was prudent, appropriate, or perfect. *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). Rather, the focus is on ensuring the proceedings resulting in a petitioner's conviction and sentence were fair. *Strickland*, 466 U.S. at 684-85.

In evaluating the prejudice prong, the relevant inquiry is whether there is a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *Strickland*, 466 U.S. at 694; *see also Smith v. Robbins*, 528 U.S. 259, 284, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000) (prejudice turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed").

III. Discussion

A. Ground One — Ineffective Assistance of Counsel Regarding the Failure to Ensure That Petitioner Received the Correct Instruction for Conspiracy to Commit Third-Degree Murder

Petitioner asserts that PCRA counsel was deficient during his collateral appeal for failing to raise an ineffective assistance of trial counsel claim on the grounds that trial counsel did not object to the trial court's jury

instructions for the charge of conspiracy to commit third-degree murder. Hab. Pet. at 25. He argues that trial counsel's failure to object allowed the jury to convict without evidence that he entered into an agreement to commit a crime. *Id.* at 24-25. The first instruction Petitioner disputes was delivered by the trial court as follows:

> Now this defendant is also charged with a crime of criminal conspiracy to commit the crime of third degree murder. As I previously instructed you in the context of third degree murder, the Commonwealth doesn't have to prove for third degree murder a specific intent to kill, or even a specific intent to harm. The Commonwealth need only establish a killing with malice. In order to find the defendant guilty of conspiracy to commit third degree murder you must be satisfied that the following elements have been proven beyond a reasonable doubt:
>
> *First, that the defendant agreed with Michael Hinton that one or both of them would isolate, confront or accost Victor Baez in Pottstown in the early morning hours, while unlawfully armed with loaded handguns. Second, that the defendant and Michael Hinton intended to isolate and confront or accost the victim in the early morning hours for the purpose of settling an ongoing feud or for the motive which the Commonwealth alleges here.* Third, that the defendant or Michael Hinton committed one or more of the overt acts upon which you

> unanimously agree in furtherance of their conspiracy.
>
> Again, for third degree murder, malice is established where the defendant's intentional act indicates that he consciously disregarded an unjustified or an extremely high risk that his actions might cause death or serious bodily harm. If you find that the Commonwealth has proven each of these elements beyond a reasonable double then you should find the defendant guilty of conspiracy to commit third degree murder; otherwise, you should find him not guilty.

(N.T. 6/26/14, 188-89) (emphasis added).

Petitioner further argues that the trial court "gave a totally different instruction in response to a jury question which also did not reflect the law." *Id.* at 25. There, the trial court gave the following response to the jury's question:

> First, that the defendant, Mr. Andrews, agreed with Michael Hinton that one or more of them would create an unjustified high risk and knowingly disregarded that risk understanding that their actions might cause death or serious bodily injury.
>
> The evidence that was submitted as it concerns this element was this: It is alleged that Mr. Andrews agreed with Michael Hinton that

> one or both of them would confront Mr. Victor Baez in Pottstown, Pennsylvania in the early morning hours of March 22nd of year 2013, having been armed with loaded handguns.
>
> *Second, that the defendant and Michael Hinton shared the intention of creating the unjustified risk — the unjustified risk, ladies and gentleman, means that persons armed with loaded handguns for the purpose of discussing or confronting any situation with another individual, the Commonwealth submits, creates a high risk that harm and/or death may occur.* The third element, that the defendant or Michael Hinton committed one or more overt acts upon which you unanimously agree in furtherance of their conspiracy.
>
> The third element, that the defendant or Michael Hinton committed one or more over acts upon which you unanimously agree in furtherance of their conspiracy.

(N.T. 6/26/14 at 12 – 13) (emphasis added).

Petitioner contends that the trial court gave two incorrect jury instructions and that his due process rights were violated because the instructions relieved the Commonwealth of its burden of proving every element of the crime beyond a reasonable doubt. *Id.* at 25 - 27. The Commonwealth responds that Petitioner is not entitled to relief because his claim is meritless and cannot overcome procedural default. Commonwealth Answer at 27. (doc. 15).

I agree with the Commonwealth that this claim has no merit, and that the procedural default cannot be excused.

a. Petitioner's Claim is Without Merit

Petitioner acknowledges that this claim is procedurally defaulted because it was never presented and cannot now be presented to the state courts. Hab. Pet. at 21. He argues, however, that the default should be excused under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). *Id.* In *Martinez*, the Supreme Court recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. Following *Martinez*, the Third Circuit provided that where state law, like the law of the Commonwealth, "requires a prisoner to raise claims of ineffective assistance of trial counsel in a collateral proceeding, rather than on direct review, a procedural default on those claims will not bar their review by a federal habeas court if three conditions are met: (a) the default was caused by ineffective assistance of post-conviction counsel or the absence of counsel (b) in the initial-review collateral proceeding (i.e., the first collateral proceeding in which the claim could be heard) and (c) the underlying claim of trial counsel ineffectiveness is 'substantial.'" *Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 376 (3d Cir. 2018) (*quoting Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014) (*quoting Martinez*, 566

U.S. at 14)). Here, Petitioner fails to satisfy the necessary elements to overcome procedural default.

To begin, the second prong is satisfied because PCRA counsel did not raise the ineffectiveness claim before the PCRA court, which was the "first collateral proceeding in which the claim could be heard[.]"[3] *Cox*, 757 F.3d at 119; *see also Preston*, 902 F.3d at 377 ("The second *Cox* requirement is also satisfied here, as PCRA counsel failed to raise the [ ] claim in the initial-review collateral proceedings before the Court of Common Pleas."). Thus, we are left to evaluate the first and third prongs of *Cox*. Because Petitioner's claim that his PCRA counsel's assistance was ineffective stems from the strength of his underlying ineffective assistance of trial counsel claim, we consider the third *Cox* requirement first.

