No.

_____

_____ Term _____

IN THE
SUPREME COURT OF THE UNITED STATES

In Re:

Jason Paul Maple
Petitioner, Pro se

On Petition for Writ of Mandamus
to the United States Court of Appeals
for the Third Circuit (No. 20-2514)

APPENDIX

Jason Paul Maple
Pro se
Prisoner No. HV3555
SCI Mercer
801 Butler Pike
Mercer, PA 16137

Index of Appendices

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2514

JASON PAUL MAPLE

v.

SUPERINTENDENT ALBION SCI,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:17-cv-00529)
District Judge: Honorable Cathy Bissoon

Argued: September 28, 2021

Before: AMBRO, KRAUSE, and BIBAS, *Circuit Judges*

(Filed: December 13, 2021)

Michael A. Pacek
John W. Peck [ARGUED]
WESTMORELAND COUNTY

OFFICE OF DISTRICT ATTORNEY
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Greensburg, PA 15601
Counsel for Appellant

Christopher M. Capozzi [ARGUED]
100 Ross Street, Suite 340
Pittsburgh, PA 15219
Counsel for Appellee

OPINION OF THE COURT

BIBAS, *Circuit Judge*.

Not every murder is a mystery. Here, we know who did it: Jason Maple. On federal habeas, he challenges his murder and attempted-murder convictions. He says police violated *Miranda* by interrogating him before reading him his rights. But after weighing the strong evidence against him, Pennsylvania courts held that was harmless error. Because that ruling was reasonable, we will reverse the District Court's grant of habeas.

I. BACKGROUND

Maple was furious at William Teck. Maple's girlfriend, Jennifer Vinsek, had told him that Teck had tried to rape her. Later, they found her apartment ransacked and blamed Teck and his friend, Patrick Altman. So Maple tracked them down at a bar, where he brawled with them before being bounced. Dissatisfied, Vinsek called the police to report the burglary.

When police arrived, Maple asked if they could "either shoot [Teck] or arrest him." App. 102. If not, Maple warned, "maybe I'll just handle it my way" and "take care of it myself." App. 103. A few hours later, Maple found Teck and Altman and shot at them. He missed Altman but killed Teck.

When police found Teck's body, they suspected Maple and Vinsek. Detectives quickly interviewed Altman, who told them about the bar fight. They learned that Maple owned a shotgun. So they went to talk to Maple and Vinsek.

The plainclothes detectives identified themselves as police. They told the couple that they were investigating Teck's death. They said Maple was not under arrest but asked to talk with him about the murder. Maple agreed, and Vinsek accompanied them to the police station.

At the station, the detectives questioned Vinsek and then Maple separately. At first, they failed to read him his *Miranda* rights. App. 105–06; *see Miranda v. Arizona*, 384 U.S. 436 (1966). After about an hour, Maple finally confessed. He was then arrested and read *Miranda* warnings. He waived those rights and confessed again, this time on tape.

Maple moved to suppress both confessions, but the Pennsylvania court admitted them, finding no *Miranda* violation. At trial, Maple confessed again, but claimed he was drunk at the time. Yet the prosecution produced a mountain of evidence that proved his intent. Several witnesses testified to Maple's earlier confrontations with Teck. The officers who responded to the burglary call relayed that Maple had asked them to shoot or arrest Teck. Altman and three witnesses testified to the

shooting. And they all said that, though Maple had been drinking, he did not clearly look intoxicated. This evidence convinced the jury. Maple was convicted of first-degree murder and attempted murder, then sentenced to life.

Maple challenged his convictions unsuccessfully. He argued that the police had violated his *Miranda* rights by getting confessions that tainted the trial. The Pennsylvania Superior Court agreed, but it held that the error was harmless. The Pennsylvania Supreme Court denied review. Pennsylvania courts also rejected his two state-habeas (technically, PCRA) petitions.

So Maple filed this first federal habeas petition, and the District Court granted it. Because Pennsylvania had not appealed the state-court finding of a *Miranda* violation, the District Court thought that the exhaustion requirement barred review. It also held that the *Miranda* error was not harmless. Although Maple admitted at trial that he had shot Teck, it reasoned that his earlier unwarned confession may have forced him to testify. Pennsylvania now appeals.

Because the District Court granted habeas without an evidentiary hearing, we review de novo. *Saranchak v. Beard*, 616 F.3d 292, 301 (3d Cir. 2010). We presume that the Superior Court's factual findings were correct. 28 U.S.C. § 2254(e)(1). And we defer to its rulings unless they were "contrary to, or involved an unreasonable application of, clearly established Federal law" or were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d).

II. The Superior Court Reasonably Found Any Error Harmless

To start, the District Court erred in relying on the exhaustion doctrine. True, before reaching federal court, "an *applicant*" for habeas relief must first "exhaust[ ] the remedies available in [state] courts." 28 U.S.C. §2254(b)(1), (b)(1)(A) (emphasis added). That requires raising and appealing the same arguments at each step. But the exhaustion requirement is asymmetrical: as Maple rightly concedes, it applies only to prisoners seeking habeas relief, not to states defending convictions. So even though Pennsylvania did not appeal the finding of a *Miranda* violation in state court, we can still review the issue.

Yet we need not reach the merits of the *Miranda* issue. Even if there was a *Miranda* error, it was harmless. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (holding that involuntary confessions are subject to harmless-error review). When reviewing the state court's finding of harmless error, we ask whether that "harmlessness determination itself was unreasonable." *Johnson v. Lamas*, 850 F.3d 119, 134 (3d Cir. 2017) (quoting *Davis v. Ayala*, 576 U.S. 257, 269 (2015)); *see* 28 U.S.C. §2254(d)(1). It was not.

Even ignoring Maple's confessions, other evidence at trial overwhelmingly incriminated him. A chorus of witnesses linked him to the murder. Three of them saw Maple and Teck in a bar fight. One eyewitness saw him shoot Teck and miss Altman, and two others saw him at the scene with the shotgun right before the shooting. And Altman himself testified that he was shot at by a man with Maple's build.

This testimony also proved that Maple killed Teck intentionally, as Pennsylvania law required for a first-degree murder conviction. *See* 18 Pa. Cons. Stat. §2502(a). Maple had been angry at Teck for several days after Vinsek told him of the attempted rape. And their conflict had escalated: two police officers and another witness heard Maple ask the officers to arrest or shoot Teck. A few hours later, he followed Teck and Altman, pointed a shotgun at them, and fired. This evidence alone sufficed to prove premeditation. *Commonwealth v. O'Searo*, 352 A.2d 30, 36–38 (Pa. 1976).

Plus, the testimony undermined Maple's intoxication defense. Pennsylvania lets a first-degree murder defendant claim voluntary intoxication as a partial defense only when he was "so overwhelmed or overpowered by [alcohol] to the point of losing his faculties at the time the crime was committed." *Commonwealth v. Fletcher*, 861 A.2d 898, 907–08 (Pa. 2004). Maple said he was drunk, and Vinsek's statements were internally inconsistent on that point. But every other witness who was asked said Maple did not seem clearly intoxicated. So his only defense would not fly.

* * * * *

The case against Maple was very strong. Even if the trial court should have suppressed his confession before *Miranda* warnings, any error was harmless. Maple doubtless would have been convicted of first-degree murder of Teck and trying to murder Altman. So we will reverse and remand for the District Court to deny his habeas petition.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2514

JASON PAUL MAPLE

v.

SUPERINTENDENT ALBION SCI,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:17-cv-00529)
District Judge: Honorable Cathy Bissoon

Argued: September 28, 2021

Before: AMBRO, KRAUSE, and BIBAS, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on September 28, 2021.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** that the District Court's judgment entered on June 30, 2020, is hereby **REVERSED** and **REMANDED**. Costs will not be taxed. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: December 13, 2021

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

JASON PAUL MAPLE,	)	
	)	
Petitioner,	)	Civil Action No. 17-529
	)	
v.	)	Judge Cathy Bissoon
	)	
MICHAEL R. CLARK,	)	Magistrate Judge Patricia L. Dodge
	)	
Respondent.	)	

MEMORANDUM AND ORDER

I. MEMORANDUM

On April 24, 2017, Jason Paul Maple ("Petitioner") filed a Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, ("Petition," Doc. 1.) Michael R. Clark ("Respondent") was given several extensions to answer the Petition, but before he did so, on August 21, 2017, Petitioner filed an Amended Petition, ("Amended Petition," Doc. 25). Respondent filed his Answer on September 20, 2017, ("Answer," Doc. 21).[1] After being granted leave to do so, Petitioner filed Petitioner's Reply to Respondent's Answer on October 26, 2017, ("Reply," Doc. 24), and then, on April 9, 2018, he filed a Supplement in Support of Petitioner's Reply to Respondent's Answer, ("Supplemental Reply," Doc. 28).

Shortly thereafter, on May 15, 2018, Magistrate Judge Mitchell issued a Report and Recommendation, ("R&R," Doc. 29), recommending that the Amended Petition be dismissed

[1] Attached to Respondent's Answer is an Appendix with the relevant state court records. A Table of Contents appears at pages 51–55, followed by several attachments containing the state court records which have consecutively numbered pages, each with the designation "App." When citing to these records, the Court will use the "App" page designations.

and a certificate of appealability denied.[2] On July 2, 2018, Petitioner's Objections to Magistrate Judge's Report and Recommendation, ("Objections," Doc. 32), were docketed.

After a *de novo* review of the pleadings and documents in the case, together with the R&R and the Objections thereto, the R&R will be adopted in part and rejected in part. For the reasons that follow, the Amended Petition will be granted as to ground one.

A. BACKGROUND

Petitioner is serving a sentence of life without parole following his conviction by a jury of first-degree murder, aggravated assault with serious bodily injury, and other violent offenses. (Amended Petition at 1.) As the history of Petitioner's case in the Pennsylvania courts is critical to evaluating the grounds raised in the Amended Petition, it will be memorialized in detail below.

1. State Proceedings

On July 29, 2006, Petitioner was charged by criminal information with first-degree murder, criminal attempt to commit murder, aggravated assault, and conspiracy to commit murder and robbery. (App. 88–91.) All the charges arise out of events culminating in the death of William Teck, ("Mr. Teck"), in the early morning hours of May 30, 2006. (App. 88.)

At the preliminary hearing on the charges, Detective Terrence A. Kuhns, ("Detective Kuhns"), a detective with twenty years of experience with the Westmoreland County District Attorney's Office, testified regarding the investigation and initial questioning of Petitioner on May 30, 2006. (App. 160–207.) Detective Kuhns brought with him and played a tape-recorded

[2] This case was reassigned to Magistrate Judge Dodge on June 7, 2019, following Magistrate Judge Mitchell's retirement. (Doc. 35.)

statement made by Petitioner at approximately 10:30 pm on May 30, 2006. (App. 164–190.) During the tape-recorded statement, Petitioner admits to shooting Mr. Teck. (App. 175–78.)

On cross-examination, Detective Kuhns states that Petitioner was a suspect and was brought to the District Attorney's office for an interview by six law enforcement officers. (App. 191–92.) When questioning began, Petitioner denied knowing anything about Mr. Teck's murder. (App. 194.) Later, "at some point" during questioning, Petitioner stated he wanted to tell the truth, and Detective Kuhns confirmed Petitioner then "proceeded to tell [him] the truth prior to the taped statement in a manner very similar to what the information contained in this taped statement." (App. 195.) When asked by counsel, "Now once he's told you . . . once he's admitted to you that he shot William Teck that's when you ask him . . . won't put the cart before the horse. That's when you advise him of his Miranda warnings, correct?," Detective Kuhns responded affirmatively. (App. 196; see also App. 417–18 (Detective Kuhns's supplemental interview report memorializing Miranda warnings given after Petitioner's initial inculpatory statement). Detective Kuhns also stated he made efforts to find out how much alcohol Petitioner had been drinking prior to the shooting and that Petitioner told him it was "a lot" and that he was "really drunk." (App. 199–200; see also App. 417–18 (Detective Kuhns's supplemental interview report stating Petitioner was "drinking the entire day on May 29, 2006 and into May 30, 2006.").)

Petitioner's trial counsel moved to suppress Petitioner's initial inculpatory statements and his tape-recorded statement as being obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Siebert, 542 U.S. 600 (2004). (App. 214–16 (suppression motion); App. 223–33 (supporting brief).) A hearing on the motion was held on December 20, 2006, during which Detective Kuhns again testified, though his testimony changed as to some important

issues. Trial counsel filed a supplemental brief following the hearing, summarizing all testimony from the hearing and supporting evidence, (App. 383–390; 400–03),[3] and addressing Detective Kuhns's testimony at the motion hearing. (App. 396–403.)

On May 21, 2007, the trial judge denied Petitioner's suppression motion, finding he was not in custody when he made the initial statement and validly waived his Miranda rights prior to making the tape-recorded statement. (App. 439–43.)

a. Trial and Direct Appeal

Petitioner went to trial on the charges and was found guilty on September 16, 2008.[4] (App. 449–50 (verdict forms).) At the trial, Petitioner's recorded statement was played for the jury, and a transcription was admitted into evidence as an exhibit. (App. 1197 n.2.) Following admission of that evidence, Petitioner testified on his own behalf. (App. 907; see also App. 2913 –3071 (transcript of Petitioner's trial testimony).)

On November 24, 2008, Petitioner's post-trial motions were denied and he was sentenced to life in prison without the possibility of parole for killing Mr. Teck, to be served consecutive and concurrent 12 to 23 years' incarceration for the other crimes of conviction. (App. 467–72 (sentencing orders); Id. at 490–92 (pronouncement of sentence).) On December 19, 2008, Petitioner appealed. (App. 498.)

[3] This includes, the Miranda Form Petitioner completed on May 30, 2006, which reveals that after Petitioner confirmed he understood his rights, in response to the question " Do you wish to exercise any of these rights at this time?," the word "Yes" is circled, and next to it, the word "YES" is also handwritten. (App. 419.) The Form is signed by Petitioner, as well as by Detective Kuhns and Detective Zupan. (Id.) Petitioner's taped-recorded statement was taken immediately following completion of the Form.

[4] An earlier trial, in May of 2008, ended in a mistrial after the trial judge found a member of the victim's family tampered with the jury. (App. 561.)

