UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JESSE BROWN,
Petitioner,

v.

No. 2:18-cv-04512

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

OPINION

Report and Recommendation, ECF No. 31 – Adopted

Joseph F. Leeson, Jr.
United States District Judge

May 4, 2021

I. INTRODUCTION

Petitioner Jesse Brown filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction in the Philadelphia County Court of Common Pleas of first-degree murder, possessing an instrument of crime, and carrying an unlicensed firearm. Magistrate Judge Thomas J. Rueter issued a Report and Recommendation ("R&R") recommending that the habeas corpus claims be denied. Brown has filed objections to the R&R. For the reasons set forth below, the R&R is adopted.

II. STANDARDS OF REVIEW

A. Standard of Review - Report and Recommendation of a Magistrate Judge

When objections to a report and recommendation have been filed under 28 U.S.C. § 636(b)(1)(C), the district court must make a de novo review of those portions of the report to which specific objections are made. 28 U.S.C. § 636(b)(1)(C); *Sample v. Diecks*, 885 F.2d 1099,

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1106 n.3 (3d Cir. 1989). "District Courts, however, are not required to make any separate findings or conclusions when reviewing a Magistrate Judge's recommendation de novo under 28 U.S.C. § 636(b)." *Hill v. Barnacle*, 655 F. App'x. 142, 147 (3d Cir. 2016). In the absence of a specific objection, the district court is not statutorily required to review the report, under de novo or any other standard. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 152 (1985). Nevertheless, the Third Circuit Court of Appeals has held that it is better practice to afford some level of review to dispositive legal issues raised by the report, *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987), *writ denied* 484 U.S. 837 (1987); therefore, the court should review the record for plain error or manifest injustice. *Harper v. Sullivan*, No. 89-4272, 1991 U.S. Dist. LEXIS 2168, at *2 n.3 (E.D. Pa. Feb. 22, 1991); *see also Oldrati v. Apfel*, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998). The "court may accept, reject, or modify, in whole or in part, the findings and recommendations" contained in the report. 28 U.S.C. § 636(b)(1)(C).

B. Standard of Review - Habeas corpus petitions under 28 U.S.C. § 2254

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before seeking federal habeas review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Where a petitioner has failed to properly present his claims in the state court and no longer has an available state remedy, he has procedurally defaulted those claims. *See id.* at 847-48. An unexhausted or procedurally defaulted claim cannot provide the basis for federal habeas relief unless the petitioner "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 claims will result in a fundamental miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 732-33, 750

(1991) (explaining that a "habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion [because] there are no state remedies any longer 'available' to him"). The Supreme Court has held that the ineffectiveness of counsel on collateral review may constitute "cause" to excuse a petitioner's default. *See Martinez v. Ryan*, 566 U.S. 1 (2012). The fundamental miscarriage of justice exception "applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). "Put differently, the exception is only available when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Coleman v. Greene*, 845 F.3d 73, 76 (3d Cir. 2017) (quoting *McQuiggin*, 133 S. Ct. at 1936; *Schlup*, 513 U.S. at 316).

The AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (internal quotations omitted); *See also* 28 U.S.C. § 2254(d);[1] *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (holding that there is a "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard" because the question before a federal court is not whether the state court's determination was correct, but whether the determination was unreasonable); *Hunterson v. Disabato*, 308 F.3d 236, 245 (3d Cir.

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[1] "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . .; or . . . resulted in a decision that was based on an unreasonable determination of the facts . . . ." 28 U.S.C. § 2254(d).