To satisfy the third *Cox* requirement, the petitioner must demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is substantial. In other words, the petitioner must demonstrate that "the claim has some merit." *Cox*, 757 F.3d at 119. In *Martinez*, the Court relied on *Miller–El v. Cockerell*, suggesting that we apply the standard for issuing certificates of appealability in resolving the inquiry into what constitutes a "substantial" claim. Thus, whether a claim is "substantial" is a threshold inquiry that "does not require full consideration of the factual or legal bases adduced in support of the claims."

3. Under Pennsylvania law, claims of trial counsel's ineffectiveness should be brought on collateral review rather than direct appeal. *See Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 738 (Pa. 2002).

Preston, 902 F.3d at 377. With this framework as our guide, we can now turn to an analysis of Petitioner's ineffective assistance of counsel claim.

To prove ineffective assistance of counsel under *Strickland*, a petitioner must prove "(1) that his counsel's performance was deficient, that is, it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced his client," i.e., 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 669. We have previously referred to these as the "performance" and "prejudice" prongs of the *Strickland* test. Generally, trial counsel's stewardship is constitutionally deficient if he or she "neglect[s] to suggest instructions that represent the law that would be favorable to his or her client supported by reasonably persuasive authority" unless the failure is a strategic choice. *Everett v. Beard*, 290 F.3d 500, 514 (3d Cir. 2002).

In examining the instruction here, I am guided by two important legal principles: (1) that the trial court "has broad discretion in phrasing jury instructions, and may choose its own wording as long as the law is clearly, adequately and accurately presented to the jury for its consideration." *Commonwealth v. Chambers*, 546 Pa. 370, 685 A.2d 96, 102 (Pa. 1996) (citation omitted); and (2) that this Court must consider jury instructions in the context of the overall charge as opposed to viewing them "in artificial isolation." *Bey*, 856 F.3d at 240 (3d Cir. 2017) (citations omitted). Viewing the instruction as a whole,

I do not find that trial counsel was ineffective for failure to object to the jury instruction at issue.

The trial court began its charge by describing the elements of first-degree and third-degree murder. (N.T. 6/26/14 at 177). While instructing the jury on third-degree murder, the trial court explained that:

> The Commonwealth must prove to you beyond a reasonable doubt, one that the victim, Victor Bonilla-Baez, is dead; two, that Maurice Andrews killed the victim; and, three, that the killing was committed with malice.
>
> Third degree murder is any killing committed with malice. Unlike the crime of first degree murder there is no requirement for the specific intent to kill, or even a specific intent to harm the victim. Again, for a murder of the third degree a killing is with malice if the perpetrator's action show his deliberate and willful negligent of an unjustified and extremely high risk that his conduct would result in death or serious bodily injury to another person.
>
> In this form of malice the Commonwealth need not prove that the perpetrator specifically intended to kill another. The Commonwealth must prove however that he took action while consciously, with knowingly disregard the most serious risk he was creating, and that by his disregard of that risk he demonstrated his

> disregard his extreme unconcern for the value of human life. Malice may be inferred from all of the circumstances surrounding the defendant's conduct and may be inferred from the use of a deadly weapon on the vital part of the body of another.
>
> Again, because specific intent is not an element of third degree murder, the Commonwealth need not have proven that it was the defendant's specific intention that Mr. Baez be killed in order for him to be convicted of third degree murder.

Id. at 180-182. This instruction properly set forth the elements of third-degree murder and instructed the jury that in order to convict, it needed to find that Petitioner acted with malice. *See* 18 Pa.C.S. § 2502(c).

Next, the court explained the concept of criminal conspiracy to the jury. Importantly, and contrary to Petitioner's argument, the trial court explained multiple times that a criminal conspiracy is an agreement between two or more people to commit a crime. The court explained:

> Mr. Andrews is charged with two counts of criminal conspiracy. He's charged with conspiring with Michael Hinton to commit the crime of first degree murder and conspiring with Mr. Hinton to commit the crime of third degree murder. In general terms, ladies and gentlemen, a criminal conspiracy is an

agreement with two or more persons to commit a crime. A conspiracy exists once two conditions are met: One, that there is an agreement, and one of the members then commits some act to help achieve the goal of the conspiracy.

So now let me explain each of the elements in greater detail. The first element of the conspiracy, as I mentioned is that there has to be an agreement. It can be stated in words, or unspoken but acknowledged. But it must be an agreement in the sense that two or more people have come to an understanding that they agree to act together to commit a crime or crimes. Their agreement does not have to cover the details of how the crime will be committed, nor does the agreement have to call for both of them to participate in actually committing the crime. They can agree that one of them will do the job. What is necessary is that the parties do agree. In other words, they do come to a firm common understanding that a crime will be committed.

Although the agreement itself is the essence of conspiracy, a defendant cannot be convicted of conspiracy unless he or his fellow conspirator does something more, an overt act in furtherance of the conspiracy. The overt act is an act by any member of the conspiracy that would serve to further the goal of the conspiracy. The overt act can be a criminal or noncriminal act in itself as long as it is designed to put the conspiratorial agreement into effect. This is to

show that the parties have a firm agreement and are not just thinking, or talking about committing a crime. The overt act shows that the conspiracy has reached the action stage. If the conspirator actually commits or attempts to commit the agreed upon crime, that obviously would be an overt act in the furtherance of the conspiracy. But a small act or step that is much more preliminary and a lot less significant can [satisfy] the overt act requirement. The Commonwealth of Pennsylvania may prove a conspiracy by direct evidence or circumstantial evidence. People who conspire often do their conspiring secretly and try to cover up afterwards.