The facts of the case brought out at Petitioner's trial were summarized by the Pennsylvania Superior Court (and noted in the R&R) as follows:

> At approximately 4:00 a.m. on May 30, 2006, William Teck and Patrick Altman were walking along railroad tracks in Manor, Pennsylvania. Mr. Teck and Mr. Altman had been staying at the residence of Jennifer Vinsek, who was Appellant's girlfriend and Mr. Altman's cousin. Appellant shot and killed Mr. Teck with a shotgun and then fired his weapon at Mr. Altman. While Mr. Altman was not struck with a bullet, he dropped a bag that he was carrying as he fled the scene.
>
> Appellant's accomplices in the crime included Jennifer Vinsek, Dewayne Shank, Dewayne's brother Nathan Shank, and Ryan Bronowski. Following the shootings, Nathan removed a backpack from Mr. Teck's body, and Appellant retrieved Mr. Altman's abandoned bag. Dewayne, Nathan, and Bronowski testified against Appellant at trial. The Commonwealth witnesses also included Mr. Altman, Amy Kujawa, who was Vinsek's roommate, and Robert Johnson, a friend of Ms. Kujawa and Vinsek.
>
> The motivation for the crimes generated from events that started about one week prior to the shooting on May 23, 2006. At that time, Mr. Johnson inadvertently walked in on Vinsek and Mr. Teck engaged in consensual sexual intercourse at Ms. Kujawa's and Vinsek's residence on 12 B Division Street, Greensburg, Pennsylvania. On Thursday, May 25, 2006, Vinsek left with Appellant to go camping, where they stayed until May 29, 2006. During their camping trip, Vinsek told Appellant that Mr. Teck had assaulted and attempted to rape her.
>
> When Vinsek and Appellant returned to Greensburg on May 29, 2006, they went to Vinsek's apartment, which was in disarray. Vinsek claimed that Mr. Teck and Mr. Altman were responsible for the damage and that they also had stolen items. Vinsek and Appellant immediately tracked down Mr. Teck and Mr. Altman, who were drinking at Clear Waterz Bar in Greensburg, where Ms. Kujawa worked as a bartender. At about 12:30 a.m. on May 30, 2006, Appellant and Vinsek confronted the two men and, at approximately 1:00 a.m., were ejected from Clear Waterz Bar by the owner.
>
> Appellant and Vinsek then returned to 12B Division Street and contacted police to report that a burglary had occurred. Greensburg Police Officers Donald Sarsfield and Kerry Dieter responded to the

> burglary report. Mr. Johnson was present because he had seen Mr. Teck and Mr. Altman at the apartment during the day of May 29, 2006. Vinsek informed police that Mr. Altman and Mr. Teck burglarized her apartment and that Mr. Teck had attempted to rape her the previous week. In the presence of Police Officer Sarsfield, Police Officer Dieter, and Mr. Johnson, Appellant threated to retaliate against Mr. Teck and Mr. Altman.
>
> After Officers Dieter and Sarsfield left Vinsek's apartment, Appellant contacted Dewayne Shank and asked him for assistance in confronting Mr. Teck and Mr. Altman. Appellant told Dewayne to enlist the aid of Nathan Shank and Bronowski and informed the Shank brothers that Mr. Teck had guns, money, and drugs in his backpack, and that he wanted to retaliate against Mr. Teck and Mr. Altman for certain crimes that they had committed against Vinsek. Appellant promised the Shanks that they could keep the guns, money, and drugs in Mr. Teck's possession in return for their assistance.
>
> While Appellant was arranging for help, Mr. Teck and Mr. Altman left Clear Waterz Bar and went to Manor Diner. Vinsek located the two men through Ms. Kujawa. Nathan, Dewayne, and Bronowski drove to Manor and rendezvoused with Appellant and Vinsek. Vinsek then induced Ms. Kujawa to invite Mr. Teck and Mr. Altman to a party at 12B Division Street so that the two victims, who did not have a vehicle, would leave the diner to walk to Greensburg. When the two men left Manor Diner and started out toward Greensburg along the railroad tracks, Appellant followed the two men and fired his shotgun twice at them, killing Mr. Teck.

(App. 1536–37.)

In his appeal brief filed May 13, 2009, Petitioner renewed his argument that the trial court had erred in failing to find a Miranda violation and in declining to suppress Petitioner's two inculpatory statements. (App. 501; see also App. 564–66 (facts relevant to issue in Appellant's Brief); id. at 569–80 (argument).) In its brief, the Commonwealth argued that Petitioner was not in custody, but even if his Miranda rights were violated, the error was harmless. (App. 645.) Specifically, the Commonwealth argued:

> Maple took the witness stand at trial, and told the jury essentially the same thing he told the detectives in both his initial statement

> and his taped statement. He ran after Teck and shot at him twice. Accordingly, Maple can no longer challenge the ruling on the suppression court; any error committed by Judge Pezze is considered harmless.

(App. 647.)

In his Reply brief, Petitioner addressed the issue of harmlessness as follows:

> Appellant testified regarding his statement only after the prosecution introduced the wrongfully obtained confession. The Court should not consider simply whether Appellant testified, but why he was required to do so. If testimony is given in order to present a defense to the confession or to overcome the impact of the improperly introduced confession, 'then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.'

(App. 679 (quoting Harrison v. United States, 392 U.S. 319, 223 (1968).) Petitioner stated "[i]n order to overcome the effect of the improperly admitted statement, Appellant had no choice but to testify." (App. at 680.)

The Pennsylvania Superior Court issued its opinion on August 6, 2010. (App. 699.) As to Petitioner's primary contention on appeal—that both of his confessions should have been suppressed—the Court agreed. (App. 704–14.) It found Petitioner was in custody as of 9:05 p.m., before either confession was made, and that he should have been read his Miranda rights at that time. (App. 712–14.) In concluding that the erroneous admission of the confessions was harmless error, the Superior Court reasoned as follows:

> Appellant took the stand and essentially repeated verbatim the statement that he gave the police on May 30, 2006. While testifying, he merely expanded on the narrative that he gave to police by setting forth the details of his alcohol consumption and the specifics regarding his provocation for shooting Mr. Teck and attempting to shoot Mr. Altman. Thus, the erroneously-admitted confessions were cumulative of other substantially similar and untainted evidence.

(App. 716.) The Superior Court also concluded that the "properly-admitted, uncontradicted" evidence of Petitioner's guilt was "so overwhelming and the prejudicial effect of the admission of his statements was so insignificant by comparison to the evidence that the fact that Appellant's statements were introduced into evidence could not have contributed to the verdict." (App. 723.) One judge wrote "separately to emphasize my reluctance to find harmless error where the Majority has acknowledged that a constitutionally infirm confession was improperly admitted into evidence." (App. 731 (Musmanno, J., concurring).) Petitioner sought rehearing *en banc*, but the application for rehearing was denied on October 25, 2010. (App. 756.)

Petitioner did not initially appeal the Superior Court decision.[5]

c. First PCRA Petition

On June 30, 2011, Petitioner filed a *pro se* Petition under Pennsylvania's Post Conviction Relief Act ("PCRA") and requested appointment of counsel. (App. 733–53.) Counsel was appointed and an Amended PCRA Petition ("First PCRA Petition") was filed on March 19, 2012. (App. 755–849.)

As a preliminary matter, the First PCRA Petition details the failure of trial counsel to timely file a Petition for Allowance of Appeal, ("PAA"), with the Pennsylvania Supreme Court. (App. 757–66.) Petitioner requested leave to file a PAA *nunc pro tunc*. (App. 766.)

Relevant here, Petitioner's primary argument was that trial counsel was ineffective for failing to call an expert witness to testify regarding Petitioner's alcoholism and the impact of alcohol intoxication on cognition and the ability to form intent. (App. 776–82.) The

[5] Petitioner was given leave to file an appeal *nunc pro tunc* on January 3, 2013, (Doc. 1187), and the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal on December 31, 2014. (App. 1264.)

Commonwealth filed a short Answer to the First PCRA Petition on May 21, 2012. (App. 850–52.)

A hearing was held on the First PCRA Petition on August 23, 2013. During the hearing, Petitioner testified that he took the stand at his trial on the advice of counsel to "to bring in the alcohol, the drinking that weekend." (App. 907 (transcript of hearing on First PCRA Petition).) Petitioner represented that trial counsel had discussed getting an expert witness "[a]s far as the alcohol, diminished capacity," but that he never interacted with such an expert in preparation for trial.[6] (App. 908–09.)

Professor Bruce Antkowiak ("Professor Antkowiak") also testified on behalf of Petitioner at the hearing. Professor Antkowiak offered that trial counsel's strategy "essentially just simply overlooked another viable defense that was clearly available in this case but was not meaningfully pursued which was the defense of voluntary intoxication which would have authorized the jury to not acquit, obviously, but simply to find a verdict on the murder count of no higher than third degree murder." (App. 939.) Professor Antkowiak also offered testimony on how critical an expert was to making out the voluntary intoxication defense. (App. 944–47.)

Petitioner also offered the testimony of Dr. Mark King, ("Dr. King"). Dr. King indicated that he reviewed records, interviewed Petitioner and formed the opinion that Petitioner is an alcoholic and was at the time of the murder. (App. 981–86.) Dr. King also gave expert testimony about how alcohol impacts an alcoholic's brain differently than a non-alcoholic's brain, including that the "cognitive impairment, lack of judgment, lack of ability to form intent is

[6] Petitioner's mother, Susan Maple, also testified at the hearing on the First PCRA Petition. She represented that she and her husband had paid a $10,000 retainer for a psychiatrist, Lawson Bernstein. (App. 896–97.) The check was initially cashed but the entire retainer was later returned to her after no services were rendered. (App. 896.)

significantly more so for an alcoholic who is drinking than a non-alcoholic who just happened to drink." (App. 987–92; see also id. at 987 ("So, you could do a lot of rote things without cognitive ability to assess them, to make judgments about them in a blackout state.").) Dr. King testified, that if Petitioner accurately represented the quantity of alcohol he consumed, that at the time of the shooting, Petitioner's "intent would have been impaired. That doesn't mean he has no intent, but his intention would not be specific, it would be impaired." (App. 1006.) Dr. King testified he would have been available to testify at Petitioner's trial if he had been called. (App. 992.)

The record was held open for Petitioner's trial counsel to testify and a second hearing on the First PCRA Petition took place on September 30, 2013.[7] (App. 1020.) At that hearing, trial counsel testified that "I was of the opinion that I would be able to establish for a jury sufficient evidence to raise a valid involuntary intoxication defense. However . . . I did not once actually consult with an expert on that issue." (App. 1025.) Trial counsel testified that "perhaps hubris" had made him "over confident" in his "ability to persuade a jury that this was a crime of passion." (App. 1027.) Trial counsel offered that Petitioner was "very hesitant" to testify at trial but that if their defense was "you were so drunk you didn't know what you were doing" then testifying was in his best interest. (App. 1029.) Trial counsel testified that Petitioner was the only witness he presented with respect to the voluntary intoxication defense.[8] (App. 1029–30.)

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[7] Petitioner's PCRA counsel had locate and subpoena trial counsel, who had moved to Grand Junction, Colorado, after being disciplined and suspended from the practice of law for one year and one day by the Supreme Court of Pennsylvania, effective December 22, 2011. (App. 1181; see also Office of Disciplinary Counsel v. Mark D. Lancaster, No. 1750, Disciplinary Docket No. 3, No. 78 DB 2010 (Allegheny County).)

[8] At Petitioner's first trial, trial counsel presented evidence related to Defendant's use of alcohol, particularly on the weekend leading up to the shooting, through his girlfriend at the time, Jennifer Vinsek. Ms. Vinsek declined to testify at Petitioner's second trial. At the hearing, trial counsel stated "[t]here were no other witnesses" when asked "So you really had no other witness to put on to put the evidence of the voluntary intoxication before the jury other than Jason?." (App. 1029–30.)

On redirect, trial counsel stated he "didn't even think about" retaining an expert to explain the "blackouts" Petitioner testified about to the jury. (App. 1048–49.)

When questioned about the defenses he presented—voluntary manslaughter and voluntary intoxication—being in tension, trial counsel offered "[i]t was a discorded defense, and I don't think I ever sat through an analyzed it and thought it through." (App. 1031–32.) In closing on the issue of defenses presented, trial counsel offered that "there was no firm basis to argue on a voluntary manslaughter charge." (App. 1033; see also App. 1044 ("I failed to consider specific intent is also one of the elements of voluntary manslaughter. . . . I realized [after closing arguments] that I made a grievous error.").)

With respect to filing the PAA, trial counsel confirmed that he had promised to file the PAA and that he failed to do so. (App. 1034–35.) Counsel offered that there was no reason "whatsoever" for his failure to do so and agreed that he "dropped the ball on that." (App. 1035.)

Both Petitioner and the Commonwealth filed supplemental briefing after the hearing. (App. 1065 (Petitioner's Brief); App.1161 (Commonwealth's Brief).)

On January 3, 2014, Judge Blahevoc of the Westmoreland County Court of Common Pleas issued his ruling with respect to the First PRCA Petition. On the issue of the PAA, Judge Blahevoc found that trial counsel "was ineffective for failing to file the PAA" and ordered Petitioner be permitted to proceed with filing a PAA *nunc pro tunc*. (Doc. 1187–88.)

On the issue of trial counsel's failure to call an expert related to the voluntary intoxication defense, Judge Blahevoc reasoned as follows:

> This Court finds that while the claim has arguable merit; the petitioner cannot establish prongs two and three of the ineffectiveness test: namely that there was no reasonable basis for counsel's failure to do so; and that he was prejudiced.

> Mr. Lancaster testified that he was presenting a dual defense of voluntary intoxication and voluntary manslaughter. He called defendant as a witness who testified regarding the enormous amounts of alcohol he drank leading up to the shooting. Moreover, the proposed expert witness could not testify with certainty that Mr. Maple lacked a specific intent to kill. Therefore, defendant was not prejudiced by Mr. Lancaster's failure to call an expert witness.

(App. 1187.)

d. Reinstatement of Direct Appeal

Petitioner's PCRA counsel filed a PAA on January 30, 2014. (App. 1189.) In the PAA, Petitioner adopted the facts relayed by the Superior Court, but also offered argument on "two important matters" overlooked in that recitation. (App. 1197.) First, Petitioner noted that three of the eye-witnesses at his trial were also charged with criminal homicide (and two had been previously convicted of *crimen falsi* offenses). (Id.) Thus, the jury was charged that they were "corrupt sources" and their testimony should be evaluated carefully. (Id.) Second, Petitioner emphasized that this trial testimony was materially different from his confessions to police: he testified he lacked a "plan or intention to shoot the victim" and he elaborated on the enormous quantity of alcohol he drank over the holiday weekend leading up to the shooting[9] and his history of alcoholic blackouts. (Id.)