2002) ("[I]f permissible inferences could be drawn either way, the state court decision must stand, as its determination of the facts would not be unreasonable."). Additionally, "a federal habeas court must afford a state court's factual findings a presumption of correctness and that [] presumption applies to the factual determinations of state trial and appellate courts." *Fahy v. Horn*, 516 F.3d 169, 181 (3d Cir. 2008). The habeas petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

C. Standard of Review - Claims of ineffective assistance of counsel

To establish counsel's ineffectiveness, a petitioner must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668 (1984). There is a strong presumption that counsel is effective and the courts, guarding against the temptation to engage in hindsight, must be "highly deferential" to counsel's reasonable strategic decisions. *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002). The mere existence of alternative, even more preferable or more effective, strategies does not satisfy the first element of the *Strickland* test. *Id.* at 86. To establish prejudice under the second element, the petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *Strickland*, 466 U.S. at 694). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689 (explaining that courts should not second-guess counsel's assistance and engage in "hindsight, to reconstruct the circumstances of counsel's challenged conduct"). The court must consider the totality of the evidence and the burden is on the petitioner. *Id.* at 687, 695.

When considering ineffective assistance of counsel claims under § 2254, the question before a federal court is not whether the state court's determination was correct, but whether the

determination was unreasonable. *Knowles*, 556 U.S. at 123. "And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* (describing "the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard").

III. BACKGROUND

The R&R summarizes the factual and procedural background of this case. *See* R&R 1-5, ECF No. 31. Brown does not object to this summary and, after review, it is adopted and incorporated herein.

In brief summary, *see* R&R 1-3, evidence was produced from multiple eyewitness that the day before the shooting, Brown had a verbal argument with the now-deceased victim regarding a note Brown handed to the deceased's girlfriend containing his phone number. Brown and the deceased had another argument the following day, which turned into a physical altercation. Eye-witnesses testified at trial that the deceased punched Brown in his face and the two began to wrestle. During the fight, Brown pulled out a gun. A witness testified that although she did not actually see Brown shoot the deceased, she heard multiple gunshots "less than five seconds"[2] after Brown pulled out the gun. When the police arrived, the deceased was lying in the street with gunshot wounds. The deceased was taken to the hospital and pronounced dead. Evidence was also presented in the form of a photograph from Brown's phone showing him brandishing a matching gun.

Also of note, the R&R outlined the issues presented in the habeas petition as follows:

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

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

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

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

R&R 5 (citing Rev. Pet. ¶ 11, ECF No. 5). The Magistrate Judge determined that each of these claims was procedurally defaulted and without merit. *See* R&R 13-22.

Brown has filed objections and amended objections to the R&R. *See* Objs., ECF No. 33; Am. Objs., ECF No. 35. He argues that the procedural default, if any, should be excused based on the ineffectiveness of PCRA[3] counsel and that each of his claims have merit. *See id.*

IV. ANALYSIS

This Court has conducted de novo review of Brown's claims and adopts the R&R in its entirety and incorporates the same herein. This Opinion briefly addresses Brown's objections.

Initially, the Court notes that Brown identified the issues he raised on direct appeal, none of which were presented in the habeas petition. *See* Rev. Pet. 2-3.[4] In his objections to the R&R, Brown does not assert that his claims are not procedurally defaulted; rather, he argues that the default should be excused based on the ineffectiveness of PCRA counsel for not properly presenting these claims to the state courts. For the reasons discussed below, because each of the claims lacks merit, Brown cannot establish that he was prejudiced by PCRA counsel's failure to raise the claims or that the miscarriage of justice exception saves his default.

1. Brown's first habeas claim is procedurally defaulted and because trial counsel's concession in closing argument that Brown fired the fatal gunshots in order to argue for a lesser degree of guilt was a reasonable strategic decision, Brown was not prejudiced by PCRA counsel's failure to raise this claim.

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[3] Pennsylvania's Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9551 ("PCRA")

[4] Throughout this Opinion, all citations to page numbers of any documents filed on the Court's Case Management/Electronic Case Files system ("ECF") are to the page numbers assigned by ECF.