In many conspiracy trials circumstantial evidence is the best or the only evidence on the question of whether or not there was an agreement that is, a common understanding, and whether the conspirator shared the intent to promote or facilitate commit the object crime. Thus, you may if you think it proper infer that there was a conspiracy from the relationship, the conduct, and the acts of the defendant and his alleged co-conspirator, and the circumstances surrounding their activity. However, the evidence of this support — the evidence of this must support your conclusion beyond a reasonable doubt.

A defendant cannot be convicted of criminal conspiracy simply because he knew what the

> other or others planned or were doing. There must be proof of an agreement between the defendant and the other person or persons to form or continue a conspiracy. To be proved guilty of being a conspirator the defendant must have intended to act jointly with the other members of the conspiracy and must have intended that the crime or crimes alleged to be the goal of the conspiracy would be committed.

Id. at 182-185.

Before instructing the jury on the particular conspiracy charges, the trial court explained that Petitioner was charged with the crime of conspiring with Michael Hinton to commit murder in the first-degree as well as conspiring with Hinton to commit murder in the third-degree. *Id.* at 185. Specifically, the trial court informed the jury that to convict the defendant of criminal conspiracy it must unanimously agree that:

> One, the same person with whom the defendant allegedly conspired, the Commonwealth alleges here that was Michael Hinton; two the same object crime. Here the Commonwealth contends that there is a conspiracy to commit first degree murder and a conspiracy to commit third degree murder. And, three, the same overt act or acts undertaken in furtherance of the object crime.
>
> In this case, the Commonwealth has charged Mr. Maurice Andrews as having conspired with

> Michael Hinton to commit the crimes of first degree and third degree murder. *First degree murder and third degree murder are thus the alleged object crimes of the conspiracy in this case.*

Id. at 185-186. (emphasis added). Thus, the trial court again instructed the jury that the object of the conspiracy must be a crime, and one such crime was the crime of third-degree murder, which it had already correctly defined to the jury.

Finally, the trial court instructed the jury on the conspiracy to commit third-degree murder charge, *see supra* at 9, — which Petitioner contends, did not present the correct elements of the charge and allowed the jury to convict Petitioner "based on an agreement which would not even involve an illegal act." Hab. Pet. at 46.

Viewing the jury instructions in their entirety, I cannot find that trial counsel was ineffective for not objecting to the conspiracy to commit third-degree murder instruction. It is undisputed that the trial court gave the correct instructions for criminal conspiracy and third-degree murder. The trial court also instructed the jury that a conspiracy is an agreement to commit a crime. It told the jury this numerous times. Therefore, Petitioner's contention that the instruction criminalized "perfectly legal" behavior is unavailing. Moreover, the instruction accurately conveys the law for conspiracy to commit third-degree murder in the Commonwealth. Conspiracy to commit third-degree murder requires an

agreement to commit an intentional act, characterized by malice, that results in death, intended or not. *Fisher*, 80 A.3d at 1191. Here, the jury charge instructed the jurors of a motive, an agreement, an intentional act, and a killing with malice. I therefore do not find that the instruction was incorrect and thus cannot find that Petitioner's trial counsel's performance was deficient under *Strickland*.

Concomitantly, Petitioner contends "that the trial court gave a totally different instruction in response to a jury question which also did not reflect the law." Hab. Pet. at 46. Responding to a jury question, the trial court read the following:

> First, that the defendant, Mr. Andrews, agreed with Michael Hinton that one or more of them would create an unjustified high risk and knowingly disregarded that risk understanding that their actions might cause death or serious bodily injury.
>
> The evidence was submitted as it concerns this element was this: It is alleged that Mr. Andrews agreed with Michael Hinton that one or both of them would confront Mr. Victor Baez in Pottstown, Pennsylvania in the early morning hours of March 22nd of year 2013, having been armed with loaded handguns.
>
> Second, that the defendant and Michael Hinton shared the intention of creating an unjustified risk — the unjustified risk, ladies

> and gentlemen, means that persons armed with loaded hand guns for the purpose of discussing or confronting any situation with another individual, the Commonwealth submits, creates a high risk that harm and/or death may occur.
>
> The third element, that the defendant or Michael Hinton committed one or more overt acts upon which you unanimously agree in furtherance of their conspiracy.

(N.T. 6/26/14 at 12-13).

Contrary to Petitioner's contention, this was not a "totally different instruction" for conspiracy to commit third-degree murder. Instead, to answer the jury's question, the trial court explained the charge in more detail by contextualizing the instruction with the facts presented at trial. The court still instructed the jury that it needed to find an agreement, shared intent, and an overt act in furtherance of the conspiracy. *See* 18 Pa.C.S. § 903(a), (a)(1). The elements of the crime charged remained the same and reflected the applicable law.

Moreover, the court did not reduce the *mens rea* for third-degree murder as Petitioner suggests, rendering his *Domek* argument inapplicable. The trial court properly instructed the jury that it needed to find that Petitioner and Michael Hinton agreed that "one or more of them would create an unjustifiable high risk and knowingly disregard that risk understanding that their actions might cause death or serious bodily injury." (N.T. 6/26/14 at 12).

This instruction is entirely consistent with the definition of malice under Pennsylvania law. *See Commonwealth v. Packer*, 2016 PA Super 143, 146 A.3d 1281, 1285 (Pa. Super. 2016) (*citing Commonwealth v. Kling*, 1999 PA Super 110, 731 A.2d 145, 147-48 (Pa. Super. 1999)). Accordingly, the trial court in no way reduced the Commonwealth's burden.