Substantively, Petitioner sought review of the Superior Court's conclusion that admission of this statements obtained in violation of Miranda was harmless error. (App. 1199.) Petitioner challenged the Superior Court's conclusion that other "properly admitted and uncontradicted

[9] Petitioner's testimony was that on Friday he and his girlfriend "drank a case of beer, 2 bottles of wine, and 3/4 bottle of Jack Daniel [sic]," that he finished the bottom of Jack Daniel's and "drank and indeterminate but large amount of beer on Saturday, that he drank beer all day and had a few shots at a bar on Sunday , and that he began drinking beer from a keg on Monday afternoon and continued the remainder of the day. (App. 1197–98.)

evidence" was overwhelming, and that the Superior Court's holding was in conflict with United States Supreme Court precedent on the issue.[10] (Id.)

On June 12, 2014, the Pennsylvania Supreme Court denied the PAA. (App. 1264.)

e. Second PCRA Petition

On December 31, 2014, Petitioner's PCRA counsel filed a Second PCRA Petition with the previously raised substantive claims in order to obtain a final determination on them for appeal. (App. 1265.) Petitioner's argument that trial counsel was ineffective for failing to call an expert witness to testify about his alcoholism and intent was presented in the Second PCRA Petition. (App. 1267.) Petitioner submitted that without an expert, his testimony, which was "replete with 'I don't know', 'I can't remember', and 'I blacked out,'" came across as evasive rather than that he "was immersed in a blackout episode," causing prejudice. (App. 1277.) The Commonwealth filed an Answer to the Second PCRA Petition on June 3, 2015. (App. 1292.) Argument was held on the Second PCRA Petition on July 14, 2015.[11] (App. 1315.)

In Petitioner's brief in support of his Second PCRA Petition, he elaborates on how he was prejudiced by trial counsel's failure to present an expert regarding alcohol intoxication and cognition. (App. 1316–18.) In particular, Petitioner argued for the first time that the "need for an expert witness was heightened in this case because petitioner was an alcoholic who may not have appeared intoxicated to others." (App. 1318.) Petitioner noted two police officers who testified that Petitioner had been drinking, but did not appear intoxicated, and that one officer offered expert testimony on how intoxicated persons present with "'slurred speech, bloodshot, glassy eyes" and noted that when "they walk, they stagger." (App. 1319–20 (testimony of

[10] Petitioner's argument on this point is primarily based on Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

[11] A transcript of this hearing does not appear in the Appendix.

Officer Sarsfield).) The officer opined that Petitioner was not intoxicated because he did not exhibit those signs. (App. 1320.) PCRA counsel closed on the issue that "failure to call an expert witness to explain if and why an alcoholic may appear to lay observers to be functioning normally when, in reality, he was immersed in a blackout episode caused prejudice." (App. 1331.)

The Opinion and Order on Petitioner's Second PCRA Petition was issued on November 3, 2015. (App. 1360.) In rejecting Petitioner's arguments, the Court of Common Pleas judge reasoned:

> This Court finds that Maple's recollection of the events shows that Maple killed Mr. Teck willfully, deliberately, and with premeditation. Maple was aware of his actions and any alcohol he consumed did not prevent him from forming the specific intent to kill.
>
> ...
>
> Although Dr. King's testimony may have been helpful to show that Maple's intent may have been impaired, this Court finds that Maple's own recollection clearly demonstrates Maple's intent to kill Mr. Teck. This Court finds that notwithstanding trial counsel's failure to call the expert witness to testify the outcome would not have been different, and Maple was not prejudiced as a result.

(App. 1368.) Petitioner appealed on November 30, 2015. (App. 1371.)

Petitioner filed a brief in support of his appeal with the Superior Court on April 18, 2016. (App. 1377.) The Commonwealth filed a brief on July 14, 2016. (App. 1497.)

On March 13, 2017 the Superior Court issued its Opinion, rejecting Petitioner's arguments regarding an expert. (App. 1536.) First, the Superior Court concluded that:

> The certified record refutes Appellant's contention regarding the need for expert testimony regarding alcohol intoxication and impairment. As the Commonwealth points out, Officers Sarsfield and Dieter, Robert Johnson, Dewayne Shank, Nathan Shank, and Ryan Bronowski all had contact with Appellant on the night of the shooting and testified that Appellant appeared to be sober.

> Moreover, Appellant never testified as to the quantity of alcohol he consumed during the relevant period."

(App. 1542–43.) The Superior Court added a footnote indicating that Petitioner acknowledged that "witnesses for the prosecution testified that he did not appear to be intoxicated on the night of the shooting." (App. 1543 n.2.)

Second, the Superior Court determined that Petitioner's claim that "Dr. King's testimony was needed to explain his memory loss appears contrary to the facts." The Court elaborated:

> Even if we assumed, for purposes of argument, that Dr. King advanced a plausible theory to explain an alcoholic's memory loss, despite the individual's performance of habitual and routine acts, the proffered opinion does not explain the facts before us. Here, the evidence showed that Appellant's conduct on the night in question involved planning and deliberation and was not routine and habitual. . . . The substantial evidence of planning and premeditation compels us to conclude that Dr. King's testimony would not have helped to establish a voluntary intoxication defense in this case.

(App. 1543–44.)

2. Magistrate Judge's Report and Recommendation

The Amended Petition lays out five grounds for relief, (Amended Petition at 18), and the Magistrate Judge concluded that grounds two, four, and five were procedurally defaulted and that Petitioner has not made the requisite showing to overcome that default. (See R&R at 3 (grounds), 6 (default analysis).) The undersigned agrees with the Magistrate Judge's conclusions with respect to those grounds and will adopt that portion of the R&R.

The Magistrate Judge reviewed the remaining two grounds and found both previously presented to the Pennsylvania courts, and thus reviewable.[12] The Amended Petition's first ground for review reads:

> The trial Court's error in failing to suppress a confession that was illegally obtained by Detectives in violation of Miranda and introducing it into evidence at Petitioner's trial(s) was not Rendered harmless error by Petitioner taking the witness stand and testifying in his own behalf, as the erroneous admitted confession had a 'substantial and injurious effect or influence' on the jury and their verdict.

(Amended Petition at App'x F.)

The second exhausted issue presented in the Amended Petition as the third ground for relief, reads:

> In presenting a defense of voluntary intoxication, trial Counsel was ineffective by failing to exhaust his obligations as Counsel and perform an objectively reasonable investigation into, obtain, and present expert witness testimony regarding alcoholism and the impact of alcohol intoxication on cognition and the ability to form the specific intent to kill, as expert witness testimony is the only relevant evidence when demonstrating a defense of voluntary intoxication which tends to mitigate a degree of homicide from first to third degree.

(Id. at App'x H.)

As to the first ground, the Magistrate Judge concluded that "while we do not believe that a Miranda issue existed, even accepting the determination that Miranda was implicated, the record conclusively supports the conclusion of the Superior Court that error if it occurred was harmless under federal standards." (R&R at 11.) As to the third ground presented in the

[12] An issue is exhausted, and reviewable by a federal court, if it has been fairly presented to the state's highest court on either direct appeal or on collateral review. Castille v. Peoples, 489 U.S. 346, 350–51 (1989). The first ground was exhausted on direct appeal, and the third ground in Petitioner's PCRA Petitions.

Amended Petition, the Magistrate Judge determined "there is nothing in the record to suggest that petitioner was intoxicated at the time of the homicide. Indeed the evidence suggested just the opposite." (Id.) Thus, the Magistrate Judge recommended the Amended Petition and a certificate of appealability each be denied. (Id.)

Petitioner filed lengthy Objections to the R&R. As to the first ground, Petitioner argued that the Magistrate Judge misapprehended his claim for relief, and instead substituted his own judgment—that there was no Miranda violation—for that of the Superior Court, which concluded Petitioner's Miranda rights had been violated. (Objections at 3–4.) Petitioner also challenged Magistrate Judge's review of the harmlessness of the Miranda violation. (Id. at 5–18.) With respect to the third ground, Petitioner took issue with the Magistrate Judge's conclusion that the record was devoid of evidence that Petitioner was intoxicated at the time of the homicide. (Id. at 29–32.) Thus, Petitioner contended expert testimony was relevant and, his counsel's failure to present such evidence at trial, counsel was ineffective under Strickland. (Objections at 32–40 (citing Strickland v. Washington, 466 U.S. 668 (1984).)

B. ANALYSIS

The Court first considers Petitioner's first ground for relief. (Amended Petition at App'x F.) Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a petition for a writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits "unless adjudication of the claim [in State court] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). For purposes of § 2254(d)(1), "clearly established Federal

law" includes only United States Supreme Court decisions issued prior to the state court's denial of relief. Greene v. Fisher, 565 U.S. 34, 40 (2011).

Whether the state court recognized the error or not, the impact of the Constitutional error is analyzed under the Brecht standard. Fry v. Pliler, 551 U.S. 112, 121–22 (2007) (holding "substantial and injurious effect" standard of Brecht v. Abrahamson, 507 U.S. 619 (1993) applies in § 2254 proceedings); see also Davis v. Ayala, 135 S. Ct. 2187, 2199 (2015) ("[A] prisoner who seeks federal habeas corpus relief must satisfy Brecht, and if the state court adjudicated his claim on the merits, the Brecht test subsumes the limitations imposed by AEDPA."). "The State bears the burden of proving that an error passes muster under this standard." Brecht, 507 U.S. at 630; Harrison, 392 U.S. at 225–26. Under Brecht, if the Court has "grave doubt" about the effect of an error on the jury, it should treat the error as non-harmless. O'Neal v. McAninch, 513 U.S. 432, (1995). However, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." Fry, 551 U.S. at 119 (referencing Mitchell v. Esparza, 540 U.S. 12 (2003) (emphasis original)).

If a state's highest court does not substantively address the issue being reviewed, the district court should "look through" to the "last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). The State may rebut this showing with alternate grounds for affirmance. Id.

Here, the Pennsylvania Supreme Court denied review, (App. 1264), and therefore, we "look through" to the relevant opinion by the Superior Court. (App. 699–732.) The Superior Court held the Miranda violation was harmless for two reasons.

> First, Appellant took the stand and essentially repeated verbatim the statement that he gave the police on May 30, 2006. While testifying, he merely expanded on the narrative that he gave to police by setting forth the details of his alcohol consumption and the specifics regarding his provocation for shooting Mr. Teck and attempting to shoot Mr. Altman. Thus, the erroneously-admitted confessions were cumulative of other substantially similar and untainted evidence.

(App. 716.) And second, the Superior Court determined:

> All this properly-admitted, uncontradicted evidence of Appellant's guilt was so overwhelming and the prejudicial effect of the admission of his statements was so insignificant by comparison to that evidence that the fact that Appellant's statements were introduced into evidence could not have contributed to the verdict.

(App. 723.)

Before this Court, the Commonwealth has not provided alternate grounds for affirmance. Wilson, 138 S. Ct. at 1192. Rather, it has wholesale adopted the Superior Court's reasoning:

> In regard to the Superior Court finding that the admission of Petitioner's confession was harmless error, the Respondent agrees with the reasoning of the Court in its August 6, 2010 memorandum opinion, to the extent IF this Court finds that the confession was unconstitutionally obtained, and adopts the same argument to this Court.

(Doc. 21 at 18; see also id. at 18–22 (pasting Superior Court's reasoning regarding Petitioner's testimony verbatim into brief).)

1. Unreasonable application of Federal law

Petitioner urges that the Superior Court's first justification for its harmless error determination is contrary to Federal law.[13] In Harrison v. United States, the Supreme Court

[13] With respect to the underlying Miranda violation, the Court agrees with Petitioner that, if the Commonwealth wished to challenge the Superior Court's finding, it should have pursued that argument on direct appeal. (Doc. 32 at 3-4.) Because the Commonwealth did not do so, the determination is entitled to this Court's deference, and the undersigned finds no reason to disturb it. Rather, the issue presented by Petitioner is the harmless error determination. (Id.)

reversed defendant's conviction after finding that his "trial testimony was the inadmissible fruit of [ ] illegally procured confessions." 392 U.S. 219, 221 (1968).[14]

In Harrison, the defendant was charged with felony murder. 392 U.S. at 220. Defendant made three confessions which were used in evidence in his trial, and he testified after the confessions were admitted. Id. He was found guilty, but on appeal, his convictions were reversed after the court of appeals determined that his confessions were illegally obtained. Id. At the defendant's second trial, the prosecution did not introduce the confession, but it did introduce the defendant's trial testimony from the first trial. Id. at 221. The defendant was again convicted, and this conviction was upheld by the court of appeals. Id.

The Supreme Court held that because the defendant testified only after the illegally obtained evidence was wrongfully introduced at trial, his testimony was fruit of the poisonous tree. Id. at 222 ("If [defendant testified] in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible."). Under such circumstances, the Supreme Court found it was improper to "demand a demonstration by a petitioner that he would not have testified as he did if his inadmissible confessions had not been used." Id. at 224. Rather, "the Government must show that its illegal action did not induce [defendant's] testimony" in order to purge the taint of illegality. Id. at 225–26. As the Government failed to do so in the case before it, the judgment of conviction was reversed. Id. at 226.

Under Harrison, Petitioner's trial testimony is similarly tainted. Petitioner testified after the prosecution used his illegally obtained confessions, (App. 679), and Petitioner argued on

[14] In his Reply to the Superior Court, Petitioner's trial counsel argued Petitioner's trial testimony was tainted by the same illegality and cited Harrison. (App. 677–81.)

appeal and here that he did so at least in part to "overcome the impact of confessions illegally obtained and hence improperly introduced." Harrison, 392 U.S. at 223. Thus, his trial testimony cannot excuse the Constitutional violation; it is part and parcel of the same Constitutional harm.

In response to the Amended Petition, the Commonwealth has not presented evidence to demonstrate "its illegal action did not induce his testimony" nor (as noted above) has it provided any alternate grounds for affirmance of the Superior Court's harmless error determination. Harrison, 392 U.S. at 225. Petitioner's trial testimony thus cannot be considered to be either "substantially similar and untainted evidence" or "properly-admitted, uncontradicted" evidence of guilt as found by the Superior Court.

2. Harmlessness under Brecht

Therefore, this Court must conduct its own harmless error analysis and consider:

> the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradicting the testimony of the witness on material points, the extent cross-examination was permitted, and, of course, the overall strength of the prosecution's case.