The R&R explained that because Brown did not raise the first claim on direct appeal or PCRA review it is procedurally defaulted. *See* R&R 13-15. The Magistrate Judge nevertheless reviewed the claim on its merits. The Magistrate Judge concluded that trial counsel did not violate Brown's right against self-incrimination; rather, trial counsel made a reasonable strategic decision to argue to the jury that Brown's actions amounted to, at most, voluntary manslaughter and not first-degree murder. *See* R&R 15-16. The R&R reasoned that "[h]ad trial counsel attempted to deny that petitioner killed the victim at all, counsel would have lost all credibility with the jury." *See id.*

Brown's objections to the R&R on the merits of this claim essentially combine his argument in support of the first habeas claim with the argument supporting his second habeas claim regarding the sufficiency of the evidence. *Cf.* Rev. Pet. 10-12, *with* Objs. 3-4 and Am. Objs. 1-4. However, for the reasons discussed in the next section, in the R&R, and in the state court opinions, there was more than sufficient evidence presented at trial establishing that Brown killed the deceased.[5] Therefore, trial counsel's strategy to concede Brown fired the fatal gunshots, but to argue for a lesser degree of guilt was a reasonable strategic decision. *See Allen v. Sobina*, 148 F. App'x 90, 92 and n.2 (3d Cir. 2005) (concluding that trial counsel's decision to concede the defendant did the killing and to focus on arguing that the defendant did not possess the requisite intent for first-degree murder was a tactical decision and did not prejudice the defendant); *Davenport v. Diguglielmo*, 215 F. App'x 175, 180-81 (3d Cir. 2007) (holding that

[5] Brown's objection, *see* Objs. 3-4; Am. Objs. 2-3, that the evidence he fired the gun was lacking because there was no proof that the gun he was brandishing in the photograph was the same used to kill the deceased and that the eyewitnesses did not actually see Brown fire the gun, is unpersuasive given the totality of the evidence against him, which also includes eyewitness testimony that within seconds of Brown pulling out a gun during a physical altercation with the deceased numerous shots were fired and the deceased died of multiple gunshot wounds.

even in the absence of explicit consent from the defendant, trial counsel was not ineffective for conceding guilt during closing argument because "defense counsel pursued a reasoned trial strategy in light of the evidence available"). Contrary to Brown's objections, *see* Am. Objs. 4, the mere fact that this strategy was not successful, does not mean that it was unreasonable, *see* *Franklin v. Klopotoski*, No. 09-3838, 2013 U.S. Dist. LEXIS 142731, at *17 (E.D. Pa. Aug. 7, 2013) (holding that "even if counsel's actions ultimately proved unsuccessful or hindered the defendant, counsel shall not be deemed ineffective if his decision was a reasonable strategy based on a sound investigation of the law and facts"). Brown's objection is overruled and the first habeas claim is dismissed as procedurally defaulted and found to be without merit.

2. The evidence presented at trial was sufficient to support a first-degree murder conviction, despite Brown's suggestion of self-defense, such that PCRA counsel's failure to raise this claim in the state courts does not excuse the procedural default.

In his habeas petition, Brown claimed that the facts introduced at trial established only voluntary manslaughter, not first-degree murder, because the shooting was in self-defense. *See* Rev. Pet. 12. The R&R concluded that this claim was not presented in the state courts and was procedurally defaulted. *See* R&R 16-17. Regardless, the Magistrate Judge considered the claim on the merits. The R&R explained that "under Pennsylvania law, '[a] criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.'" *Id.* at 18 (quoting 18 Pa.C.S.A. § 2502(a)). Further, "the specific intent to kill required for a conviction of first-degree murder 'can be established through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim's body.'" *Id.* (quoting *Commonwealth v. Mattison*, 82 A.3d 386, 392 (Pa. 2013)). After also noting that the federal court is to decide sufficiency of the evidence "after viewing the evidence in the light most favorable to the prosecution," *see* *Jackson v. Virginia*, 443 U.S. 307 (1979), and that the state courts found the evidence against

Brown to be "overwhelming," the Magistrate Judge agreed with the state courts that "the evidence presented to the jury was overwhelming [and t]he testimony was sufficient evidence from which a rational factfinder could find petitioner guilty of the crimes of which he was convicted beyond a reasonable doubt." R&R 18-19. Accordingly, Brown could not excuse the procedural default. *See id.* 17.