Because the challenged portions of the trial court's instructions were proper — particularly viewed in light of the instructions as a whole — Petitioner's underlying ineffectiveness of trial counsel claim is not substantial, meaning it has no merit. Consequently, PCRA counsel cannot be deemed ineffective for failing to raise this claim on collateral review. Therefore, Petitioner cannot demonstrate cause necessary to excuse his procedural default under *Martinez*.

b. Petitioner Was Not Prejudiced by Trial Counsel

Notwithstanding my conclusion that Petitioner's claim is meritless, I turn to *Strickland's* prejudice prong which requires me to determine whether 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. I find that there is none. "A 'reasonable probability' is one 'sufficient to undermine confidence in the outcome.'" *Bey*, 856 F.3d at 242 (*quoting Strickland*, 466 U.S. at 694). The prejudice standard "'is not a stringent one' and is 'less demanding than the preponderance standard.'" *Bey*, 856 F.3d at 242 (*quoting Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001)). However,

a petitioner must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* (*quoting United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)) (quotations omitted). The prejudice prong of the *Strickland* analysis is consistent with the general "harmless error" standard applicable to all federal habeas cases. *See Johnson v. Lamas*, 850 F.3d 119, 132 (3d Cir. 2017) ("To be entitled to habeas relief, a habeas petitioner must establish that the trial error 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" (alteration in original) (*quoting Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993))).

I am convinced the trial court's instruction did not prejudice Petitioner's trial. Even if the trial court gave the instruction, as Petitioner suggests, *see* Hab. Pet. at 24, the jury would have still found that Petitioner was guilty of the crimes charged. To come to this conclusion, I examine the jury's verdict against the Commonwealth's evidence at trial.

Regardless of the instruction, the jury would still have heard the same evidence. The jury would have heard that Petitioner tried to kidnap Victor Baez's nephew the day before the murder. (N.T. 6/25/14, at 139-41). It would have heard that Petitioner believed Baez wanted to kill him as a result. *Id.* It would have also heard that Petitioner wanted to kill Baez before Baez found him so he asked his cousin, Michael Hinton, to go to Pottstown with him

to confront Baez. *Id.* at 142-44. Moreover, the jury would have heard testimony from Michael Hinton, Saquanna Harrell, and Benjamin Alford which placed Petitioner in Pottstown on the night of the murder. The jury would have heard about cell phone records which confirmed that Petitioner was at or around the area of Brian's Café both shortly before and after the murder. (N.T. 6/26/14, at 32-45). They would have heard testimony from Hinton and Alford which detailed how Petitioner, armed with a gun, waited outside Brian's Café until Baez came out and how Petitioner ultimately shot Baez multiple times. (N.T. 6/25/14, at 61-63, 97-98, 100, 138-147, 163). Finally, the jury would have still heard evidence about Petitioner›s actions after the murder. That is, the jury would have heard: that Petitioner fled to his mother's house in Harrisburg and then to his aunt's house in Philadelphia following the murder; that Petitioner's girlfriend and aunt testified to seeing Petitioner with a gun or an object appearing to be a gun in the weeks following the murder; and that Petitioner and his mother had cryptic conversations, while Petitioner was in prison, that appeared to be about the location of the murder weapon. (N.T. 6/25/14, at 41-44, 52-56, 61-63, 87-89, 138-150; N.T. 6/26/14, at 33-45).

On this evidence, there is not a reasonable probability that the jury would have acquitted Petitioner even if the jury received the standard instruction. The jury believed this evidence was sufficient to prove beyond a reasonable doubt that Petitioner was guilty of third-degree murder. The jury believed that there was a criminal conspiracy and overt acts done in furtherance of the conspiracy. The trial judge's use of the words "isolating, confronting, or

accosting" cannot be said to have any effect on the jury's conclusion that Petitioner was guilty of conspiracy to commit third-degree murder or any other of the crimes charged. *See Commonwealth v. Collins*, 2002 PA Super 344, 810 A.2d 698, 701 (Pa. Super. 2002) (the trial court is not required to use the standard jury instructions, but instead must inform the jury of the applicable law).

Moreover, I cannot accept Petitioner's contention that the conviction for conspiracy formed the basis for Petitioner's conviction on the other substantive offenses charged. *See* Hab. Pet. at 48. The trial court specifically instructed the jury that it should consider the most serious charges, i.e. first-and third-degree murder, *before* considering the remainder of the charges. (N.T. 6/26/14 at 192). Thus, the jury necessarily decided on the third-degree murder charge before addressing the conspiracy to commit third-degree murder charge.

Without a reasonable probability that the outcome at trial would have been different, Petitioner cannot show ineffective assistance of counsel under *Strickland*. Because trial counsel was not constitutionally ineffective under *Strickland*, PCRA counsel was not ineffective. For that reason, *Martinez v. Ryan* does not excuse the procedural default of this claim.

B. Ground Two — Ineffective Assistance of Counsel Regarding Failure to Object to Trial Court's Jury Instructions Which Improperly Reduced the Commonwealth's Burden

Petitioner next argues that he received ineffective assistance of counsel due to trial counsel's failure to object to two jury instructions which he alleges improperly reduced the Commonwealth's burden. The first instruction Petitioner disputes went as follows:

> Let me speak to you for a moment about what is known as accomplice testimony. A person is an accomplice of another person in the commission of a crime if he has the intention of promoting or facilitating the commission of the crime and he aids or agrees or attempts to aid such other person in plan[ning] or committing the crime. Put simply an accomplice is a person who knowingly and voluntarily cooperates with or aids another person in committing an offense.
>
> When a Commonwealth witness is an accomplice his testimony has to be judged by special precautionary rules. Experience shows that an accomplice when caught may often try to place the blame falsely on someone else. On the other hand, an accomplice may be a perfectly truthful witness. It will be up to the jury to make that decision.
>
> The special precautionary rules that I will give to you are meant to help you distinguish between

truthful and false accomplice testimony. *Now in view of the evidence in this case of Mr. Michael Hinton's criminal involvement as set forth in his own statements which have been admitted into evidence, you must regard him as an accomplice of Mr. Andrews in the crime charged here* and apply the special rules that I am about to mention. The rules are as follows:

First, you should view the evidence from an accomplice with disfavor because it comes from what the law terms a corrupt and polluted source. Meaning it comes from one who also is alleged to have taken part in the crime. Second, you should examine the evidence of an accomplice closely and accept it only with care and caution. And, third, you should consider whether testimony of an accomplice is supported in whole or in part by other evidence.