Johnson v. Superintendent Fayette SCI, 949 F.3d 791, 799 (3d Cir. 2020) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)); see also Johnson, 949 F.3d at 799 n.5 (finding the factors discussed in Van Arsdall apply to a court reviewing a for harmless error under Brecht). After careful consideration of all of these factors, the Court concludes that admission of Petitioner's testimony—including both of his confessions in violation of Miranda and his "testimony impelled thereby" at trial—"had a substantial and injurious effect or influence in determining the jury's verdict." Harrison, 392 U.S. at 222; Brecht, 507 U.S. at 637.

Three considerations drive the Court's conclusion. First, and as Judge Musmanno noted in the concurring opinion to the Superior Court's opinion on direct appeal:

> [a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted again him....[T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.' Bruton v. United States, 391 U.S., at 139–40 (White, J., dissenting); see also Cruz v. New York, 481 U.S. at 195 (White, J., dissenting) (citing Bruton). While some statements by a defendant may concern isolated aspects the crime or may be incriminating when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession . . . the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

Arizona v. Fulminante, 499 U.S. 279, 296 (1991). In this instant case, the jury was made aware that Petitioner *three times admitted* that he shot the victim. After hearing he confessed to officers, the jury heard the subsequent tape-recorded statement of Petitioner's second confession and were given a transcript of the recording to take back with them when they deliberated. The jury saw Petitioner confess to shooting Mr. Teck at trial. Each one of these admissions were tainted by illegality of the first, and they were contrary to Petitioner's Constitutional rights. Simply put, this Court has "grave doubt" that these statements were not prejudicial. O'Neal v. McAninch, 513 U.S. 432, 438–39 (1995).

Second, while the Court is not inclined to speculate about how Petitioner's trial may have proceeded without these pieces of evidence, there is no doubt that it could have been dramatically different. One way in which it could have been different relates to the third ground for relief in the Amended Petition—whether trial counsel was ineffective for failing to present an expert as to the issue of alcoholism, cognition and intent in connection with Petitioner's

voluntary intoxication defense. At the hearing on the First PCRA Petition, trial counsel admitted that Petitioner was the *only* witness he used to put on evidence about the voluntary intoxication defense. (App. 1029–30.) If Petitioner had not testified in order to mitigate against his coerced confessions, his counsel may have explored other avenues to present the defense (or, would have risked a finding of ineffectiveness for not presenting the defense *at all*). However, if the prosecution had neither of Petitioner's confessions nor his trial testimony, it is possible defense counsel may have pursued an entirely different type of defense—one which could have led to acquittal, rather than just mitigating the most serious charges in the case.

This is just one example of how pervasive the effect of removing the tainted testimony could have been on the entirety of Petitioner's trial; the Court can think of many others. All this to say, the impact of removing Petitioner's confessions and testimony from the trial is so significant, that "the error itself had substantial influence" on the verdict. Kotteakos v. United States, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.").

Finally, while the Commonwealth had other strong evidence, there is also no doubt that Petitioner's confessions and his trial testimony are of the highest importance for the most serious convictions in the case. The Superior Court's analysis made clear that the "other substantially similar and untainted evidence" to the "erroneously-admitted confessions" consisted entirely of statements made by Petitioner at trial. (App. 716). Without the trial testimony and the confessions, the prosecution lacks direct evidence on critical issues, including intent. With respect to the Commonwealth's other eyewitnesses, at least three were charged by the trial judge

as "corrupt sources" under Pennsylvania law, and thus their testimony must be evaluated with caution. (App. 1189); see Commonwealth v. Williams, 732 A.2d 1167, 1181 (Pa. 1999) (holding that the instruction is "indicated in cases in which the evidence is sufficient to present a jury question with respect to whether the Commonwealth's witness is an accomplice"). Without Petitioner's coerced confessions and testimony to corroborate the accounts of those witnesses, it is much more likely the jury would doubt their testimony. See Johnson, 949 F.3d at 799 (highlighting factors including importance of witness testimony, cumulative nature of testimony, and corroborating effects for consideration in assessing an error's harmlessness).

For these reasons, the Court will grant the Amended Petition as to this ground.

3. Ground Three: Expert Witness

Briefly, Petitioner's third ground does not provide an independent basis for relief. While this Court agrees with Judge Blahevoc that this claim has "arguable merit," (App. 1187), it cannot say that the Superior Court's conclusions are unreasonable with respect to an expert related to the voluntary intoxication defense. (App. 1542–43); see also 28 U.S.C. § 2254(d)(2).

While Petitioner maintained that he was "blacked out" at the time of the killing, there were a number of other witnesses that testified that he did not appear to be intoxicated. (Id.) While Petitioner urges that an expert witness is necessary to explain why lay witnesses could think Petitioner—an alcoholic person in a blackout—appeared sober, it is reasonable to conclude, as the Superior Court did, that the lay witnesses thought Petitioner was sober *because he was*. In the latter event, an expert would not have been necessary or helpful, and thus, Petitioner could not have been prejudiced by his counsel's failure to obtain one. Strickland, 446 U.S. at 687.

II. ORDER

The Magistrate Judge's Report and Recommendation, (Doc. 29), is **ADOPTED IN PART** and **REJECTED IN PART.** Grounds two, four, and five of the Amended Petition are barred as procedurally defaulted, and relief is **DENIED** as to ground three. The Amended Petition is **GRANTED** with respect to ground one, and Petitioner's conviction is **VACATED**; Respondent shall **RELEASE** Petitioner from custody unless, within 120 days from the date of this Order, the Commonwealth of Pennsylvania grants Petitioner a new trial.

This Order is **STAYED** until post-judgment motions and appeals are final or the time to file such motions and appeals expires.

IT IS SO ORDERED.

June 30, 2020

s\Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via Electronic Filing):

All Counsel of Record

cc (via First-Class U.S. Mail):

Jason Paul Maple
HV-3555
SCI Mercer
801 Butler Pike
Mercer, PA 16137

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

JASON PAUL MAPLE,	)	
	)	
Petitioner,	)	Civil Action No. 17-529
	)	
v.	)	Judge Cathy Bissoon
	)	
MICHAEL R. CLARK,	)	Magistrate Judge Patricia L. Dodge
	)	
Respondent.	)	

JUDGMENT ORDER

FINAL JUDGMENT hereby is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure. This case has been marked closed.

IT IS SO ORDERED.

June 30, 2020

s\Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via Electronic Filing):

All Counsel of Record

cc (via First-Class U.S. Mail):

Jason Paul Maple
HV-3555
SCI Mercer
801 Butler Pike
Mercer, PA 16137

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

JASON PAUL MAPLE, HV-3555, Petitioner,	)	
v.	)	2:17-cv-529
MICHAEL R. CLARK, Respondent.	)	

REPORT and RECOMMENDATION

I.RECOMMENDATION:

It is respectfully recommended that the amended petition of Jason Paul Maple (ECF No. 25) be denied, and because reasonable jurists could not conclude that a basis for appeal exists, that a certificate of appealability be denied.

II. Report:

Jason Paul Maple, an inmate at the State Correctional Institution at Albion has presented a petition for a writ of habeas corpus which he has been granted leave to further prosecute in forma pauperis.[1]

Maple is presently serving a life without parole sentenced imposed on November 24, 2008 following his conviction by a jury of first degree murder, aggravated assault with serious bodily injury, criminal conspiracy-engaging in robbery, criminal conspiracy-engaging in murder, criminal attempt-criminal homicide and robbery-threat of immediate serious injury at Nos. 2544 and 2545 of 2006 in the Court of Common Pleas of Westmoreland County, Pennsylvania (CP-65-CR-2544 and 2545- 2006).[2]

An appeal was filed in the Superior Court in which the issues presented were:

[1] Maple submitted the filing fee with his petition as well as a motion to proceed further in forma pauperis which was granted.
[2] See: Amended petition at ¶¶ 1-6.

I. Whether the trial court erred in not finding a violation of Maple's Miranda warnings had occurred and by allowing the admission of Maple's confession.

II. Whether the trial court violated the Confrontation Clause when it permitted the state to present testimony regarding the state of mind, alleged statements, and speculation regarding the acts committed by an individual who was deceased and therefore unavailable.

III. Whether the court violated the best evidence rule by admitting the testimony of an officer over the physical evidence contained on the Miranda form when that same officer executed and attested to its accuracy.

IV. The trial court erred in designing verdict slips which did not set forth the overt act Maple was charged with having committed and further compounded this error by sentencing Maple on the conspiracy charges when the overt act written on the verdict slip did not match the overt act charged in the information.

V. Whether the trial court abused its discretion and deprived Maple of a fair trial by admitting into evidence colored photographs which were inflammatory, prejudicial, had no evidentiary value and were cumulative, and therefore, neither relevant, nor admissible.

VI. Whether prosecutorial misconduct occurred when the prosecution failed to correct a witness' preliminary hearing testimony once it became aware that allegedly false testimony had been given. (Appx. p. 560).

On August 6, 2010, the judgment of sentence was affirmed (Appx. pp.699-732). Allowance of appeal was denied by the Pennsylvania Supreme Court on June 12, 2014 (Appx. p.1264).

On December 31, 2014, Maple filed a post-conviction petition. Relief was denied and an appeal was filed in which the issues were:

I. Whether trial counsel was ineffective for failing to call an expert witness to testify regarding alcoholism and the impact of alcohol intoxication on cognition and the ability to form the specific intent to kill, in violation of the Sixth Amendment to the Constitution of the Uni8ted States and Article I, Section 9 of the Pennsylvania Constitution.

II. Whether trial counsel was ineffective for failing to object to the Court's instructions with regard to both the "over act" requirement and the special interrogatories and trial counsel was ineffective for failing to object to the form of the special interrogatories, in violation of the Sixth Amendment to the

Constitution of the United States and Article I, Section 9 of the Pennsylvania Constitution. (Appx. p. 1385).

On March 13, 2017, the denial of post-conviction relief was affirmed (Appx. 1536-1546). Leave to appeal was not sought from the Pennsylvania Supreme Court.

Maple filed his original habeas petition in this Court on April 24, 2017 and an amended petition on August 21, 2017. In his amended petition, Maple raises the following issues:

1. The trial court's error in failing to suppress a confession that was illegally obtained by detectives in violation of Miranda and introducing it into evidence at petitioner's trial(s) was not rendered as harmless error by petitioner taking the witness stand and testifying in his own behalf, as the erroneous admitted confession had a "substantial and injurious" effect or influence on the jury and their verdict.
2. Trial counsel was ineffective by inadequately advising petition of the risks of testifying and by persuading him to testify when petitioner was reluctant to take the witness stand at trial, who otherwise would not have testified because he was concerned about sacrificing the ability to appeal his meritorious Miranda issue, thereby vitiating a knowing and intelligent decision by petitioner to testify in his own behalf.
3. In presenting a defense of voluntary intoxication, trial counsel was ineffective by failing to exhaust his obligation as counsel and perform an objectively reasonable investigation into, obtain, and present expert witness testimony regarding alcoholism and the impact of alcohol intoxication or cognition and the ability to form the specific intent to kill, as expert witness testimony is the only relevant evidence when demonstrating a defense of voluntary intoxication which tends to mitigate a degree of homicide from first to third degree.
4. PCRA counsel was ineffective in failing to raise an ineffectiveness claim of trial counsel for his failure to investigate, obtain, and present expert witness testimony regarding petitioner's service-related post-traumatic stress disorder, where expert evidence regarding the scientific and psychological effects of a PTSD mental infirmity would have negated the specific intent requirement of first degree murder and would have mitigated petitioner's conviction to third degree.
5. PCRA counsel was ineffective in failing to raise an ineffectiveness claim on trial counsel for his failure to object to, and seek the suppression of, the eye-witness testimony of Dewayne Shank, Nathan Shank, and Ryan Bronowski – the identities of whom were discovered by a direct connection to petitioner's illegally obtained confession, rendering their

testimony "tainted fruit." (Appx. F, G, H, I and J to the amended petition.)

The background to this prosecution is set forth in the memorandum of the Superior Court:

> At approximately 4:00 a.m. on May 30, 2006, William Teck and Patrick Altman were walking along railroad tracks in Manor, Pennsylvania. Mr. Teck and Mr. Altman had been staying at the residence of Jennifer Vinsek, who was Appellant's girlfriend and Mr. Altman's cousin. Appellant shot and killed Mr. Teck with a shotgun and then fired his weapon at Mr. Altman. While Mr. Altman was not struck with a bullet, he dropped a bag that he was carrying as he fled the scene.
>
> Appellant's accomplices in the crime included Jennifer Vinsek, Dewayne Shank, Dewayne's brother Nathan Shank, and Ryan Bronowski. Following the shootings, Nathan removed a backpack from Mr. Teck's body, and Appellant retrieved Mr. Altman's abandoned bag. Dewayne, Nathan, and Bronowski testified against Appellant at trial. The Commonwealth witnesses also included Mr. Altman, Amy Kujawa, who was Vinsek's roommate, and Robert Johnson, a friend of Ms. Kujawa and Vinsek.
>
> The motivation for the crimes generated from events that started about one week prior to the shooting on May 23, 2006. At that time, Mr. Johnson inadvertently walked in on Vinsek and Mr. Teck engaged in consensual sexual intercourse at Ms. Kujawa's and Vinsek's residence on 12 B Division Street, Greensburg, Pennsylvania. On Thursday, May 25, 2006, Vinsek left with Appellant to go camping, where they stayed until May 29, 2006. During their camping trip, Vinsek told Appellant that Mr. Teck had assaulted and attempted to rape her.
>
> When Vinsek and Appellant returned to Greensburg on May 29, 2006, they went to Vinsek's apartment, which was in disarray. Vinsek claimed that Mr. Teck and Mr. Altman were responsible for the damage and that they also had stolen items. Vinsek and Appellant immediately tracked down Mr. Teck and Mr. Altman, who were drinking at Clear Waterz Bar in Greensburg, where Ms. Kujawa worked as a bartender. At about 12:30 a.m. on May 30, 2006, Appellant and Vinsek confronted the two men and, at approximately 1:00 a.m., were ejected from Clear Waterz Bar by the owner.
>
> Appellant and Vinsek then returned to 12B Division Street and contacted police to report that a burglary had occurred. Greensburg Police Officers Donald Sarsfield and Kerry Dieter responded to the burglary report. Mr. Johnson was present because he had seen Mr.