Brown's objections to the R&R on the merits of this claim are a recitation of the arguments in his habeas petition. *Cf.* Rev. Pet. 8-12, *with* Objs. 5-6 and Am. Objs. 4-8. After de novo review, this Court adopts the findings and conclusions in the R&R. In addition to the reasons set forth therein, this Court concludes that Brown's assertion the evidence showed he acted in self-defense lacks merit. *See Aponte v. Eckard*, No. 15-561, 2016 U.S. Dist. LEXIS 74141, at *27-28 (E.D. Pa. June 3, 2016) (finding that the petitioner's claim that the evidence was insufficient to support his conviction for first-degree murder was meritless where the evidence "could lead a rational fact finder to conclude beyond a reasonable doubt that Petitioner intentionally caused the death of Ward by firing a gun multiple times into Ward's body, that his intent to do so developed in the moments when he reached for the gun, and that he did not act out of the unreasonable belief that the use of deadly force was justified"); *Commonwealth v. Brown*, 178 A.3d 134 (Pa. Super. Ct. 2017) (finding that the evidence that after the deceased threw the first punch, he and Brown wrestled and "less than five seconds" after Brown pulled out a gun, multiple gunshots were fired did not support a claim of self-defense). This objection is overruled and because the claims lacks merit, Brown was not prejudiced by any failure of PCRA counsel to raise this issue and the claim therefore is procedurally defaulted.

3. Brown procedurally defaulted his claim that trial counsel was ineffective for failing to object to Ms. Hawkins's allegedly false testimony and because trial counsel cross-examined Ms. Hawkins on the inconsistencies in her testimony, the claim lacks merit such that the procedural default cannot be excused.

The R&R explains that while the third habeas claim was raised in the PCRA petition and addressed on the merits by the PCRA court and the Pennsylvania Superior Court in the PCRA appeal, both courts found that the claim was waived because Brown failed to present it on direct appeal. *See* R&R 19-22. The R&R determined the claim was procedurally defaulted. *See id.* The R&R, applying the doubly deferential standard of review, further concluded the claim lacked merit because Brown failed to show why the testimony was objectionable. *See id.* 22.

In the habeas petition, Brown asserted that the testimony of Ms. Hawkins that she did not "actually" see Brown hand a piece of paper to Ms. Fulton containing Brown's phone number was false because it was inconsistent with her prior statement to police and with the testimony of Ms. Fulton about whether anyone else was present at that time. *See* Rev. Pet. 15 (citing Fulton N.T. 222:6-25 and 223:2-6; Hawkins N.T.[6] 106:12-14). In his objections to the R&R, Brown elaborates on this claim and seeks an evidentiary hearing. *See* Objs. 6-7 and Am. Objs. 8-10.[7] It is clear, however, after de novo review of the claim and the trial transcripts, that Brown's argument lacks merit and no evidentiary hearing is needed.

De novo review of the record and trial transcripts shows that Ms. Hawkins's testimony

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[6] Notes of Testimony (Hawkins N.T. __), Trial, April 17, 2008.

[7] Brown also suggests that trial counsel's failure to object to Ms. Hawkins's testimony violated his equal protection rights. However, this claim was not presented in his habeas petition and cannot be raised for the first time now. *See* Order dated November 19, 2018, ECF No. 8 ("Pursuant to Local Civil Rule 72.1 IV(c), all issues and evidence shall be presented to the United States Magistrate Judge, and that new issues and evidence shall not be raised after the filing of the Report and Recommendation if they could have been presented to the United States Magistrate Judge."). Moreover, such a claim is wholly without support or even explanation.