Accomplice evidence is more dependable if it is supported by independent evidence. However, even if there is no independent supporting evidence you may still find the defendant guilty solely on the basis here of the accomplice testimony, Mr. Hinton's statements, if after using the special rules I just told you about, you are satisfied beyond a reasonable doubt that Hinton's statements to the police were truthful when he gave them and the defendant is guilty.

(N.T. 6/26/14, 165 – 66) (emphasis added).

Second, Petitioner contends that his trial counsel should have objected to the trial court's response to a jury question. Here, the jury asked a question and wanted to know if it should convict. The trial court responded:

> The answer to your question as posed in the hypothetical "A" and "B" go to a location; "A" pulls the trigger while "B" stands next to him, can "B" be convicted of first degree murder, of third degree murder? The answer to that question is a qualified yes, if you find that the Commonwealth has proved each and every element of the crime of criminal conspiracy, first of all to commit first degree murder, *or if you find that the Commonwealth has proved each and every element of the crime of criminal conspiracy to commit third degree murder as I have defined it.*

(N.T. 6/26/14, 14) (emphasis added). Petitioner argues that the trial court made it easier for the Commonwealth to obtain a conviction because it usurped the jury's role by applying the law to the facts. Moreover, Petitioner states that, "[i]nstead of simply telling the jury that it should consider the elements of the crimes charged and re-reading the elements, the trial court read the wrong elements to the jury for conspiracy to commit third degree murder, argued the case to the jury, and then told the jury that a hypothetical set of facts would be sufficient evidence for a conviction even though the hypothetical implied that Petitioner was potentially merely present." Hab. Pet. at 50.

The Commonwealth responds that Petitioner cannot overcome procedural default of his claim because his ineffective assistance of counsel argument is meritless. The Commonwealth contends that the disputed instructions are consistent with Pennsylvania law and Pennsylvania standard jury instructions for accomplice liability.

Similar to my analysis above, I must address whether Petitioner's underlying ineffectiveness of trial counsel claim has any merit. If it does not, I cannot excuse the procedural default here.

a. Procedural Default of this Claim is Not Excused

I begin my analysis by examining the disputed accomplice liability instruction which instructed the jury that it must consider Michael Hinton as an accomplice in the crimes charged. Petitioner argues that the trial court's accomplice instruction usurped the jury's role as the finder of fact. In particular, Petitioner takes issue with the language in the instruction which stated that the jury "must regard [Hinton] as an accomplice of Mr. Andrews in the crime charged here." (N.T. 6/26/14, 165-166). Petitioner claims that this instruction "left the jury with little to do but find Mr. Andrews guilty per the trial court's mandatory instruction." (doc. 16 at 10). He further alleges that "[w]hen the court instruct[ed] the jury that Mr. Andrews and Mr. Hinton [were] accomplice, the court [told] the jury that Mr. Andrews committed the crime." *Id.* Petitioner's argument is unavailing given the purpose and context of the accomplice instruction.

Appendix C

An accomplice is a person who knowingly and voluntarily cooperates with or aids another in the commission of a crime. *Commonwealth v. Scoggins*, 451 Pa. 472, 304 A.2d 102, 107 (Pa. 1973); 18 Pa.C.S.A. § 306(c). Here, the evidence certainly permitted an inference that Hinton was an accomplice to the crime. Hinton testified at trial that he went with the Petitioner to Brian's Café on the night of the murder. Hinton's statements to detectives further detailed how he was approached by Petitioner to travel to Pottstown to kill Baez, how both men travelled to Pottstown, and how both men were armed when they went to Brian's Café. Hinton also stated how he briefly went into the bar to confirm Baez was inside. Finally, Hinton explained that when Baez exited the bar, Petitioner approached him and shot him numerous times. (N.T. 6/25/14 at 97-98, 100, 138-141, 144-147, 163).

When an accomplice implicates the defendant at trial, as Hinton did here, the court should instruct the jury that "the accomplice is a corrupt and polluted source whose testimony should be viewed with great caution." *Commonwealth v. Chmiel*, 536 Pa. 244, 639 A.2d 9, 13 (Pa. 1994) (*citing Commonwealth v. Turner*, 367 Pa. 403, 80 A.2d 708 (Pa. 1951)). This is because an accomplice, when caught, may often try to falsely blame someone else. *See* Pa. SSJI § 4.01(1). An accomplice charge is required where the facts permit the inference that a witness was an accomplice. *Chmiel*, 639 A.2d at 13. This does not mean that the facts must establish that the witness was indeed an accomplice. *Id.* If the evidence is sufficient to present a jury question as to whether the witness was an accomplice, a defendant is entitled to an instruction regarding the

weight and credibility of the witness's testimony. *Id.* (*citing Commonwealth v. Mouzon*, 456 Pa. 230, 318 A.2d 703 (Pa. 1974)). In light of the evidence mentioned above, it was proper for the trial court to consider Hinton as an accomplice to the crime.