Teck and Mr. Altman at the apartment during the day of May 29, 2006. Vinsek informed police that Mr. Altman and Mr. Teck burglarized her apartment and that Mr. Teck had attempted to rape her the previous week. In the presence of Police Officer Sarsfield, Police Officer Dieter, and Mr. Johnson, Appellant threated to retaliate against Mr. Teck and Mr. Altman.

After Officers Dieter and Sarsfield left Vinsek's apartment, Appellant contacted Dewayne Shank and asked him for assistance in confronting Mr. Teck and Mr. Altman. Appellant told Dewayne to enlist the aid of Nathan Shank and Bronowski and informed the Shank brothers that Mr. Teck had guns, money, and drugs in his backpack, and that he wanted to retaliate against Mr. Teck and Mr. Altman for certain crimes that hey had committed against Vinsek. Appellant promised the Shanks that they could keep the guns, money, and drugs in Mr. Teck's possession in return for their assistance.

While Appellant was arranging for help, Mr. Teck and Mr. Altman left Clear Waterz Bar and went to Manor Diner. Vinsek located the two men through Ms. Kujawa. Nathan, Dewayne, and Bronowski drove to Manor and rendezvoused with Appellant and Vinsek. Vinsek then induced Ms. Kujawa to invite Mr. Teck and Mr. Altman to a party at 12B Division Street so that the two victims, who did not have a vehicle, would leave the diner to walk to Greensburg. When the two men left Manor Diner and started out toward Greensburg along the railroad tracks, Appellant followed the two men and fired his shotgun twice at them, killing Mr. Teck.

***

After litigating an unsuccessful motion to suppress his two inculpatory remarks, Appellant was convicted at a jury trial. Appellant was convicted of first-degree murder of William Teck, conspiracy to commit homicide, and conspiracy to commit robbery. As to the victim Patrick Altman, Appellant was convicted of attempted homicide, aggravated assault, conspiracy to commit robbery, and robbery. Appellant was acquitted of robbery with respect to Mr. Teck. (Appx. pp. 1536 -1537) (footnotes omitted).

It is provided in 28 U.S.C. §2254(b) that:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

This statute represents a codification of the well-established concept which requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to that state's highest court for consideration. Preiser v. Rodriguez, 411 U.S. 475 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Doctor v. Walters, 96 F.3d 675 (3d Cir. 1996).

It is only when a petitioner has demonstrated that the available corrective process would be ineffective or futile that the exhaustion requirement will not be imposed. Preiser v. Rodriguez, supra.; Walker v. Vaughn, 53 F.3d 609 (3d Cir. 1995).

If it appears that there are available state court remedies, the court must determine whether a procedural default has occurred. If a procedural default has occurred, the court must determine whether cause or prejudice exists for the default, or whether a fundamental miscarriage of justice would result from a failure to consider the claims. Carter v. Vaughn, 62 F.3d 591 (3d Cir. 1995).

An examination of the issues which the petitioner seeks to raise here, namely issues 2,4 and 5 demonstrates that they were never raised in the courts of the Commonwealth during either his direct appeal of post-conviction appeal, and for this reason have not been exhausted. However, in Coleman v. Thompson, 501 U.S. 722,750 (1991), the Court held:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.

Because no such showing is made here, the petitioner has defaulted the available state court remedies on these issues and no further consideration of these issues is warranted here.

Thus remaining for review are his first and third issues.

In his first issue, Maple argues that it was error for the trial court to fail to suppress his confession allegedly obtained in violation of Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it

demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

Following a hearing the trial court made the following factual findings:

> In the early morning hours of May 30, 2006, William Teck was shot and killed on the railroad tracks of Manor Borough, Westmoreland County. Terry Kuhns received information that Jason Maple... had some sort of verbal confrontation with the victim that evening. The detective and his partner ... went to the defendant's home. They identified themselves to defendant and his girlfriend, Jennifer Vinsek, and asked the two if they would come to the District Attorney's Office for purpose of being interviewed concerning a homicide investigation. They agree, and defendant asked if he should drive himself. Kuhns suggested they ride with the detectives, as it was easier for parking ... Detective Zupan told them they were not under arrest, and that the detectives had been interviewing a lot of people. They were patted down as part of standard police safety procedure. None of the law enforcement officials were in uniform and no guns were drawn.
>
> The defendant was never handcuffed or restrained in any way. After they arrived at the courthouse, the defendant was seated alone in a vacant office while the detectives interviewed Ms. Vinsek in another room. The door to the District Attorney's Office was not locked and not guarded.
>
> Detective Kuhns at one point came out of the interview with Vinsek and asked the defendant if he was okay, to which the defendant answered in the affirmative. Detective Marcocci offered him coffee and told him if he needed anything to give him a holler... He was asked if he needed a bathroom break. He asked for and was given a soft drink and cigarettes. The interview was rather calm, with no raised or hostile voices. He initially denied any involvement in the homicide, but fifty minutes into the interview when Kuhns told him he didn't think he was telling the truth, the defendant admitted that he shot the victim.
>
> The defendant was then placed under arrest and asked if he would give a taped statement before he was arraigned. The defendant asked if he could see Vinsek. Detective Kuhns brought her into the room and the two were together for approximately 30 minutes. At 10:30 p.m., the defendant was read his Miranda rights, which he waived, and signed a form consenting to taping his confession. Before the taping began, the defendant asked, "If because of the tape, do I need a lawyer?" Kuhns responded, "That's up to you. If you want a lawyer,

we will stop right now." The defendant then said, "All right, let's just do it."

The Court then concluded as a matter of law,

> Defendant was not in custody for purposes of Miranda warnings where he was not restrained in any way, the place he was interviewed was only blocks from his home, he was not in a locked or guarded room, detectives checked on his welfare and gave him cigarettes and beverages, and the initial interview lasted only fifty minutes. (App. pp.439-441)(transcript references omitted).[3]

In reviewing Miranda issue, the Superior Court disagreed with the trial court and concluded that Maple was in custody at the time he made his statements and wrote:

> Since Appellant's first admission was obtained prior to the administration of constitutional warnings, it should have been suppressed under Miranda []. Furthermore, the fact that the required warnings were given prior to the procurement of the taped statement did not purge the second confession of the primary taint of the first, illegally-obtained admission. The second confession was procured immediately after and was clearly derived from the first admission, and the taped confession also should have been suppressed (Appx. p.714).

However, the Superior Court also concluded that the admission of these statement was harmless error under the teachings of Arizona v. Fulminante, 499 U.S. 279 (1991) because petitioner testified on his own behalf at trial and repeated the disclosures of his statements and because of the independent "overwhelming" evidence of his guilt. (Appx.pp. 715– 717). Petitioner challenges this determination.

In Columbe v. Connecticut 367 U.S. 568, 602(1961) the Court held

> "the ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired the use of his confession offends due process."

[3] At the suppression hearing testimony was presented which indicated that after his initial concession, the petitioner's girlfriend visited him for approximately thirty minutes during which time she sat on his lap and they were hugging and crying (Appx. p. 265).

That is, the issue of voluntariness is determined from the totality of the circumstances. Fulminante, at 286 (1991). As the Court continued in Id. at 287, "our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient." (footnote omitted). Ultimately, the Court concluded, that a constitutional error does not require automatic reversal of a conviction but rather subjects review to a harmless error rule. Id. at 306. No such showing has been made here, and it appears that the petitioner's confession was not obtained in violation of Miranda.

Although the Superior Court determined that a Miranda violation had occurred, the Court further concluded that its admission was harmless error and for this reason not a basis for relief. Specifically, the Court wrote:

> [B]oth the second and third tests for the existence of harmless error [as set forth in Commonwealth v. Atkinson, 987 A.2d 743, 752 (Pa.Super. 2009] are present. First, Appellant took the stand and essentially repeated verbatim the statement that he gave to police on May 30, 2006. While testifying, he merely expanded on the narrative that he gave to police by setting forth the details of his alcohol consumption and the specifics regarding his provocation for shooting Mr. Teck and attempting to shoot Mr. Altman. Thus, the erroneously-admitted confessions were cumulative of other substantially similar and untainted evidence.
>
> Additionally, the Commonwealth introduced independent, overwhelming evidence of Appellant's guilt ... Appellant was Jennifer Vinsek's boyfriend and owned a shotgun with a camouflage barrel. Vinsek and Amy Kujawa were roommates at 12B Division Street, Greensburg. In May, 2006, Patrick Altman, Vinsek's cousin, needed a place to stay, and he and his friend, William Teck, moved into the apartment. Vinsek began a consensual sexual relationship with Mr. Teck, and about one week prior to the murder, Mr. Johnson, a friend of Ms. Kujawa and Vinsek, accidentally walked in on Mr. Teck and Vinsek engaged in sexual intercourse. Shortly thereafter, Vinsek left with Appellant to go on a camping trip. On May 29, 2006, they returned to Vinsek's home where they allegedly found items damaged and taken by Mr. Teck and Mr. Altman.
>
> At that time, those two men were drinking at the Clear Waterz bar in Greensburg, where Ms. Kujawa worked as a bartender. Appellant and Vinsek arrived at the bar between 12:30 a.m. and 12:45 a.m. on May 30, 2006, confronted Mr. Teck and Mr. Altman, and accused them of breaking the items at 12 B Division Street. Appellant yelled at Mr. Teck and Mr. Altman and pushed Mr. Altman. At that point, the

owner of Clear Waterz removed Vinsek and Appellant from the bar. This confrontation was witnessed by Mr. Altman, Ms. Kujawa, and Mr. Johnson.

At approximately 1:00 a.m., Vinsek and Appellant left Clear Waterz bar, returned to 12B Division Street, telephoned police, and reported that her apartment had been burglarized by Mr. Teck and Mr. Altman. Greensburg Police ... responded to the burglary report and encountered Appellant, Vinsek, and Mr. Johnson in the apartment...

Police Officer Dieter confirmed that Vinsek reported that Mr. Teck and Mr. Altman had burglarized the apartment. Vinsek also told Officer Dieter that Mr. Teck had assaulted her and attempted to rape her. While Officer Dieter was speaking with Vinsek, Appellant "would make comments such as in response, can you either shoot him or arrest him? And then [Appellant] stated on at least two occasions, 'maybe I'll just handle it my way, and maybe if I find him/them first, I will take care of it myself.'" Officer Dieter did smell alcohol on Appellant's breath but testified that he was not intoxicated because he could hold a coherent conversation, was not staggering, and did not display slurred speech or red or glassy eyes. Mr. Johnson testified consistently that Appellant told police, "'[I]f you find them, shoot them; if you don't, I'll take care of it.'"

In the meantime, Mr. Teck and Mr. Altman left Clear Waterz and ... started to walk toward Greensburg along the railroad tracks when two men, one of whom had a shotgun, came out from behind the Manor Community Building. Mr. Altman started to run, and then there "was a shot, and ... I heard my buddy Bill [Teck] say, 'oh, fuck.'" Mr. Altman continued to run ... He fled to the Manor Borough police station where he told police about the crime.

The Commonwealth presented the testimony of Dewayne Shank, Nathan Shank, and Ryan Bronowski to establish the sequence of events between 2:00 am ... and 4:00 a.m., when the shootings occurred. Dewayne testified as follows. At approximately 2:30 a.m. on May 30, 2006, Appellant telephoned Dewayne and asked him for help in connection with an altercation that Appellant had with some people ... Dewayne explained that Appellant told him about the drugs, money, and guns because Dewayne, Nathan, and Bronowski were going to keep those items in exchange for helping Appellant...

Everyone drove to the Manor Diner, and Appellant exited his car and grabbed "a shotgun out of the back of the trunk. He start[ed] to run down the steps towards the basement of the Manor Diner..."

> Vinsek ... told Dewayne and Appellant that Mr. Teck and Mr. Altman would be leaving the Manor Diner momentarily. Dewayne then observed the two victims, and saw Appellant, who was in possession of his shotgun, and Nathan follow them while Bronowski trailed in his car.
>
> At that point, a Manor Borough police officer arrived in the gravel lot, and Dewayne and Vinsek left. As they were driving through Manor, they passed the police station, and Vinsek spotted Mr. Altman. Vinsek hid in the car and said, "that's my cousin, we need to hit him and get rid of some witnesses."
>
> Vinsek and Dewayne proceeded back to the Shanks' residence where Dewayne called Appellant, who asked to speak with Vinsek; Dewayne overheard Appellant tell Vinsek, "It is done[.]" Dewayne helped Bronowski clean his car, which contained blood, and the shotgun was dismantled and its pieces were thrown away. Police recovered some of the fragments of the camouflage-decorated gun and introduced them into evidence.
>
> Nathan Shank confirmed the events described by his brother Dewayne...
>
> Appellant, accompanied by Nathan, followed the two victims. Nathan witnessed Appellant take his shotgun, place the gun on his shoulder, walk around a tree, and fire the weapon. Nathan then observed Mr. Teck fall to the ground while Mr. Altman ran away... Bronowski's testimony was consistent with that of Nathan and Dewayne Shank. He saw Appellant in possession of a shotgun immediately before and after the murder...
>
> Hence, we conclude that the harmless error standard has been satisfied and a new trial is unnecessary. (Appx. pp. 716 -723) (record citations omitted).

In addition, at trial petitioner testified that he "snapped" and shot William Teck (Appx. pp. 2966-67, 3045, 3050-3052, 3061); that he willingly spoke to the police (Appx. p. 2975) and because he was aware that they had information from his previous questioning, he decided to cooperate with them (Appx. p. 2979).

Thus, while we do not believe that a Miranda issue existed, even accepting the determination that Miranda was implicated, the record conclusively supports the conclusion of the Superior Court that error if it occurred was harmless under federal standards. Accordingly, this claim does not provide a basis for relief.

The remaining issue, petitioner's third, alleges that counsel was ineffective for failing to discover and present evidence of the effects of alcohol intoxication.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court explained that there are two components to demonstrating a violation of the right to the effective assistance of counsel. First, the petitioner must show that counsel's performance was deficient. This requires showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688; see also Williams v. Taylor, 529 U.S. 362, 390-91 (2000). Second, under Strickland, the defendant must show that he was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The Strickland test is conjunctive and a habeas petitioner must establish both the deficiency in performance prong and the prejudice prong. See Strickland, 466 U.S. at 687; Rainey v. Varner, 603 F.3d 189,197 (3d Cir.2010) cert. denied 131 S.Ct. 1673 (2011). As a result, if a petitioner fails on either prong, he loses. Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006).