was not in fact false. According to a police summary, Ms. Hawkins informed police that Brown handed Ms. Fulton a piece of paper. Similarly, at trial, Ms. Hawkins testified that she was present with Ms. Fulton on May 12, 2006, witnessed Brown and Ms. Fulton talking, and saw Brown hand Ms. Fulton a piece of paper. *See* Hawkins N.T. 104:5 – 105:20. However, as Brown points out, Ms. Hawkins thereafter testified that she did not "actually" see Brown hand Ms. Fulton the piece of paper. *See id.* 106:10-16. Ms. Hawkins explained that she reached her conclusion when Ms. Fulton showed her the paper. *See id.* Given her explanation, this Court does not find her testimony was false, let alone something that would require an objection or a mistrial. Furthermore, defense counsel did cross-examine Ms. Hawkins about the perceived inconsistencies in her statements. *See id.* 117:12 - 126:18. Trial counsel was therefore not ineffective and Brown has not shown that he was prejudiced by trial counsel's conduct or by the failure of PCRA counsel to raise this issue. *See Bender v. McGinley*, No. 1:19-cv-60, 2019 U.S. Dist. LEXIS 119052, at *19-21 (M.D. Pa. July 17, 2019) (concluding that where trial counsel did not object to a witness's allegedly false testimony or request a mistrial, but did thoroughly cross-examine the witness regarding the differences between her statements, the defendant was not prejudiced by counsel's performance and, also, that the defendant was not prejudiced by PCRA counsel's failure to raise this claim).

For these reasons and those more fully set forth in the R&R, the third habeas claim is procedurally defaulted and lacks merit. This Court also agrees with the Magistrate Judge's conclusion that an evidentiary hearing is not required. *See Morris v. Beard*, 633 F.3d 185, 196 (3d Cir. 2011) (holding that no evidentiary hearing is required where the record refutes the petitioner's factual allegations or otherwise precludes relief). Brown's objections are therefore overruled.

4. There is no basis for the issuance of a certificate of appealability.

A certificate of appealability ("COA") should only be issued "if the petitioner 'has made a substantial showing of the denial of a constitutional right.'" *Tomlin v. Britton*, 448 F. App'x 224, 227 (3d Cir. 2011) (citing 28 U.S.C. § 2253(c)). "Where a district court has rejected the constitutional claims on the merits, . . . the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

For the reasons set forth herein and in the R&R, Brown has not made a substantial showing of the denial of a constitutional right, nor would jurists of reason find the Court's assessment debatable or wrong. A COA is denied.

V. CONCLUSION

After de novo review and for the reasons set forth herein, the R&R is adopted. The claims are procedurally defaulted and such default cannot be excused because the claims lack merit. The objections are overruled and the habeas claims are denied and dismissed.

A separate Order follows.

BY THE COURT:

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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

No. 2:18-cv-04512

ORDER

AND NOW, this 4th day of May, 2021, for the reasons set forth in the Opinion issued this date, **IT IS HEREBY ORDERED THAT**:

1. The Report and Recommendation, ECF No. 31, is **ADOPTED**;

2. The petition for writ of habeas corpus, ECF No. 1, is **DISMISSED and DENIED**.

3. There is no basis for the issuance of a certificate of appealability.

4. This action is **CLOSED**.

BY THE COURT:

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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

ORDER

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

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

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

BY THE COURT:

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

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

UNITED STATES DISTRICT COURT
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No. 2:18-cv-04512

Appendix-B

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

Joseph F. Leeson, Jr.
United States District Judge

December 21, 2021

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

I. BACKGROUND

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

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

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

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

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

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

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

II. STANDARDS OF REVIEW

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

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

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

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

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

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

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

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

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

III. ANALYSIS

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

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

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

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

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

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

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

emphasizes that a habeas petitioner cannot circumvent the strictures of 28 U.S.C. § 2244, which governs the filing of second or successive habeas petitions, by simply labeling his paper a motion under Rule 60." *United States v. Brown*, No. 99-730, 2013 U.S. Dist. LEXIS 99616, at *20 (E.D. Pa. July 16, 2013). Because Brown did not have permission from the Court of Appeals to file a successive petition, the motion, if not considered under Rule 59(e), would be dismissed for lack of jurisdiction.

To the extent the motion for relief is considered pursuant to Rule 60(b)(6), it is denied and dismissed.

IV. CONCLUSION

Brown's motion for relief is properly considered pursuant to Rule 59(e), but does not provide a basis to relitigate his claims. Rule 60(b)(6) also offers no relief because Brown has not shown any extraordinary circumstances to reopen judgment or that he has jurisdiction to raise a successive § 2254 petition. The motion for relief is denied.