My analysis of the instruction, however, does not stop here. Petitioner contends that because the trial court informed the jury that it "must regard [Hinton] as an accomplice of Mr. Andrews in the crime charged here", the trial court usurped the jury's role in determining whether Petitioner was in fact a participant in the crime. The trial court, however, did no such thing. Instead, the trial court gave a near verbatim recitation of the suggested instruction for accomplice testimony. *See* Pa. SSJI § 4.01. The instruction was presented for the limited purpose of evaluating Hinton's testimony, not for determining the facts of this case. The court's instruction that the jury "must" consider Hinton and Andrews as accomplices was meant to ensure that the jury did, in fact, apply the special rules that required it to view Hinton's testimony with disfavor. The trial court did not usurp the jury's role as it specifically told that it was the jury's role to employ the special instructions and determine beyond a reasonable doubt whether Hinton's statements were true. (N.T. 6/26/14, 166). Thus, the jury was still left to determine whether it believed Hinton's testimony.

Moreover, the trial court's accomplice instruction cannot be said to have prejudiced Petitioner either. To the contrary, it worked to his advantage. Part of trial counsel's strategy in this case was to discredit Hinton's

testimony. The accomplice instruction established that Hinton's testimony came from a polluted source and should be treated with caution. Trial counsel did not have a basis to object to the instruction and in any event, Petitioner was not prejudiced. Therefore, Petitioner cannot establish cause nor prejudice required to overcome procedural default.

I now turn to Petitioner's allegation that the trial court again usurped the jury's role when it responded to the jury's hypothetical question. The jury asked whether Petitioner could be convicted if he was present while Michael Hinton shot Baez. (N.T. 6/26/14, 14). The trial court responded:

> The answer to your question as posed in the hypothetical "A" and "B" go to a location; "A" pulls the trigger while "B" stands next to him, can "B" be convicted of first degree murder, of third degree murder? The answer to that question is a qualified yes, if you find that the Commonwealth has proved each and every element of the crime of criminal conspiracy, first of all to commit first degree murder, or if you find that the Commonwealth has proved each and every element of the crime of criminal conspiracy to commit third degree murder as I have defined it.

Id. Petitioner argues that the trial court made it easier for the Commonwealth to obtain a conviction by applying the law to the facts.

Viewing the trial court's response as a whole, it is apparent that the trial court did not usurp the jury's role nor did it reduce the Commonwealth's burden. The trial court began answering the jury's question by reiterating the definition of malice, the elements of first-degree murder, third-degree murder, criminal conspiracy generally, and criminal conspiracy to commit first-and third-degree murder. *Id.* at 3-13. Then, immediately before answering the hypothetical, the court instructed the jury that the "specific answer to [its] question must be a qualified answer because it depends upon what the jury determines the facts are after due consideration, and whether or not the jury concludes they have found certain things have been proven beyond a reasonable doubt." *Id.* at 13-14. Thus, the trial court answered the question in a manner that explicitly left to the jury the task of determining the facts and applying those facts.

Accordingly, the trial court did not usurp the jury's role as the finder of fact. Given that the trial court's response was not improper, Petitioner's underlying claim regarding ineffectiveness of trial counsel is insubstantial. Consequently, Petitioner cannot avoid procedural default of this claim because PCRA counsel cannot be deemed ineffective for failing to raise a meritless claim. *See Real v. Shannon*, 600 F.3d 302, 309 (3d Cir. 2010) (counsel cannot be considered ineffective for failing to pursue a meritless claim).

C. Ground Three — Ineffective Assistance of Counsel for Failing to Ensure That the Trial Court Provided Jury Instructions for Self-Defense or Defense of Others

Petitioner next argues that both trial counsel and PCRA counsel were ineffective in failing to ensure that he received jury instructions on self-defense and defense of others. Petitioner concedes that this claim is procedurally defaulted and because there is no federal constitutional right to PCRA counsel, I must evaluate this claim under the *Martinez* standard. Thus, Petitioner must demonstrate that trial counsel's representation fell below an objective standard of reasonableness. *Preston*, 902 F.3d at 376 (*citing Strickland*, 466 U.S. at 688). He cannot do so here.

A lawyer's performance falls below an objective standard of reasonableness when "there is simply no rational basis to believe that counsel's failure to argue the ... issue on appeal was a strategic choice." *United States v. Mannino*, 212 F.3d 835, 844 (3d Cir. 2000); *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 244 (3d Cir. 2017). The record here reflects that trial counsel made a strategic decision not to request a self-defense or defense of others instruction.[4] That is because those defenses

4. To establish a defense of self-defense under Pennsylvania law, a defendant must show that he was free from fault in provoking or continuing the difficultly which resulted in the slaying; that he reasonably believed he was in imminent danger of death or great bodily harm and that there was a necessity to use such force to save himself therefrom; and that he did not violate the duty to retreat or

necessarily require that a defendant be physically present at the scene and the defendant admit that he shot the decedent. *See Commonwealth v. Philistin*, 617 Pa. 358, 53 A.3d 1, 12-13 (Pa. 2002) (self-defense instruction was not available where defendant failed to admit he intentionally fired at officers to protect himself); *see also Commonwealth v. Gay*, 489 Pa. 17, 413 A.2d 675, 677 (Pa. 1980) (appellant was not entitled to self-defense instruction where he denied shooting the victim). Instead of arguing self-defense, trial counsel's approach was to show that the Commonwealth lacked sufficient evidence to satisfy its burden of proof that Petitioner, in any way, participated in the killing of Victor Baez. Trial counsel's strategy was apparent from his opening statement, where he told the jury:

> You heard a lot about this evidence that the Commonwealth is going to present. Let me tell you some things that they are not going to be able to present:
>
> There's not going to be any DNA whatsoever linking my client to anything to do with this crime. There's not going to be any forensic evidence linking my client to anything with

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avoid the danger. *Commonwealth vs. Mayfield*, 401 Pa. Super. 560, 585 A.2d 1069, 1071 (Pa. Super. 1991); *see also* 18 Pa.C.S. § 505. A defense of others defense is similar to self-defense but requires a reasonable belief that another is in danger of death or great bodily harm and action is necessary to protect such other person. *Commonwealth v. Laurin*, 269 Pa. Super. 368, 409 A.2d 1367, 1369 (Pa. Super. 1979); *see also* 18 Pa.C.S. § 506.

the crime. There's not going to be any ballistic evidence linking my client to the crime. You're not going to hear any law enforcement officer testifying to anything that my client said...

Why is it not there? And I ask when you hear through all the witnesses and you think about what evidence is not there, that goes to show why the Commonwealth can't carry their burden — can't carry their burden of proof.

And they are not going to be able to show you how or who did this crime. And I will submit to you that that's important. In order for the Commonwealth to carry their burden of proof, they have to show what exactly happened. We can't guess. We can't infer. You should expect hard evidence to show what happened. And I submit to you that the Commonwealth is not going to be able to do that, based on all the evidence that they present.

As the Commonwealth also pointed out, you are not going to see any evidence of my client in Brian's Café or near Brian's Café on that night. You will hear evidence about Michael Hinton being inside, but you will not see any evidence of my client, any videotape in Brian's Café where the murder allegedly occurred. You are not going to see any evidence from any neutral witness who sees my client at the scene. It's not there, ladies and gentlemen. And that's

> important for you guys all to consider when you are hearing all of the evidence.

(N.T. 6/24/14 at 28-30).

Trial counsel's tactics were consistent throughout trial as he continued to point to the Commonwealth's lack of evidence in his closing statement:

> Now DNA doesn't lie. Forensic evidence doesn't lie. And they handpick what items they thought would implicate my client. There's not 7500 items to go out and test, they pick 13 items to test: shell casings, peanut and jelly, swabs from the guns, the bullet fragments. Would any of that stuff come back and link my client to the crime scene? Absolutely not. Nothing in this report, this DNA report, the Commonwealth's report, not mine, introduced by their witness, doesn't link my client to the scene, to the murder or any crime whatsoever.

(N.T. 6/26/14 at 108-109). Demonstrating that the Commonwealth could not place Petitioner at the scene of the crime allowed counsel to attempt to cast reasonable doubt on the Commonwealth's overall case, attack the credibility of witnesses who stated that Petitioner was in Pottstown on the night of the crime, and point fingers at others who were present at Brian's Café, such as Michael Hinton. That this strategy was unsuccessful does not mean counsel was acting unreasonably. *See Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002) ("[T]he mere

existence of alternative — even preferable or more effective — strategies does not satisfy the requirements of demonstrating ineffectiveness under *Strickland*.").

Moreover, a self-defense claim would have been meritless, and counsel cannot be considered ineffective for failing to pursue a meritless argument. *See Real v. Shannon*, 600 F.3d 302, 309 (3d Cir. 2010); *see also McAleese v. Mazurkiewicz*, 1 F.3d 159, 169 (3d Cir. 1993). The evidence presented at trial established that Petitioner was the initial aggressor. Petitioner recruited Michael Hinton to go with him to Brian's Café. N.T. 6/24/14 at 121-122. Petitioner laid in wait outside of the bar and then approached an unarmed Baez with a loaded gun. N.T. 6/25/14 at 62-63, 138-146, 154, 163. He then fired numerous shots at Baez which hit him in the back of his body. *Id.* at 12, 21-22, 144-147, 149, 154. These facts make clear that neither a self-defense instruction nor defense of others instruction was warranted.

Accordingly, counsel's decision to not ask the trial court for self-defense or defense of others instructions was not unreasonable and Petitioner is not entitled to habeas relief on this claim.

D. Ground Four — Ineffective Assistance of Counsel for Failing to Request a Voluntary Manslaughter Instruction

In Ground Four, Petitioner asserts that trial counsel was ineffective in failing to request a voluntary manslaughter instruction. Hab. Pet. at 55. Petitioner

argues that the evidence on record would have supported a claim of voluntary manslaughter for heat of passion and for imperfect self-defense. *Id* at 56. He states that a manslaughter instruction was warranted because the jury could have concluded he needed to defend himself and others by using deadly force. *Id.* Unlike Petitioner's other claims, this claim was considered on its merits and rejected by the state courts. *See Commonwealth v. Andrews*, 198 A.3d 426, 2018 WL 4233716 (Pa. Super. 2018). Therefore, his claim must now be assessed under the AEDPA standard of review.

Here, the PCRA court found Petitioner did not demonstrate that he was prejudiced by counsel's failure to request a voluntary manslaughter instruction. The court explained that

> the record is devoid of any indication that at the time [Petitioner] killed [Victim] he acted under a sudden and intense passion resulting from serious provocation by [Victim].... [T]he facts of the case ... show a deliberate murder of Victim by [Petitioner], such that he went to the bar and laid in wait for Victim with his motive being to kill him before Victim could retaliate for [Petitioner's] prior, failed robbery and kidnapping of Victim's nephew. The jury found beyond a reasonable doubt that these facts amounted to malice and a specific intent to kill, upon which the trial court instructed them. Notably, [Petitioner] also was given an on-the-record colloquy, wherein

Appendix C

> [Petitioner] stated it was his decision not to pursue a voluntary manslaughter instruction. [Petitioner] cannot, then, instantly claim trial counsel was ineffective for failing to request such a charge and instruction, for which the record did not support anyway....

[*49] (PCRA Ct. Op., at 13) (record citations and quotation marks omitted).

On appeal, the Superior Court agreed, finding that Petitioner had "not proven there is a reasonable probability that, if counsel had requested a voluntary manslaughter instruction, the result of trial would have been different." *Andrews*, 145 A.3d 781, 2018 WL 4233716 at *7. The Superior Court categorized Petitioner's claim as "unsupported speculation" devoid of evidentiary support and denied his claim. *Id.*

As noted above, state court factual determinations are given considerable deference under the AEDPA. *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004). Petitioner has not come forward here with a convincing reason to depart from the state courts' factual findings. Rather, he merely speculates that the result of trial could have been different had the trial court given a voluntary manslaughter instruction. This, however, falls far short of a showing that the factual findings made in the Commonwealth courts were objectively unreasonable in light of the evidence presented in his PCRA hearing. *See Miller-El v. Cockrell*, *supra*, at 537 U.S. 340.

Nor was the decision an unreasonable application of *Strickland*. The Pennsylvania Superior Court accepted the PCRA court's finding that Petitioner's argument was unsupported by the record. The Third Circuit has regularly held that counsel cannot be considered ineffective for failing to pursue a meritless argument. *See Real v. Shannon*, 600 F.3d 302, 309 (3d Cir. 2010); *see also McAleese v. Mazurkiewicz*, 1 F.3d 159, 169 (3d Cir. 1993). Moreover, there is no basis under AEDPA for disturbing the conclusion of the Pennsylvania courts that trial counsel was not ineffective because it was Petitioner's own decision not to pursue the voluntary manslaughter instruction.[5] *See Commonwealth v. Muhammad*, 2002

5. The record regarding Petitioner's decision to forgo a voluntary manslaughter instruction reads as follows:

> Q [counsel]: Now the second area I want to ask you about is regarding the judge's charge and whether or not we want to ask for a charge of voluntary manslaughter. You remember us talking about that?
>
> A [Petitioner]: Yes.
>
> Q: And I have also consulted with your mom at your request on that issue; correct?
>
> A: Yes.
>
> Q: And based on our decision and our consultation, it was your request not to have the judge instruct the jury on a voluntary manslaughter charge; right?
>
> A: Yes.
>
> Q: And I've explained to you that legally voluntary manslaughter is the same as first degree murder except that it could imply that there was provocation,

PA Super 55, 794 A.2d 378, 384 (Pa. Super. 2002) (*citing Commonwealth v. Barnes*, 455 Pa. Super. 267, 687 A.2d 1163, 1167 (Pa. Super. 1996) (a defendant is bound by his "statements made during a plea colloquy, and may not successfully assert claims that contradict such statements")). Additionally, as discussed *supra* at pp. 26-27, requesting a voluntary manslaughter instruction would have cut against the defense's argument that the Commonwealth could not place Petitioner at the scene of the crime. Therefore, the state courts' determination that trial counsel was not ineffective for failing to raise a meritless claim is not contrary to or an unreasonable application of clearly established federal law. *See Real*, 600 F.3d at 310; *see also* 28 U.S.C. § 2254(d)(1).

Given that this court must abide by a highly deferential standard, I cannot find that trial counsel's actions as to this claim were deficient or unreasonable. Accordingly, Petitioner is not entitled to habeas relief on this claim.

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heat of passion or some sort of defense that could mitigate it from a first degree murder charge to a voluntary manslaughter. Did I explain those principles to you?

A: Yes.

Q: And knowing all that you still do not wish to have the Court instruct the jury on any issues regarding voluntary manslaughter; correct?

A: Yes.

(N.T. 6/26/14, at 98-99).

E. Ground Five — Petitioner is Actually Innocent

In his final claim, Petitioner claims he is actually innocent of the crimes charged. Hab. Pet. at 56. The Supreme Court has held that a convincing claim of actual innocence will overcome the habeas limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). This requires the petitioner to supplement his claim with new, reliable evidence of factual innocence. *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). The Supreme Court has explained that this is an exacting standard. "The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *McQuiggin*, 569 U.S. at 286 (*quoting Schlup*, 513 U.S. at 329).

As the Supreme Court explained in *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution-not to correct errors of fact," and so "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits," *Id.* at 400-04. The Supreme Court explained that the threshold showing is therefore extraordinarily high. *Id.* at 417.

Here, Petitioner neither provides new facts nor any support for his actual innocence claims beyond assertions

about trial counsel's ineffectiveness, and his assertions are nowhere near the threshold showing of actual innocence. Although Petitioner repeatedly asserts his innocence, he has not identified any new, reliable evidence of factual innocence as required by *Schlup*. Therefore, his claim of innocence is insufficient and denied.

IV. Conclusion

For all the foregoing reasons, Maurice Andrews' petition for writ of habeas corpus should be **DENIED**. Therefore, I make the following:

RECOMMENDATION

AND NOW, this 21st day of December 2021, it is **RESPECTFULLY RECOMMENDED** that the petition for writ of habeas corpus be **DENIED**.

BY THE COURT:

/s/ Scott. W. Reid
SCOTT W. REID, J.
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED AUGUST 24, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1339

MAURICE ANDREWS,

Appellant,

v.

DISTRICT ATTORNEY MONTGOMERY COUNTY;
SUPERINTENDENT COAL TOWNSHIP SCI;
ATTORNEY GENERAL OF PENNSYLVANIA.

E.D. Pa. 2:20-cv-04326

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant in the above-captioned 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.**

By the Court,
s/Stephanos Bibas
Circuit Judge

Dated: August 24, 2022