In reviewing this issue, the Superior Court wrote:

> The certified record refutes Appellant's contentions regarding the need for expert testimony regarding alcohol intoxication and impairment. As the Commonwealth points out, Officers Sarsfield and Dieter, Robert Johnson, Dewayne Shank, Nathan Shank, and Ryan Bronowski all had contact with Appellant on the night of the shooting and testified that Appellant appeared to be sober... Moreover, Appellant never testified as to the quantity of alcohol he consumed during the relevant time period. Additionally, Appellant's claim that Dr. King's testimony was needed to explain his memory loss appears contrary to the facts... Even if we assumed, for purposes of argument, that Dr. King [petitioner's proposed expert] advanced a plausible theory to explain an alcoholic's memory loss, despite the individual's performance of habitual and routine acts, the proffered opinion does not explain the facts before us. Here, the evidence showed that Appellant's conduct on the night in question involved planning and deliberation and was not routine and habitual. To perpetrate the attack on the victims, Appellant recruited the assistance of several other individuals, allocated potential spoils to induce the assistance of

> others, and lured the victims away from a public space and into a more secluded area where they would be vulnerable to an assault and where the likelihood of detection would be reduced. The substantial evidence of planning and premeditation compels us to conclude that Dr. King's testimony would not have helped to establish a voluntary intoxication defense in this case... (Appx. pp. 1542 -1544).

In the instant case, there was nothing in the record to suggest that the petitioner was intoxicated at the time of the homicide. Indeed the evidence suggested just the opposite. For this reason, Dr. King's testimony would only have been relevant if there was evidence of intoxication. Counsel cannot be deemed to have been ineffective for failing to raise meritless claims. Real v. Shannon, 600 F.3d 302, 310 (3d Cir. 2010). Thus, this allegation does not provide a basis for relief here.

Because the petitioner's conviction was not secured in any manner contrary to the determinations of the United States Supreme Court, nor did it involve an unreasonable application of those decisions, he is not entitled to relief here. Accordingly, it is recommended that the petition of Jason Paul Maple for a writ of habeas corpus be dismissed, and because reasonable jurists could not conclude that a basis for appeal exists, that a certificate of appealability be denied.

Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections within fourteen (14) days of this date and mailing them to United States District Court, 700 Grant Street, Pittsburgh PA 15219-1957. Failure to file timely objections will waive the right to appeal.

Respectfully submitted,
s/ Robert C. Mitchell
United States Magistrate Judge

Filed: May 15, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2514

JASON PAUL MAPLE,

v.

SUPERINTENDENT ALBION SCI;
Appellant

(W.D. Pa. 2:17-cv-00529)

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 Appellee 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: January 27, 2022
JK/cc: All Counsel of Record

8-6-10

J. A36039/09

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

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JASON P. MAPLE, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2150 WDA 2008

Appeal from the Judgment of Sentence of November 24, 2008, in the Court of Common Pleas of Westmoreland County, Criminal Division, at No. 2544 CRIMINAL 2006, 2545 CRIMINAL 2006.

BEFORE: MUSMANNO, BENDER, and BOWES, JJ.

MEMORANDUM: Filed: August 6, 2010

Jason P. Maple appeals from the judgment of sentence of life imprisonment that was imposed after he was convicted of first degree murder and other crimes in connection with events that transpired on May 30, 2006. While we conclude that the Appellant's confession was procured in violation of his constitutional rights, we also find that its admission into evidence constituted harmless error. Rejecting Appellant's remaining claims, we affirm the judgment of sentence.

At approximately 4:00 a.m. on May 30, 2006, William Teck and Patrick Altman were walking along railroad tracks in Manor, Pennsylvania. Mr. Teck and Mr. Altman had been staying at the residence of

Jennifer Vinsek,[1] who was Appellant's girlfriend and Mr. Altman's cousin. Appellant shot and killed Mr. Teck with a shotgun and then fired his weapon at Mr. Altman. While Mr. Altman was not struck with a bullet, he dropped a bag that he was carrying as he fled the scene.

Appellant's accomplices in the crime included Jennifer Vinsek, Dewayne Shank, Dewayne's brother Nathan Shank, and Ryan Bronowski. Following the shootings, Nathan removed a backpack from Mr. Teck's body, and Appellant retrieved Mr. Altman's abandoned bag. Dewayne, Nathan, and Bronowski testified against Appellant at trial. The Commonwealth witnesses also included Mr. Altman, Amy Kujawa, who was Vinsek's roommate, and Robert Johnson, a friend of Ms. Kujawa and Vinsek.

The motivation for the crimes generated from events that started about one week prior to the shooting on May 23, 2006. At that time, Mr. Johnson inadvertently walked in on Vinsek and Mr. Teck engaged in consensual sexual intercourse at Ms. Kujawa and Vinsek's residence on 12B Division Street, Greensburg, Pennsylvania. On Thursday, May 25, 2006, Vinsek left with Appellant to go camping, where they stayed until May 29, 2006. During their camping trip, Vinsek told Appellant that Mr. Teck had assaulted and attempted to rape her.

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[1] Vinsek was tried separately for her role in the crimes at issue herein. She was convicted of second degree murder, two counts of robbery, and three counts of conspiracy.

When Vinsek and Appellant returned to Greensburg on May 29, 2006, they went to Vinsek's apartment, which was in disarray. Vinsek claimed that Mr. Teck and Mr. Altman were responsible for the damage and that they also had stolen items. Vinsek and Appellant immediately tracked down Mr. Teck and Mr. Altman, who were drinking at Clear Waterz Bar in Greensburg, where Ms. Kujawa worked as a bartender. At about 12:30 a.m. on May 30, 2006, Appellant and Vinsek confronted the two men and, at approximately 1:00 a.m., were ejected from Clear Waterz Bar by the owner.

Appellant and Vinsek then returned to 12B Division Street, and contacted police to report that a burglary had occurred. Greensburg Police Officers Donald Sarsfield and Kerry Dieter responded to the burglary report. Mr. Johnson was present because he had seen Mr. Teck and Mr. Altman at the apartment during the day of May 29, 2006. Vinsek informed police that Mr. Altman and Mr. Teck burglarized her apartment and that Mr. Teck had attempted to rape her the previous week. In the presence of Police Officer Sarsfield, Police Officer Dieter, and Mr. Johnson, Appellant threatened to retaliate against Mr. Teck and Mr. Altman.

After Officers Dieter and Sarsfield left Vinsek's apartment, Appellant contacted Dewayne Shank and asked him for assistance in confronting Mr. Teck and Mr. Altman. Appellant told Dewayne to enlist the aid of Nathan Shank and Bronowski and informed the Shank brothers that Mr. Teck had

guns, money, and drugs in his backpack, and that he wanted to retaliate against Mr. Teck and Mr. Altman for certain crimes that they had committed against Vinsek. Appellant promised the Shanks that they could keep the guns, money, and drugs in Mr. Teck's possession in return for their assistance.

While Appellant was arranging for help, Mr. Teck and Mr. Altman left Clear Waterz Bar and went to Manor Diner. Vinsek located the two men through Ms. Kujawa. Nathan, Dewayne, and Bronowski drove to Manor and rendezvoused with Appellant and Vinsek. Vinsek then induced Ms. Kujawa to invite Mr. Teck and Mr. Altman to a party at 12B Division Street so that the two victims, who did not have a vehicle, would leave the diner to walk to Greensburg. When the two men left Manor Diner and started out toward Greensburg along the railroad tracks, Appellant followed the two men and fired his shotgun twice at them, killing Mr. Teck.

At approximately 7:00 p.m. on May 30, 2006, Appellant and Vinsek were taken by Westmoreland County detectives to their headquarters located in the Westmoreland County Courthouse. Vinsek was interviewed for two hours but did not make inculpatory remarks. Appellant was interviewed for nearly one hour, denied involvement in the crimes, and then orally confessed to shooting Mr. Teck. At that point, Appellant was

administered ***Miranda*** warnings for the first time. He waived his constitutional rights in writing and then gave a tape-recorded statement.

After litigating an unsuccessful motion to suppress his two inculpatory remarks, Appellant was convicted at a jury trial. Appellant was convicted of first-degree murder of William Teck, conspiracy to commit homicide, and conspiracy to commit robbery. As to the victim Patrick Altman, Appellant was convicted of attempted homicide, aggravated assault, conspiracy to commit robbery, and robbery. Appellant was acquitted of robbery with respect to Mr. Teck. This appeal followed imposition of judgment of sentence. Appellant raises these issues on appeal:

I. Whether the trial court erred in not finding a violation of Maple's Miranda warnings had occurred and by allowing the admission of Maple's confession.

II. Whether the trial court violated the confrontation clause when it permitted the state to present testimony regarding the state of mind, alleged statements, and speculation regarding the acts committed by an individual who was deceased, and therefore, unavailable.

III. Whether the court violated the best evidence rule by admitting the testimony of an officer over the physical evidence contained on the Miranda form when that same officer executed and attested to its accuracy.

IV. Whether the court erred in designing verdict slips which did not set forth the overt act Maple was charged with having committed and further compounded this error by sentencing Maple on the conspiracy charges when the overt act written on the verdict slip did not match the overt act charged in the information.

V. Whether the trial court abused its discretion and deprived Maple of a fair trial by admitting into evidence colored photographs which were inflammatory, prejudicial, had no evidentiary value, and were cumulative, and therefore, neither relevant, nor admissible.

VI. Whether prosecutorial misconduct occurred when the prosecution failed to correct a witness' preliminary hearing testimony once it became aware that allegedly false testimony had been given.

Appellant's brief at 5.

Appellant's primary contention on appeal is that his confessions should have been suppressed because his initial verbal admission was obtained without the administration of ***Miranda***[2] warnings while he was subject to custodial interrogation and his subsequent tape-recorded statement was the product of that unconstitutional interrogation. We agree with these assertions.

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. ***Commonwealth v. Bomar***, 573 Pa. 426, 826 A.2d 831, 842

[2] Pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966), a defendant must be apprised of certain constitutional rights prior to a custodial interrogation. If those warnings are not administered, any admissions subsequently gleaned from questioning must be suppressed.

> (2003). . . . Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Jones, 988 A.2d 649, 654 (Pa. 2010).

Appellant established that police were aware of the following facts before they arrived at 12B Division Street at 7:00 p.m. on May 30, 2006, to take Appellant to the detective headquarters for an interview. Mr. Altman had informed police that Appellant owned a shotgun, and police were aware that Mr. Teck died of a shotgun wound. N.T. Suppression Hearing, 12/20/06, at 54. Mr. Altman, Mr. Johnson, and Ms. Kujawa had been questioned and reported to police that Vinsek and Appellant were romantically involved, had gone to the Clear Waterz Bar about four hours before the shootings, and had a confrontation with the shooting victims at the bar. Ms. Kujawa further told police that around 2:30 a.m. on May 30, 2006, Vinsek had called her to track down the location of Mr. Teck and Mr. Altman.

As soon as Greensburg Police Officer Kerry Dieter became aware of Mr. Teck's homicide, she contacted Manor police and informed them that two hours before the shooting, Vinsek had accused Mr. Teck of attempting to rape her and accused Mr. Teck and Mr. Altman of burglarizing her apartment. Officer Dieter also related the following. During the investigation into Vinsek's allegations, Appellant was present and had made "comments such as 'can you either shoot him or arrest him.' [Appellant]

also related on at least two occasions 'maybe I'll just handle it my way' and 'maybe if I find him/them first I will take care of it myself.'" Supplemental Brief in Support of Omnibus Pretrial Motion, 2/8/06, at Exhibit C.[3] This information was relayed to County Detective Terrence A. Kuhns. ***Id.***

At the suppression hearing, Detective Kuhns of the Westmoreland County District Attorney's Office testified as follows. He was placed in charge of the homicide investigation. Throughout the day following the murder, Detective Kuhns interviewed various witnesses, and at approximately 7:00 p.m. on May 30, 2006, he went to 12B Division Street with now-deceased County Detective Mark Zupan to interview Vinsek and Appellant. When they arrived, the Chief of Police of Greensburg and three other detectives were already there. The six police officers were not in uniform but were armed. N.T. Suppression Hearing, 12/20/06, at 13-14. Vinsek and Appellant answered the door.

Police informed Vinsek and Appellant that they were detectives conducting a homicide investigation, and that during their investigation, they discovered Vinsek and Appellant had "some contact with the victim and Patrick Altman earlier in the day. We would like to talk to them about it."

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[3] The Commonwealth maintains that many of Appellant's factual assertions are not supported by documents of record. However, Appellant attached all pertinent police reports as exhibits to record filings, and contrary to the Commonwealth's position, Appellant does not rely upon any facts dehors the record.

Id. at 11. Appellant asked the detectives if they wanted him to drive to the police headquarters, but Detective Kuhns "suggested, no, they could just go in cars with us. It would be easier for parking, because we have access to the parking garage." ***Id***.

Detective Zupan told Appellant that he was not under arrest. ***Id***. at 12.[4] Appellant was searched but not handcuffed, and he entered one police car while Vinsek, who was not searched, entered another one. They all proceeded to the Westmoreland County Courthouse, the location of detective headquarters, which was approximately a ten-minute drive from Vinsek's apartment.

Appellant was directed to sit in an empty detective's office, and the door remained open. Detectives Kuhns and Zupan proceeded to interview Vinsek, and her interview concluded at 8:50 p.m., approximately two hours later. Vinsek told police the following. On May 27, 2006, while on a camping trip in Somerset, Pennsylvania, she had told Appellant that Mr. Teck attempted to rape her. When she and Appellant returned to her apartment on May 29, 2006, there were items broken therein. She and Appellant traveled to the Clear Waterz Bar and confronted Mr. Teck and

[4] Detective Zupan was deceased at the time of the suppression hearing. Appellant objected on hearsay grounds to Officer Kuhn's testimony as to what Detective Zupan told Appellant. The trial court permitted the testimony but not for the truth of the matter asserted; instead, it was used as establishing Appellant's state of mind as to whether he reasonably believed that he was in police custody.

Mr. Altman about the damaged apartment, and after they were ejected from the bar, reported the burglary to police. Afterwards, she and Appellant went to a parking lot in Manor, where they were joined by Bronowski and the Shank brothers, who wanted money. Vinsek said that she was unaware that there was going to be a shooting.