A separate Order follows.

BY THE COURT:

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

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

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

December 12, 2022

Mr. Jesse Brown
Prisoner ID #HN1283
SCI Albion
10745 Route 18
Albion, PA 16475-0001

Appendix C

Re: Jesse Brown
v. Eric Armel, Superintendent, State Correctional Institution at Fayette, et al.
No. 22-5263

Dear Mr. Brown:

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

Exhibit-D

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

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

Appendix-D

 Exhibit-D

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

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

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

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

Appendix-D

Exhibit-D

for trial counsel's failure to also advance a diminished capacity defense, when theoretically, that defense may have produced a verdict of third degree murder. *Legg*, 711 A.2d at 434.

In the instant case, this Court finds no evidence in the record that a diminished capacity defense was presented. Trial counsel declined to make an opening statement and also declined to put on any evidence in Appellant's case-in-chief. In Appellant's Fourth Amended PCRA Petition, it states a single conclusory sentence without making any citations to the record or any legal authority. *See* Fourth Amended PCRA Petition at ¶ D. Without more, and without any indication of a diminished capacity defense in the Court's review of the record, this Court finds this claim to have been waived for lack of specificity. *See* Pa. R. Crim. Pro 902(A)(11)-(12). Therefore, this claim is without merit.

B. Trial Counsel Was Not Ineffective For Arguing For A Voluntary Manslaughter Conviction

To prove an ineffective assistance of counsel claim, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." *Harrington*, 562 U.S. at 104. Again, the standard for judging counsel's representation is a most deferential one. *Id.* at 105. It is well-settled that counsel has a reasonable strategic basis in seeking to avoid a higher degree of murder by asking the jury to convict on a lower degree. *See Commonwealth v. Tabron*, 465 A.2d 637, 639 (Pa. 1983); *Commonwealth v. Loftron*, 292 A.2d 327, 330 (Pa. 1972). A verdict of voluntary manslaughter carries a maximum sentence of 20 years, which is far below the mandatory life sentence applicable to first-degree murder. *See* 18 Pa.C.S. 2503(c) (grading voluntary manslaughter as a first-degree felony).

Appellant states that trial counsel was ineffective because trial counsel should have challenged the sufficiency of the evidence of the first-degree murder charge rather than arguing

Appendix-D

A. A Diminished Capacity Defense Was Not Presented

"[T]he test for counsel ineffectiveness is the same under both the Pennsylvania and federal Constitutions: it is the performance and prejudice test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *Commonwealth v. Spotz,* 870 A.2d 822, 829 (Pa. 2005). In order to prove deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." *Harrington v. Richter,* 562 U.S. 86, 104 (2011) (quoting *Strickland,* 466 U.S. at 688). More specifically, deficient performance requires a showing that: (1) the appellant's underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have a reasonable basis designed to effectuate the appellant's interests; and (3) the counsel's ineffectiveness prejudiced the appellant. *Commonwealth v. Pierce,* 786 A.2d 203, 213 (Pa. 2001); *Commonwealth v. Kimball,* 724 A.2d 326, 333 (Pa. 1999). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. *Commonwealth v. Spotz,* 870 A.2d 822, 829-30 (Pa. 2005). Furthermore, the standard for judging counsel's representation is a most deferential one. *Harrington,* 562 U.S. at 105.

A diminished capacity defense is only a partial defense, which focuses on the inability to form the specific intent to kill. *Commonwealth v. Travaglia,* 541 Pa. 108, 124, 661 A.2d 352, 359 (1995); see also *Commonwealth v. Hutchinson,* 25 A.3d 277, 314 (Pa. 2011). A diminished capacity defense is "an extremely limited defense." *Commonwealth v. Legg,* 711 A.2d 430, 433 (Pa. 1998). However, if successful in asserting this defense, first degree murder is mitigated to third degree. *Travaglia,* 661 A.2d at 359. The Supreme Court of Pennsylvania has found that even when the facts support a finding of first degree murder, there is no reasonable justification