Detectives Kuhns and Zupan proceeded to the office where Appellant was located and started questioning him at 9:05 p.m. Appellant was given a drink and permitted to smoke. Detective Kuhns told Appellant that he was not under arrest and was free to leave. ***Id.*** at 24. Appellant disclaimed involvement in the homicide and said that his shotgun had been stolen and that he was at the home of Vinsek's father in Youngwood when the killing occurred. Fifty minutes into the interview, Appellant was told by Detective Kuhns, "[L]isten, your story is not true. I know you're not telling the truth." ***Id.*** at 25. Detective Kuhns continued that "based on talking to other people that I knew that what he was telling me wasn't true." ***Id.*** at 26. Detective Kuhns also "talked to [Appellant] about I was aware he was in the Marine Corps, and he came from a good family. And I think that his family would be upset that he was involved in something like this." ***Id.*** At that point, "there was a physical reaction on [Appellant's] part, . . . his face got flushed and [he] started tearing up a little bit." ***Id.*** Appellant then said, '"All right, I will tell the truth.' . . . And then he admitted to shooting

Mr. Teck." ***Id.*** Appellant was placed under arrest. Appellant's ***Miranda*** rights were first read to him at 10:30 p.m. ***Id.*** at 31. Appellant waived those rights and gave a taped statement.

During his cross-examination of Detective Kuhns, Appellant ascertained the following. There were a number of places that Appellant could have parked his car close to the courthouse. ***Id.*** at 47. The only means by which the courthouse could have been exited at 7:00 p.m. was through the main entrance. At that entrance, there is a security desk manned by a police officer. ***Id.*** at 50. Seven detectives were present at the office when Appellant arrived. ***Id.*** at 53. At the June 9, 2006 preliminary hearing before the magistrate, Detective Kuhns testified that he never told Appellant that he was free to leave the courthouse. ***Id.*** at 62. Detective Kuhns explained this discrepancy by stating that after that hearing, Detective Zupan told him that he had made a mistake because Detective Zupan told Appellant "he was free to go, and so did [Detective Kuhns] in the office." ***Id.*** At that point, Detective Kuhns recalled "that is exactly what happened." ***Id.***

It is well established that a "law enforcement officer must administer ***Miranda*** warnings prior to custodial interrogation." ***Commonwealth v. Schwing***, 964 A.2d 8, 11 (Pa.Super. 2008). In the present case, there is no doubt that Appellant was being questioned when Detectives Kuhns and

Zupan entered the office and started to ask Appellant about the crime. The issue in this case is whether Appellant was in custody. The standard for assessing whether a person is in police custody is an objective one, and that question is answered by examining the circumstances surrounding the interdiction, with consideration given to the impression being conveyed to the person who is being questioned. ***Id.*** Thus, "[t]he test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the test focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted." ***Commonwealth v. Gonzalez***, 979 A.2d 879, 887 (Pa.Super. 2009) (quoting ***Commonwealth v. Clayton Williams,*** 650 A.2d 420, 427 (Pa. 1994)). A person is considered to be in police custody either when his freedom of action is significantly restricted such that he has been in effect placed under arrest or if he reasonably believes that to be the case. ***Gonzalez, supra***. To state the concept differently, a police interdiction will be considered custodial in nature when the conditions or duration of the defendant's detention become sufficiently coercive to be viewed as the functional equivalent of arrest. ***Schwing, supra***.

The factors that we are to utilize in determining whether an interdiction has become custodial include the reason for the detention, its length and location, whether the defendant was transported somewhere

against his will, how far he was forced to travel, whether the defendant was restrained, whether police made a display of force or threat of force, and methods that police employed to confirm or dispel suspicions against the defendant. ***Id.*** The fact that the defendant was the focus of the investigation is a factor to be used in determining whether a police interdiction was custodial. ***Gonzalez, supra.*** However, merely because an individual is the focus does not automatically require the administration of ***Miranda*** warnings. ***Schwing, supra.***

We conclude that the vast majority of factors utilized to determine whether a defendant has been placed in custody lead to the inevitable conclusion that Appellant was under arrest before he first admitted to shooting Mr. Teck. The reason for the detention was the investigation into one of the most serious of crimes, murder. Appellant's freedom was restricted from the moment detectives arrived at 12B Division Street. Six armed police appeared at Vinsek's home to transport Appellant to their headquarters. Even though Detective Kuhns indicated that their weapons were under their clothing, having six police officers arrive to retrieve someone constitutes a significant display of force. Appellant was aware that the six plainclothes men at his door were homicide detectives who wanted to speak to him about a murder.

Appellant's freedom of movement was then further restricted. The first question that Appellant posed of police was whether he should drive his own vehicle to the interview. He was prevented from doing so because it allegedly was easier for detectives to park their cars at the courthouse. Meanwhile, Appellant established that there were many parking spaces readily available next to the building at the time. The fact that Appellant was not granted access to his car to drive himself to the courthouse on a clearly pretextual basis supports the conclusion that Appellant's freedom of action was actually restricted, and he could not have refused to go with police. Appellant also was searched, while Vinsek was not. Being searched by police while another individual who is going to the same interview is not searched would lead a reasonable person to believe he was in custody.

Appellant was transported to the courthouse and placed in an office while seven detectives remained at the headquarters. Although Appellant purportedly was free to leave, there was only one exit that he could have utilized to do so, and that avenue was being guarded by a police officer. In addition, his vehicle remained at Vinsek's apartment.

By 9:05 p.m. on May 30, 2006, Appellant unquestionably was the prime suspect and the focus of the investigation. Police knew the following. Appellant owned a shotgun and that the victim died of a shotgun blast. Appellant had a verbal confrontation with the two victims at a bar four hours

before the killing and had informed Officer Dieter two hours before the crime that he wanted to shoot Mr. Teck. Detective Kuhns also was aware of Appellant's motive—Mr. Teck had allegedly attempted to rape Appellant's girlfriend and he and Mr. Altman had burglarized her residence. Police knew that approximately one hour before the shooting, Vinsek had tracked down the victims' location and that Vinsek was in Appellant's company at that time.

We are aware that Appellant was told he was free to leave, was not handcuffed or threatened, was allowed to have a drink and smoke while he was at the courthouse, and the door to the room where he was seated remained open. However, "it is clear that an interrogation may be custodial in nature even where the accused has been advised he is not under arrest during questioning and where he voluntarily appears at the interview at the request of the police." ***Commonwealth v. DiStefano***, 782 A.2d 574, 580 (Pa.Super. 2001). Moreover, the lack of use of handcuffs and threats is not determinative of whether an individual was in police custody. ***Gonzalez, supra***. The question of whether a person is in custody is not answered by viewing the subjective intent of the police but by looking at whether a reasonable person would believe that he was in custody.

In this case, six armed police detectives told Appellant that they wanted to interview him in connection with a murder. It was suggested that

he not use his own car and was immediately searched. He was driven to an office containing seven detectives, and despite being told he could leave, the only available means for him to do so was guarded by a police officer and he did not have his vehicle. He waited for two hours while Vinsek was being questioned and was then interviewed for an additional hour by two detectives before an inculpatory statement was procured. Detective Kuhns knew that Appellant was the shooter when he began the interview. We conclude that Appellant was subjected to a custodial interrogation at 9:05 p.m. on May 30, 2006. ***Commonwealth v. O'Shea***, 318 A.2d 713 (Pa. 1974); ***Gonzalez, supra***; ***DiStefano, supra***.

Since Appellant's first admission was obtained prior to the administration of constitutional warnings, it should have been suppressed under ***Miranda v. Arizona***, 384 U.S. 436 (1966). Furthermore, the fact that the required warnings were given prior to the procurement of the taped statement did not purge the second confession of the primary taint of the first, illegally-obtained admission. The second confession was procured immediately after and was clearly derived from the first admission, and the taped confession also should have been suppressed. ***Commonwealth v. Ware***, 265 A.2d 790 (Pa. 1970); ***see also Commonwealth v. Spotts***, 491 A.2d 132 (Pa.Super. 1985); ***cf. Commonwealth v. DeJesus***, 787 A.2d 394 (Pa. 2001).

On appeal, the Commonwealth's position is that the admission of Appellant's statements was harmless error. In ***Arizona v. Fulminante***, 499 U.S. 279 (1991), the Supreme Court specifically held that the admission into evidence of a constitutionally-infirm confession is a classic example of trial court error that is subject to a harmless-error analysis. ***Id.*** at 309. The appellate courts in Pennsylvania have applied the harmless-error standard in a number of cases waiving the introduction of constitutionally-infirm inculpatory remarks. ***See, e.g. Commonwealth v. Rice***, 383 A.2d 903, 906 (Pa. 1978) ("This court has consistently held that when a defendant takes the stand and reiterates the factual narrative contained in a confession claimed to be invalid . . . for constitutional infirmities[,] the admission into evidence of the alleged illegal formal confession, if error at all, is harmless error beyond a reasonable doubt.") (citing ***Commonwealth v. Saunders***, 331 A.2d 193 (Pa. 1975)); ***Commonwealth v. Diaz***, 264 A.2d 592 (Pa. 1970) (despite facially-valid ***Miranda*** contention with respect to validity of confession, its admission into evidence was harmless error because the Commonwealth introduced other, overwhelming evidence against defendant); ***Commonwealth v. Henry***, 599 A.2d 1321 (Pa.Super. 1991) (inculpatory statement procured from defendant should have been suppressed because he had invoked his right to remain silent but its admission into evidence was harmless error in light of record).

> Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was *de minimis;* (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Atkinson, 987 A.2d 743, 752 (Pa.Super. 2009) (quoting ***Commonwealth v. Hutchinson,*** 811 A.2d 556, 561 (Pa. 2002)).

Our Supreme Court has noted that

> the doctrine of harmless error is a technique of appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that a trial error was harmless beyond a reasonable doubt. Its purpose is premised on the well-settled proposition that "a defendant is entitled to a fair trial but not a perfect one."

Commonwealth v. Allshouse, 985 A.2d 847, 859 (Pa. 2009) (quoting ***Commonwealth v. Thornton,*** 431 A.2d 248, 251 (Pa. 1981)).

In the present case, both the second and third tests for the existence of harmless error are present. First, Appellant took the stand and essentially repeated verbatim the statement that he gave to police on May 30, 2006. While testifying, he merely expanded on the narrative that he gave to police by setting forth the details of his alcohol consumption and the specifics regarding his provocation for shooting Mr. Teck and attempting to shoot Mr. Altman. Thus, the erroneously-admitted confessions were cumulative of other substantially similar and untainted evidence.

Additionally, the Commonwealth introduced independent, overwhelming evidence of Appellant's guilt, which we now review. Appellant was Jennifer Vinsek's boyfriend and owned a shotgun with a camouflage barrel. N.T. Jury Trial, 9/8-16/08, at 136-39. Vinsek and Amy Kujawa were roommates at 12B Division Street, Greensburg. In May, 2006, Patrick Altman, Vinsek's cousin, needed a place to stay, and he and his friend, William Teck, moved into the apartment. Vinsek began a consensual sexual relationship with Mr. Teck, and about one week prior to the murder, Mr. Johnson, a friend of Ms. Kujawa and Vinsek, accidentally walked in on Mr. Teck and Vinsek engaged in sexual intercourse. Shortly thereafter, Vinsek left with Appellant to go on a camping trip. On May 29, 2006, they returned to Vinsek's home where they allegedly found items damaged and taken by Mr. Teck and Mr. Altman.

At that time, those two men were drinking at the Clear Waterz bar in Greensburg, where Ms. Kujawa worked as a bartender. Appellant and Vinsek arrived at the bar between 12:30 a.m. and 12:45 a.m. on May 30, 2006, confronted Mr. Teck and Mr. Altman, and accused them of breaking the items at 12B Division Street. Appellant yelled at Mr. Teck and Mr. Altman and pushed Mr. Altman. At that point, the owner of Clear Waterz removed Vinsek and Appellant from the bar. This confrontation was

witnessed by Mr. Altman, Ms. Kujawa, and Mr. Johnson. ***Id.*** at 163-65, 791-98, 847-49.

At approximately 1:00 a.m., Vinsek and Appellant left Clear Waterz bar, returned to 12B Division Street, telephoned police, and reported that her apartment had been burglarized by Mr. Teck and Mr. Altman. Greensburg Police Officers Donald Sarsfield and Kerry Dieter responded to the burglary report and encountered Appellant, Vinsek, and Mr. Johnson in the apartment. Police Officer Sarsfield related that Vinsek accused Mr. Teck and Mr. Altman of burglarizing her residence. ***Id.*** at 913. Officer Dieter was in charge of the investigation, but Officer Sarsfield overhead Appellant ask Officer Dieter, "[W]ell, are you going to arrest them or shoot them." ***Id.*** at 914.

Police Officer Dieter confirmed that Vinsek reported that Mr. Teck and Mr. Altman had burglarized the apartment. Vinsek also told Officer Dieter that Mr. Teck had assaulted her and attempted to rape her. ***Id.*** at 949. While Officer Dieter was speaking with Vinsek, Appellant "would make comments such as in response, can you either shoot him or arrest him? And then [Appellant] stated on at least two occasions, 'maybe I'll just handle it my way, and maybe if I find him/them first, I will take care of it myself.'" ***Id.*** at 942-43. Officer Dieter did smell alcohol on Appellant's breath but testified that he was not intoxicated because he could hold a coherent

conversation, was not staggering, and did not display slurred speech or red and glassy eyes. Mr. Johnson testified consistently that Appellant told police, "'[I]f you find them, shoot them; if you don't, I'll take care of it.'" ***Id.*** at 852. Police left around 2:00 a.m., Mr. Johnson went to pick up Ms. Kujawa from Clear Waterz, and Appellant and Vinsek got into Appellant's car.

In the meantime, Mr. Teck and Mr. Altman left Clear Waterz and went to the Manor Diner. Ms. Kujawa telephoned Mr. Teck, told him that she was having a party at 12B Division Street, and invited Mr. Teck and Mr. Altman to attend. ***Id.*** at 170-72. The two men started to walk toward Greensburg along the railroad tracks when two men, one of whom had a shotgun, came out from behind the Manor Community Building. Mr. Altman started to run, and then there "was a shot, and . . . I heard my buddy Bill [Teck] say, 'oh, fuck.'" ***Id.*** at 177. Mr. Altman continued to run, dropping his shoulder bag along the way. He fled to the Manor Borough police station where he told police about the crime.

The Commonwealth presented the testimony of Dewayne Shank, Nathan Shank, and Ryan Bronowski to establish the sequence of events that occurred between 2:00 a.m., when police left 12B Division Street on May 30, 2006, and 4:00 a.m., when the shootings occurred. Dewayne testified as follows. At approximately 2:30 a.m. on May 30, 2006, Appellant telephoned

Dewayne and asked him for help in connection with an altercation that Appellant had with some people. Dewayne woke up his brother Nathan and then called Bronowski, telling Bronowski that he needed a ride because he did not have an operational vehicle.

Appellant called a second time and told "us about his girlfriend, Jennifer, she got threatened to get raped. These people broke into her house, stole some jewelry, some money, and had some drugs on them, some guns, and just, you know, we are going to come down and help him[.]" ***Id.*** at 405. Dewayne explained that Appellant told him about the drugs, money, and guns because Dewayne, Nathan, and Bronowski were going to keep those items in exchange for helping Appellant. ***Id.*** at 406.

Bronowski drove Nathan and Dewayne to the Manor Community and Borough Building, where they met Appellant and Vinsek. Everyone drove to the Manor Diner, and Appellant exited his car and grabbed "a shotgun out of the back of the trunk. He start[ed] to run down the steps towards the basement of the Manor Diner." ***Id.*** at 416. Dewayne observed a woman standing at a nearby window and motioned to Appellant that the woman could see them.

The cohorts then drove their cars across the street to a gravel parking lot. Appellant then told Dewayne that "Jennifer's getting ahold of these kids to get them [Mr. Teck and Mr. Altman] to leave" the diner and that "they

threatened to rape his girlfriend and stole this money and drugs." ***Id.*** at 420. Vinsek, who had been conversing with someone on her cell phone, told Dewayne and Appellant that Mr. Teck and Mr. Altman would be leaving Manor Diner momentarily. Dewayne then observed the two victims, and saw Appellant, who was in possession of his shotgun, and Nathan follow them while Bronowski trailed in his car. ***Id.*** at 424.

At that point, a Manor Borough police officer arrived in the gravel lot, and Dewayne and Vinsek left. As they were driving through Manor, they passed the police station, and Vinsek spotted Mr. Altman. Vinsek hid in the car and said, "that's my cousin, we need to hit him and get rid of some witnesses." ***Id.*** at 433.

Vinsek and Dewayne proceeded back to the Shanks' residence where Dewayne called Appellant, who asked to speak with Vinsek; Dewayne overheard Appellant tell Vinsek, "It is done[.]" ***Id.*** at 436. Dewayne helped Bronowski clean his car, which contained blood, and the shotgun was dismantled and its pieces were thrown away. Police recovered some of the fragments of the camouflage-decorated gun and introduced them into evidence.

Nathan Shank confirmed the events described by his brother Dewayne, relating the following. Dewayne woke him up in the early morning hours of May 30, 2006, to tell Nathan that Appellant "really need[ed] our help to rob

this Teck guy. He's supposed to have fifteen hundred dollars, an ounce of crack, and two TEC-9s on him." ***Id.*** at 560. The Shanks were driven by Bronowski to rendezvous with Appellant and Vinsek in Manor. They proceeded to the Manor Diner, where Appellant exited his car. When Dewayne saw a woman in a window, Nathan observed Appellant enter Bronowski's car with a shotgun in his hand. ***Id.*** at 573. After they drove across the street to the gravel parking lot, Vinsek said that she would call someone to get Mr. Teck and Mr. Altman to leave the diner. A few minutes later, Mr. Teck and Mr. Altman, who both were in possession of bags, started to walk along the railroad tracks.

Appellant, accompanied by Nathan, followed the two victims. Nathan witnessed Appellant take his shotgun, place the gun on his shoulder, walk around a tree, and fire the weapon. ***Id.*** at 587. Nathan then observed Mr. Teck fall to the ground while Mr. Altman ran away, dropping his bag in the process. Appellant retrieved Mr. Altman's bag while Nathan took a book bag from Mr. Teck's body. Bronowski's testimony was consistent with that of Nathan and Dewayne Shank. He saw Appellant in possession of a shotgun immediately before and after the murder.

Thus, three people saw Appellant confront the two victims at a bar about three hours before the shootings. Then, two hours before Mr. Teck was killed, two police officers and Mr. Johnson heard Appellant threaten to

shoot that victim. The Shanks established that Appellant promised to give them the proceeds from robbing the two men if they helped Appellant get revenge on Mr. Teck and Mr. Altman for the purported crimes against Vinsek. The Shanks and Bronowski were witnesses to the shooting. All this properly-admitted, uncontradicted evidence of Appellant's guilt was so overwhelming and the prejudicial effect of the admission of his statements was so insignificant by comparison to that evidence that the fact that Appellant's statements were introduced into evidence could not have contributed to the verdict. Hence, we conclude that the harmless error standard has been satisfied and a new trial is unnecessary. ***See Allshouse, supra*** (we can affirm on any valid basis).

Appellant's next allegation concerns admission of evidence during the suppression hearing. As noted, Detective Zupan was deceased when the hearing occurred. Appellant objected on hearsay grounds to Officer Kuhn's testimony that Detective Zupan told Appellant that he was not under arrest. The trial court permitted the testimony but not for the truth of the matter asserted; instead, it was used as establishing Appellant's state of mind as to whether he reasonably believed that he was in police custody.

On appeal, Appellant claims error in this respect, suggesting that he was denied his constitutional right to confront Detective Zupan. However, we have concluded that, even accepting as true that Detective Zupan told

Appellant that he was not under arrest, Appellant was subject to a custodial interrogation. Thus, the admission into evidence of Detective Zupan's remark had no impact on the outcome of this case.

Appellant's third and sixth issues have similarly been rendered moot by our determination that Appellant's confession was infirm under ***Miranda***. The third issue involves the fact that on his written waiver form, Appellant checked the box that indicated that he did wish to invoke his ***Miranda*** rights, but Detective Kuhn testified that Appellant did not orally assert any of his constitutional rights. Appellant claims that the best evidence rule should have precluded Detective Kuhn's testimony in this respect. Since we determined that both of Appellant's statements were tainted because he should have been administered his ***Miranda*** rights at 9:05 p.m., we need not address the validity of Appellant's written waiver.

In his sixth issue on appeal, Appellant complains about the correction that Detective Kuhn's made to the testimony that he gave at the preliminary hearing. As delineated *supra*, Detective Kuhn said at the preliminary hearing that he did not tell Appellant that he was free to leave the detective headquarters. At the suppression hearing, Detective Kuhns represented that Detective Zupan told him after the preliminary hearing that he was incorrect and that Appellant was told that was free to leave. Again, this contention is no longer relevant based upon our conclusion that, regardless of whether he

was told he was free to leave, Appellant's confession was obtained in violation of ***Miranda***.

Appellant's next issue concerns discrepancies between the informations and the verdict rendered by the jury. The following facts are pertinent. Appellant was charged with three separate conspiracy counts: one to murder Mr. Teck, one to rob Mr. Teck, and one to rob Mr. Altman. In the informations, the overt act Appellant allegedly committed in furtherance of the conspiracies with Mr. Teck as victim was that he shot at Mr. Teck, and in connection with the conspiracy to rob Mr. Altman, the overt act Appellant was charged with committing was shooting at Mr. Altman.

The trial court submitted the case to the jury in the form of special interrogatories and asked the jury to delineate specifically, on blank lines, what overt act Appellant committed in furtherance of each of the three conspiracies at issue. Appellant did not object in any respect to the content or form of these special interrogatories.[5] Without any complaint from Appellant, the jury was thus left free to decide what overt act Appellant committed with respect to each conspiracy count.

[5] Counsel maintains that she did not see the verdict slip and this somehow avoids a finding of waiver. We disagree. It was counsel's responsibility to view this item and to object to any defects therein. Merely because she chose not to review the verdict slip does not mean counsel did not waive any objection to its contents.

Additionally, during the jury charge, the trial court never told the jurors that it was constrained to find that Appellant shot at Mr. Teck as the overt act committed in furtherance of the two conspiracies with Mr. Teck as victim. The jury, similarly, was not instructed that it should insert in the verdict slip that the overt act that Appellant performed in connection with the conspiracy to rob Mr. Altman was Appellant's act of shooting at that victim. The jury was informed about the overt acts that the Commonwealth **alleged** that Appellant committed with respect to the victims. N.T. Jury Trial, 9/8-16/08, at 1534. However, contrary to Appellant's suggestion in his reply brief, the trial court never told the jury that it was constrained by allegations in the informations. Rather, the court delineated a broad definition of overt act. Appellant raised no objection to the jury instructions.

> [T]he Defendant cannot be convicted of a conspiracy unless he or a 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 criminal or noncriminal 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 a conspirator actually commits or attempts to commit the agreed crime, that obviously would be an overt act in 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.

Id. at 1533-34. Thus, the jury was given a blank slate in both instructions and on the verdict slip to decide which overt acts that the evidence established that Appellant committed to further the conspiracies in question.

When the jury returned its verdict, it had concluded that the overt act that Appellant committed with respect to the robbery of Mr. Teck was, "All met in Manor, Pennsylvania." N.T. Jury Trial, 9/8-16/08, at 1555. The overt act as to the conspiracy to murder Mr. Teck was, consistent with the information regarding that victim, "Shot him with a gun." ***Id.*** The overt act for the conspiracy to rob Mr. Altman was not in conformity with the information; instead, the jury found Appellant's overt act was, "After chasing with gun, he picked up bag." ***Id.***

It was only after deliberations were completed and the verdict was returned that Appellant expressed concern about a variance between the overt acts charged in the informations and the overt acts found by the jury. However, at that point, Appellant's voiced objection was too late. This error easily could have been avoided if Appellant, at the inception, had merely brought to the court's attention that the jury **had** to find that he committed the overt acts as charged in the informations. Instead, Appellant assented to the verdict slip, which left the jury with unfettered authority to decide each overt act. Then, Appellant leveled no complaint about the jury instructions, which similarly allowed the jury decide, based upon all of the

evidence, what actions, without limitation, that Appellant had performed to further the conspiracies.[6] A litigant simply cannot sit by and allow error to occur and then bootstrap that default into a claim that a new trial is warranted.

The law clearly provides that a defendant must make both a specific and **timely** objection to error so as to allow the trial court the opportunity to correct the default and obviate the necessity of a new trial:

> In order to preserve an issue for review, a party must make a timely and specific objection." ***Commonwealth v. Montalvo***, 641 A.2d 1176 (Pa.Super. 1994) citing ***Commonwealth v. Smith***, 606 A.2d 939 (1992). "The Superior Court will not consider a claim on appeal which was not called to the trial court's attention at a time when any error committed could have been corrected. ***Id***.

Commonwealth v. Brown, 701 A.2d 252, 254 (Pa.Super. 1997); ***see also Commonwealth v. Edmondson***, 718 A.2d 751, 753 (Pa. 1998) ("Requiring a timely, specific objection to be lodged in the trial court ensures that the trial judge has a chance to correct alleged trial errors and eliminates the possibility that the appellate court will be required to expend time and energy reviewing points on which no trial ruling has been made.").

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[6] We observe that the evidence supports the existence beyond a reasonable doubt of the overt acts delineated on the verdict slip. Furthermore, there was no need for the Commonwealth to allege in the informations what overt act was committed in support of each conspiracy charge. ***Commonwealth v. Weldon***, 48 A.2d 98 (Pa.Super. 1946).

Herein, had Appellant raised the appropriate objection, either to the open-ended nature of the special interrogatories or to a charge that left the jury free to fix each overt act, there would not have been a variance between the verdict slip and the informations. Hence, we concur with the trial court's assessment that Appellant's present contention is waived.

The final allegation raised on appeal is that the trial court erred in allowing the jury to view color photographs of the victim. "The admission of photographs is a matter vested within the sound discretion of the trial court whose ruling thereon will not be overturned absent an abuse of that discretion." ***Commonwealth v. Solano***, 906 A.2d 1180, 1191 (Pa. 2006). Additionally, "photographic images of the injuries inflicted in a homicide case, although naturally unpleasant, are nevertheless oftentimes particularly pertinent to the inquiry into the intent element of the crime of murder." ***Id.***

> In determining whether the photographs are admissible, we employ a two-step analysis. First, we consider whether the photograph is inflammatory. If it is, we then consider whether the evidentiary value of the photograph outweighs the likelihood that the photograph will inflame the minds and passions of the jury. Even gruesome or potentially inflammatory photographs are admissible when the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Id. at 1191-92 (citations omitted). In ***Commonwealth v. Robinson***, 864 A.2d 460 (Pa. 2004), the Court specifically upheld a trial court's decision to allow a jury to view colored photographs of a murder victim.

In the present case, the trial court conducted the appropriate review, and we affirm its disposition of this averment on the basis of pages one through three of its February 23, 2009 opinion.

Judgment affirmed.

Judge Musmanno files a Concurring Statement.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

DATE: August 6, 2010

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JASON P. MAPLE, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2150 WDA 2008

Appeal from the Judgment of Sentence of November 24, 2008, in the Court of Common Pleas of Westmoreland County, Criminal Division, at No. 2544 CRIMINAL 2006, 2545 CRIMINAL 2006.

BEFORE: MUSMANNO, BENDER, and BOWES, JJ.

CONCURRING STATEMENT BY MUSMANNO, J.:

I am constrained to join the result reached by the Majority, as it is in accordance with the current state of Pennsylvania jurisprudence, specifically, this Court's holding in ***Commonwealth v. Henry***, 599 A.2d 1321 (Pa. Super. 1991). However, I write separately to emphasize my reluctance to find harmless error where the Majority has acknowledged that a constitutionally infirm confession was improperly admitted into evidence.

> A confession is like no other evidence. Indeed the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so[.]

Commonwealth v. Ardestani, 736 A.2d 552, 557 (Pa. 1999) (quoting ***Arizona v. Fulminante***, 499 U.S. 279, 296 (1991)).

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 27, 2022

Mr. Jason Paul Maple
Prisoner ID HV3555
SCI Mercer
801 Butler Pike
Mercer, PA 16137

Re: Jason Paul Maple
v. Lonnie Oliver, Superintendent, State Correctional Institution at Albion
No. 21-7694

Dear Mr. Maple:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 22, 2022

Mr. Jason Paul Maple
Prisoner ID HV3555
SCI Mercer
801 Butler Pike
Mercer, PA 16137

Re: Jason Paul Maple
v. Lonnie Oliver, Superintendent, State Correctional Institution at Albion
No. 21-7694

Dear Mr. Maple:

The Court today entered the following order in the above-entitled case:

The petition for rehearing is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk