No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMAR LASHAWN TRAVILLION,

Petitioner,

v.

MARK GARMAN (Superintendent for the State Correctional Institution at Rockview); STEPHEN A. ZAPPALA (District Attorney for Allegheny County, Pennsylvania); ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

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

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JAMAR LASHAWN TRAVILLION
Petitioner*

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DLD-235

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-1624**

JAMAR L. TRAVILLION, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI, ET Al

(W.D. Pa. Civ. No. 2:17-cv-00515)

Present: CHAGARES, Chief Judge, KRAUSE, and MATEY, Circuit Judges

Submitted are:

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

(2) Appellant's motion for leave to file amended request for a certificate of appealability; and

(3) Appellant's motion for leave to exceed the page limit for the request for certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's motions to file an amended application for a certificate of appealability and to exceed the page limits are granted. Appellant's request for a certificate of appealability, as amended, is denied. See 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the same reasons provided by the District Court, jurists of reason would agree, without debate, that Appellant's claims are either meritless, see Strickland v. Washington, 466 U.S. 558, 687 (1984); Wilkerson v.

APPENDIX A

Klem, 412 F.3d 449, 453–56 (3d Cir. 2005), Fischetti v. Johnson, 384 F.3d 140, 148–53 (3d Cir. 2004); Cullen v. Pinholster, 563 U.S. 170, 181 (2011), or procedurally defaulted, with no grounds for excusing the default, see Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986); Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir. 2012); Martinez v. Ryan, 566 U.S. 1 (2012), or non-cognizable on federal habeas review, Ross v. Moffitt, 417 U.S. 600, 610–11 (1974); Wainwright v. Torna, 455 U.S. 586, 587–88 (1982).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: September 27, 2022
PDB/cc: Jamar L. Travillion
Ronald M. Wabby, Jr., Esq.

A True Copy:

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

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

JAMAR LASHAWN TRAVILLION,	)	
	)	
Petitioner,	)	2:17-cv-00515
v.	)	
	)	Chief Judge Mark R. Hornak
MARK GARMAN and STEPHEN A. ZAPPALA,	)	
	)	Magistrate Judge Maureen P. Kelly
	)	
Respondents.	)	

MEMORANDUM ORDER

Before the Court is the Amended Report and Recommendation (ECF No. 74) (referred to herein as "R&R") as to Petitioner Jamar Lashawn Travillion's Petition for Writ of Habeas Corpus pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 (ECF No. 4), and Petitioner's Objections to the R&R (ECF No. 77), as well as Petitioner's prior amended Objections (ECF No. 58) to the prior Report and Recommendation that his present Objections incorporate by reference (referred to herein, collectively with the Objections at ECF No. 77, as "Objections"). For the reasons explained below, and upon full consideration of Petitioner's Objections and *de novo* review and consideration of the record, the Court adopts the conclusions of the R&R as to Petitioner's asserted grounds for relief and as to the issuance of a certificate of appealability, denies the Petition for Writ of Habeas Corpus, and concludes that no certificate of appealability should issue. Further, the Court clarifies and expands upon certain portions of the R&R in consideration of the Objections, and this Memorandum Order—together with the R&R's conclusions that the Petition should be denied and that no certificate of appealability should issue—constitute the Opinion of this Court as provided below.

APPENDIX B

I. BACKGORUND

The R&R thoroughly summarizes the factual and procedural history of this case. (*See* ECF No. 74, at 1–10.) The Court highlights the following components of that case history as context for this Memorandum Order.

Petitioner's pending habeas Petition raises six grounds for relief, which can be summarized as follows: (1) ineffective assistance of trial counsel (Ground One); (2) denial of Petitioner's Sixth Amendment right to counsel at trial (Ground Two); (3) denial of Petitioner's Sixth Amendment right to testify on his own behalf (Ground Three); (4) denial of Petitioner's Sixth Amendment right to compulsory process (Ground Four); (5) ineffective assistance of direct appeal counsel (Ground Five); and (6) ineffective assistance of counsel in Petitioner's state post-conviction relief proceedings pursuant to the Post-Conviction Relief Act (PCRA) (referred to herein as "PCRA counsel") (Ground Six). (*Id.* at 8 (citing ECF No. 4, at 1–2).) [1]

Ground Two was adjudicated on the merits by the state courts on direct appeal. (*See* ECF Nos. 21-3, at 6–36 (Pennsylvania Court of Common Pleas opinion and addendum to opinion); 21-5, at 1–22 (Pennsylvania Superior Court opinion); and 21-6, at 38–42 (Pennsylvania Supreme Court opinion).) Ground Five was adjudicated on the merits by the state courts during the PCRA proceedings. (*See* ECF Nos. 21-9, at 6–17 (Court of Common Pleas opinion); 21-10, at 1–11 (Superior Court opinion); and 21-11, at 28 (Supreme Court denial of petition for allowance of appeal).)

Magistrate Judge Maureen P. Kelly issued her first Report and Recommendation (ECF No. 32) as to the pending Petition on December 26, 2019. Petitioner then filed Objections to the first

[1] To the extent Petitioner names other possible claims for relief (e.g., at Ground Three, Petitioner references claims in addition to the right to testify in the heading of that portion of his Petition but only focuses substantively on the right to testify (ECF No. 74, at 31)), this Court agrees with the R&R's assessment of the claims Petitioner has brought as being substantively limited to those listed here.

Report and Recommendation on July 9, 2020 (ECF No. 44) and filed amended Objections on December 8, 2020 (ECF No. 58). Petitioner also filed a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases (ECF No. 45), which this Court granted to allow the Magistrate Judge to consider supplemental material made part of the record (i.e., the filings at ECF Nos. 31 and 69, and those accompanying the Objections at ECF Nos. 44 and 58) "to the degree consistent with prevailing law." (ECF No. 72, at 1.)

The Amended Report and Recommendation (ECF No. 74) (referred to herein as "R&R") followed on July 12, 2021, and Petitioner filed the pending Objections to the Amended R&R (ECF No. 77) on August 17, 2021 (referred to herein, together with the amended Objections to the first Report and Recommendation that the pending Objections incorporate, as "Objections").

II. DISPOSITION OF PETITIONER'S OBJECTIONS TO THE AMENDED REPORT & RECOMMENDATION

A. Petitioner's Supplemental Material

The R&R contains a section addressing the Magistrate Judge's and this Court's ability to consider Petitioner's supplemental material as part of his Petition, and Petitioner objects to those findings. This Court's conclusions on the R&R and the Objections as to this subject are set out below.

The R&R lists Petitioner's supplemental material filed after his pending Petition. (ECF No. 74, at 14–16.) The R&R explained that (1) to the extent that the material supports claims for relief adjudicated on the merits in state court, the Court can only consider evidence presented in the state court proceedings, and (2) to the extent that the material supports claims not adjudicated on the merits in state court, the Court can only consider material outside of the state court record if Petitioner has met the requirements of 28 U.S.C. § 2254(e)(2). (*Id.* at 18–20.) The R&R noted that, despite having been informed of his obligation to do so, Petitioner had failed to identify where the majority of his supplemental material had appeared in the state court record. (*Id.* at 17.) The R&R then concluded

that "save for Item Nos. 16 and 18–20" in the list of Petitioner's supplemental material, which were easily identifiable as part of the state court record, the supplemental material could not be considered in reviewing Petitioner's claims, whether those claims have been adjudicated on the merits in state court or not. (*See id.* at 16–17, 20.)

Petitioner makes three primary objections to this assessment of the supplemental material. First, he contests the R&R's statement that Petitioner has provided scant citation to where in the state court record the supplemental materials can be found. (*See* ECF No. 77, at 5–10.) Second, he argues that the R&R "conflat[es]" § 2254(e)(2) and Rule 7 of the Rules Governing Section 2254 Cases, and he argues that Rule 7 allows this Court to consider the supplemental material regardless of the confines of § 2254(e)(2). (*Id.* at 10–12.) Third, Petitioner objects to the R&R's conclusion that Petitioner has not met the burden to show that the supplemental materials may be considered, even assuming that the requirements of § 2254(e)(2) apply. (*Id.* at 12–14.)

With one correction, the Court adopts the R&R's conclusions as to Petitioner's supplemental material and whether it can properly be part of his Petition. The Court corrects the R&R's conclusion as to which supplemental materials were part of the state court record by noting that Item No. 21 (a Judicial/Prosecutorial Misconduct Complaint filed by Petitioner in December 2005) was part of the state court record, as Petitioner contends (*see* ECF No. 77, at 7–8), in addition to Item Nos. 16 and 18–20. As to the remainder of the section of the R&R concerning supplemental material, this Court adopts the R&R, as modified and amplified by this Memorandum Order, as the Opinion of the Court because the R&R has properly applied the law as to whether the Court may consider the supplemental material. *See, e.g.*, *Rosato v. Sec'y, Dep't of Corrs.*, 2015 WL 13821935, at *2 (M.D. Fla. July 27, 2015) (citing *Cullen v. Pinholster*, 536 U.S. 170, 181–82 (2011)) (explaining that

regardless of Rule 7, § 2254 "severely limits a federal court's authority to expand the record and restricts a federal court's review to the record that was before the state court").[2]

B. Petitioner's Asserted Grounds for Relief

i. Ground One: Ineffective Assistance of Trial Counsel

As to Ground One, the R&R concluded that Petitioner has procedurally defaulted this claim by not raising it during the PCRA proceedings, and that Petitioner lacks sufficient cause to excuse the procedural default because he fails to show that his ineffective assistance of trial counsel claim is "substantial" such that the *Martinez v. Ryan* exception to the procedural default doctrine applies and allows Petitioner to assert ineffective assistance of PCRA counsel as cause for the default. (ECF No. 74, at 23–25, 44.)[3] *See* 566 U.S. 1, 14 (2012). The R&R also concluded that even if Petitioner's claim at Ground One was not procedurally defaulted, Petitioner fails to show that his trial counsel was ineffective. (ECF No. 74, at 24.)

Petitioner asserts that his claim of ineffective assistance of his trial counsel is substantial such that his PCRA counsel's failure to raise it is cause to excuse the procedural default. (ECF No. 58, at 24–26; *see* ECF No. 77, at 21.) Further, Petitioner objects to the R&R's conclusion that he has not shown that his trial counsel, William H. Difenderfer, was ineffective. Petitioner he alleges that Mr. Difenderfer's failure to fulfill his promise to Petitioner to repay Petitioner one-half of his retainer fee upon being terminated from the case—which the R&R acknowledges as a specific instance alleged

[2] Despite the R&R's correct conclusions about whether the Magistrate Judge was permitted to consider Petitioner's supplemental material, the Magistrate Judge nonetheless "reviewed each and every article of Supplemental Material that Petitioner has submitted" in evaluating Petitioner's asserted grounds for relief. (ECF No. 74, at 21.)

[3] The R&R discussed Petitioner's claim of ineffective assistance of PCRA counsel—to the extent Petitioner asserts in his Objections that that alleged ineffectiveness constitutes cause that excuses his procedural default of his claim at Ground One—in the section of the R&R addressing Ground Six of Petitioner's habeas petition. (*See* ECF No. 74, at 40–45.) The Court addresses whether Petitioner can overcome procedural default of Ground One by asserting ineffective assistance of PCRA counsel in this section of the Opinion to streamline its summary of the R&R's conclusions and Petitioner's Objections as to each Ground on which Petitioner seeks relief.

by Petitioner as ineffective assistance of counsel (ECF No. 74, at 24)—prevented Petitioner from hiring replacement counsel and "completely denied Petitioner counsel at trial." (ECF No. 58, at 15–16, 21–22; *see* ECF No. 77, at 15–16.)

Having reviewed Petitioner's Objections to the R&R's conclusions at Ground One, this Court adopts the R&R, as modified and amplified by this Memorandum Order, as the Opinion of the Court because the Court agrees with the R&R that Petitioner procedurally defaulted his Ground One claim by not raising it with the state courts and that the claim is not substantial, as discussed below, preventing the alleged ineffective assistance of PCRA counsel from excusing the default under *Martinez*. Thus, the Court concludes that Ground One does not entitle Petitioner to habeas relief. In addition, the Court concludes that a certificate of appealability should not issue as to Ground One because "jurists of reason could [not] disagree with th[is] . . . resolution of [Petitioner's] constitutional claim[] [at Ground One] [nor] . . . conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Further, because the R&R acknowledges but does not squarely address Petitioner's assertion that Mr. Difenderfer's failure to refund Petitioner was an instance of deficient performance that prejudiced Petitioner, the Court expands upon the R&R as to that aspect of Petitioner's Objections.

Assuming that Petitioner had not procedurally defaulted his claim of ineffective assistance of his trial counsel (notwithstanding that the R&R properly concluded that he did[4]) or that the procedural default could be excused (notwithstanding that the R&R properly concluded that it cannot

[4] The R&R concluded that Petitioner's ineffective assistance of trial counsel claim is procedurally defaulted because Petitioner did not raise it in the PCRA proceedings. This is correct because the PCRA proceedings were the only opportunity Petitioner would have had to raise this claim with the state courts. *See Bey v. Superintendent Greene SCI*, 856 F.3d 230, 243–44 (3d Cir. 2017) (explaining that in Pennsylvania, "collateral review . . . is the first possible instance in which to raise claims of ineffective assistance of trial counsel").

be[5]), Petitioner's claim that Mr. Difenderfer breached his promise to repay Petitioner a retainer fee is insufficient to establish ineffective assistance of counsel. "To prove ineffective assistance of counsel under *Strickland v. Washington*, a petitioner must prove (1) that his counsel's performance was deficient, that is, it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced his client, *i.e.*, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 238 (3d Cir. 2017) (citing 466 U.S. 668 (1984)). By the time Mr. Difenderfer allegedly refused to repay Petitioner the retainer fee, Mr. Difenderfer was no longer Petitioner's counsel, and thus logically could not have rendered deficient performance as counsel through that act.

But even if Mr. Difenderfer's refusal after his termination to repay any of the fee he received from Petitioner could be considered an act by counsel, Petitioner has not explained how that refusal fell below an objective standard of reasonable performance as counsel—especially given the terms of the fee agreement that Mr. Difenderfer provided Petitioner. (*See* ECF No. 31-4.)[6] Separately, the record does not demonstrate that "but for" Mr. Difenderfer's failure to repay Petitioner, Petitioner

[5] The R&R rejected Petitioner's assertion that ineffectiveness of Petitioner's PCRA counsel was sufficient cause to excuse the procedural default of Ground One because while *Martinez v. Ryan* allows a petitioner to assert ineffectiveness of post-conviction counsel as cause for procedurally defaulting a claim of ineffectiveness of trial counsel, the underlying claim as to trial counsel must be "substantial." (*See* ECF No. 74, at 44.) The R&R properly concluded that Ground One is not substantial, as exemplified by this Court's expansion of the R&R to address Petitioner's claim that failure to repay Petitioner's retainer fee does not constitute ineffective assistance of counsel.

[6] Petitioner filed a copy of the fee agreement that Mr. Difenderfer sent to Petitioner (ECF No. 31-4) as part of Petitioner's Declaration that he filed in support of his Petition (ECF No. 31). The fee agreement does not discuss repayment of fees, and it states that "the quoted fee is the fee, regardless of whether the case goes to trial," making Mr. Difenderfer's termination immediately prior to the trial of no moment as to whether he owed Petitioner any money back. (ECF No. 31-4, at 3.) Nor does Petitioner's citation to ABA Model Rule of Professional Conduct 1.16(d) demonstrate that Mr. Difenderfer was ineffective by not repaying Petitioner's fee because Rule 1.16(d) specifically refers to refunds of "advance payment of fee *that has not been earned*." (ECF No. 58, at 21 (quoting Rule 1.16(d).) The timing of Mr. Difenderfer's termination—after jury selection for the trial had begun—coupled with the language of the fee agreement strongly suggests that Mr. Difenderfer would have reasonably earned his fee and that no refund was due under any theory.

would have had counsel at trial—possibly making the result of the proceeding different—because it is not by any means certain (as Petitioner seems to assume) that Petitioner would have been able to hire another lawyer to take his case even if he had the money he asked Mr. Difenderfer to repay (in fact, the record shows that some lawyers whom Petitioner contacted simply never responded to him). (*See* ECF No. 58-4, at 50.) And, of course, if Petitioner lacked funds to secure retained counsel due to Mr. Difenderfer's alleged failure to repay the fee Petitioner suggests was due to him or otherwise, such would have presumably qualified Petitioner to have counsel appointed to represent him, at no cost to Petitioner. Thus, Petitioner's claim at Ground One, even if it were not procedurally defaulted, lacks merit.

ii. Ground Two: Denial of Sixth Amendment Right to Counsel

As to Ground Two, the R&R concluded that Petitioner has failed to show that the Pennsylvania Supreme Court's resolution of Petitioner's claim that he was denied his Sixth Amendment right to counsel was contrary to or an unreasonable application of U.S. Supreme Court precedent or was an unreasonable determination of the facts. (ECF No. 74, at 25–31.) *See* 28 U.S.C. § 2254(d)(1)-(2). Petitioner objects to this conclusion because he argues that "the [t]rial [c]ourt forced him to proceed at trial and sentencing without the assistance of counsel following the termination of Attorney Difenderfer's representation" and that the determination by the trial court and Pennsylvania Supreme Court that Petitioner forfeited his right to counsel is unreasonable under both § 2254(d)(1) and § 2254(d)(2). (ECF No. 58, at 30–48; *see* ECF No. 77, at 17.) Specifically, Petitioner asserts that *Illinois v. Allen* does not support the principle that a criminal defendant can, through his conduct, forfeit his right to counsel, as opposed to his right to be present during proceedings, and thus argues that the conclusion that he forfeited his right to counsel is contrary to federal law as established by the U.S. Supreme Court. (ECF No. 58, at 37–40; *see* ECF No. 77, at

17.) *See* 397 U.S. 337 (1970). Further, Petitioner argues that even if federal law supports a finding of forfeiture of the right to counsel in some circumstances, both the state courts' application of that doctrine in Petitioner's case and those courts' factual findings were unreasonable. (ECF No. 58, at 40–48; *see* ECF No. 77, at 17.)

Having reviewed Petitioner's Objections to the R&R's conclusions at Ground Two, this Court adopts the R&R, as modified and amplified by this Memorandum Order, as the Opinion of the Court because the Court agrees with the R&R that Petitioner has not met his burden under § 2254 to show that he is entitled to relief as to this claim, as explained below.[7] The Court concludes that Ground Two does not entitle Petitioner to habeas relief; the Court also concludes that a certificate of appealability should not issue as to Ground Two because Petitioner's failure to meet his burden to obtain relief on Ground Two under AEDPA is not debatable among jurists of reason. *Miller-El*, 537 U.S. at 327; *see Becker v. Sec'y Pa. Dep't of Corrs.*, No. 20-2844, Opinion of the Court, at 2–3 (3d Cir. Mar. 21, 2022) ("When deference to state court rulings under AEDPA will apply to the merits of a petitioner's habeas claim, such deference likewise applies to [the appellate court's] decision whether to issue a [certificate of appealability] . . . .").

The Court makes the following additional observations about Petitioner's claim at Ground Two, finding it important to do so due to the centrality of this claim throughout the history of Petitioner's case and the utmost importance of a criminal defendant's right to counsel.

First, the Third Circuit has directly addressed forfeiture of the right to counsel in reviewing habeas petitions by state prisoners who allege that they were denied their constitutional right to counsel, and those cases demonstrate why Petitioner has not met his burden under § 2254 at Ground

[7] The R&R stated that "[i]n the initial Report and Recommendation, the [Magistrate Judge] refused to consider any evidence in Petitioner's Declaration, ECF No. 31, unless Petitioner could *not* show where it appeared in the underlying state court records." (ECF No. 74, at 27 (emphasis added).) The Court revises the latter part of that statement to read, "unless Petitioner could show where it appeared in the underlying state court records."

Two. In a 2004 precedential decision, *Fischetti v. Johnson*, the Third Circuit denied habeas relief under § 2254 with respect to a petitioner's claim that he was denied his right to counsel, despite concluding that the state trial court committed error that would be reversible on direct appeal. 384 F.3d 140, 147, 153 (3d Cir. 2004). In doing so, the Third Circuit explained that because the U.S. Supreme Court's "established precedent . . . has n[either] expressly dealt with the matter of forfeiture of counsel . . . [nor] involved facts that [were] materially indistinguishable" from those in *Fischetti*, the state court's determination that the defendant had forfeited his right to counsel "was not contrary to federal law as articulated by the decisions of the [U.S.] Supreme Court." *Id.* at 150. The Third Circuit also reasoned that the state court's forfeiture conclusion in that case did not "unreasonably appl[y] [U.S.] Supreme Court case law" because that case law "certainly provide[s] a basis to conclude . . . that defiant behavior by a defendant can properly cost that defendant some of his Sixth Amendment protections [including the right to counsel] if necessary to permit a trial to go forward in an orderly fashion." *Id.* at 151.

Since *Fischetti*, the U.S. Supreme Court has not issued any decisions that address forfeiture of the right to counsel, nor has it overruled the decisions that the Third Circuit identified in *Fischetti* as providing a basis from which to conclude that forfeiture of the right to counsel can occur despite the Sixth Amendment's broad protections. Thus, Third Circuit precedent makes clear that the Pennsylvania state courts' decisions here as to Petitioner's forfeiture of his right to counsel were not contrary to nor did they involve an unreasonable application of federal law as articulated by the U.S. Supreme Court and thus do not implicate § 2254(d)(1).

Further, while the Third Circuit has not explicitly addressed § 2254(d)(2) in cases involving state court conclusions that a defendant forfeited the right to counsel, Third Circuit cases on forfeiture of that right suggest that the Pennsylvania state courts' conclusions here that Petitioner forfeited

his right to counsel also do not implicate § 2254(d)(2) in that they were not "unreasonable determination[s] of the facts in light of the evidence presented in the State court proceeding."

For example, in concluding that a habeas petitioner had failed to show that state courts unreasonably applied U.S. Supreme Court precedent when concluding the petitioner had forfeited the right to counsel, the Third Circuit in *Wilkerson v. Klem* explained: "[N]o clear forfeiture standard has been articulated by the Supreme Court . . . . It is not sufficient [to warrant habeas relief] to say that [the petitioner's] actions did not rise to the level of conduct that has constituted forfeiture in the past; the issue is whether the state court's application of forfeiture to [the petitioner's] case was precluded by Supreme Court precedent." 412 F.3d 449, 455–56 (3d Cir. 2005). *See also Fischetti*, 384 F.3d at 152 ("[N]one of the[] cited appellate cases saw in the Supreme Court's precedents any clear guidance as to the precise standard to be applied before forfeiture can be triggered. Put another way, the Supreme Court has not fully defined when a defendant's misconduct or defiance warrants a forfeiture.").

Thus, the issue here is not whether Petitioner's conduct "r[ose] to the same level of conduct that has constituted forfeiture in the past," *Wilkerson*, 412 F.3d at 456, nor is it whether this Court agrees with the state courts' determination that Petitioner's conduct was disruptive enough to constitute forfeiture of his right to counsel, *see Fischetti*, 384 F.3d at 150–51 (explaining that a federal court must find more than "simple error" to grant relief under § 2254(d)(1) and cannot grant relief on the basis that it disagrees that the state court's application of Supreme Court precedent was proper). Applying the required § 2254 standards, the Court concludes, as the R&R did, that the decisions of Pennsylvania's Court of Common Pleas and Supreme Court that Petitioner forfeited his right to counsel were not objectively unreasonable, either as an application

of federal law as established by the U.S. Supreme Court or as a determination of the facts before the state courts.

Second, the Court emphasizes that the precise reason that Petitioner is not entitled to habeas relief based on his Ground Two claim is because the state courts, including the Pennsylvania Supreme Court, ultimately concluded that Petitioner *forfeited* his right to counsel. Despite the Court of Common Pleas' initial conclusion that Petitioner *waived* his right to counsel (ECF No. 21-3, at 15–27), that court's later addendum to that opinion, in which the court concluded that Petitioner had forfeited his right to counsel (ECF No. 21-3, at 36), is what the Pennsylvania Supreme Court addressed and affirmed.

The U.S. Supreme Court has repeatedly held that in habeas proceedings, "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Thus, because the state supreme court in this case relied on the doctrine of forfeiture in its reasoned opinion through which it ruled against Petitioner on his claim of denial of his right to counsel, this Court must analyze Petitioner's claim of denial of his right to counsel at Ground Two by determining whether the finding of forfeiture was appropriate within the framework of § 2254 and without consideration of the trial court's first opinion in which it concluded Petitioner had waived his right to counsel, which is a separate concept from forfeiture that the Pennsylvania Supreme Court did not address. And because Petitioner has not met his burden to show that the Pennsylvania Supreme Court's determination that Petitioner forfeited his right to counsel was contrary to or an unreasonable application of U.S. Supreme Court precedent, or was an unreasonable determination of the facts, Petitioner's claim at Ground Two must be denied.

iii. Ground Three: Denial of Sixth Amendment Right to Testify

As to Ground Three, the R&R concluded that Petitioner has procedurally defaulted this claim by not raising it in the Superior Court on direct appeal or during the PCRA proceedings. (*See* ECF No. 74, at 7, 31–32.) The R&R determined that Petitioner could not show cause to excuse the procedural default of the claim on appeal in the Superior Court because to the extent Petitioner asserted ineffectiveness of his appellate counsel as the cause, Petitioner's appellate counsel was not ineffective. (*Id.* at 32, 27–40.)[8] The R&R also explained that Petitioner could not show cause to excuse the procedural default of the claim during the PCRA proceedings because to the extent Petitioner asserted ineffectiveness of his PCRA counsel as the cause, the exception to the rule that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default," *Martinez*, 566 U.S. at 9, only applies to claims of ineffectiveness of trial counsel (including Petitioner's claim at Ground One). (ECF No. 74, at 32, 42–43.)[9]

In the alternative, the R&R concluded that even if Petitioner had not procedurally defaulted his claim at Ground Three of denial of his right to testify, Petitioner has failed to show that the Court of Common Pleas' resolution of Petitioner's claim was contrary to or an unreasonable application of U.S. Supreme Court precedent or was an unreasonable determination of the facts. (*Id.* at 32–33.)

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[8] The R&R discusses Petitioner's claim of ineffective assistance of direct appeal counsel—which Petitioner asserts in his Objections constitutes cause that excuses his procedural default of his claims at Grounds Three and Four—in the section of the R&R addressing Ground Five of Petitioner's habeas petition. (*See* ECF No. 74, at 35–40.) The Court addresses whether Petitioner can overcome procedural default of Grounds Three and Four by asserting ineffective assistance of direct appeal counsel in this and the next section of the Opinion to streamline its summary of the R&R's conclusions and Petitioner's Objections as to each Ground on which Petitioner seeks relief.

[9] The R&R discussed Petitioner's claim of ineffective assistance of PCRA counsel—to the extent Petitioner asserts in his Objections that that alleged ineffectiveness constitutes cause that excuses his procedural default of his claims at Grounds Three and Four—in the section of the R&R addressing Ground Six of Petitioner's habeas petition. (*See* ECF No. 74, at 40-45.) The Court addresses whether Petitioner can overcome procedural default of Grounds Three and Four by asserting ineffective assistance of PCRA counsel in this and the next section of the Opinion to streamline its summary of the R&R's conclusions and Petitioner's Objections as to each Ground on which Petitioner seeks relief.

Petitioner objects to the R&R's conclusion that his direct appeal counsel was not ineffective and asserts that any procedural default of Ground Three "result[ed] from [direct appeal] Attorney [Thomas] Farrell's ineffective assistance" and "should therefore be excused." (ECF No. 58, at 89; *see* ECF No. 77, at 20.) Further, as to the merits of his denial of the right to testify claim, Petitioner contends that the trial court's "arbitrary and unconstitutional restrictions [that it] placed on the presentation of Petitioner's testimony" without a "justifiable rational[e]" was contrary to or an unreasonable application of federal law and that "the trial court's recital of the facts" as to Petitioner's waiver of the right to testify was "selective" and was an unreasonable determination of the facts. (ECF No. 58, at 50–61; *see* ECF No. 77, at 18.)

The Court agrees with the R&R's conclusions that Petitioner procedurally defaulted the Ground Three claim and cannot show cause to overcome the default because, as the state courts in the PCRA proceedings properly determined based on testimony by Petitioner's direct appeal counsel regarding why he did not raise all possible claims on appeal (*see* ECF No. 74, at 38–39), Petitioner's direct appeal counsel was not ineffective for failing to raise Ground Three on direct appeal in the Superior Court. Further, the alleged ineffective assistance of PCRA counsel cannot excuse the procedural default of this type of claim under *Martinez*. The Court also concurs with the R&R that the state court's resolution of the claim does not allow relief under § 2254 because the state trial court's determination that Petitioner was given the right to testify and waived it was not contrary to nor an unreasonable application of federal law as determined by the U.S. Supreme Court, nor an unreasonable determination of the facts. Therefore, the Court adopts the R&R, as modified and amplified by this Memorandum Order, as the Opinion of the Court as to Ground Three and concludes that Ground Three does not entitle Petitioner to habeas relief and that a certificate of appealability as to Ground Three should not issue, because jurists of reason could not disagree that Petitioner

procedurally defaulted his Ground Three claim and cannot demonstrate cause for the default, *Miller-El*, 537 U.S. at 327.[10]

iv. Ground Four: Denial of Sixth Amendment Right to Compulsory Process

As to Ground Four, the R&R concluded that Petitioner has procedurally defaulted this claim by not raising it in the Superior Court on direct appeal or during the PCRA proceedings. (*See* ECF No. 74, at 7, 34.) The R&R determined that Petitioner could not show cause to excuse the procedural default of the claim on appeal in the Superior Court because to the extent Petitioner asserted ineffectiveness of his appellate counsel as the cause, Petitioner's appellate counsel was not ineffective.(*Id.* at 34, 37–40.)[11] The R&R also explained that Petitioner could not show cause to excuse the procedural default of the claim during the PCRA proceedings because to the extent Petitioner asserted ineffectiveness of his PCRA counsel as the cause, the exception to the rule that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default," *Martinez*, 566 U.S. at 9, only applies to claims of ineffectiveness of trial counsel (including Petitioner's claim at Ground One). (ECF No. 74, at 34, 42–43.)[12]

In the alternative, the R&R concluded that even if Petitioner had not procedurally defaulted his claim at Ground Four of denial of his right to compulsory process, Petitioner has failed to show that the Court of Common Pleas' resolution of Petitioner's claim was contrary to or an unreasonable application of U.S. Supreme Court precedent or was an unreasonable determination of the facts. (*Id.* at 34–35.)

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[10] The R&R stated that "the *Martinez* exception can only serve as cause to excuse claims of trial counsel's ineffectiveness and no other procedurally defaulted claims, not even such a closely related procedurally default claim of direct appeal counsel's ineffectiveness, yet alone less related claims." (ECF No. 74, at 42.) The Court revises the last portion of that statement to read, "let alone less related claims."

[11] *See supra* note 8.

[12] *See supra* note 9.

Petitioner objects to the R&R's conclusion that his direct appeal counsel was not ineffective and asserts that any procedural default of Ground Four "result[ed] from [direct appeal] Attorney Farrell's ineffective assistance" and "should therefore be excused." (ECF No. 58, at 89; *see* ECF No. 77, at 20.) Further, as to the merits of his denial of the right to compulsory process claim, Petitioner contends that "[t]he exaggerated warnings against self-incrimination and threats of criminal prosecution directed at defense witness Raymond Geeter by the Commonwealth and the [t]rial [c]ourt exerted such duress upon [Geeter's] mind that [Geeter] could not make a free and voluntary decision on whether or not to testify in th[e] case," which allegedly prevented Petitioner from presenting evidence through Mr. Geeter's testimony in contravention of Petitioner's right to compulsory process. (ECF No. 58, at 66–70; *see* ECF No. 77, at 19.) Petitioner asserts that the state trial court unreasonably determined the facts in reviewing this claim on direct appeal. (ECF No. 58, at 71–72; *see* ECF No. 77, at 19.)

The Court agrees with the R&R's conclusions that Petitioner procedurally defaulted the Ground Four claim and that no cause exists to excuse the procedural default because, as the state courts in the PCRA proceedings properly determined based on testimony by Petitioner's direct appeal counsel regarding why he did not raise all possible claims on appeal (*see* ECF No. 74, at 38–39), Petitioner's direct appeal counsel was not ineffective for failing to raise Ground Four on direct appeal in the Superior Court. Further, the alleged ineffective assistance of PCRA counsel cannot excuse the procedural default of this type of claim under *Martinez*. The Court also agrees that the state trial court's determination that the trial court's and Commonwealth's actions in informing Mr. Geeter of his Fifth Amendment rights did not deny Petitioner his right to compulsory process was reasonable under § 2254. Therefore, the Court adopts the R&R, as modified and amplified by this Memorandum Order, as the Opinion of the Court as to Ground Four and concludes that Ground Four

does not entitle Petitioner to habeas relief and that a certificate of appealability should not issue as to Ground Four, because jurists of reason could not disagree with the finding of procedural default and lack of cause to excuse the default, *Miller-El*, 537 U.S. at 327.

v. Ground Five: Ineffective Assistance of Direct Appeal Counsel

In his habeas petition, Petitioner alleges two instances of ineffective assistance of direct appeal counsel, and the R&R's recommendation that this Court deny the petition at Ground Five addresses those alleged instances separately.

First, Petitioner alleges ineffectiveness at the Superior Court phase of his direct appeal proceedings, arguing that direct appeal counsel was ineffective by "not raising [] three other issues in the brief that appellate counsel filed with the Pennsylvania Superior Court on appeal that appellate counsel had earlier raised in the Rule 1925(b) Statement of Errors." (ECF No. 74, at 35 (citing ECF No. 4, at 52–58).) In response, the R&R concluded that Petitioner has failed to show that the resolution of this part of his claim in the state court PCRA proceedings was contrary to or an unreasonable application of U.S. Supreme Court precedent or was an unreasonable determination of the facts. (ECF No. 74, at 37–40.) Petitioner objects, arguing that the claims that his direct appeal counsel included in the Rule 1925(b) Statement of Errors but did not present in his brief to the Superior Court were "so vociferous and intertwined with the violation of [Petitioner's] right to counsel," a claim that the brief did include, "that those claims should by no means have been abandoned on direct review." (ECF No. 58, at 85; *see* ECF No. 77, at 20.)

Second, Petitioner alleges ineffectiveness of his direct appeal counsel at the Pennsylvania Supreme Court phase of the appeal proceedings based on counsel's failure to "fil[e] a brief in opposition to the Commonwealth's Petition for Allowance of Appeal to the Pennsylvania Supreme Court after the Superior Court reversed Petitioner's conviction and remanded for a new trial." (ECF

No. 74, at 35 (citing ECF No. 4, at 52–58).) The R&R concluded that this claim lacks merit because Petitioner had no Sixth Amendment right to counsel at the petition for allowance of appeal stage of his direct appeal proceedings. (*Id.* at 35–37.) Petitioner disagrees because he argues that his success in his appeal in the Superior Court and the Commonwealth's attempt to reverse that by filing a petition for allowance of appeal made the Supreme Court stage "part and parcel of Petitioner's first appeal of right," and Petitioner argues that he was entitled to have his direct appeal counsel continue to defend his interests at that stage. (ECF No. 58, at 83–84; *see* ECF No. 77, at 20.)

Having reviewed the R&R and Petitioner's Objections, this Court adopts the R&R's conclusion that the state court in the PCRA proceedings resolved Petitioner's claim as to his Superior Court phase of his direct appeal reasonably such that § 2254 provides no relief, because the Superior Court on PCRA review considered Mr. Farrell's testimony at the trial court PCRA hearing as to his strategy for not raising all possible claims on direct appeal (*see* ECF No. 74, at 38–39) and did not unreasonably determine that Mr. Farrell's actions were reasonable. For reasons expanded upon below, the Court also adopts the R&R's conclusion that Petitioner lacked a right to counsel in the Supreme Court phase of the appeal. Further, the Court concludes that a certificate of appealability should not issue as to Ground Five because Petitioner's failure to meet his burden to obtain relief on Ground Five under AEDPA is not debatable among jurists of reason. *Miller-El*, 537 U.S. at 327; *see Becker v. Sec'y Pa. Dep't of Corrs.*, No. 20-2844, Opinion of the Court, at 2–3 (3d Cir. Mar. 21, 2022).

As to Petitioner's right to counsel in the Pennsylvania Supreme Court on direct appeal, the Court believes it is important to address Petitioner's emphasis on the way the petition for allowance of appeal stage of his appellate proceedings came about in his case—namely, the Commonwealth filed the petition after Petitioner prevailed in the Superior Court—and how, if at all, that impacts

whether that stage of the appellate process was "discretionary" and whether Petitioner had a right to counsel at that stage. Petitioner argues, without legal support, that the context of the Pennsylvania Supreme Court proceedings in his case were such that Petitioner was entitled to have his direct appeal counsel oppose the petition: "Attorney Farrell had a duty to protect Petitioner's interests in preserving the outcome reached in the Superior Court, and [counsel] standing by while the Commonwealth mounted a specious attack against those interests was ineffective assistance of counsel." (ECF No. 58, at 83–84.) The Court understands Petitioner's reasoning to be that he should have had a right to counsel when it was the Commonwealth seeking a discretionary appeal in an effort to reverse Petitioner's success at the Superior Court level, get his conviction reinstated, and deprive him of his liberty. This argument, regardless of whether the law supports it, is logical. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 341–43 (1963) (explaining that the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty" (quoting *Johnson v. Zerbst*, 304 U.S. 458 462 (1938))).

However, the Court has not identified any authority that makes a defendant's right to counsel during a discretionary appeal dependent on the procedural context preceding that appeal. The law, as articulated by the U.S. Supreme Court, is that a defendant "has no federal constitutional right to counsel on a petition for discretionary review." *Commonwealth v. Liebel*, 825 A.2d 630, 633 (Pa. 2003) (first citing *Ross v. Moffitt*, 417 U.S. 600, 610 (1974); and then citing *Evitts v. Lucey*, 469 U.S. 387, 401 (1985)). Thus, the Court concurs in the R&R's conclusion that Petitioner lacked a right to counsel in the Pennsylvania Supreme Court phase of his appeal proceedings.[13]

[13] In reviewing Petitioner's claim in the PCRA proceedings of ineffective assistance of direct appeal counsel at the Pennsylvania Supreme Court stage, the Pennsylvania Superior Court rejected Petitioner's claim on different grounds than did the R&R. The Superior Court reasoned that even if Petitioner's appeal counsel acted unreasonably in not filing a brief in response to the petition for allowance of appeal, Petitioner could not demonstrate prejudice as required to make out an ineffective assistance of counsel claim. (ECF No. 21-10, at 7.) (footnote continues)

vi. Ground Six: Ineffective Assistance of PCRA Counsel

As to Ground Six, the R&R concluded that Petitioner's claim fails as an independent ground for relief because the U.S. Supreme Court has articulated, and Congress has legislated, that ineffective assistance of counsel in post-conviction proceedings cannot be a ground for relief under § 2254. (ECF No. 74, at 40–41.) Further, the R&R determined that Petitioner's Ground Six claim also fails as an asserted cause for procedural default of the claims at Grounds One, Three, and Four, as described above in those sections of this Memorandum Order. (*Id.* at 41–45.)

In his Objections, Petitioner focuses on the R&R's conclusion about ineffective assistance of counsel as asserted cause for procedural default of other claims and does not appear to object to the R&R's conclusion that Petitioner cannot obtain relief through a standalone ineffective assistance

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After the Supreme Court granted the petition for allowance of appeal and reinstated Petitioner's conviction, direct appeal counsel filed an application for reconsideration, but the Supreme Court stood by its decision and declined to reconsider. (*Id.*) Based on those facts, the Superior Court concluded that the Supreme Court would have rejected direct appeal counsel's arguments regardless of whether he advanced them in a brief in opposition to the petition or in an application for reconsideration, preventing Petitioner from showing that the outcome of the proceedings would have been different if not for direct appeal counsel's conduct. (*Id.*) This Court notes without deciding that the Superior Court's resolution of Petitioner's claim does not appear to be an unreasonable application of federal law as articulated by the U.S. Supreme Court, nor an unreasonable application of the facts, and thus that Petitioner cannot overcome the requirements necessary to obtain relief based on this claim.

Separately, neither the R&R nor the Superior Court PCRA decision addressed whether Petitioner's direct appeal counsel's filing of a "no answer" letter in response to the Commonwealth's petition for allowance of appeal *was* deficient performance at all. However, the Court notes without deciding that direct appeal counsel's conduct likely would not constitute deficient performance under *Strickland*. Deficient performance means "representation [that] fell below an objective standard of reasonableness as defined by prevailing professional norms . . . [as] assessed on the facts of the particular case, viewed as of the time of counsel's conduct." *Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 588 (3d Cir. 2015) (citations and internal quotation marks omitted). As Petitioner notes, his direct appeal counsel testified during the PCRA petition hearing at the Court of Common Pleas that while he concluded that he was "wrong" and "mistake[n]" to file a no answer letter, "it was standard practice [at the time] to file a no answer letter to petitions for allowance of appeal in his experience at the District Attorney's Office" (which, together with his experience at the Pennsylvania Attorney General's Office, amounted to over 10 years of appellate practice), and that "the purpose of not responding with a brief was to avoid red flagging the petition." (ECF No. 58, at 80–81.)

Even if Petitioner had a right to counsel in responding to the petition for allowance of appeal, it would likely be difficult for Petitioner to counter this testimony to show that his direct appeal counsel's actions were objectively unreasonable "as defined by prevailing professional norms . . . [as] assessed on the facts of the particular case, viewed as of the time of counsel's conduct." *Saranchak*, 802 F.3d at 588. As Mr. Farrell's testimony indicated, there was a thoughtful and considered strategic rationale for direct appeal counsel to not formally oppose the Commonwealth's discretionary review petition, one based on Mr. Farrell's actual professional experience and judgment, and one that this Court would not conclude was objectively unreasonable. Subjective hindsight is not the core of the applicable *Strickland* standard.

of PCRA counsel claim. As described above, relying on *Martinez v. Ryan*, Petitioner objects to the R&R's conclusion that ineffective assistance of PCRA counsel does not excuse his procedural default of his Ground One claim—ineffective assistance of trial counsel—because Petitioner asserts that his Ground One claim is substantial and thus that the *Martinez* exception applies such that PCRA counsel ineffectiveness is sufficient cause to excuse the default. (ECF No. 58, at 24–26; *see* ECF No. 77, at 21.)

This Court adopts the R&R, as modified and amplified by this Memorandum Order, as the Opinion of the Court as to Ground Six first because the R&R correctly observes, and Petitioner does not contest, that ineffective assistance of counsel in post-conviction proceedings does not entitle a habeas petitioner to relief, preventing Petitioner from successfully asserting a standalone ineffective assistance of PCRA counsel claim; and second because, for the reasons explained above as to Grounds One, Three, and Four, the alleged ineffectiveness of Petitioner's PCRA counsel is not sufficient cause to excuse the procedural default of other claims in his habeas petition. The Court also determines that a certificate of appealability should not issue as to Ground Six because those conclusions are not debatable among jurists of reason. *Miller-El*, 537 U.S. at 327.

III. CONCLUSION

For the reasons explained above, the Court adopts the conclusions of the R&R as to Petitioner's asserted grounds for relief and the issuance of a certificate of appealability and concludes that Petitioner's Objections to the R&R's conclusions about his supplemental material and asserted grounds for relief lack merit. The Court denies the Petition for Writ of Habeas Corpus, and it concludes that no certificate of appealability should issue. Further, the Court adopts the R&R, as modified and amplified by this Memorandum Order, as the Opinion of the Court.

s/ Mark R. Hornak
Mark R. Hornak
Chief United States District Judge

Date: March 24, 2022
cc: All counsel of record via CM/ECF
Mr. Jamar Lashawn Travillion (via U.S. Mail)

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

JAMAR LASHAWN TRAVILLION,	)	
	)	
Petitioner,	)	Civil Action No. 17-515
	)	Chief Judge Mark R. Hornak/
v.	)	Magistrate Judge Maureen P. Kelly
	)	
MARK GARMAN, *Superintendent for SCI-Rockview*; and STEPHEN A. ZAPPALA, *District Attorney for Allegheny County, Pennsylvania*,	)	
	)	
Respondents.	)	

AMENDED REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (the "Petition"), ECF No. 4, be denied and that a certificate of appealability likewise be denied.

II. REPORT

Jamar Lashawn Travillion ("Petitioner") is a state prisoner, proceeding *pro se*, who was convicted of, *inter alia*, second-degree murder and sentenced to life imprisonment without parole as a consequence of the conviction.

A. Factual History

The Court of Common Pleas of Allegheny County, in its Opinion dated July 6, 2009, summarized the factual history of Petitioner's case as follows:

> On February 21, 2002, James Kapinski, (hereinafter referred to as "Kapiniski"), was a graduate student at Carnegie-Mellon University and lived in an apartment located at 408 Grant Street in the Garfield Section of the City of Pittsburgh. Kapinski had gone to school early that day and sometime between ten a.m. and seven p.m., an unknown individual entered into his apartment and stole some watches, a zip drive, some electronic equipment, an MP3 player, and a .357 caliber magnum Reuger revolver. Kapinski reported the burglary and theft to the police that day.

APPENDIX C

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On September 27, 2002, at approximately five a.m., Leonard Feigel, age sixty-two, and his wife Doris Feigel, were delivering newspapers for the Pittsburgh Post-Gazette in the Bloomfield/Friendship area of the City of Pittsburgh. Leonard Feigel, who suffered from coronary disease and cirrhosis of the liver, was awaiting a liver transplant and this was the least strenuous type of employment in which he could engage. The Feigels were about to deliver the newspapers on Evangeline [sic] Street when Mrs. Feigel noticed an individual walking down that street toward them. This unknown individual came up to the driver's car door, opened it and then pulled Mr. Feigel out of the car. Mr. Feigel told him to take whatever he wanted, however, an altercation ensued as Mr. Feigel and his assailant moved up the street away from the Feigel's automobile toward an unoccupied parked car. Mrs. Feigel saw her husband's attacker pull out a gun and then she heard a shot and her husband cry out in pain. Her husband also yelled for her to get away from them.

When she heard her husband cry out in pain, Mrs. Feigel slid over to the driver's seat and put the car in gear and then drove toward her husband and his attacker in an attempt to hit this assailant. She barely touched Travillion when he then turned around and fired twice into her car and ran to the back of it and fired two more shots. He then ran down the street where one of the neighbors who had heard the shots saw him get into a dark colored foreign car which resembled a picture of a Mitsubishi Mirage shown during the course of the investigation of this crime. Mrs. Feigel, who was not hurt, got out of the vehicle and ran to several of the houses pounding on the doors, asking for someone to call the police for an ambulance.

The police and the paramedics arrived within minutes of the shooting and noted that Mr. Feigel had been shot in the leg and that he had lost a significant amount of blood. The paramedics noted that he said he was cold and believed that he was going into shock. Mr. Feigel was transported by ambulance to Presbyterian University Hospital where he underwent emergency surgery and following the surgery he was listed as critical but stable; however, the trauma associated with this wound, his significant loss of blood, together with his severe coronary artery disease and his cirrhosis of the liver, ultimately resulted in his death. Dr. Bennett Omalu performed the autopsy on Feigel and noted that the downward, backward, and through and through gunshot wound had perforated the two major arteries of the leg causing a substantial loss of blood. Based upon that autopsy, Dr. Omalu offered the opinion that the cause of death of Feigel was atherosclerotic heart disease and cirrhosis of the liver which were exacerbated by the trauma of the gunshot wound and the significant loss of blood that he sustained. The triggering factor in Feigel's death was the gunshot wound to his leg and the loss of blood.

Mrs. Feigel was interviewed by the homicide detectives and she told them that her husband's attacker was an African American in his mid-twenties to early thirties and that he was approximately two hundred twenty pounds and that he was

reasonably tall. Mrs. Feigel had indicated to the homicide detectives that she was able to get a good look at the individual who not only killed her husband but, also shot at her since he was a short distance from her and the street was well-lit. On October 10, 2002, she was shown a photo array of potential suspects; however, she was unable to identify anybody from that photo array.

During 2002 Samantha Smith owned a black Mitsubishi Mirage which was wrecked by her boyfriend, Travillion. Smith went to Enterprise Rental Company and rented a red Ford Focus automobile while awaiting payment from her insurance company so that she could purchase a new vehicle. In renting this automobile, she indicated on the rental form that she would be the only driver and that there were no other permitted drivers.

On November 24, 2002, Officer Joseph Shurina, of the Ross Township Police Department, was on routine patrol along McKnight Road checking buildings for any evidence of possible criminal activity. In the preceding weeks there had been numerous burglaries of commercial establishments along McKnight Road and it was Officer Shurina's job that night to check the buildings for evidence of any burglaries. At approximately 11:00 p.m., as Office Shurina approached the Bed, Bath & Beyond store, he noticed a vehicle parked behind the building with its lights on and engine running. Officer Shurina suspected that something might be wrong since the building was closed and the area where the car was stopped was not a parking lot nor was it used to gain ingress or egress to the parking lot for the store.

Officer Shurina pulled behind this automobile and put on his take down lights. Once he had put these lights on, Officer Shurina noticed that there was one individual in the car and that this individual started to move around in that vehicle. He also noted that the vehicle was a red Ford Focus automobile. The driver of this vehicle was subsequently identified as Travillion who got out of the vehicle and attempted to explain why he was in the alleyway behind the store. Officer Shurina told him to get back into the car and then he ran the plate to determine the ownership of the vehicle. When he received the information that the vehicle was owned by Enterprise Rental, he went back to the car and asked the driver for owner's and operator's information. Travillion supplied him with his driver's license and told him that the car was his girlfriend's car and provided him with the rental agreement which indicated that only his girlfriend, Samantha Smith, was a permitted driver for this vehicle. Travillion then told Officer Shurina that he had pulled into the alley because he needed to urinate. When asked why he had not stopped at a restaurant that had a restroom, Travillion had no answer and seemed befuddled and then became more nervous and agitated.

Officer Shurina then called for backup and waited for his backup to arrive. After the backup officer arrived, they both approached the vehicle and saw that Travillion had bent down and was moving around inside the car. Officer Shurina

asked Travillion to get out of the car so that he could perform a pat-down of him and at this point when Travillion exited the vehicle Officer Shurina noticed a barrel of a gun sticking out from under the driver's seat. Officer Shurina took possession of this firearm, noted that it was loaded, and it was a 357 Magnum. Officer Shurina then checked to determine whether or not Travillion had a license to carry a firearm and when he was advised that he did not, Travillion was arrested and subsequently transported to the Ross Township Police Department. An inventory search was performed on the vehicle and during the search of that vehicle, a bag a [sic] of marijuana was found in the console of the car. Travillion subsequently was charged with possession of a firearm without a license and possession of a small amount of a controlled substance. From the time that Officer Shurina initially encountered Travillion until the time that he was taken from the Ross Township Police Department to the Allegheny County Jail, Travillion did not request an opportunity to go to the bathroom.

The firearm found in Travillion's car was turned over to the Allegheny County Crime Lab so that it could be examined to see if it was in good operating condition and whether or not any of the bullets fired from it matched any of those contained in open case files. The gun was examined in May of 2003 by Robert Levine, Ph.D., who was the firearm's expert for the Crime Lab and it was determined that this weapon was used in the killing of Leonard Feigel. This information was given to the Pittsburgh Homicide Detectives and they, in turn, contacted the Ross Township Police Department so that they could gather information as to the facts surrounding how they came into possession of the firearm. After receiving the information that Travillion had been arrested and charged with the crime of possession of a firearm without a license, a new photo array was prepared which included his photograph and then that photo array was shown to Mrs. Feigel who immediately identified Travillion as the individual who killed her husband.

A [sic] arrest warrant was issued for Travillion for the homicide of Feigel and on May 16, 2003, Homicide Detectives Hal Bolin and George Satler went to Travillion's last known address to arrest him. The Detectives knocked on his door and Travillion came to the door and asked what they wanted. The Detectives identified themselves and told him that they had an arrest warrant for him for the charge of criminal homicide. Satler and Bolin knew that it was Travillion at the door since they had with them the a [sic] copy of the picture that Mrs. Feigel had identified in the photo array. Initially, Travillion denied that he was Jamar Travillion and, in fact, told the police that his name was Raymont Geeter. Travillion had on him a Pennsylvania driver's license with the name Raymont Geeter. Knowing that they had the right individual, they arrested Travillion and transported him to the homicide headquarters.

After being read his Miranda warnings, Travillion signed the form indicating that he had been fully advised of his rights and that he was willing to talk to the

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police with respect to the death of Feigel. Initially, Travillion maintained that he had nothing to do with that death and this continued for approximately forty-five minutes when Travillion asked if he could have a couple of minutes alone. After a ten minute break, Bolin continued with his interview of Travillion and Travillion said he was responsible for Feigel's death. He stated that he was high on marijuana that was laced with formaldehyde and on the morning of Feigel's death he had driven Smith's black Mitsubishi to the Bloomfield area looking for somebody to rob because he wanted to buy more marijuana. Once he saw Feigel he approached him, drew his gun and demanded money. He held the gun at his side, pointing low, and pointing down. The victim grabbed at the gun and it went off and he took twenty to thirty dollars from the victim and possibly his wallet. After shooting Feigel, he ran from the scene and went home. Travillion never mentioned shooting into Feigel's car at Mrs. Feigel. During the course of this interview, Bolin was taking notes and once he finished the interview, he reviewed the notes with Travillion, had him read those notes and asked him if they were accurate. Travillion indicated that the notes were accurate and that he had no additions or corrections to those notes. However, when he was asked to sign those notes he refused and he also refused to put his statement on tape.

Travillion was taken to the Coroner's office so that he could be arraigned on the charge of criminal homicide. After being arraigned, he was leaving that office when he was confronted by numerous members of the media who asked him why he killed Feigel and he denied that he had done that. While he was being taken to the Allegheny County Jail, Bolin asked Travillion why he lied to the media and he said he was mad at the detectives because he believed they were the cause of the media being there and he was informed that the detectives did not call the media, but if anyone called the media, it was probably somebody from the Coroner's office.

ECF No. 21-3 at 8 – 15.

B. Procedural History

1. State Court

The Pennsylvania Superior Court, quoting the PCRA trial court opinion, recounted the procedural history of the conviction and direct appeal as follows:

On February 26, 2006, [appellant] was found guilty of the charges of second degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violation of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance. A presentence report was ordered in aid of sentencing and [appellant] was sentenced on May 15, 2006, to the mandatory life without parole for the conviction of second degree murder and a consecutive sentence of one hundred eight to two hundred sixteen months for his

conviction of the charge of robbery and a consecutive sentence of twelve to twenty-four months for his conviction of possessing a firearm without a license. [Appellant] did not file either post-sentencing motions or a direct appeal to the Superior Court.

On April 2, 2007, his appellate counsel filed a petition for post-conviction relief requesting that his appellate rights be reinstated. On June 4, 2007, this Court entered an order granting the reinstatement of his appellate rights and [appellant's] appellate counsel filed post-sentencing motions on June 15, 2007. On August 29, 2007, a hearing was held on those motions and an Order was entered on January 31, 2008 denying those motions. [Appellant] filed an appeal from the denial of his post-sentencing motions and was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In that concise statement, [appellant] suggested that there were four claims of error. Initially, [appellant] maintained that he was denied his right to counsel under the United States and Pennsylvania Constitutions. [Appellant] also maintained he was denied his right to testify at the time of his trial. [Appellant] also suggested that this Court erred when it denied his motion to suppress the evidence seized by the Ross Township Police, the identification made of him by one of the victims and his inculpatory statements made to the investigating homicide detectives. Finally, [appellant] contended that this Court intimidated one of his witnesses thereby causing that witness to refuse to testify.

This Court filed its 1925(b) Opinion and addressed all of the claims of error raised by [appellant's] appellate counsel, Thomas Farrell. Although Farrell alleged four claims of error in his statement of matters complained of on appeal, his appellate brief only addressed one issue, that being [appellant's] claim that he was denied his right to counsel. Following the decision by the Pennsylvania Supreme Court in ***Commonwealth v. Luccarelli,*** 601 Pa. 185, 971 A.2d 1173 (2009), this Court filed an addendum Opinion in which it maintained that [appellant] had forfeited his right to counsel as a result of his extremely dilatory conduct and obstructive behavior. On October 13, 2010, the Superior Court vacated [appellant's] sentences and remanded his cases [sic] for the purpose of a new trial. The Commonwealth filed an application for allowance of appeal to the Pennsylvania Supreme Court and Farrell responded to that application with a no answer letter. On April 29, 2011, the Pennsylvania Supreme Court issued an Order reversing the Superior Court's disposition of [appellant's] appeal and reinstated the judgment of sentence imposed on the basis of its decision in ***Commonwealth v. Luccarelli, supra.*** Farrell filed an application for reargument with the Pennsylvania Supreme Court, which was denied on July 6, 2011.

On June 14, 2012, [appellant] filed a pro se petition for post-conviction relief and this Court appointed his current counsel, Robert S. Carey, to represent him in connection with that petition and to file an amended petition for post- conviction relief, which was done. A hearing was held on November 14, 2014, at which time [appellant] presented the testimony of his former counsel, Farrell. On January 8,

> 2015, this Court entered an Order denying [appellant's] petition for post-conviction relief from which he has taken the instant timely appeal. [Appellant] was required to file a concise statement of matters complained of on appeal and in complying with that directive, he has asserted two claims of error, the first being that his former appellate counsel was ineffective for failing to file a response to the Commonwealth's application for allowance of appeal to the Pennsylvania Supreme Court and, second, that his former appellate counsel was also ineffective for failing to address all of the issues that he originally raised in his statement of matters complained of on appeal.

ECF No. 21-10 at 1 - 3.

On appeal to the Pennsylvania Superior Court from the denial of PCRA relief, Petitioner raised only two issues:

> 1. Whether the [PCRA] court erred in finding that appellate counsel was effective when the record establishes that Attorney Farrell had no reasonable strategic basis for failing to file a response to the Commonwealth's Petition for Allowance of Appeal and, based on counsel's omission, the Supreme Court reinstated [appellant's] judgment of sentence?
>
> 2. Whether the [PCRA] court erred in finding appellate counsel effective where the record shows that Attorney Farrell waived winning claims when he failed to brief meritorious issues that were previously identified in the Rule 1925 statement?

Id. at 4. The Superior Court reviewed these two issues on the merits and found them to be meritless and affirmed the PCRA trial court's denial of relief. Id. at 1 – 11.

On July 8, 2016, Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. ECF No. 21-11 at 4 – 26. The Supreme Court denied the Petition for Allowance of Appeal on December 6, 2016. Id. at 28.

2. Federal Court

On April 21, 2017, Petitioner filed a *pro se* Motion for Leave to Proceed *In Forma Pauperis* (the "IFP Motion"). ECF No. 1. Because the IFP Motion was deficient, the Court issued a deficiency order. ECF No. 2. Thereafter, Petitioner paid the filing fee on May 9, 2017, ECF No. 3, and the 68-page Petition was filed that same day. ECF No. 4.

In the Petition, Petitioner raised six Grounds for Relief.

> GROUND ONE: Ineffective assistance of privately retained trial counsel: withdraw, termination & abandonment by hired trial counsel[.]
>
> GROUND TWO: The Sixth Amendment of the United States Constitution: the right to counsel, standby counsel, conflicts of interest & waiver or forfeiture of the right to counsel[.]

Id. at 1 (capitalization altered).

> GROUND THREE: The Fifth and Sixth Amendments of the United States Constitution: compulsory process, privileges against self-incrimination & the right to testify in one's own behalf[.]
>
> GROUND FOUR: The Sixth Amendment of the United States Constitution: compulsory process, the right to call witnesses in one's favor & official intimidation of witnesses for the defense[.]
>
> GROUND FIVE: Ineffective assistance of direct appeal counsel: abandonment of issues on direct review & failure to respond to Commonwealth's Petition for Allowance of Appeal[.]
>
> GROUND SIX: Ineffective assistance of post-conviction counsel: failure to litigate or pursue claims on collateral review, procedural default & the compound effect[.]

Id. at 2 (capitalization altered).

After being granted three extensions of time to file their Answer, ECF Nos. 14, 18 and 20, Respondents filed their Answer, denying that the Petitioner was entitled to any federal habeas relief. ECF No. 21. Respondents also asserted in the Answer that the state courts' disposition of Petitioner's claims was not contrary to or an unreasonable application of United States Supreme Court precedent. Respondents attached substantial portions of the state court record as exhibits to the Answer. In addition, Respondents caused the original state court record to be transmitted to the Clerk of this Court.

Petitioner was twice granted an extension of time to file a Reply or Traverse, ECF Nos. 23 and 26, but he failed to do so. Instead, Petitioner filed a Motion for Appointment of Counsel, ECF No. 27, which the undersigned denied. ECF No. 28. Petitioner appealed and then-District Judge Mark R. Hornak affirmed.[1] ECF No. 30. Petitioner subsequently filed a document that he titled "Declaration in support of Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody" ("Declaration") and attached thereto multiple exhibits. ECF No. 31 (capitalization altered). Prior to submitting the Declaration and its attachments, Petitioner did not seek leave of court to expand the state court record in accord with Rule 7 of the Rules Governing Section 2254 Cases and Local Rule 2254G.

On December 26, 2019, the undersigned issued a Report and Recommendation recommending denial of both the Petition and a certificate of appealability. ECF No. 32. At pages 19–20 of the Report and Recommendation, the undersigned declined to consider Petitioner's Declaration and attachments "unless and until Petitioner can show where in the state court record of his criminal case, the evidence exists that supports his assertions in his Declaration and in his Affidavit." Id. at 19-20.

After four extensions of time, ECF Nos. 34, 37, 39 and 41, Petitioner filed Objections to the Report and Recommendation on July 9, 2020. ECF No. 44.[2] On July 10, 2020, Petitioner filed a Motion to Expand the Record, pursuant to Rule 7 of the Rules Governing Section 2254 Cases.

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[1] Judge Hornak became the Chief Judge of the United States District Court for the Western District of Pennsylvania on December 7, 2018.

[2] Petitioner's various motions and requests for extensions of time led Chief Judge Hornak to stay and administratively close this case. ECF No. 43.

ECF No. 45. On December 8, 2020, Petitioner filed Amended Objections. ECF No. 58. On April 5, 2021, Petitioner submitted a Motion for Leave to Supplement Petitioner's Amended Objections. ECF No. 69. Thereafter, Chief Judge Hornak granted the Motion for Leave to Supplement with an express reservation as to the determination of whether the documents were properly before the Court. ECF No. 70.

On May 19, 2021, Chief Judge Hornak issued an order granting Petitioner's Motion to Expand the Record on the following terms:

> For the sake of completeness and out of an abundance of opportunity, the United States Magistrate Judge may appropriately address the supplemental material made part of the record by the undersigned's grant of the Motion at ECF No. 45, to the degree consistent with the prevailing law. The grant of this Motion is not a determination on the merits by the undersigned as to the substance of Petitioner's claims nor as to the relevance of the supplemental material that Petitioner seeks to add to the record, but is instead intended to provide Petitioner the widest latitude as to such matters.
>
> The Magistrate Judge is authorized to take any action resulting from the consideration of those supplemental materials as are just and proper under the law.

ECF No. 72 at 1.

This authorization included leave to issue the instant Amended Report and Recommendation. Id. Chief Judge Hornak lifted the stay and reopened this case on the same date. ECF No. 73.

Pursuant to Chief Judge Hornak's Order of May 19, 2021, ECF No. 72, the undersigned respectfully submits this Amended Report and Recommendation in which Petitioner's supplemental material, discussed herein, is considered and addressed to the extent appropriate under the law.

C. Applicable Legal Principles

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, §101 (1996) (the "AEDPA") which amended the standards for reviewing state court judgments in federal

habeas petitions filed under 28 U.S.C. § 2254 was enacted on April 24, 1996. Because Petitioner's habeas Petition was filed after its effective date, the AEDPA is applicable to this case. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000).

Where the state court has reviewed a federal issue presented to them and disposed of the issue on the merits, and that issue is also raised in a federal habeas petition, the AEDPA provides the applicable deferential standards by which the federal habeas court is to review the state court's disposition of that issue. See 28 U.S.C. § 2254(d) and (e).

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court expounded upon the standard found in 28 U.S.C. § 2254(d). In Williams, the Supreme Court explained that Congress intended that habeas relief for errors of law may only be granted in two situations: 1) where the state court decision was "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States" or 2) where that state court decision "involved an unreasonable application of[] clearly established Federal law as determined by the Supreme Court of the United States." Id. at 404-05 (emphasis deleted). A state court decision can be contrary to clearly established federal law in one of two ways. First, the state courts could apply a wrong rule of law that is different from the rule of law required by the United States Supreme Court. Second, the state courts can apply the correct rule of law but reach an outcome that is different from a case decided by the United States Supreme Court where the facts are indistinguishable between the state court case and the United States Supreme Court case.

In addition, we look to the United States Supreme Court holdings under the AEDPA analysis as "[n]o principle of constitutional law grounded solely in the holdings of the various courts of appeals or even in the dicta of the Supreme Court can provide the basis for habeas relief." Rodriguez

v. Miller, 537 F.3d 102, 106–07 (2d Cir. 2008) (citing Carey v. Musladin, 549 U.S. 70 (2006)). The United States Court of Appeals for the Third Circuit has explained that "Circuit precedent cannot create or refine clearly established Supreme Court law, and lower federal courts 'may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct.'" Dennis v. Sec., Pa. Dep't of Corrections, 834 F.3d 263, 368 (3d Cir. 2016) (quoting, Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam)). As the United States Supreme Court has further explained: "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." White v. Woodall, 572 U.S. 415, 428 (2014).

The AEDPA also permits federal habeas relief where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Finally, it is a habeas petitioner's burden to show that the state court's decision was contrary to or an unreasonable application of United States Supreme Court precedent and/or an unreasonable determination of the facts. Ross v. Atty. Gen. of State of Pennsylvania, CIV.A. 07-97, 2008 WL 203361, at *5 (W.D. Pa. Jan. 23, 2008). This burden means that Petitioner must point to specific caselaw decided by the United States Supreme Court and show how the state court decision was contrary to or an unreasonable application of such United States Supreme Court decisions. Owsley v. Bowersox, 234 F.3d 1055, 1057 (8th Cir. 2000) ("To obtain habeas relief, Mr. Owsley must therefore be able to point to a Supreme Court precedent that he thinks the Missouri state courts acted contrary to or unreasonably applied. We find that he has not met this burden in this appeal. Mr.

Owsley's claims must be rejected because he cannot provide us with any Supreme Court opinion justifying his position."); West v. Foster, 2:07-CV-00021-KJD, 2010 WL 3636164, at *10 (D. Nev. Sept. 9, 2010) ("petitioner's burden under the AEDPA is to demonstrate that the decision of the Supreme Court of Nevada rejecting her claim 'was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*.' 28 U.S.C. § 2254(d)(1) (emphasis added). Petitioner has not even begun to shoulder this burden with citation to apposite United States Supreme Court authority."), aff'd, 454 F. App'x 630 (9th Cir. 2011).

The United States Court of Appeals for the Third Circuit has recognized the significance of the deference under the AEDPA that federal habeas courts owe to state courts' decisions on the merits of federal legal claims, which are raised by state prisoners in federal habeas proceedings, and the Third Circuit has emphasized how heavy is the burden that petitioners bear in federal habeas proceedings. The Third Circuit explained that: "[w]e also defer to state courts on issues of law: We must uphold their decisions of law unless they are 'contrary to, or involve[ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' So on federal habeas, 'even 'clear error' will not suffice.' Instead, the state court must be wrong 'beyond any possibility for fairminded disagreement.'" Orie v. Sec. Pa. Dep't. of Corrections, 940 F. 3d 845, 850 (3d Cir. 2019) (citations and some internal quotations omitted).

D. Petitioner's Supplemental Material

Because Petitioner's Motion to Expand the Record, ECF No. 45, and various supplemental materials provide a basis for this Amended Report and Recommendation, it is appropriate to address them separately from the merits of the Petition.

By way of his Declaration, two sets of Objections, and Supplement, ECF Nos. 31, 44, 58, and 69, Petitioner has submitted no fewer than 26 separate documents with which he would supplement the record (collectively, the "Supplemental Material"). Many of these documents were not contemplated in the Declaration dated August 29, 2018, or the Motion to Expand the Record. ECF Nos. 31 and 45. Specifically, the following documents were submitted with Petitioner's Declaration:

1. "Affidavit by Jamar Lashawn Travillion," dated August 23, 2018, in which Petitioner recites a timeline of his relationship with Mr. Difenderfer, an ensuing dispute over refund of his retainer, and attempts to retain other counsel after firing Difenderfer. ECF No. 31-1.

2. A letter to Petitioner dated May 6, 2003, from Attorney Michael D. Foglia. ECF No. 31-2.

3. A receipt for $2500.00 dated May 27, 2003, and labeled "Coroners [sic] inquest for Jamar." ECF No. 31-3.

4. A letter and fee agreement from Mr. Difenderfer addressed to Petitioner, dated August 6, 2003. ECF No. 31-4.

5. Multiple receipts dated between March 2, and October 21, 2004, labeled "Jamar," "Jamar Travillion," or "Trial." ECF No. 31-5.

6. A letter signed by Petitioner and dated August 4, 2004, discussing his case and some missing property. ECF No. 31-6.

7. National Tool and Machining Association aptitude test results dated October 10, 2002. ECF No. 31-7.

8. "Supplemental Report" of Officers H. Bolin and G. Satler dated May 16, 2003, referencing Petitioner's arrest and statement. ECF No. 31-8.

9. Allegheny County Jail property inventory dated December 2, 2004. At least one entry appears to be redacted. Additionally, this exhibit includes an authorization and receipt to turn over passport and keys to Brenda Travillion, dated June 30, 2003. ECF. No. 31-9.

10. Docket sheet for Travillion v. Difenderfer, No. GD-06-028614. ECF No. 31-10.

11. Docket sheet for Travillion v. Difenderfer, No. GD-10-023055. ECF No. 31-11.

12. Letter dated May 9, 2005, to Petitioner from Attorney David B. Cercone, declining representation. ECF No. 31-12.

13. Letter dated June 13, 2005, from Allegheny County Bar Association Lawyer Referral Service to Petitioner, requesting a fee for a referral. ECF No. 31-13.

14. Petitioner's medical records dated July 3, 2005, from the Pittsburgh Mercy Health System Emergency Department. ECF No. 31-14.

15. Docket sheet for Travillion v. Allegheny County Bureau of Corrections, No. 07-cv-928. ECF No. 31-15.

16. Order of August 31, 2005, appointing the Public Defender of Allegheny County to represent Petitioner as standby counsel in Commonwealth v. Travillion, CC Nos. 200303767, 200307963, and 200308353 - *i.e.*, the cases that resulted in the conviction from which Petitioner currently seeks habeas relief.[3] ECF No. 31-16.

17. Order of August 31, 2005, recognizing the existence of a conflict with the Public Defender, and appointing the Office of Conflict Counsel to represent Petitioner in Commonwealth v. Travillion, CC Nos. 200306438 and 200306704 - *i.e.*, cases that did not result in the conviction from which Petitioner currently seeks habeas relief. ECF No. 31-17.

The following items were submitted with Petitioner's Objections and Amended Objections to the initial Report and Recommendation. ECF Nos. 44 and 58.

18. Docket sheet for Commonwealth v. Travillion, No. CP-02-CR-0003767-2003. This is one of the criminal cases that resulted in the conviction from which Petitioner currently seeks habeas relief.[4] ECF No. 44-1.

19. Docket sheet for Commonwealth v. Travillion, No. CP-02-CR-0007963-2003. This is one of the criminal cases that resulted in the conviction from which Petitioner currently seeks habeas relief. ECF No. 44-2.

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[3] CC Nos. 200303767, 200307963, and 200308353 are interchangeable with the more formal case numbers CP-02-CR-0003767-2003, CP-02-CR-0007963-2003 and CP-02-CR-0008353-2003 respectively.

[4] The documents numbered herein 18-22, inclusive, were submitted a second time with Petitioner's Amended Objections. Compare ECF Nos. 44-1 – 44-5 with ECF Nos. 58-1 – 58-4.

20. Docket sheet for Commonwealth v. Travillion, No. CP-02-CR-0008353-2003. This is one of the criminal cases that resulted in the conviction from which Petitioner currently seeks habeas relief. ECF No. 44-3.

21. "Judicial/Prosecutorial Misconduct Complaint" dated December 27, 2005, and submitted by Petitioner. This exhibit includes attachments from a complaint filed by Petitioner with Pittsburgh's Citizen Police Review Board on May 23, 2005, various correspondence relating to Petitioner's underlying state criminal case, including written objections to the order of August 31, 2005 appointing the Public Defender as standby counsel, a "Petition for the Appointment of Investigator," an affidavit of William Thompson dated October 3, 2005, and correspondence regarding the content of transcripts. ECF No. 44-4.

22. Correspondence dated June 26, 2014, from Petitioner to Attorney Robert Stanley Carey, Jr., regarding the content of his amended PCRA petition, including a list of 60 desired attachments for the record. ECF No. 44-5.

Finally, Petitioner submitted the following documents with his Motion for Leave to Supplement Petitioner's Amended Objections. ECF No. 69.

23. Correspondence from Petitioner to Attorney Thomas Farrell, dated February 8, 2010, attaching the Order of August 31, 2005 in Petitioner's underlying criminal case (see ECF No. 31-16). ECF No. 69-1.

24. Correspondence from Attorney Thomas Farrell to Petitioner, dated February 26, 2010, discussing the deadline for an amended appellate brief and acknowledging receipt of a copy of the Order of August 31, 2005. ECF No. 69-2.

25. Correspondence from Petitioner to Attorney Thomas Farrell, dated May 28, 2010, following up on outstanding items raised in the letter of February 8, 2010. ECF No. 69-3.

26. Correspondence from Attorney Thomas Farrell to Petitioner, dated June 17, 2010, confirming the filing of the amended appellate brief with a copy of the "after-discovered order[.]" ECF No. 69-4.

Complicating matters, Petitioner has provided scant citation to the state court record with respect to the above documents in his Declaration, Motion to Expand the Record, various Objections to the initial Report and Recommendation, and the Supplement thereto. ECF Nos. 31, 44, 45, 58, and 69. Specifically, Petitioner indicates where the Order of August 31, 2005 – Item No. 16 above – may be found. ECF No. 44 at 28 and n. 7. The docket sheets at Item Nos. 18-20 also are easily

identifiable as part of the state court record in his underlying criminal case. The rest of his Supplemental Material remains a mystery.

Petitioner was informed of the necessity of showing where his Supplemental Material could be found in the state court record in the initial Report and Recommendation issued on December 26, 2019. ECF No. 32 at 18-20. As of the date of this Amended Report and Recommendation – over 18 months later – Petitioner still refuses to provide citation to the state court record with respect to the lion's share of his Supplemental Material, leaving this Court to do his work for him. But "[j]udges are not like pigs, hunting for truffles buried in the record." Doeblers' Pennsylvania Hybrids, Inc. v. Doebler, 442 F.3d 812, 820, n.8 (3d Cir. 2006) (quoting Albrechtsen v. Board of Regents of University of Wisconsin System, 309 F.3d 433, 436 (7th Cir. 2002) (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991))) (internal quotations omitted). As such, save for Item Nos. 16 and 18-20 above, Petitioner has waived any argument that his Supplemental Material is present in the state court record. See Keaton v. Folino, No. 11-CV-07225-PD, 2018 WL 8584252, at *41 n.28 (E.D. Pa. Nov. 15, 2018), report and recommendation adopted, No. CV 11-7225, 2019 WL 2525609 (E.D. Pa. June 19, 2019), aff'd sub nom. Keaton v. Superintendent Greene SCI, 845 F. App'x 153 (3d Cir. 2021) (citing Collins v. Boyd, 541 F. App'x. 197, 203 (3d Cir. 2013) (a failure to make "citations to the record of proceedings or the transcripts from the trial to support these contentions[ ]" in the context of Rule 28(a)(9) of the Federal Rules of Appellate Procedure waived the argument on the issue).

In his order granting Petitioner's Motion to Expand the Record, ECF No. 45, which was filed pursuant to Rule 7 of the Rules Governing Section 2254 Cases, Chief Judge Hornak instructed the undersigned to "appropriately address the supplemental material made part of the record by the

undersigned's grant of the Motion at ECF No. 45, ***to the degree consistent with the prevailing law***." ECF No. 72 at 1 (emphasis added). Of particular significance, the "prevailing law" under the AEDPA with respect to evidence that was not presented to the state courts differs somewhat depending on whether the underlying claim for which that evidence is submitted was adjudicated on the merits by the state courts.

First, to the extent that that Petitioner submits any of the exhibits above to support a claim that was adjudicated on the merits by the state court, the "prevailing law" prohibits consideration of any evidence that was not presented in the state court proceeding. See 28 U.S.C. § 2254(d)(2) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court ***shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings*** unless the adjudication of the claim . . . (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***.") (emphasis added). See also Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.") See also id. at 206 (Breyer, J., concurring in part and dissenting in part) ("There is no role in (d) analysis for a habeas petitioner to introduce evidence that was not first presented to the state courts."). As such, Petitioner

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is limited to the state court record on any of his claims that were adjudicated on the merits by the state courts.

Second, to the extent that Petitioner would use any of the above identified Supplemental Material to support a claim that was ***not*** adjudicated on the merits by the state court, he still is bound by the record before the state court unless he can meet the requirements set forth in Section 2254(e)(2). See, e.g., Landrum v. Mitchell, 625 F.3d 905, 923–24 (6th Cir. 2010) (applying the requirements of Section 2254(e) in the context of expanding the record under Rule 7 of the Rules Governing Section 2254 Cases).[5] See also Holland v. Jackson, 542 U.S. 649, 652–53 (2004) (Evidence that is not part of the state court record may be subject to an evidentiary hearing in the district court "only if respondent was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed by § 2254(e)(2) were met." . . . . "Those same restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing.").

Section 2254(e)(2) provides that:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

[5] Petitioner's underlying Motion to Expand the Record was filed pursuant to Rule 7 of the Rules Governing Section 2254 Cases. Accordingly, it is useful to analyze the case law relating to Rule 7 in order to determine how much weight, if any, the "prevailing law" allows this Court to grant Petitioner's Supplemental Material.

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The United States Court of Appeals for the Third Circuit has explained the significance of Section 2254(e)(2) in greater detail as follows:

> The Supreme Court has held that a failure to develop the factual basis of a claim in the opening clause of section 2254(e)(2) "is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). The Court distinguished the diligence requirement of the opening clause of section 2254(e)(2) from the diligence requirement of section 2254(e)(2)(A)(ii) by explaining that the latter refers to cases in which the facts underlying a claim could not have been discovered through due diligence while the former asks only whether "the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court...." *Id.* at 435, 120 S.Ct. at 1490.
>
> Thus, there is a separate fault requirement in the opening clause of section 2254(e)(2) which asks whether the petitioner adequately and diligently pursued the factual basis of his claim in state court. If the petitioner fails in this regard and is therefore "at fault," the bar to relief in section (e)(2) is raised. Otherwise, if the petitioner is not "at fault," the court may exercise its discretion to grant an evidentiary hearing. *See Campbell*, 209 F.3d at 287 (stating that if section 2254(e)(2) does not bar an evidentiary hearing, federal courts have discretion to grant a hearing with the potential to advance the petitioner's claim).

Lark v. Sec'y Pennsylvania Dep't of Corr., 645 F.3d 596, 614 (3d Cir. 2011). See also Galloway v. Wenerowicz, No. CV 13-956, 2016 WL 2894476, at *7–9 (W.D. Pa. Apr. 20, 2016), report and recommendation adopted, 2016 WL 2866765 (W.D. Pa. May 17, 2016).

Here, save for Item Nos. 16 and 18-20, Petitioner has not met his burden to show diligence by himself and his counsel to submit the Supplemental Material before the state court. See Williams, 529 U.S. at 440; (recognizing that Petitioner has "the burden of showing he was diligent in efforts to develop the facts supporting his . . . claims[.]"); see also Burnam v. Capozza, No. 20-CV-1800, 2020 WL 7130600, at *4 (W.D. Pa. Dec. 4, 2020) (citing McLeod v. Jones, No. 03-74122, 2005

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WL 2033535, at *5 (E.D. Mich. Aug. 23, 2005)). The state trial court held an evidentiary hearing on Petitioner's PCRA claims on November 14, 2014. Additionally, although it is not absolutely certain from the filing, even Petitioner's Supplemental Material appears to indicate that much of that material was in Petitioner's possession during his underlying criminal and/or PCRA proceedings, and appears to have been sent by Petitioner to his PCRA counsel. Compare Item Nos. 1-26 above with ECF No. 58-5 at 6-11. As such, a conclusion of fault by Petitioner or his counsel is inescapable. See Williams, 529 U.S. at 532. The same facts preclude a finding of diligence under the meaning of the term in Section 2254(e)(2)(A)(ii). Further, as discussed in Part II.E.6, infra, the strong evidence of Petitioner's guilt – even when compared to his Supplemental Material – does not support a finding that Petitioner has "establish[ed] by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Accordingly, the "prevailing law" with respect to Petitioner's new supplemental evidence is that this Court cannot consider it unless it was presented to the state courts.

Be that as it may, the fact remains that, in preparing this Amended Report and Recommendation, the undersigned reviewed each and every article of Supplemental Material that Petitioner has submitted. As more fully stated herein, even if the prevailing law allowed this Court to consider them, they still do not warrant granting habeas relief.

E. Discussion

1. Ground One – Trial counsel was not ineffective.

In Ground One, Petitioner complains that his privately retained trial counsel, William H. Difenderfer ("Difenderfer"), rendered ineffective assistance of counsel by, *inter alia*, allegedly not preparing the defenses that Petitioner had wanted him to prepare and that Difenderfer failed to

request a continuance of the trial in order for Difenderfer to prepare those defenses that Petitioner had wanted, and consequently a break down in their relationship ensued which eventually lead Difenderfer to allegedly abandon Petitioner. Petitioner claims that he exhausted this claim of trial counsel's ineffectiveness and abandonment by suing his trial counsel for return of the fees paid to Difenderfer. ECF No. 4 at 30 ("Petitioner did not use or have available to him any other state remedies to exhaust the issues set forth by Ground One of this Petition.").

To the extent that Petitioner's Ground One is premised on the factual contention that Difenderfer abandoned Petitioner, we reject this factual contention because the state courts found that Petitioner fired Difenderfer. As explained by the trial court regarding Petitioner's disruptive and uncooperative behavior during the jury selection process which culminated in Petitioner firing Difenderfer as his trial counsel, the trial court found as follows:

> Following his dismissal of Difenderfer [in December 2004], Travillion indicated that he was unprepared to pick a jury and he requested a continuance so that he could hire a new lawyer. Travillion's case was then continued until January, 2006, in hopes that Travillion would hire a new lawyer so that a prompt trial date could be scheduled.
>
> Despite giving Travillion more than a year to hire a new lawyer, he did not do so and this Court, on its own motion, appointed the Public Defender's Office to assist him and/or to represent him. Both Christopher Patarini and Sumner Parker of the Public Defender's Office of Allegheny County attempted to meet with Travillion but he refused to discuss his case with them. Their efforts to meet with Travillion were further complicated by the fact that Travillion spent more than six months in "the hole" as a result of his being a disciplinary problem at the Allegheny County Jail.
>
> Difenderfer, prior to being fired, put forth the issues that Travillion wanted to discuss and his difficulty in dealing with Travillion in deciding the strategy and evidence that should be presented in his case.

ECF No. 21-3 at 15-16.

Therefore, because the trial court found that Petitioner fired Difenderfer as of December 4, 2004, Petitioner has no claim of trial counsel's ineffectiveness against Difenderfer after December 4, 2004. State Court Record, Transcript of Suppression Hearing and Motions, 12/1-6/2004 at 186 – 190 (recounting the firing of Difenderfer); id. at 194, lines 15 – 18.[6] Hence, to the extent that Petitioner claims ineffective assistance of Difenderfer, after December 4, 2004, such claims fail as a matter of law and logic given that Difenderfer was no longer Petitioner's counsel as of that date.

To the extent that Petitioner is claiming ineffective assistance of trial counsel for any period of time between July 24, 2003, (which appears to be the earliest date that Difenderfer entered his appearance in the second degree murder case, ECF No. 21-1 at 29) and December 4, 2004, when Petitioner fired him, we find that such claims were procedurally defaulted because they were not raised in the counseled Amended PCRA petition, ECF No. 21-8 at 21 – 28, or in the appeal brief filed to the Pennsylvania Superior Court in the PCRA appeal proceeding.[7]

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[6] The transcript reveals that Petitioner conceded that he fired his trial counsel.

> THE DEFENDANT: That is the reason that I had to cut Mr. Difenderfer off and terminate his services, because I did not feel that I was being effectively represented.

Id.

[7] In the counseled Amended PCRA Petition, the only issues raised were claims of ineffective assistance of direct appeal counsel, notwithstanding that direct appeal counsel persuaded the Superior Court to vacate Petitioner's sentence and grant a new trial. Counseled Amended PCRA Petition, ECF No. 21-8 ¶ 32; Brief in Support of Counseled Amended PCRA Petition, id. at 29. In the Brief on Appeal to the Superior Court during the PCRA proceedings, the only two issues raised were:

> 1. Whether the trial court [i.e., PCRA court] erred in finding that appellate counsel was effective when the record establishes that Attorney Farrell had no reasonable

(...footnote continued)

Furthermore, even if this claim were not procedurally defaulted, Petitioner fails to carry his burden to argue, yet alone show, that Difenderfer was ineffective. In order to successfully establish an ineffective assistance of counsel claim, Petitioner must show that his counsel rendered deficient performance and that Petitioner suffered prejudice as a consequence thereof, and prejudice is defined as a "reasonable probability that the outcome of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984) ("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."). Given that Petitioner fired Difenderfer a year before his trial commenced, he cannot show that any deficient performance on Difenderfer's part which could have affected the proceeding of his trial, given that Difenderfer was not his counsel at the time of his trial. Nor does Petitioner in the Petition before this Court argue specific instances of deficient performance or prejudice based upon Difenderfer's assistance with respect to Petitioner's trial, other than his failure to refund the lawyer fees paid by Petitioner to Difenderfer. This is true even considering Petitioner's Supplemental Material discussed in Part II.D, supra.

To the extent that Petitioner attempts to assert the ineffective assistance of his PCRA counsel as cause to excuse the procedural default of any trial counsel ineffectiveness claims pursuant to

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> strategic basis for failing to file a response to the Commonwealth's Petition for Allowance of Appeal and, based on counsel's omission, the Supreme Court reinstated the Defendant's judgment of sentence?
>
> 2. Whether the trial court erred in finding appellate counsel effective where the record shows that Attorney Farrell waived winning claims when he failed to brief meritorious issues that were previously identified in the Rule 1925 Statement.

ECF No. 21-9 at 19.

Martinez v. Ryan, 566 U.S. 1 (2012), we address the claimed ineffectiveness of PCRA counsel below relative to Ground Six.

Accordingly, Ground One does not merit any federal habeas relief.

2. Ground Two – Petitioner was not denied his right to counsel.

In Ground Two, Petitioner complains that his right to counsel was denied by the trial court ECF No. 4 at 30 – 37.

To the extent that Petitioner claims a denial of his right to counsel, he appears to be raising the same issue as he raised in the Superior Court on direct appeal, namely, "Whether Defendant was denied his right to counsel during the trial under both the Pennsylvania and United States Constitution?" ECF No. 21-3 at 47. To the extent that Petitioner raises any other claims in Ground Two that were not raised in either the direct appeal or the counseled Amended PCRA petition, we find them to have been procedurally defaulted, including any claim of ineffective assistance of stand-by counsel or conflicts of interest between Petitioner and court appointed counsel in the form of the Allegheny County Public Defender's office.

a. The state courts did not unreasonably apply United States Supreme Court precedent.

The state courts addressed Petitioner's claimed denial of the right to counsel on the merits. The trial court initially found that Petitioner waived his right to counsel, and therefore, he was not denied his right to counsel. Id. at 6 – 34. After the Pennsylvania Supreme Court issued its opinion in Commonwealth v. Luccarelli, 971 A.2d 1173 (Pa. 2009), the trial court issued an "Addendum to Opinion" wherein the trial court found that "when reviewing the entire record of Travillion's case it is clear that he forfeited his right to counsel by firing his original trial counsel, who was prepared

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to proceed to trial, refused to hire new counsel and, finally, refused to meet and to cooperate with two lawyers who were appointed for him by this Court." ECF No. 21-3 at 36.

On Petitioner's direct appeal, a panel of the Pennsylvania Superior Court, in a two to one decision, reversed the judgment of sentence, and remanded for a new trial. ECF No. 21-5 at 1 – 22. The Superior Court found that the record did not establish that Petitioner either waived his right to counsel or forfeited his right to counsel. Id. at 11.

The Commonwealth then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Supreme Court granted the Petition for Allowance of Appeal, reversed the Superior Court and reinstated the judgment of sentence. ECF No. 26-1 at 38 – 42.[8] In doing so, the Pennsylvania Supreme Court reasoned as follows:

> Therefore, in accordance with *Lucarelli,* despite the initial finding of waiver of counsel by the trial court, we agree with the trial court's conclusion in its addendum—that respondent forfeited his right to counsel. Some measure of deference must be shown to the trial court, which is in a better position to assess a defendant's sincerity and motivation in delaying a trial and to determine whether a defendant's conduct is genuine or obstructive. The trial court here correctly concluded that the record establishes that respondent's conduct was an orchestrated plan to manipulate the system. Accordingly, as contemplated by *Lucarelli,* respondent's behavior constituted extremely dilatory conduct sufficient to result in the forfeiture of his right to counsel.

Com v. Travillion, 17 A.3d 1247, 1248 (Pa. 2011); ECF No. 21-6 at 39 – 40.

Petitioner fails to assert that the Pennsylvania Supreme Court's disposition is contrary to or an unreasonable application of United States Supreme Court precedent. He does not cite any United States Supreme Court precedent to this Court in an attempt to meet the AEDPA requirements.

[8] Justice Saylor filed a Dissenting Statement objecting to the procedure of granting the Petition and summarily reversing the Superior Court. ECF No. 21-6 at 51 – 42.

Accordingly, we find Petitioner fails to carry his burden to show entitlement to relief for any legal error under AEDPA. Nor do we find the Pennsylvania Supreme Court's decision herein to constitute a decision that is contrary to or an unreasonable application of United States Supreme Court precedents. See, e.g., U.S. v. Goldberg, 67 F.3d 1092 (3d Cir. 1995) (analyzing concept of forfeiture versus waiver and finding support in the Supreme Court's decision in Illinois v. Allen, 397 U.S. 337 (1970) for the concept of forfeiting a constitutional right by one's behavior).

b. The state courts did not unreasonably determine facts.

In the initial Report and Recommendation, the undersigned refused to consider any evidence in Petitioner's Declaration, ECF No. 31, unless Petitioner could not show where it appeared in the underlying state court records. ECF No. 32 at 19-21. Rather than providing that information, Petitioner responded with his Motion to Expand the Record seeking to incorporate his Declaration and its attachments, ECF No. 45. Petitioner also filed two sets of Objections ECF Nos. 44 and 58 and a Supplement, ECF No. 69 – each of which included additional documents, as discussed in Part II.D, supra.

It appears that, by filing the Supplemental Material attached to the above-identified filings, ECF Nos. 31, 44-45, 58, and 69, Petitioner is attempting to establish that the state courts' factual findings are unreasonable under 28 U.S.C. § 2254(d)(2). Compare Petitioner's Affidavit, ECF No. 31-1 at 14 ("I never refused to meet or cooperate with two lawyers appointed by the court. The court never appointed counsel with a charged [sic] to represent me at trial to meet and cooperate with.") with Trial Court Addendum to Opinion, ECF No. 21-3 at 36 ("when reviewing the entire record of Travillion's case, it is clear that he forfeited his right to counsel by firing his original trial

counsel, who was prepared to proceed to trial, refused to hire new counsel and, finally, refused to meet and cooperate with two lawyers who were appointed for him by this Court.").[9]

To the extent that Petitioner is attempting to establish that the presumptively correct State Court factual findings "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***" under 28 U.S.C. § 2254(d)(2) (emphasis added), Petitioner fails at least because the prevailing law precludes us from considering any evidence which was not contained in the state court record.[10]

i. Petitioner has the burden to rebut the presumptively correct facts as found by the state courts.

To the extent that Petitioner is challenging state court factual determinations, that he, *inter alia*, did not refuse to meet and cooperate with two lawyers and that the trial court did not appoint him two such lawyers and that Petitioner did not fire Difenderfer, (all of which lead to the Pennsylvania Supreme Court finding that Petitioner forfeited his right to counsel, and not that Petitioner was denied counsel), Petitioner must contend with 28 U.S.C. § 2254(e) (1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of

[9] But see Trial Tr. at 11. (Petitioner stating: "Mr. Patriani and Mr. Sumner Parker came to the jail, who are public defenders, I may also add, 23 days before I had to go to trial, Your Honor. That is totally -- that is insufficient time to prepare for the case, Your Honor.").

[10] Even if this Court were free to consider Petitioner's Supplemental Material, Petitioner still would not meet his burden to overcome the presumptively correct state court factual determinations of the state court with clear and convincing evidence. See, e.g., Part II.E.2.b and n.7, supra.

correctness by clear and convincing evidence."). See also Lambert v. Blackwell, 387 F.3d 210, 234 – 36 (3d Cir. 2004) (explaining the relationship between Section 2254(d)(2) and (e)(1).

ii. Petitioner can only carry his burden by pointing to evidence contained in the state court record.

It is strikingly clear that where the state courts have adjudicated a claim on the merits, the interplay between Sections (d)(2) (limiting review to the state court record) and (e)(1) requires that the federal habeas petitioner carry his burden to rebut by clear and convincing evidence the presumed correctness of state court factual findings by pointing to evidence solely contained in the state court record. Pinholster, 563 U.S. at 206 (Breyer, J., concurring in part and dissenting in part) ("There is no role in (d) analysis for a habeas petitioner to introduce evidence that was not first presented to the state courts."). See, e.g., Grant v. Lockett, 709 F.3d 224, 232 – 33 (3d Cir. 2013) (finding that the State courts' factual finding was an unreasonable determination of the facts by pointing to evidence solely contained in the state court record), *rejected on other grounds by*, Dennis, 834 F.3d at 293.

Hence, and as discussed in Part II.D, supra, we are prohibited from considering Petitioner's Supplemental Material, including his Declaration and Affidavit, ECF No. 31-1 at 2 – 14, and any of its attachments, or any attachments to his Objections, ECF No. 44, Amended Objections, ECF No. 58, and supplement thereto, ECF No. 69, unless and until Petitioner can show where in the state court record of his criminal case, the evidence exists that supports his assertions and contentions in his Declaration and in his Affidavit. Other than with respect to Item Nos. 16 (the Order of August 31, 2005, appointing the Public Defender as standby counsel) and 18-20 (the docket sheets from the state trial court in Petitioner's criminal cases), Petitioner has not made the requisite showing.

Further, he cannot hope to carry his burden under Sections 2254(d)(2) and (e)(1) to rebut by clear and convincing evidence the presumed correctness of state court factual findings by pointing to evidence solely contained in the state court record of his criminal case. The law is clear. It is Petitioner's burden to show where in the state court record of his criminal case such clear and convincing evidence exists and it is not the federal habeas court's burden to scour the state court record in order to determine if and whether such evidence exists in the state court record of the criminal case. As explained previously by a distinguished member of this Court:

> In his objections, much like he did before the State Superior Court, Petitioner fails to cite where in the trial record there is evidence that the prosecution presented a conspiracy theory to the jury. This court is not required to comb through the extensive trial record to find such evidence, if indeed there be any. Adams v. Armontrout, 897 F.2d 332, 333 (8th Cir. 1990) ("We do not believe that 28 U.S.C. § 2254 or the Section 2254 Rules require the federal courts to review the entire state court record of habeas corpus petitioners to ascertain whether facts exist which support relief. Requiring such an exhaustive factual review of entire state court records would pose an insuperable burden on already strained judicial resources. We join the numerous federal courts which have repeatedly expressed their unwillingness to sift through voluminous documents filed by habeas corpus petitioners in order to divine the grounds or facts which allegedly warrant relief."); Wenglikowski v. Jones, 306 F.Supp.2d 688, 695 (E.D. Mich. 2004)("Furthermore, the petitioner's failure to isolate specific portions of the transcript indicating the trial judge's alleged bias is fatal to his claim. It is not the role of the district court to scour the petitioner's trial transcript to find support for the arguments in his habeas corpus petition Cf. In re Morris, 260 F.3d 654, 665 (6th Cir. 2001) (holding that the trial court is under no obligation to search the record to protect a non-moving party from summary judgment)."), *aff'd on other grounds*, 162 Fed. Appx. 582 (6th Cir. 2006).

Moorefield v. Grace, CIV.A.06 541, 2007 WL 1068469, at *2 (W.D. Pa. Apr. 5, 2007).

Here, Petitioner has not presented clear and convincing evidence to rebut the state court factual findings. Therefore, we find that Petitioner has failed to establish that the state courts' disposition of this claim in Ground Two that he was denied his federal constitutional right to counsel was either contrary to or an unreasonable application of United States Supreme Court precedent or

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. Hence, Ground Two does not afford Petitioner federal habeas relief.

3. Ground Three – Petitioner was not denied the right to testify.

In Ground Three, Petitioner refers to three distinct violations of his rights, namely: 1) compulsory process;[11] 2) the privilege against self-incrimination; and 3) the right to testify on one's own behalf. Although Petitioner references these three claims in the heading of Ground Three, ECF No. 4 at 37, in the substance of the argument in the Petition regarding Ground Three, he only argues that he was denied his right to testify on his own behalf. Id. at 37 – 40.

At the outset, we find that Petitioner procedurally defaulted Ground Three because he failed to raise Ground Three in his appellate brief to the Pennsylvania Superior Court on direct appeal. While Petitioner apparently raised some of these three claims in his Statement of Errors Complained of on Appeal, which was filed in the state trial court and addressed to the state trial court, during the direct appeal proceedings, and the trial court addressed some of these claims on the merits, Petitioner's appellate counsel ultimately abandoned all three claims now raised in Ground Three. Petitioner's direct appeal counsel raised only one issue in the appellate brief to the Superior Court, namely, that Petitioner was denied his right to counsel. This sole issue was successful because the Superior Court granted Petitioner relief on this claim, and, as such, reversed the judgment and remanded the case for a new trial. ECF No. 21-4 at 9 and ECF No. 21-5 at 11. Accordingly, we

[11] To the extent that Petitioner's reference to compulsory process in Ground Three refers to the claim that his right to have compulsory process for the witness, Mr. Geeter, was violated, that specific claim is addressed in the analysis of Ground Four.

find all of the issues other than the claim that Petitioner was denied his right to counsel (which Petitioner raises in Ground Two) to have been procedurally defaulted for failing to raise them on direct appeal. Nor on this record, can Petitioner establish either cause and prejudice or a miscarriage of justice in order to excuse the procedural default of these claims. We address this issue of Petitioner's procedural default of his claims more thoroughly below in analyzing Ground Six.

Secondly, insofar as the right to testify is concerned, Petitioner, in fact, concedes he was not denied his right to testify, but rather, feeling frustrated with the process regarding whether Mr. Geeter would testify on Petitioner's behalf, Petitioner simply declined to testify on his own behalf when asked. ECF No. 4 at 40 ("In the fall out of this controversy the court asked Petitioner whether he would give his narrative statement. Petitioner frustrated, said no. I can't do that Petitioner said.").

In the alternative, we find that Petitioner has failed to carry his burden under the AEDPA to show that the state trial court's disposition of the sole claim which Petitioner actually argued in the body of Ground Three, i.e., he was denied his right to testify, was contrary to or an unreasonable application of United States Supreme Court precedent or constituted a decision based upon an unreasonable determination of the facts.[12] See e.g., ECF No. 21-3 at 28 – 29 (wherein the trial court addressed this issue).

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[12] While it is true that under AEDPA, we review the last reasoned decision of the state courts, we find that the last reasoned decision of the state courts with respect to the procedurally defaulted claims (defaulted precisely because, although raised in the trial court, they were not raised in the appellate brief to the Superior Court), is the trial court's disposition of the claims raised in the Rule 1925(b) Statement of Errors Complained of on Appeal. Skipper v. French, 130 F.3d 603, 609 (4th Cir. 1997) ("The relevant state court decision for purposes of the inquiry is that of 'the last state court to be presented with the particular federal claim' at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 2593, 115 L.Ed.2d 706 (1991)."). See also Simmons v. Beard, 590 F.3d 223, 232 (3d Cir. 2009) ("A state court decision is an 'adjudication on the merits,' reviewed under the deferential standard of § 2254(d), where it is 'a decision finally resolving the parties' claims, with

(...footnote continued)

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In relevant part, the trial court concluded that "[w]hen given the opportunity to present his testimony in the form of a narrative statement, Travillion made a knowing, voluntary and intelligent decision not to exercise his right to testify." Id. at 29.

Even if AEDPA deference were not applicable to the trial court's reasoning with respect to the alleged denial of the right to testify as raised in Ground Three, we adopt as our own the reasoning of the trial court in its opinion rejecting Petitioner's claim on the merits.

Accordingly, for the foregoing reasons, Ground Three does not merit the grant of federal habeas relief.

4. Ground Four – Petitioner's right to compulsory process was not denied.

In Ground Four, Petitioner claims that his rights to compulsory process and the right to call witnesses in his defense were violated when the Court advised one of Petitioner's witnesses, namely Mr. Geeter, who had already taken the stand and testified to operating a jitney, that he might be placing himself in jeopardy and the Court then appointed counsel for Mr. Geeter. ECF No. 4 at 42 – 52. After consultation with counsel, Mr. Geeter ultimately decided to invoke his Fifth Amendment right against self-incrimination and not further testify for Petitioner. ECF No. 21-3 at 32 – 34. Petitioner "complained that the inquiries into Mr. Geeter's privileges against self-incrimination were being used as an intimidation tactic." ECF No. 4 at 43.

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res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.'") (quoting Rompilla v. Horn, 355 F.3d 233, 247 (3d Cir. 2004), *rev'd on other grounds sub nom.*, Rompilla v. Beard, 545 U.S. 374 (2005)).

This ground was procedurally defaulted because, although Petitioner raised it in his Rule 1925(b) Statement of Errors Complained of on Appeal, the claim was not raised in his brief to the Superior Court. ECF No. 21-4 at 9. Moreover, on this record, Petitioner cannot show cause and prejudice or a miscarriage of justice in order to overcome this procedural default as more fully explained in our analysis of Ground Six.

Furthermore, Petitioner has not shown that the trial court's decision of this claim on the merits was contrary to or an unreasonable application of United States Supreme Court precedent or an unreasonable determination of the facts.

The trial court reasoned as follows in rejecting this claim.

> Travillion's final claim of error is that this Court intimidated a defense witness to the point that that witness refused to testify in support of Travillion. Travillion called Raymond [sic] Geeter to testify and elicited some basic information to [sic] him which included the fact on the day prior to Travillion's arrest by the Ross Township Police Department that Geeter was in possession of Susan Smith's car and that he was using that vehicle as a jitney. When this information came forward, the assistant district attorney asked to approach sidebar and asked that Geeter be advised of his Fifth Amendment rights in light of the possibility of him admitting to several crimes, the least of which would be operating a jitney and the worst of which might be his involvement in the homicide of Feigel. Following a discussion in chambers with respect to the possibility of Geeter disclosing incriminating information, this Court appointed Giuseppe Rosselli to represent him and advise him of his rights in light of the purported testimony that he was to give. Geeter met in this Court's chambers with Rosselli, and no one else was present. Following their meeting, Geeter indicated that he wanted to invoke his Fifth Amendment right since he had been advised by Roselli that the testimony he might give could possibly implicate him in the death of Feigel since he was in the car which had the murder weapon in it at the time he was using that vehicle.
>
> At no time did this Court ever advise Geeter that it would charge him but, rather, advised him that any decision as to whether or not he would be subject to criminal charges would be made by the District Attorney's office. This Court, rather than trying to intimidate Geeter, was insuring that his rights were protected by appointing an attorney to advise him of what his rights and options were with respect to testifying in this particular case. As with all of Travillion's claims of error, this one was also without merit.

ECF No. 21-3 at 23 – 34. Petitioner fails to show the foregoing disposition merits federal habeas relief under the standards of AEDPA.

Lastly, even if AEDPA deference were not to apply to the trial court's reasoning in rejecting this claim, applying a *de novo* standard of review to this claim, we would adopt as our own the trial court's reasoning in rejecting this claim.

Accordingly, for the above stated reasons, Ground Four does not afford Petitioner federal habeas relief.

5. Ground Five – Direct appeal counsel was not ineffective.

In Ground Five, Petitioner claims that his direct appeal counsel was ineffective for two reasons. First, he complains that his appellate counsel was ineffective for not filing a brief in opposition to the Commonwealth's Petition for Allowance of Appeal to the Pennsylvania Supreme Court after the Superior Court reversed Petitioner's conviction and remanded for a new trial. ECF No. 4 at 52 – 58. Second, Petitioner contends that his appellate counsel was ineffective for not raising the three other issues in the brief that appellate counsel filed with the Pennsylvania Superior Court on appeal that appellate counsel had earlier raised in the Rule 1925(b) Statement of Errors Complained of on Appeal. Id.

a. Petitioner has no right to counsel at the discretionary appeal stage.

Petitioner claims ineffective assistance of his appeal counsel for not filing a response in opposition to the Commonwealth's Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Although not raised by Respondents in the Answer, we have an independent obligation to

apply the correct law.[13] The correct law is that Petitioner had no federal constitutional right to counsel at the petition for allowance of appeal stage of the proceedings and thus, cannot establish a federal claim of denial of a non-existent federal right to counsel.

As well-explained by a fellow member of this Court:

> As to whether it was ineffective for Attorney Garvin not to file an [sic] PAA from the Superior Court's adverse suppression decision, this issue was raised in the PCRA proceedings. .... More importantly perhaps, even if we assume that Attorney Garvin was ineffective in not filing a PAA, which is a discretionary petition for review, ineffectiveness at that stage of the proceedings is not a ground for granting federal habeas relief because at that stage of the proceedings Petitioner had no federal constitutional right to counsel. *Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982); *Ross v. Moffitt,* 417 U.S. 600, 610, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).
>
> A claim of ineffectiveness of counsel is cognizable in federal habeas proceedings only if there is a federal right to counsel at the stage when counsel is alleged to have been ineffective. *See Coleman v. Thompson,* 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") (citations omitted). Here, at the point where Attorney Garvin is alleged to have been ineffective, i.e., after the Superior Court rendered its decision in the suppression appeal, which is during the stage of the discretionary appeal to the Pennsylvania Supreme Court, Petitioner did not have a federal right to counsel. *Wainwright v. Torna,* 455 U.S. at 587-88 ("Since respondent had no constitutional right to counsel [in order to file a request for discretionary appeal], he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application

[13] U.S. v. Alvarez, 646 F. App'x 619, 620 (10th Cir. 2016) ("Contrary to Mr. Alvarez's argument, a party's failure to raise all defenses does not preclude the district court from applying the correct law and properly disposing of a claim. *See Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) ('When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'). Mr. Alvarez contends that 'the District Court was only authorized to answer to the [jurisdictional] defense presented by the Government.' Aplt. Br. at 3. This is incorrect. The district court has an obligation to apply the correct law"); Alston v. D.C., 561 F. Supp. 2d 29, 37 (D.D.C. 2008) ("the court nevertheless analyzes this claim under the appropriate law, *Smith v. Mallick,* 514 F.3d 48, 51 (D.C. Cir. 2008) (holding that courts have an independent obligation to apply the correct law regardless of the parties' arguments)").

> timely."); *Ross v. Moffitt,* 417 U.S. at 610 (there is no federal constitutional right to counsel to file a discretionary appeal petition). Hence, this ineffectiveness claim does not merit the grant of federal habeas relief.

Moorefield v. Grace, CIV.A. 06-541, 2007 WL 1175847, at *6 (W.D. Pa. Feb. 26, 2007), report and recommendation adopted, CIVA 06-541, 2007 WL 927965 (W.D. Pa. Mar. 26, 2007), judgment vacated on reconsideration on other grounds, CIV.A.06 541, 2007 WL 1068469 (W.D. Pa. Apr. 5, 2007), and report and recommendation adopted, CIV.A.06 541, 2007 WL 1068469 (W.D. Pa. Apr. 5, 2007).

Accordingly, Petitioner cannot establish a federal claim of the denial of effective assistance of counsel and this is so even if Petitioner had some state law right to effective assistance of counsel at that stage. Dorsey v. Wilson, CIV.A. 07-509, 2008 WL 2952892, at *2 (W.D. Pa. July 30, 2008) ("Petitioner next objects to the Report's disposition of Claim # 11, wherein the Report found that any claim of appellate counsel's ineffectiveness for failing to raise a claim in the Petition for Allowance of Appeal ('PAA') to the Pennsylvania Supreme Court failed to state a claim for habeas relief as there is no federal right to counsel and where there is no federal right, there can be no basis upon which to grant habeas relief. That he may have a state right law to counsel, whether arising from the State Constitution or State rules of criminal procedure, is of no consequence because in order to be granted federal habeas relief, Petitioner must show a denial of a federal constitutional or statutory right. *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wells v. Petsock,* 941 F.2d 253 (3d Cir. 1991).").

b. Direct appeal counsel was not ineffective before the Superior Court.

As to Petitioner's claim that his direct appeal counsel was ineffective before the Superior Court for abandoning, on appeal, the three issues that direct appeal counsel had earlier raised in the

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Rule 1925(b) Statement of Errors Complained of on Appeal, Petitioner fails to carry his burden under the AEPA to show entitlement to relief.

The Superior Court addressed this claim on the merits as follows:

> Appellant next complains that appellate counsel was ineffective because he failed to raise certain claims on appeal that he raised in his Rule 1925(b) statement.
>
> Here, attorney Farrell raised four issues in his Rule 1925(b) statement, but pursued only one issue on appeal. At the PCRA hearing, attorney Farrell testified that he has several decades of appellate experience, and then he explained his strategy for selecting appellate issues, as follows:
>
> > A What I do is I look at the brief—I'm sorry, I look at the transcript. I go through the transcript and I take copious notes, I have a pad. I don't read it like a novel but I go through the transcript and I take copious notes and read everything. I read the record, I write and have notes to make sure that I understand the record fully....
> >
> > I have raised almost every issue that has been objected to at trial. The reason why I do that is, if I look at an issue and I think it's really, really bad, sometimes I will not raise it but most of the time I will raise all of those issues in a concise statement to preserve. At that time, in that short period of time, I don't have time to write a brief. I don't have time to look at all the law and so forth. I'm trying to raise the issues, raise as many issues as I can—that's really wrong. I raise all the issues that have been preserved. Now on some of them I look at it and say it's stupid, I'm not going to raise it in a concise statement. Things like sometimes the weight of the evidence and that kind of thing, I don't raise it. But for the most part, I raise all of the issues that have been preserved and that's what I do in a concise statement.
> >
> > Q Mr. Farrell, so you're casting a [wider] net in the 1925 B statement than you would later in the brief?
> >
> > A Absolutely. Many times I'll raise seven, eight, or maybe ten issues sometimes and I would never raise that in a brief. I would never do that in a brief. You raise two, three, four[ ] issues tops. I think the most I ever raised was five issues in a brief. But in a concise statement, you raise those issues, you ferret [sic] it out and you see what the trial court writes. And there's actually two cases that I had with Judge Cashman. One of them which is pending on appeal which is in front of the Supreme Court of Pennsylvania right now and the other has been reversed. In both cases I thought that the issues were

> frivolous. I raised those and Judge Cashman wrote an opinion and after looking at his opinion, I realized maybe these claims did have merit and we did win both of them in Superior Court.
>
> Q Your answer is, you said something along the lines "I would never raise ten issues in front of the Superior Court in my brief;" why is that?
>
> A Well, Judge Aldisert's quote where if you raise ten, most appellate courts think that they all have no issues. You can only win a new trial on one issue, you don't need two issues to win a trial so I try to be selective in most cases.
>
> Q So Mr. Farrell, you would agree with me then that you're picking the best issue you think you have when you write your brief to the Superior Court?
>
> A I try to raise the best issue that I can....
>
> Notes of testimony, 11/14/14 at 12–15.
>
> Here, attorney Farrell had a reasonable basis for pursuing one issue on appeal: he focused on the one issue that he determined was the most likely to prevail. His strategy comports with effective appellate advocacy, and his actions, therefore, were reasonable.

ECF No. 21-10 at 8 – 11 (footnotes omitted).

Petitioner has not established that any United States Supreme Court precedent is either contrary to the Superior Court's disposition or was unreasonably applied by the Superior Court. Petitioner also fails to establish that the Superior Court's disposition was an unreasonable determination of the facts. This would be true even taking into account Petitioner's Supplemental Material filed with his Declaration, Objections, Amended Objections, and Supplement. Accordingly, Petitioner has failed to carry his burden under the AEDPA. Ground Five does not merit the grant of federal habeas relief.

Furthermore, we must note that Petitioner's direct appeal counsel was, in fact, clearly effective during the direct appeal in that he did obtain relief from the Superior Court on the sole ground that he did raise on appeal and the Superior Court reversed and remanded the case for a new trial.

6. Ground Six – PCRA counsel's alleged ineffectiveness.

In Ground Six, Petitioner complains that his PCRA counsel was ineffective for failing to address issues of trial counsel's alleged ineffectiveness that Petitioner raised in his *pro se* PCRA petition but that PCRA counsel abandoned in the counseled Amended PCRA petition and in the brief in support of the counseled Amended PCRA Petition. According to Petitioner, he had asked PCRA counsel to further amend the counseled Amended PCRA Petition. PCRA counsel did not comply with Petitioner's request. Petitioner complains that his PCRA counsel abandoned issues of the ineffective assistance of trial counsel and the "oppressive conditions of pre-trial confinement" at the Allegheny County Jail ("ACJ") which he claims were imposed on Petitioner due to retaliation against him from ACJ staff for Petitioner's filing of a civil rights action against ACJ staff while he was housed there. ECF No. 4 at 59 - 61.

a. Ineffective assistance of PCRA counsel does not merit relief.

To the extent that Petitioner is raising the ineffective assistance of PCRA counsel as an independent ground for relief, his claim fails as a matter of law. Ground Six cannot provide an independent basis for the granting of federal habeas relief because such claims of errors of PCRA counsel cannot serve as a basis for granting the writ of habeas corpus. Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of

counsel in such proceedings.") (citations omitted); Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998) ("The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation. . . . Federal habeas power is 'limited ... to a determination of whether there has been an improper detention by virtue of the state court judgment.'"); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004) ("alleged errors in collateral proceedings ... are not a proper basis for habeas relief from the original conviction."). Moreover, Congress prohibits a claim of ineffective assistance of post-conviction counsel from serving as a ground for relief in federal habeas proceedings. 28 U.S.C. § 2254 (i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). Accordingly, Ground Six does not afford a basis for federal habeas relief.

b. Petitioner fails to show "cause" based on PCRA counsel's actions.

Petitioner appears to argue in Ground Six that the ineffectiveness of his PCRA counsel may excuse the procedural defaults of his claims. Because Petitioner's PCRA counsel did not raise any issues other than direct appeal counsel's alleged ineffectiveness, all other potential claims are procedurally defaulted. Apparently aware of this, Petitioner appears to assert that his PCRA counsel's ineffectiveness was the "cause" of the procedural default of these issues, including the procedural default of the alleged ineffective assistance of trial counsel, i.e., Difenderfer. We understand Petitioner to be invoking the so-called Martinez exception.

As this Court has previously explained:

> The decision of the United States Supreme Court in Martinez v. Ryan created a sea change in the doctrine of procedural default, holding for the first time that a

> claim of ineffective assistance of post-conviction relief counsel could serve as cause to excuse the procedural default of a claim of trial counsel's ineffectiveness. However, the Supreme Court in Trevino v. Thaler, 133 S.Ct. 1911, 1918 (2013) explained that Martinez only permits a federal habeas court to find "cause" based on post conviction counsel's ineffectiveness and "thereby excus[e] a defendant's procedural default, where (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding."

Taylor v. Pennsylvania, CV 15-1532, 2018 WL 446669, at *9 (W.D. Pa. Jan. 16, 2018).

To the extent that Petitioner seeks to excuse the procedural default of any claim other than the ineffective assistance of trial counsel, he cannot do so because the Martinez exception can only serve as cause to excuse claims of trial counsel's ineffectiveness and no other procedurally defaulted claims, not even such a closely related procedurally defaulted claim of direct appeal counsel's ineffectiveness, yet alone less related claims. See Davila v. Davis, 137 S. Ct. 2058, 2065–66 (2017).[14] The same is true to the extent that Petitioner attempts to fault his PCRA counsel for failing

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[14] The United States Supreme Court rejected the expansion of the Martinez to include anything other than a procedurally defaulted claim of trial counsel's ineffectiveness and explained as follows:

> On its face, *Martinez* provides no support for extending its narrow exception to new categories of procedurally defaulted claims. *Martinez* did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it "qualifie[d] *Coleman* by recognizing a narrow exception" that applies only to claims of "ineffective assistance of counsel at trial" and only when, "under state law," those claims "must be raised in an initial-review collateral proceeding." *Martinez, supra,* at 9, 17, 132 S.Ct. 1309. And *Trevino* merely clarified that the exception applies whether state law explicitly or effectively forecloses review of the claim on direct appeal. 569 U.S., at ___, 133 S.Ct., at 1914–1915, 1920–1921. In all but those "limited circumstances," *Martinez* made clear that "[t]he rule of *Coleman* governs." 566 U.S., at 16, 132 S.Ct. 1309. Applying *Martinez*'s highly circumscribed, equitable exception to new categories of procedurally defaulted claims would thus
>
> (...footnote continued)

C 0066

to submit any of Petitioner's Supplemental Material to the state court. See, e.g., Fielder v. Stevenson, No. 2:12–CV–00412–JMC, 2013 WL 593657, at *5 (D.S.C. Feb. 14, 2013) ("Several courts have held that the Supreme Court's holding in *Martinez* does not allow a petitioner to point to PCR counsel's failure to develop the factual record as the "cause" of the procedural default. *See Halvorsen,* 2012 WL 5866595, at *4 ('Petitioner's argument that collateral-review counsel's failure to develop the record 'should serve as cause to excuse the lack of diligence is entirely inconsistent' with the general rule that lack of diligence is attributable to the prisoner or prisoner's trial counsel)"); Williams v. Mitchell, No. 1:09 CV 2246, 2012 WL 4505181, at *6 (N.D. Ohio Sept. 28, 2012) (finding that Martinez does not provide for "claims of ineffective assistance of post-conviction counsel to establish 'cause' for a 'default' of the factual development" of a petitioner's mental capacity in state court). Additionally, the Supreme Court's language in Williams v. Taylor seemingly suggests a contrary rule: a hearing should not be held in federal court if there "is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams, 529 U.S. at 432 (emphasis added). Indeed, "only the Supreme Court could expand the application of Martinez to other areas," and "further substantive expansion" of Martinez is "not ... forthcoming." Pizzuto v. Ramirez, 783 F.3d 1171, 1176–77 (9th Cir. 2015) (refusing to apply Martinez to procedurally defaulted claims of judicial bias).

> do precisely what this Court disclaimed in *Martinez*: Replace the rule of *Coleman* with the exception of *Martinez*.

Davila, 137 S. Ct. at 2065–66.

To the extent Petitioner seeks to establish cause for the procedural default of his claims of trial counsel's alleged ineffectiveness which he raised in Ground One or any other claims of trial counsel's alleged ineffectiveness, Petitioner fails to carry his burden under Martinez.

Petitioner fails to show cause under Martinez, because he fails to show that the claim of trial counsel's alleged ineffectiveness raised in Ground One was "substantial." To the extent that Petitioner is attempting to claim prejudice in the trial outcome as the result of Difenderfer's actions, he fails to show a substantial question of prejudice, if only because Difenderfer was not his counsel at the time of Petitioner's criminal trial. Furthermore, in light of the strong evidence of Petitioner's guilt, namely, the eye-witness identification of Petitioner as the shooter by the victim's wife, the presence of the gun with Petitioner which was used in the shooting of the victim, and Petitioner's confession, even though he subsequently denied that he made the confession, Petitioner has failed to show a substantial question of prejudice, i.e., that there is a reasonable probability that the result of his trial would have been different.

Nor has Petitioner established prejudice stemming from Difenderfer's alleged ineffectiveness as to any other proceeding occurring prior to December 4, 2004 (the date on which he fired Difenderfer, as found by the state courts). The only other potential proceeding that Petitioner could point to, but does not, is the suppression hearing. Petitioner makes no specific argument herein, concerning how Difenderfer's alleged ineffectiveness prejudiced the outcome of the suppression proceeding. For these reasons, Petitioner fails to raise a substantial question of Difenderfer's alleged ineffectiveness and, therefore, fails to bring himself within the Martinez exception.

Accordingly, Ground Six fails to afford Petitioner relief and fails to serve as cause to excuse

the procedural default of any of the claims we have found to be procedurally defaulted.

F. Certificate of Appealability

It is recommended that a certificate of appealability be denied because jurists of reason would not find the foregoing debatable.

III. CONCLUSION

For the reasons set forth herein, it is respectfully recommended that the Petition be denied and that a certificate of appealability should be denied.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Respectfully submitted,

Date: July 12, 2021

/s/ Maureen P. Kelly
MAUREEN P. KELLY
UNITED STATES MAGISTRATE JUDGE

C 0069

cc: The Honorable Mark R. Hornak
Chief United States District Judge

Jamar Lashawn Travillion
GS-0389
SCI-Rockview
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All counsel of record via CM-ECF

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

JAMAR LASHAWN TRAVILLION, Petitioner, v. MARK GARMAN, *Superintendent for SCI-Rockview* and STEPHEN A. ZAPPALA, *District Attorney for Allegheny County, Pennsylvania,* Respondents.	)	2:17-cv-00515 Chief District Judge Mark R. Hornak Magistrate Judge Maureen P. Kelly

ORDER

AND NOW, this 19th day of May, 2021, it is hereby ORDERED that Petitioner's Motion to Expand Record at ECF No. 45 is GRANTED on the terms set forth in this Order. For sake of completeness and out of an abundance of opportunity, the United States Magistrate Judge may appropriately address the supplemental material made part of the record by the undersigned's grant of the Motion at ECF No. 45, to the degree consistent with the prevailing law. The grant of this Motion is not a determination on the merits by the undersigned as to the substance of Petitioner's claims nor as to the relevance of the supplemental material that Petitioner seeks to add to the record, but is instead intended to provide Petitioner the widest latitude as to such matters.

The Magistrate Judge is authorized to take any action resulting from the consideration of those supplemental materials as are just and proper under the law. If the Magistrate Judge sees fit to issue an amended Report and Recommendation, then Petitioner's Objections (ECF No. 44), Amended Objections (ECF No. 58), and the Supplement to them (ECF No. 69) shall be dismissed without prejudice, and Petitioner may file Objections to the amended Report and Recommendation within thirty-five (35) days of the date of its issuance.

APPENDIX P

Below, the Court summarizes the extensive procedural latitude the Magistrate Judge and the undersigned have previously extended to Petitioner:

On May 9, 2017, Petitioner filed his 28 U.S.C. § 2254 Habeas Petition. (ECF No. 4.) On September 5, 2017, the Answer to the Petition was filed. (ECF No. 21.) Despite being granted two (2) extensions of time to file a reply/traverse (ECF Nos. 25 and 26) until February 4, 2018, Petitioner never filed a reply/traverse. On September 12, 2018, Petitioner then filed a Declaration in Support of Petition (ECF No. 31), including seventeen (17) attachments. Prior to submitting the Declaration and its attachments, Petitioner did not seek leave of court to expand the state court record in accord with Rule 7 of the Rules Governing Section 2254 Cases and Local Rule 2254G. On December 26, 2019, the Magistrate Judge issued a Report and Recommendation denying Petitioner's Petition. (ECF No. 32.) At pages 19–20 of the Report and Recommendation, the Magistrate Judge declined to consider the Declaration and attachments "unless and until Petitioner can show where in the state court record of his criminal case, the evidence exists that supports his assertions in his Declaration and in his Affidavit". (*Id.*)

Then, only after being granted four (4) extensions of time to file Objections to the Report and Recommendation, (ECF Nos. 34, 37, 39, and 41), did the Petitioner finally file Objections on July 9, 2020. (ECF No. 44.) After filing his Objections, Petitioner then filed the Motion to Expand Record, (ECF No. 45), followed by Amended Objections at ECF No. 58 and a Supplement to the Amended Objections (ECF No. 69), which the Court authorized to be filed, but with an express reservation as to whether the documents are properly before the Court. (ECF No. 70.)

In light of this extensive procedural latitude Petitioner has already been extended by the Magistrate Judge and this Court as well as the above timeline indicating that Petitioner has had the benefit of seemingly long knowing what he has wanted to include in the record before the Court,

the Court does not anticipate granting any extensions of time beyond the thirty-five-day period authorized to file new Objections—if an amended Report and Recommendation is ultimately issued—absent the most extraordinary of circumstances.

s/ Mark R. Hornak
Mark R. Hornak
Chief United States District Judge

cc: All counsel of record
Jamar Lashawn Travillion (via U.S. Mail)

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

JAMAR LASHAWN TRAVILLION, Petitioner, v. MARK GARMAN, *Superintendent for SCI-Rockview* and STEPHEN A. ZAPPALA, *District Attorney for Allegheny County, Pennsylvania,* Respondents.	)	Civil Action No. 17-515 Chief Judge Mark R. Hornak/ Magistrate Judge Maureen P. Kelly

REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (the "Petition"), ECF No. 4, be denied and that a certificate of appealability likewise be denied.

II. REPORT

Jamar Lashawn Travillion ("Petitioner") is a state prisoner, proceeding pro se, who was convicted of, *inter alia*, second-degree murder and sentenced to life imprisonment without parole as a consequence of the conviction.

A. Factual History

The Court of Common Pleas of Allegheny County, in its Opinion dated July 6, 2009, summarized the factual history of Petitioner's case as follows:

> On February 21, 2002, James Kapinski, (hereinafter referred to as "Kapiniski"), was a graduate student at Carnegie-Mellon University and lived in an apartment located at 408 Grant Street in the Garfield Section of the City of Pittsburgh. Kapinski had gone to school early that day and sometime between ten a.m. and seven p.m., an unknown individual entered into his apartment and stole some watches, a zip drive, some electronic equipment, an MP3 player, and a .357 caliber magnum Reuger revolver. Kapinski reported the burglary and theft to the police that day.

APPENDIX E

On September 27, 2002, at approximately five a.m., Leonard Feigel, age sixty-two, and his wife Doris Feigel, were delivering newspapers for the Pittsburgh Post-Gazette in the Bloomfield/Friendship area of the City of Pittsburgh. Leonard Feigel, who suffered from coronary disease and cirrhosis of the liver, was awaiting a liver transplant and this was the least strenuous type of employment in which he could engage. The Feigels were about to deliver the newspapers on Evangeline [sic] Street when Mrs. Feigel noticed an individual walking down that street toward them. This unknown individual came up to the driver's car door, opened it and then pulled Mr. Feigel out of the car. Mr. Feigel told him to take whatever he wanted, however, an altercation ensued as Mr. Feigel and his assailant moved up the street away from the Feigel's automobile toward an unoccupied parked car. Mrs. Feigel saw her husband's attacker pull out a gun and then she heard a shot and her husband cry out in pain. Her husband also yelled for her to get away from them.

When she heard her husband cry out in pain, Mrs. Feigel slid over to the driver's seat and put the car in gear and then drove toward her husband and his attacker in an attempt to hit this assailant. She barely touched Travillion when he then turned around and fired twice into her car and ran to the back of it and fired two more shots. He then ran down the street where one of the neighbors who had heard the shots saw him get into a dark colored foreign car which resembled a picture of a Mitsubishi Mirage shown during the course of the investigation of this crime. Mrs. Feigel, who was not hurt, got out of the vehicle and ran to several of the houses pounding on the doors, asking for someone to call the police for an ambulance.

The police and the paramedics arrived within minutes of the shooting and noted that Mr. Feigel had been shot in the leg and that he had lost a significant amount of blood. The paramedics noted that he said he was cold and believed that he was going into shock. Mr. Feigel was transported by ambulance to Presbyterian University Hospital where he underwent emergency surgery and following the surgery he was listed as critical but stable; however, the trauma associated with this wound, his significant loss of blood, together with his severe coronary artery disease and his cirrhosis of the liver, ultimately resulted in his death. Dr. Bennett Omalu performed the autopsy on Feigel and noted that the downward, backward, and through and through gunshot wound had perforated the two major arteries of the leg causing a substantial loss of blood. Based upon that autopsy, Dr. Omalu offered the opinion that the cause of death of Feigel was atherosclerotic heart disease and cirrhosis of the liver which were exacerbated by the trauma of the gunshot wound and the significant loss of blood that he sustained. The triggering factor in Feigel's death was the gunshot wound to his leg and the loss of blood.

Mrs. Feigel was interviewed by the homicide detectives and she told them that her husband's attacker was an African American in his mid-twenties to early

thirties and that he was approximately two hundred twenty pounds and that he was reasonably tall. Mrs. Feigel had indicated to the homicide detectives that she was able to get a good look at the individual who not only killed her husband but, also shot at her since he was a short distance from her and the street was well-lit. On October 10, 2002, she was shown a photo array of potential suspects; however, she was unable to identify anybody from that photo array.

During 2002 Samantha Smith owned a black Mitsubishi Mirage which was wrecked by her boyfriend, Travillion. Smith went to Enterprise Rental Company and rented a red Ford Focus automobile while awaiting payment from her insurance company so that she could purchase a new vehicle. In renting this automobile, she indicated on the rental form that she would be the only driver and that there were no other permitted drivers.

On November 24, 2002, Officer Joseph Shurina, of the Ross Township Police Department, was on routine patrol along McKnight Road checking buildings for any evidence of possible criminal activity. In the preceding weeks there had been numerous burglaries of commercial establishments along McKnight Road and it was Officer Shurina's job that night to check the buildings for evidence of any burglaries. At approximately 11:00 p.m., as Office Shurina approached the Bed, Bath & Beyond store, he noticed a vehicle parked behind the building with its lights on and engine running. Officer Shurina suspected that something might be wrong since the building was closed and the area where the car was stopped was not a parking lot nor was it used to gain ingress or egress to the parking lot for the store.

Officer Shurina pulled behind this automobile and put on his take down lights. Once he had put these lights on, Officer Shurina noticed that there was one individual in the car and that this individual started to move around in that vehicle. He also noted that the vehicle was a red Ford Focus automobile. The driver of this vehicle was subsequently identified as Travillion who got out of the vehicle and attempted to explain why he was in the alleyway behind the store. Officer Shurina told him to get back into the car and then he ran the plate to determine the ownership of the vehicle. When he received the information that the vehicle was owned by Enterprise Rental, he went back to the car and asked the driver for owner's and operator's information. Travillion supplied him with his driver's license and told him that the car was his girlfriend's car and provided him with the rental agreement which indicated that only his girlfriend, Samantha Smith, was a permitted driver for this vehicle. Travillion then told Officer Shurina that he had pulled into the alley because he needed to urinate. When asked why he had not stopped at a restaurant that had a restroom, Travillion had no answer and seemed befuddled and then became more nervous and agitated.

Officer Shurina then called for backup and waited for his backup to arrive. After the backup officer arrived, they both approached the vehicle and saw that Travillion had bent down and was moving around inside the car. Officer Shurina asked Travillion to get out of the car so that he could perform a pat-down of him and at this point when Travillion exited the vehicle Officer Shurina noticed a barrel of a gun sticking out from under the driver's seat. Officer Shurina took possession of this firearm, noted that it was loaded, and it was a 357 Magnum. Officer Shurina then checked to determine whether or not Travillion had a license to carry a firearm and when he was advised that he did not, Travillion was arrested and subsequently transported to the Ross Township Police Department. An inventory search was performed on the vehicle and during the search of that vehicle, a bag a [sic] of marijuana was found in the console of the car. Travillion subsequently was charged with possession of a firearm without a license and possession of a small amount of a controlled substance. From the time that Officer Shurina initially encountered Travillion until the time that he was taken from the Ross Township Police Department to the Allegheny County Jail, Travillion did not request an opportunity to go to the bathroom.

The firearm found in Travillion's car was turned over to the Allegheny County Crime Lab so that it could be examined to see if it was in good operating condition and whether or not any of the bullets fired from it matched any of those contained in open case files. The gun was examined in May of 2003 by Robert Levine, Ph.D., who was the firearm's expert for the Crime Lab and it was determined that this weapon was used in the killing of Leonard Feigel. This information was given to the Pittsburgh Homicide Detectives and they, in turn, contacted the Ross Township Police Department so that they could gather information as to the facts surrounding how they came into possession of the firearm. After receiving the information that Travillion had been arrested and charged with the crime of possession of a firearm without a license, a new photo array was prepared which included his photograph and then that photo array was shown to Mrs. Feigel who immediately identified Travillion as the individual who killed her husband.

A [sic] arrest warrant was issued for Travillion for the homicide of Feigel and on May 16, 2003, Homicide Detectives Hal Bolin and George Satler went to Travillion's last known address to arrest him. The Detectives knocked on his door and Travillion came to the door and asked what they wanted. The Detectives identified themselves and told him that they had an arrest warrant for him for the charge of criminal homicide. Satler and Bolin knew that it was Travillion at the door since they had with them the a [sic] copy of the picture that Mrs. Feigel had identified in the photo array. Initially, Travillion denied that he was Jamar Travillion and, in fact, told the police that his name was Raymont Geeter. Travillion had on him a Pennsylvania driver's license with the name Raymont

Geeter. Knowing that they had the right individual, they arrested Travillion and transported him to the homicide headquarters.

After being read his Miranda warnings, Travillion signed the form indicating that he had been fully advised of his rights and that he was willing to talk to the police with respect to the death of Feigel. Initially, Travillion maintained that he had nothing to do with that death and this continued for approximately forty-five minutes when Travillion asked if he could have a couple of minutes alone. After a ten minute break, Bolin continued with his interview of Travillion and Travillion said he was responsible for Feigel's death. He stated that he was high on marijuana that was laced with formaldehyde and on the morning of Feigel's death he had driven Smith's black Mitsubishi to the Bloomfield area looking for somebody to rob because he wanted to buy more marijuana. Once he saw Feigel he approached him, drew his gun and demanded money. He held the gun at his side, pointing low, and pointing down. The victim grabbed at the gun and it went off and he took twenty to thirty dollars from the victim and possibly his wallet. After shooting Feigel, he ran from the scene and went home. Travillion never mentioned shooting into Feigel's car at Mrs. Feigel. During the course of this interview, Bolin was taking notes and once he finished the interview, he reviewed the notes with Travillion, had him read those notes and asked him if they were accurate. Travillion indicated that the notes were accurate and that he had no additions or corrections to those notes. However, when he was asked to sign those notes he refused and he also refused to put his statement on tape.

Travillion was taken to the Coroner's office so that he could be arraigned on the charge of criminal homicide. After being arraigned, he was leaving that office when he was confronted by numerous members of the media who asked him why he killed Feigel and he denied that he had done that. While he was being taken to the Allegheny County Jail, Bolin asked Travillion why he lied to the media and he said he was mad at the detectives because he believed they were the cause of the media being there and he was informed that the detectives did not call the media, but if anyone called the media, it was probably somebody from the Coroner's office.

ECF No. 21-3 at 8 – 15.

B. Procedural History

1. State Court

The Pennsylvania Superior Court, quoting the PCRA trial court opinion, recounted the procedural history of the conviction and direct appeal as follows:

On February 26, 2006, [appellant] was found guilty of the charges of second degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violation of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance. A presentence report was ordered in aid of sentencing and [appellant] was sentenced on May 15, 2006, to the mandatory life without parole for the conviction of second degree murder and a consecutive sentence of one hundred eight to two hundred sixteen months for his conviction of the charge of robbery and a consecutive sentence of twelve to twenty-four months for his conviction of possessing a firearm without a license. [Appellant] did not file either post-sentencing motions or a direct appeal to the Superior Court.

On April 2, 2007, his appellate counsel filed a petition for post-conviction relief requesting that his appellate rights be reinstated. On June 4, 2007, this Court entered an order granting the reinstatement of his appellate rights and [appellant's] appellate counsel filed post-sentencing motions on June 15, 2007. On August 29, 2007, a hearing was held on those motions and an Order was entered on January 31, 2008 denying those motions. [Appellant] filed an appeal from the denial of his post-sentencing motions and was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In that concise statement, [appellant] suggested that there were four claims of error. Initially, [appellant] maintained that he was denied his right to counsel under the United States and Pennsylvania Constitutions. [Appellant] also maintained he was denied his right to testify at the time of his trial. [Appellant] also suggested that this Court erred when it denied his motion to suppress the evidence seized by the Ross Township Police, the identification made of him by one of the victims and his inculpatory statements made to the investigating homicide detectives. Finally, [appellant] contended that this Court intimidated one of his witnesses thereby causing that witness to refuse to testify.

This Court filed its 1925(b) Opinion and addressed all of the claims of error raised by [appellant's] appellate counsel, Thomas Farrell. Although Farrell alleged four claims of error in his statement of matters complained of on appeal, his appellate brief only addressed one issue, that being [appellant's] claim that he was denied his right to counsel. Following the decision by the Pennsylvania Supreme Court in ***Commonwealth v. Luccarelli,*** 601 Pa. 185, 971 A.2d 1173 (2009), this Court filed an addendum Opinion in which it maintained that [appellant] had forfeited his right to counsel as a result of his extremely dilatory conduct and obstructive behavior. On October 13, 2010, the Superior Court vacated [appellant's] sentences and remanded his cases [sic] for the purpose of a new trial. The Commonwealth filed an application for allowance of appeal to the Pennsylvania Supreme Court and Farrell responded to that application with a no answer letter. On April 29, 2011, the Pennsylvania Supreme Court issued an Order reversing the Superior Court's disposition of [appellant's] appeal and reinstated the judgment of

> sentence imposed on the basis of its decision in ***Commonwealth v. Luccarelli, supra.*** Farrell filed an application for reargument with the Pennsylvania Supreme Court, which was denied on July 6, 2011.
>
> On June 14, 2012, [appellant] filed a pro se petition for post-conviction relief and this Court appointed his current counsel, Robert S. Carey, to represent him in connection with that petition and to file an amended petition for post-conviction relief, which was done. A hearing was held on November 14, 2014, at which time [appellant] presented the testimony of his former counsel, Farrell. On January 8, 2015, this Court entered an Order denying [appellant's] petition for post-conviction relief from which he has taken the instant timely appeal. [Appellant] was required to file a concise statement of matters complained of on appeal and in complying with that directive, he has asserted two claims of error, the first being that his former appellate counsel was ineffective for failing to file a response to the Commonwealth's application for allowance of appeal to the Pennsylvania Supreme Court and, second, that his former appellate counsel was also ineffective for failing to address all of the issues that he originally raised in his statement of matters complained of on appeal.

ECF No. 21-10 at 1 - 3.

On appeal to the Pennsylvania Superior Court from the denial of PCRA relief, Petitioner raised only two issues:

> 1. Whether the [PCRA] court erred in finding that appellate counsel was effective when the record establishes that Attorney Farrell had no reasonable strategic basis for failing to file a response to the Commonwealth's Petition for Allowance of Appeal and, based on counsel's omission, the Supreme Court reinstated [appellant's] judgment of sentence?
>
> 2. Whether the [PCRA] court erred in finding appellate counsel effective where the record shows that Attorney Farrell waived winning claims when he failed to brief meritorious issues that were previously identified in the Rule 1925 statement?

Id. at 4. The Superior Court reviewed these two issues on the merits and found them to be meritless and affirmed the PCRA trial court's denial of relief. Id. at 1 – 11.

On July 8, 2016, Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. ECF No. 21-11 at 4 – 26. The Supreme Court denied the Petition for Allowance of Appeal on December 6, 2016. Id. at 28.

2. Federal Court

On April 21, 2017, Petitioner filed a pro se Motion for Leave to Proceed In Forma Pauperis (the "IFP Motion"). ECF No. 1. Because the IFP Motion was deficient, the Court issued a deficiency order. ECF No. 2. Thereafter, Petitioner paid the filing fee on May 9, 2017, ECF No. 3, and the 68 page Petition was filed that same day. ECF No. 4.

In the Petition, Petitioner raised six Grounds for Relief.

> GROUND ONE: Ineffective assistance of privately retained trial counsel: withdraw, termination & abandonment by hired trial counsel[.]
>
> GROUND TWO: The Sixth Amendment of the United States Constitution: the right to counsel, standby counsel, conflicts of interest & waiver or forfeiture of the right to counsel[.]

Id. at 1 (capitalization altered).

> GROUND THREE: The Fifth and Sixth Amendments of the United States Constitution: compulsory process, privileges against self-incrimination & the right to testify in one's own behalf[.]
>
> GROUND FOUR: The Sixth Amendment of the United States Constitution: compulsory process, the right to call witnesses in one's favor & official intimidation of witnesses for the defense[.]
>
> GROUND FIVE: Ineffective assistance of direct appeal counsel: abandonment of issues on direct review & failure to respond to Commonwealth's Petition for Allowance of Appeal[.]
>
> GROUND SIX: Ineffective assistance of post-conviction counsel: failure to litigate or pursue claims on collateral review, procedural default & the compound effect[.]

Id. at 2 (capitalization altered).

After being granted three extensions of time to file their Answer, ECF Nos. 14, 18 and 20, Respondents filed their Answer, denying that the Petitioner was entitled to any federal habeas relief.

ECF No. 21. Respondents attached as exhibits to the Answer, much of the state court record. Respondents also asserted in the Answer that the state courts' disposition of Petitioner's claims was not contrary to or an unreasonable application of United States Supreme Court precedent. In addition, Respondents caused the original state court record to be transmitted to the Clerk of this Court. Thereafter, Petitioner was twice granted an extension of time to file a Reply or Traverse, ECF Nos. 23 and 26, but he failed to do so. Instead, Petitioner filed a Motion for Appointment of Counsel, ECF No. 27, which the undersigned denied. ECF No. 28. Petitioner appealed and the District Judge affirmed. ECF No. 30. Petitioner subsequently filed a document that he titled "Declaration in support of Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody" ("Declaration") and attached thereto exhibits. ECF No. 31 (capitalization altered).

C. Applicable Legal Principles

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, §101 (1996) (the "AEDPA") which amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254 was enacted on April 24, 1996. Because Petitioner's habeas Petition was filed after its effective date, the AEDPA is applicable to this case. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000).

Where the state court has reviewed a federal issue presented to them and disposed of the issue on the merits, and that issue is also raised in a federal habeas petition, the AEDPA provides the applicable deferential standards by which the federal habeas court is to review the state court's disposition of that issue. See 28 U.S.C. § 2254(d) and (e).

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court expounded upon the standard found in 28 U.S.C. § 2254(d). In Williams, the Supreme Court explained that Congress intended that habeas relief for errors of law may only be granted in two situations: 1) where the state court decision was "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States" or 2) where that state court decision "involved an unreasonable application of[] clearly established Federal law as determined by the Supreme Court of the United States." Id. at 404-05 (emphasis deleted). A state court decision can be contrary to clearly established federal law in one of two ways. First, the state courts could apply a wrong rule of law that is different from the rule of law required by the United States Supreme Court. Second, the state courts can apply the correct rule of law but reach an outcome that is different from a case decided by the United States Supreme Court where the facts are indistinguishable between the state court case and the United States Supreme Court case.

In addition, we look to the United States Supreme Court holdings under the AEDPA analysis as "[n]o principle of constitutional law grounded solely in the holdings of the various courts of appeals or even in the dicta of the Supreme Court can provide the basis for habeas relief." Rodriguez v. Miller, 537 F.3d 102, 106–07 (2d Cir. 2008) (citing Carey v. Musladin, 549 U.S. 70 (2006)). The United States Court of Appeals for the Third Circuit has explained that "Circuit precedent cannot create or refine clearly established Supreme Court law, and lower federal courts 'may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct.'" Dennis v. Sec., Pennsylvania Dept. of Corrections, 834 F.3d 263, 368 (3d Cir. 2016) (quoting, Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam)). As the United States Supreme Court has further

explained: "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." White v. Woodall, 572 U.S. 415, 428 (2014).

The AEDPA also permits federal habeas relief where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Finally, it is a habeas petitioner's burden to show that the state court's decision was contrary to or an unreasonable application of United States Supreme Court precedent and/or an unreasonable determination of the facts. Ross v. Atty. Gen. of State of Pennsylvania, CIV.A. 07-97, 2008 WL 203361, at *5 (W.D. Pa. Jan. 23, 2008). This burden means that Petitioner must point to specific caselaw decided by the United States Supreme Court and show how the state court decision was contrary to or an unreasonable application of such United States Supreme Court decisions. Owsley v. Bowersox, 234 F.3d 1055, 1057 (8th Cir. 2000) ("To obtain habeas relief, Mr. Owsley must therefore be able to point to a Supreme Court precedent that he thinks the Missouri state courts acted contrary to or unreasonably applied. We find that he has not met this burden in this appeal. Mr. Owsley's claims must be rejected because he cannot provide us with any Supreme Court opinion justifying his position."); West v. Foster, 2:07-CV-00021-KJD, 2010 WL 3636164, at *10 (D. Nev. Sept. 9, 2010) ("petitioner's burden under the AEDPA is to demonstrate that the decision of the Supreme Court of Nevada rejecting her claim 'was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*.' 28 U.S.C. § 2254(d)(1) (emphasis added). Petitioner has not even begun to shoulder this

burden with citation to apposite United States Supreme Court authority."), aff'd, 454 F. App'x 630 (9th Cir. 2011).

The United States Court of Appeals for the Third Circuit has recognized the significance of the deference under the AEDPA that federal habeas courts owe to state courts' decisions on the merits of federal legal claims, which are raised by state prisoners in federal habeas proceedings, and the Third Circuit has emphasized how heavy is the burden that petitioners bear in federal habeas proceedings. The Third Circuit explained that: "[w]e also defer to state courts on issues of law: We must uphold their decisions of law unless they are 'contrary to, or involve[ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' So on federal habeas, 'even 'clear error' will not suffice.' Instead, the state court must be wrong 'beyond any possibility for fairminded disagreement.'" Orie v. Sec. Pennsylvania Dept. of Corrections, 940 F. 3d 845, 850 (3d Cir. 2019) (citations and some internal quotations omitted).

D. Discussion

1. Ground One – Trial counsel was not ineffective.

In Ground One, Petitioner complains that his privately retained trial counsel, William H. Difenderfer ("Difenderfer"), rendered ineffective assistance of counsel by, *inter alia*, allegedly not preparing the defenses that Petitioner had wanted him to prepare and that Difenderfer failed to request a continuance of the trial in order for Difenderfer to prepare those defenses that Petitioner had wanted, and consequently a break down in their relationship ensued which eventually lead Difenderfer to allegedly abandon Petitioner. Petitioner claims that he exhausted this claim of trial counsel's ineffectiveness and abandonment by suing his trial counsel for return of the fees paid to

Difenderfer. ECF No. 4 at 30 ("Petitioner did not use or have available to him any other state remedies to exhaust the issues set forth by Ground One of this Petition.").

To the extent that Petitioner's Ground One is premised on the factual contention that Difenderfer abandoned Petitioner, we reject this factual contention because the state courts found that Petitioner fired Difenderfer. As explained by the trial court regarding Petitioner's disruptive and uncooperative behavior during the jury selection process which culminated in Petitioner firing Difenderfer as his trial counsel, the trial court found as follows:

> Following his dismissal of Difenderfer [in December 2004], Travillion indicated that he was unprepared to pick a jury and he requested a continuance so that he could hire a new lawyer. Travillion's case was then continued until January, 2006, in hopes that Travillion would hire a new lawyer so that a prompt trial date could be scheduled.
>
> Despite giving Travillion more than a year to hire a new lawyer, he did not do so and this Court, on its own motion, appointed the Public Defender's Office to assist him and/or to represent him. Both Christopher Patarini and Sumner Parker of the Public Defender's Office of Allegheny County attempted to meet with Travillion but he refused to discuss his case with them. Their efforts to meet with Travillion were further complicated by the fact that Travillion spent more than six months in "the hole" as a result of his being a disciplinary problem at the Allegheny County Jail.
>
> Difenderfer, prior to being fired, put forth the issues that Travillion wanted to discuss and his difficulty in dealing with Travillion in deciding the strategy and evidence that should be presented in his case.

ECF No. 21-3 at 15-16.

Therefore, because the trial court found that Petitioner fired Difenderfer as of December 4, 2004, Petitioner has no claim of trial counsel's ineffectiveness against Difenderfer after December 4, 2004. State Court Record, Transcript of Suppression Hearing and Motions, 12/1-6/2004 at 186

- 190 (recounting the firing of Difenderfer); id. at 194, lines 15 – 18.[1] Hence, to the extent that Petitioner claims ineffective assistance of Difenderfer, after December 4, 2004, such claims fail as a matter of law and logic given that Difenderfer was no longer Petitioner's counsel as of that date.

To the extent that Petitioner is claiming ineffective assistance of trial counsel for any period of time between July 24, 2003, (which appears to be the earliest date that Difenderfer entered his appearance in the second degree murder case, ECF No. 21-1 at 29) and December 4, 2004, when Petitioner fired him, we find that such claims were procedurally defaulted because they were not raised in the counseled Amended PCRA petition, ECF No. 21-8 at 21 – 28, or in the appeal brief filed to the Pennsylvania Superior Court in the PCRA appeal proceeding.[2]

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[1] The transcript reveals that Petitioner conceded that he fired his trial counsel.

> THE DEFENDANT: That is the reason that I had to cut Mr. Difenderfer off and terminate his services, because I did not feel that I was being effectively represented.

Id.

[2] In the counseled Amended PCRA Petition, the only issues raised were claims of ineffective assistance of direct appeal counsel, notwithstanding that direct appeal counsel persuaded the Superior Court to vacate Petitioner's sentence and grant a new trial. Counseled Amended PCRA Petition, ECF No. 21-8 ¶ 32; Brief in Support of Counseled Amended PCRA Petition, id. at 29. In the Brief on Appeal to the Superior Court during the PCRA proceedings, the only two issues raised were:

> 1. Whether the trial court [i.e., PCRA court] erred in finding that appellate counsel was effective when the record establishes that Attorney Farrell had no reasonable strategic basis for failing to file a response to the Commonwealth's Petition for Allowance of Appeal and, based on counsel's omission, the Supreme Court reinstated the Defendant's judgment of sentence?
>
> 2. Whether the trial court erred in finding appellate counsel effective where the record shows that Attorney Farrell waived winning claims when he failed to brief meritorious issues that were previously identified in the Rule 1925 Statement.

ECF No. 21-9 at 19.

Furthermore, even if this claim were not procedurally defaulted, Petitioner fails to carry his burden to argue yet alone show that Difenderfer was ineffective. In order to successfully establish an ineffective assistance of counsel claim, Petitioner must show that his counsel rendered deficient performance and that Petitioner suffered prejudice as a consequence thereof, and prejudice is defined as a "reasonable probability that the outcome of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984) ("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."). Given that Petitioner fired Difenderfer a year before his trial commenced, he cannot show that any deficient performance on Difenderfer's part which could have affected the proceeding of his trial, given that Difenderfer was not his counsel at the time of his trial. Nor does Petitioner in the Petition before this Court argue specific instances of deficient performance or prejudice based upon Difenderfer's assistance with respect to Petitioner's trial, other than his failure to refund the lawyer fees paid by Petitioner to Difenderfer.

To the extent that Petitioner attempts to assert the ineffective assistance of his PCRA counsel as cause to excuse the procedural default of any trial counsel ineffectiveness claims pursuant to Martinez v. Ryan, 566 U.S. 1 (2012), we address the claimed ineffectiveness of PCRA counsel below relative to Ground Six.

Accordingly, Ground One does not merit any federal habeas relief.

2. Ground Two – Petitioner was not denied his right to counsel.

In Ground Two, Petitioner complains that his right to counsel was denied by the trial court ECF No. 4 at 30 – 37.

To the extent that Petitioner claims a denial of his right to counsel, he appears to be raising the same issue as he raised in the Superior Court on direct appeal, namely, "Whether Defendant was denied his right to counsel during the trial under both the Pennsylvania and United States Constitution?" ECF No. 21-3 at 47. To the extent that Petitioner raises any other claims in Ground Two that were not raised in either the direct appeal or the counseled Amended PCRA petition, we find them to have been procedurally defaulted, including any claim of ineffective assistance of stand-by counsel or conflicts of interest between Petitioner and court appointed counsel in the form of the Allegheny County Public Defender's office.

a. The State Courts did not unreasonably apply United States Supreme Court precedent.

The State Courts addressed Petitioner's claimed denial of the right to counsel on the merits. The trial court initially found that Petitioner waived his right to counsel, and therefore, he was not denied his right to counsel. Id. at 6 – 34. After the Pennsylvania Supreme Court issued its opinion in Commonwealth v. Luccarelli, 971 A.2d 1173 (Pa. 2009), the trial court issued an "Addendum to Opinion" wherein the trial court found that "when reviewing the entire record of Travillion's case it is clear that he forfeited his right to counsel by firing his original trial counsel, who was prepared to proceed to trial, refused to hire new counsel and, finally, refused to meet and to cooperate with two lawyers who were appointed for him by this Court." ECF No. 21-3 at 36.

On Petitioner's direct appeal, a panel of the Pennsylvania Superior Court, in a two to one decision, reversed the judgment of sentence, and remanded for a new trial. ECF No. 21-5 at 1 – 22.

The Superior Court found that the record did not establish that Petitioner either waived his right to counsel or forfeited his right to counsel. Id. at 11.

The Commonwealth then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Supreme Court granted the Petition for Allowance of Appeal, reversed the Superior Court and reinstated the judgment of sentence. ECF No. 26-1 at 38 – 42.[3] In doing so, the Pennsylvania Supreme Court reasoned as follows:

> Therefore, in accordance with *Lucarelli,* despite the initial finding of waiver of counsel by the trial court, we agree with the trial court's conclusion in its addendum—that respondent forfeited his right to counsel. Some measure of deference must be shown to the trial court, which is in a better position to assess a defendant's sincerity and motivation in delaying a trial and to determine whether a defendant's conduct is genuine or obstructive. The trial court here correctly concluded that the record establishes that respondent's conduct was an orchestrated plan to manipulate the system. Accordingly, as contemplated by *Lucarelli,* respondent's behavior constituted extremely dilatory conduct sufficient to result in the forfeiture of his right to counsel.

Com v. Travillion, 17 A.3d 1247, 1248 (Pa. 2011); ECF No. 21-6 at 39 – 40.

Petitioner fails to assert that the Pennsylvania Supreme Court's disposition is contrary to or an unreasonable application of United States Supreme Court precedent. He does not cite any United States Supreme Court precedent to this Court in an attempt to meet the AEDPA requirements. Accordingly, we find Petitioner fails to carry his burden to show entitlement to relief for any legal error under AEDPA. Nor do we find the Pennsylvania Supreme Court's decision herein to constitute a decision that is contrary to or an unreasonable application of United States Supreme Court precedents. See, e.g., U.S. v. Goldberg, 67 F.3d 1092 (3d Cir. 1995) (analyzing concept of forfeiture

[3] Justice Saylor filed a Dissenting Statement objecting to the procedure of granting the Petition and summarily reversing the Superior Court. ECF No. 21-6 at 51 – 42.

versus waiver and finding support in the Supreme Court's decision in Illinois v. Allen, 397 U.S. 337 (1970) for the concept of forfeiting a constitutional right by one's behavior).

b. The State Courts did not unreasonably determine facts.

Although not explicit, it may be that by the filing of the Declaration and the attached exhibits, ECF No. 31, Petitioner is attempting to establish that the state courts' factual findings are unreasonable under 28 U.S.C. § 2254(d)(2). Compare Petitioner's Affidavit, ECF No. 31-1 at 14 ("I never refused to meet or cooperate with two lawyers appointed by the court. The court never appointed counsel with a charged [sic] to represent me at trial to meet and cooperate with.") with Trial Court Addendum to Opinion, ECF No. 21-3 at 36 ("when reviewing the entire record of Travillion's case, it is clear that he forfeited his right to counsel by firing his original trial counsel, who was prepared to proceed to trial, refused to hire new counsel and, finally, refused to meet and cooperate with two lawyers who were appointed for him by this Court.").

To the extent that Petitioner is attempting to establish that the presumptively correct State Court factual findings "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" under 28 U.S.C. § 2254(d)(2), Petitioner fails because we cannot consider any evidence which was not contained in the State Court record, including his Affidavit.

i. Petitioner has the burden to rebut the presumptively correct facts as found by the State Courts.

To the extent that Petitioner is challenging state court factual determinations, that he, *inter alia*, did not refuse to meet and cooperate with two lawyers and that the trial court did not appoint him two such lawyers and that Petitioner did not fire Difenderfer, (all of which lead to the

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Pennsylvania Supreme Court finding that Petitioner forfeited his right to counsel, and not that Petitioner was denied counsel), Petitioner must contend with 28 U.S.C. § 2254(e) (1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). See also Lambert v. Blackwell, 387 F.3d 210, 234 - 36 (3d Cir. 2004) (explaining the relationship between Section 2254(d)(2) and (e)(1).

ii. Petitioner can only carry his burden by pointing to evidence contained in the State Court record.

It is strikingly clear that where the state courts have adjudicated a claim on the merits, the interplay between Sections (d)(2) (limiting review to the state court record) and (e)(1) requires that the federal habeas petitioner carry his burden to rebut by clear and convincing evidence the presumed correctness of state court factual findings by pointing to evidence solely contained in the state court record. Cullen v. Pinholster, 563 U.S. 170, 206 (2011) (Breyer, J., concurring in part and dissenting in part) ("There is no role in (d) analysis for a habeas petitioner to introduce evidence that was not first presented to the state courts."). See, e.g., Grant v. Lockett, 709 F.3d 224, 232 – 33 (3d Cir. 2013) (finding that the State courts' factual finding was an unreasonable determination of the facts by pointing to evidence solely contained in the state court record), *rejected on other grounds by*, Dennis v. Sec., Pennsylvania Dept. of Corrections, 834 F.3d 263, 368 (3d Cir. 2016).

Hence, we are prohibited from considering Petitioner's so-called Declaration and Affidavit, ECF No. 31-1 at 2 – 14, and any of its attachments, unless and until Petitioner can show where in the state court record of his criminal case, the evidence exists that supports his assertions and

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contentions in his Declaration and in his Affidavit. Petitioner has not made the requisite showing. Further, he cannot hope to carry his burden under Sections 2254(d)(2) and (e)(1) to rebut by clear and convincing evidence the presumed correctness of state court factual findings by pointing to evidence solely contained in the state court record of his criminal case. It is Petitioner's burden to show where in the state court record of his criminal case such clear and convincing evidence exists and it is not the federal habeas court's burden to scour the state court record in order to determine if and whether such evidence exists in the state court record of the criminal case. As explained previously by a distinguished member of this Court:

> In his objections, much like he did before the State Superior Court, Petitioner fails to cite where in the trial record there is evidence that the prosecution presented a conspiracy theory to the jury. This court is not required to comb through the extensive trial record to find such evidence, if indeed there be any. Adams v. Armontrout, 897 F.2d 332, 333 (8th Cir. 1990) ("We do not believe that 28 U.S.C. § 2254 or the Section 2254 Rules require the federal courts to review the entire state court record of habeas corpus petitioners to ascertain whether facts exist which support relief. Requiring such an exhaustive factual review of entire state court records would pose an insuperable burden on already strained judicial resources. We join the numerous federal courts which have repeatedly expressed their unwillingness to sift through voluminous documents filed by habeas corpus petitioners in order to divine the grounds or facts which allegedly warrant relief."); Wenglikowski v. Jones, 306 F.Supp.2d 688, 695 (E.D. Mich. 2004)("Furthermore, the petitioner's failure to isolate specific portions of the transcript indicating the trial judge's alleged bias is fatal to his claim. It is not the role of the district court to scour the petitioner's trial transcript to find support for the arguments in his habeas corpus petition Cf. In re Morris, 260 F.3d 654, 665 (6th Cir. 2001) (holding that the trial court is under no obligation to search the record to protect a non-moving party from summary judgment)."), *aff'd on other grounds*, 162 Fed. Appx. 582 (6th Cir. 2006).

Moorefield v. Grace, CIV.A.06 541, 2007 WL 1068469, at *2 (W.D. Pa. Apr. 5, 2007).

Here, Petitioner has not presented clear and convincing evidence to rebut the state court factual findings. Therefore, we find that Petitioner has failed to establish that the state courts' disposition of this claim in Ground Two that he was denied his federal constitutional right to counsel

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was either contrary to or an unreasonable application of United States Supreme Court precedent or 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. Hence, Ground Two does not afford Petitioner federal habeas relief.

3. Ground Three – Petitioner was not denied the right to testify.

In Ground Three, Petitioner refers to three distinct violations of his rights, namely: 1) compulsory process;[4] 2) the privilege against self-incrimination and 3) the right to testify on one's own behalf. Although Petitioner references these three claims in the heading of Ground Three, ECF No. 4 at 37, in the substance of the argument in the Petition regarding Ground Three, he only argues that he was denied his right to testify on his own behalf. Id. at 37 – 40.

At the outset, we find that Petitioner procedurally defaulted Ground Three because he failed to raise Ground Three in his appellate brief to the Pennsylvania Superior Court on direct appeal. While Petitioner apparently raised some of these three claims, (which he raises in Ground Three) in his Statement of Errors Complained of on Appeal, which was filed in the state trial court and addressed to the state trial court, during the direct appeal proceedings, and the trial court addressed some of these claims on the merits, Petitioner's appellate counsel ultimately abandoned all three claims now raised in Ground Three. Petitioner's direct appeal counsel raised only one issue in the appellate brief to the Superior Court, namely, that Petitioner was denied his right to counsel. This sole issue was successful because the Superior Court granted Petitioner relief on this claim, and, as

[4] To the extent that Petitioner's reference to compulsory process in Ground Three refers to the claim that his right to have compulsory process for the witness, Mr. Geeter, was violated, that specific claim is addressed in the analysis of Ground Four.

such, reversed the judgment and remanded the case for a new trial. ECF Nos. 21-4 at 9, 21-5 at 11. Accordingly, we find all of the issues other than the claim that Petitioner was denied his right to counsel (which Petitioner raises in Ground Two) to have been procedurally defaulted for failing to raise them on direct appeal. Nor on this record, can Petitioner establish either cause and prejudice or a miscarriage of justice in order to excuse the procedural default of these claims. We address this issue of Petitioner's procedural default of his claims more thoroughly below in analyzing Ground Six.

Secondly, insofar as the right to testify is concerned, Petitioner, in fact, concedes he was not denied his right to testify, but rather, feeling frustrated with the process regarding whether Mr. Geeter would testify on Petitioner's behalf, Petitioner simply declined to testify on his own behalf when asked. ECF No. 4 at 40 ("In the fall out of this controversy the court asked Petitioner whether he would give his narrative statement. Petitioner frustrated, said no. I can't do that Petitioner said.").

In the alternative, we find that Petitioner has failed to carry his burden under the AEDPA to show that the state trial court's disposition of the sole claim which Petitioner actually argued in the body of Ground Three, i.e., he was denied his right to testify, was contrary to or an unreasonable application of United States Supreme Court precedent or constituted a decision based upon an unreasonable determination of the facts.[5] See e.g., ECF No. 21-3 at 28 – 29 (wherein the trial court addressed this issue).

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[5] While it is true that under AEDPA, we review the last reasoned decision of the state courts, we find that the last reasoned decision of the state courts with respect to the procedurally defaulted claims (defaulted precisely because, although raised in the trial court, they were not raised in the appellate brief to the Superior Court), is the trial court's disposition of the claims raised in the Rule 1925(b) Statement of Errors Complained of on Appeal. Skipper v. French, 130 F.3d 603, 609 (4th Cir. 1997) ("The relevant state court decision for purposes of the inquiry is that of 'the last state

(...footnote continued)

In relevant part, the trial court concluded that "[w]hen given the opportunity to present his testimony in the form of a narrative statement, Travillion made a knowing, voluntary and intelligent decision not to exercise his right to testify." Id. at 29.

Even if AEDPA deference were not applicable to the trial court's reasoning with respect to the alleged denial of the right to testify as raised in Ground Three, we adopt as our own the reasoning of the trial court in its opinion rejecting Petitioner's claim on the merits.

Accordingly, for the foregoing reasons, Ground Three does not merit the grant of federal habeas relief.

4. Ground Four – Petitioner's right to compulsory process was not denied.

In Ground Four, Petitioner claims that his rights to compulsory process and the right to call witnesses in his defense were violated when the Court advised one of Petitioner's witnesses, namely Mr. Geeter, who had already taken the stand and testified to operating a jitney, that he might be placing himself in jeopardy and the Court then appointed counsel for Mr. Geeter. ECF No. 4 at 42 – 52. After consultation with counsel, Mr. Geeter ultimately decided to invoke his Fifth Amendment right against self-incrimination and not further testify for Petitioner. ECF No. 21-3 at 32 – 34.

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court to be presented with the particular federal claim' at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 2593, 115 L.Ed.2d 706 (1991)."). See also Simmons v. Beard, 590 F.3d 223, 232 (3d Cir. 2009) ("A state court decision is an 'adjudication on the merits,' reviewed under the deferential standard of § 2254(d), where it is 'a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.'") (quoting Rompilla v. Horn, 355 F.3d 233, 247 (3d Cir. 2004), *rev'd on other grounds sub nom.*, Rompilla v. Beard, 545 U.S. 374 (2005)).

Petitioner "complained that the inquiries into Mr. Geeter's privileges against self-incrimination were being used as an intimidation tactic." ECF No. 4 at 43.

This ground was procedurally defaulted because, although Petitioner raised it in his Rule 1925(b) Statement of Errors Complained of on Appeal, the claim was not raised in his brief to the Superior Court. ECF No. 21-4 at 9. Moreover, on this record, Petitioner cannot show cause and prejudice or a miscarriage of justice in order to overcome this procedural default as more fully explained in our analysis of Ground Six.

Furthermore, Petitioner has not shown that the trial court's decision of this claim on the merits was contrary to or an unreasonable application of United States Supreme Court precedent or an unreasonable determination of the facts.

The trial court reasoned as follows in rejecting this claim.

> Travillion's final claim of error is that this Court intimidated a defense witness to the point that that witness refused to testify in support of Travillion. Travillion called Raymond [sic] Geeter to testify and elicited some basic information to [sic] him which included the fact on the day prior to Travillion's arrest by the Ross Township Police Department that Geeter was in possession of Susan Smith's car and that he was using that vehicle as a jitney. When this information came forward, the assistant district attorney asked to approach sidebar and asked that Geeter be advised of his Fifth Amendment rights in light of the possibility of him admitting to several crimes, the least of which would be operating a jitney and the worst of which might be his involvement in the homicide of Feigel. Following a discussion in chambers with respect to the possibility of Geeter disclosing incriminating information, this Court appointed Giuseppe Rosselli to represent him and advise him of his rights in light of the purported testimony that he was to give. Geeter met in this Court's chambers with Rosselli, and no one else was present. Following their meeting, Geeter indicated that he wanted to invoke his Fifth Amendment right since he had been advised by Roselli that the testimony he might give could possibly implicate him in the death of Feigel since he was in the car which had the murder weapon in it at the time he was using that vehicle.
>
> At no time did this Court ever advise Geeter that it would charge him but, rather, advised him that any decision as to whether or not he would be subject to criminal charges would be made by the District Attorney's office. This Court,

> rather than trying to intimidate Geeter, was insuring that his rights were protected by appointing an attorney to advise him of what his rights and options were with respect to testifying in this particular case. As with all of Travillion's claims of error, this one was also without merit.

ECF No. 21-3 at 23 – 34. Petitioner fails to show the foregoing disposition merits federal habeas relief under the standards of AEDPA.

Lastly, even if AEDPA deference were not to apply to the trial court's reasoning in rejecting this claim, applying a *de novo* standard of review to this claim, we would adopt as our own the trial court's reasoning in rejecting this claim.

Accordingly, for the above stated reasons, Ground Four does not afford Petitioner federal habeas relief.

5. Ground Five – Direct appeal counsel was not ineffective.

In Ground Five, Petitioner claims that his direct appeal counsel was ineffective for two reasons. First, he complains that his appellate counsel was ineffective for not filing a brief in opposition to the Commonwealth's Petition for Allowance of Appeal to the Pennsylvania Supreme Court after the Superior Court reversed Petitioner's conviction and remanded for a new trial. ECF No. 4 at 52 – 58. Second, Petitioner contends that his appellate counsel was ineffective for not raising the three other issues in the brief that appellate counsel filed with the Pennsylvania Superior Court on appeal that appellate counsel had earlier raised in the Rule 1925(b) Statement of Errors Complained of on Appeal. Id.

a. Petitioner has no right to counsel at the discretionary appeal stage.

Petitioner claims ineffective assistance of his appeal counsel for not filing a response in opposition to the Commonwealth's Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Although not raised by Respondents in the Answer, we have an independent obligation to

apply the correct law.[6] The correct law is that Petitioner had no federal constitutional right to counsel at the petition for allowance of appeal stage of the proceedings and thus, cannot establish a federal claim of denial of a non-existent federal right to counsel.

As well-explained by a fellow member of this Court:

> As to whether it was ineffective for Attorney Garvin not to file an [sic] PAA from the Superior Court's adverse suppression decision, this issue was raised in the PCRA proceedings. .... More importantly perhaps, even if we assume that Attorney Garvin was ineffective in not filing a PAA, which is a discretionary petition for review, ineffectiveness at that stage of the proceedings is not a ground for granting federal habeas relief because at that stage of the proceedings Petitioner had no federal constitutional right to counsel. *Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982); *Ross v. Moffitt,* 417 U.S. 600, 610, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).
>
> A claim of ineffectiveness of counsel is cognizable in federal habeas proceedings only if there is a federal right to counsel at the stage when counsel is alleged to have been ineffective. *See Coleman v. Thompson,* 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") (citations omitted). Here, at the point where Attorney Garvin is alleged to have been ineffective, i.e., after the Superior Court rendered its decision in the suppression appeal, which is during the stage of the discretionary appeal to the Pennsylvania Supreme Court, Petitioner did not have a federal right to counsel. *Wainwright v. Torna,* 455 U.S. at 587-88 ("Since respondent had no constitutional right to counsel [in order to file a request for discretionary appeal], he could not be deprived of the effective assistance of counsel by his retained

---

[6] U.S. v. Alvarez, 646 F. App'x 619, 620 (10th Cir. 2016) ("Contrary to Mr. Alvarez's argument, a party's failure to raise all defenses does not preclude the district court from applying the correct law and properly disposing of a claim. *See Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) ('When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'). Mr. Alvarez contends that 'the District Court was only authorized to answer to the [jurisdictional] defense presented by the Government.' Aplt. Br. at 3. This is incorrect. The district court has an obligation to apply the correct law"); Alston v. D.C., 561 F. Supp. 2d 29, 37 (D.D.C. 2008) ("the court nevertheless analyzes this claim under the appropriate law, *Smith v. Mallick,* 514 F.3d 48, 51 (D.C. Cir. 2008) (holding that courts have an independent obligation to apply the correct law regardless of the parties' arguments)").

> counsel's failure to file the application timely."); *Ross v. Moffitt,* 417 U.S. at 610 (there is no federal constitutional right to counsel to file a discretionary appeal petition). Hence, this ineffectiveness claim does not merit the grant of federal habeas relief.

Moorefield v. Grace, CIV.A. 06-541, 2007 WL 1175847, at *6 (W.D. Pa. Feb. 26, 2007), report and recommendation adopted, CIVA 06-541, 2007 WL 927965 (W.D. Pa. Mar. 26, 2007), judgment vacated on reconsideration on other grounds, CIV.A.06 541, 2007 WL 1068469 (W.D. Pa. Apr. 5, 2007), and report and recommendation adopted, CIV.A.06 541, 2007 WL 1068469 (W.D. Pa. Apr. 5, 2007).

Accordingly, Petitioner cannot establish a federal claim of the denial of effective assistance of counsel and this is so even if Petitioner had some state law right to effective assistance of counsel at that stage. Dorsey v. Wilson, CIV.A. 07-509, 2008 WL 2952892, at *2 (W.D. Pa. July 30, 2008) ("Petitioner next objects to the Report's disposition of Claim # 11, wherein the Report found that any claim of appellate counsel's ineffectiveness for failing to raise a claim in the Petition for Allowance of Appeal ('PAA') to the Pennsylvania Supreme Court failed to state a claim for habeas relief as there is no federal right to counsel and where there is no federal right, there can be no basis upon which to grant habeas relief. That he may have a state right law to counsel, whether arising from the State Constitution or State rules of criminal procedure, is of no consequence because in order to be granted federal habeas relief, Petitioner must show a denial of a federal constitutional or statutory right. *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wells v. Petsock,* 941 F.2d 253 (3d Cir. 1991).").

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b. Direct appeal counsel was not ineffective.

As to Petitioner's claim that his direct appeal counsel was ineffective before the Superior Court for abandoning, on appeal, the three issues that direct appeal counsel had earlier raised in the Rule 1925(b) Statement of Errors Complained of on Appeal, Petitioner fails to carry his burden under the AEPA to show entitlement to relief.

The Superior Court addressed this claim on the merits as follows:

> Appellant next complains that appellate counsel was ineffective because he failed to raise certain claims on appeal that he raised in his Rule 1925(b) statement.
>
> Here, attorney Farrell raised four issues in his Rule 1925(b) statement, but pursued only one issue on appeal. At the PCRA hearing, attorney Farrell testified that he has several decades of appellate experience, and then he explained his strategy for selecting appellate issues, as follows:
>
> > A What I do is I look at the brief—I'm sorry, I look at the transcript. I go through the transcript and I take copious notes, I have a pad. I don't read it like a novel but I go through the transcript and I take copious notes and read everything. I read the record, I write and have notes to make sure that I understand the record fully....
> >
> > I have raised almost every issue that has been objected to at trial. The reason why I do that is, if I look at an issue and I think it's really, really bad, sometimes I will not raise it but most of the time I will raise all of those issues in a concise statement to preserve. At that time, in that short period of time, I don't have time to write a brief. I don't have time to look at all the law and so forth. I'm trying to raise the issues, raise as many issues as I can—that's really wrong. I raise all the issues that have been preserved. Now on some of them I look at it and say it's stupid, I'm not going to raise it in a concise statement. Things like sometimes the weight of the evidence and that kind of thing, I don't raise it. But for the most part, I raise all of the issues that have been preserved and that's what I do in a concise statement.
> >
> > Q Mr. Farrell, so you're casting a [wider] net in the 1925 B statement than you would later in the brief?
> >
> > A Absolutely. Many times I'll raise seven, eight, or maybe ten issues sometimes and I would never raise that in a brief. I would never do that in a brief. You raise two, three, four[ ] issues tops. I think the

> most I ever raised was five issues in a brief. But in a concise statement, you raise those issues, you ferret [sic] it out and you see what the trial court writes. And there's actually two cases that I had with Judge Cashman. One of them which is pending on appeal which is in front of the Supreme Court of Pennsylvania right now and the other has been reversed. In both cases I thought that the issues were frivolous. I raised those and Judge Cashman wrote an opinion and after looking at his opinion, I realized maybe these claims did have merit and we did win both of them in Superior Court.
>
> Q Your answer is, you said something along the lines "I would never raise ten issues in front of the Superior Court in my brief;" why is that?
>
> A Well, Judge Aldisert's quote where if you raise ten, most appellate courts think that they all have no issues. You can only win a new trial on one issue, you don't need two issues to win a trial so I try to be selective in most cases.
>
> Q So Mr. Farrell, you would agree with me then that you're picking the best issue you think you have when you write your brief to the Superior Court?
>
> A I try to raise the best issue that I can....
>
> Notes of testimony, 11/14/14 at 12–15.
>
> Here, attorney Farrell had a reasonable basis for pursuing one issue on appeal: he focused on the one issue that he determined was the most likely to prevail. His strategy comports with effective appellate advocacy, and his actions, therefore, were reasonable.

ECF No. 21-10 at 8 – 11 (footnotes omitted).

Petitioner fails to point to any United States Supreme Court precedent that is either contrary to the Superior Court's disposition or was unreasonably applied by the Superior Court. Petitioner also fails to establish that the Superior Court's disposition was an unreasonable determination of the

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facts. Accordingly, Petitioner has failed to carry his burden under the AEDPA. Ground Five does not merit the grant of federal habeas relief.

Furthermore, we must note that Petitioner's direct appeal counsel was, in fact, clearly effective during the direct appeal in that he did obtain relief from the Superior Court on the sole ground that he did raise on appeal and the Superior Court reversed and remanded the case for a new trial.

6. Ground Six – PCRA counsel's alleged ineffectiveness.

In Ground Six, Petitioner complains that his PCRA counsel was ineffective for failing to address issues of trial counsel's alleged ineffectiveness that Petitioner raised in his pro se PCRA Petition but that PCRA counsel abandoned in the counseled Amended PCRA petition and in the brief in support of the counseled Amended PCRA Petition. According to Petitioner, he had asked PCRA counsel to further amend the counseled Amended PCRA Petition. PCRA Counsel did not comply with Petitioner's request. Petitioner complains that his PCRA counsel abandoned issues of the ineffective assistance of trial counsel and the "oppressive conditions of pre-trial confinement" at the Allegheny County Jail ("ACJ") which he claims were imposed on Petitioner due to retaliation against him from ACJ staff for Petitioner's filing of a civil rights action against ACJ staff while he was housed there. ECF No. 4 at 59 - 61.

a. Ineffective assistance of PCRA counsel does not merit relief.

To the extent that Petitioner is raising the ineffective assistance of PCRA counsel as an independent ground for relief, his claim fails as a matter of law. Ground Six cannot provide an independent basis for the granting of federal habeas relief because such claims of errors of PCRA counsel cannot serve as a basis for granting the writ of habeas corpus. Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") (citations omitted); Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998) ("The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation. . . . Federal habeas power is 'limited ... to a determination of whether there has been an improper detention by virtue of the state court judgment.'"); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004) ("alleged errors in collateral proceedings ... are not a proper basis for habeas relief from the original conviction."). Moreover, Congress prohibits a claim of ineffective assistance of post-conviction counsel from serving as a ground for relief in federal habeas proceedings. 28 U.S.C. § 2254 (i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

Accordingly, Ground Six does not afford a basis for federal habeas relief.

b. Petitioner fails to show "cause" based on PCRA counsel's actions.

It seems that Petitioner may be arguing in Ground Six that the ineffectiveness of his PCRA counsel may excuse the procedural defaults of his claims. Because Petitioner's PCRA counsel did not raise any issues other than direct appeal counsel's alleged ineffectiveness, all other potential claims are procedurally defaulted. Apparently aware of this, Petitioner appears to assert that his PCRA counsel's ineffectiveness was the "cause" of the procedural default of these issues, including the procedural default of the alleged ineffective assistance of trial counsel, i.e., Difenderfer. We understand Petitioner to be invoking the so-called Martinez exception.

As this Court has previously explained:

> The decision of the United States Supreme Court in Martinez v. Ryan created a sea change in the doctrine of procedural default, holding for the first time that a claim of ineffective assistance of post-conviction relief counsel could serve as cause to excuse the procedural default of a claim of trial counsel's ineffectiveness. However, the Supreme Court in Trevino v. Thaler, 133 S.Ct. 1911, 1918 (2013) explained that Martinez only permits a federal habeas court to find "cause" based on post conviction counsel's ineffectiveness and "thereby excus[e] a defendant's procedural default, where (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding."

Taylor v. Pennsylvania, CV 15-1532, 2018 WL 446669, at *9 (W.D. Pa. Jan. 16, 2018).

To the extent that Petitioner seeks to excuse the procedural default of any claim other than the ineffective assistance of trial counsel, he cannot do so because the Martinez exception can only serve as cause to excuse claims of trial counsel's ineffectiveness and no other procedurally defaulted claims, not even such a closely related procedurally defaulted claim of direct appeal counsel's

ineffectiveness, yet alone less related claims. See Davila v. Davis, 137 S. Ct. 2058, 2065–66 (2017).[7] Indeed, "only the Supreme Court could expand the application of Martinez to other areas," and "further substantive expansion" of Martinez is "not ... forthcoming." Pizzuto v. Ramirez, 783 F.3d 1171, 1176–77 (9th Cir. 2015) (refusing to apply Martinez to procedurally defaulted claims of judicial bias).

To the extent Petitioner seeks to establish cause for the procedural default of his claims of trial counsel's alleged ineffectiveness which he raised in Ground One or any other claims of trial counsel's alleged ineffectiveness, Petitioner fails to carry his burden under Martinez.

Petitioner fails to show cause under Martinez, because he fails to show that the claim of trial counsel's alleged ineffectiveness raised in Ground One was "substantial." To the extent that

---

[7] The United States Supreme Court rejected the expansion of the Martinez to include anything other than a procedurally defaulted claim of trial counsel's ineffectiveness and explained as follows:

> On its face, *Martinez* provides no support for extending its narrow exception to new categories of procedurally defaulted claims. *Martinez* did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it "qualifie[d] *Coleman* by recognizing a narrow exception" that applies only to claims of "ineffective assistance of counsel at trial" and only when, "under state law," those claims "must be raised in an initial-review collateral proceeding." *Martinez, supra,* at 9, 17, 132 S.Ct. 1309. And *Trevino* merely clarified that the exception applies whether state law explicitly or effectively forecloses review of the claim on direct appeal. 569 U.S., at ___, 133 S.Ct., at 1914–1915, 1920–1921. In all but those "limited circumstances," *Martinez* made clear that "[t]he rule of *Coleman* governs." 566 U.S., at 16, 132 S.Ct. 1309. Applying *Martinez*'s highly circumscribed, equitable exception to new categories of procedurally defaulted claims would thus do precisely what this Court disclaimed in *Martinez*: Replace the rule of *Coleman* with the exception of *Martinez*.

Davila, 137 S. Ct. at 2065–66.

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Petitioner is attempting to claim prejudice in the trial outcome as the result of Difenderfer's actions, he fails to show a substantial question of prejudice, if only because Difenderfer was not his counsel at the time of Petitioner's criminal trial. Furthermore, in light of the strong evidence of Petitioner's guilt, namely, the eye-witness identification of Petitioner as the shooter by the victim's wife, the presence of the gun with Petitioner which was used in the shooting of the victim, and Petitioner's confession, even though he subsequently denied that he made the confession, Petitioner has failed to show a substantial question of prejudice, i.e., that there is a reasonable probability that the result of his trial would have been different.

Nor has Petitioner even argued prejudice stemming from Difenderfer's alleged ineffectiveness as to any other proceeding occurring prior to December 4, 2004 (the date on which he fired Difenderfer, as found by the state courts). The only other potential proceeding that Petitioner could point to, but does not, is the suppression hearing. Petitioner makes no specific argument herein, concerning how Difenderfer's alleged ineffectiveness prejudiced the outcome of the suppression proceeding. For these reasons, Petitioner fails to raise a substantial question of Difenderfer's alleged ineffectiveness and, therefore, fails to bring himself within the Martinez exception.

Accordingly, Ground Six fails to afford Petitioner relief and fails to serve as cause to excuse the procedural default of any of the claims we have found to be procedurally defaulted.

E. Certificate of Appealability

It is recommended that a certificate of appealability be denied because jurists of reason would not find the foregoing debatable.

III. CONCLUSION

For the reasons set forth herein, it is respectfully recommended that the Petition be denied and that a certificate of appealability should be denied.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Respectfully submitted,

Date: December 26, 2019

MAUREEN P. KELLY
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Mark R. Hornak
Chief United States District Judge

JAMAR LASHAWN TRAVILLION
GS-0389
SCI Rockview
Box A
Bellefonte, PA 16823

All counsel of record via CM-ECF

E 0108

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1624

JAMAR L. TRAVILLION,
Appellant

v.

SUPERINTENDENT ROCKVIEW SCI;
DISTRICT ATTORNEY ALLEGHENY COUNTY;
ATTORNEY GENERAL OF THE COOMONWEALTH OF PENNSYLVANIA

(2:17—cv-00515)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant Jamar Travillion in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

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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/ Cheryl Ann Krause
Circuit Judge

Dated: December 16, 2022
PDB/cc: Jamar L. Travillion
Ronald M. Wabby, Jr., Esq.

FOLIO

APPENDIX
VOL. II

DISCARD THIS PAGE UPON FILING.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMAR LASHAWN TRAVILLION,

Petitioner,

v.

MARK GARMAN (Superintendent for the State Correctional Institution at Rockview); STEPHEN A. ZAPPALA (District Attorney for Allegheny County, Pennsylvania); ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

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

(Volume II of V, pp. 111-190)

JAMAR LASHAWN TRAVILLION
Petitioner*

Jamar L. Travillion
#GS 0389
SCI-Rockview
Box A
Bellefonte, PA 16823

* Pro se

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VOLUME IV

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VOLUME V

Court of Appeals & District Court Pleadings (cont'd)
Third Circuit No. 22-1624
District Court No. 2:17-cv-00515

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 266 WAL 2016
Respondent	:	
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
JAMAR LASHAWN TRAVILLION,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 6th day of December, 2016, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Patricia Nicola
As Of 12/6/2016

Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX G

G 0001

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMAR LASHAWN TRAVILLION,	:	No. 73 WDA 2015
Appellant	:	

Appeal from the PCRA Order, January 8, 2015,
in the Court of Common Pleas of Allegheny County
Criminal Division at Nos. CP-02-CR-0003767-2003,
CP-02-CR-0007963-2003, CP-02-CR-0008353-2003

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND OTT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MARCH 10, 2016**

Jamar Lashawn Travillion appeals from the order entered in the Court of Common Pleas of Allegheny County that dismissed his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA").

The PCRA court set forth the procedural history of this case as follows:

> On February 26, 2006, [appellant] was found guilty of the charges of second degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violation of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance. A presentence report was ordered in aid of sentencing and [appellant] was sentenced on May 15, 2006, to the mandatory life without parole for the conviction of second degree murder and a consecutive sentence of one hundred eight to two hundred sixteen months for his conviction of the

APPENDIX H

charge of robbery and a consecutive sentence of twelve to twenty-four months for his conviction of possessing a firearm without a license. [Appellant] did not file either post-sentencing motions or a direct appeal to the Superior Court.

On April 2, 2007, his appellate counsel filed a petition for post-conviction relief requesting that his appellate rights be reinstated. On June 4, 2007, this Court entered an order granting the reinstatement of his appellate rights and [appellant's] appellate counsel filed post-sentencing motions on June 15, 2007. On August 29, 2007, a hearing was held on those motions and an Order was entered on January 31, 2008 denying those motions. [Appellant] filed an appeal from the denial of his post-sentencing motions and was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In that concise statement, [appellant] suggested that there were four claims of error. Initially, [appellant] maintained that he was denied his right to counsel under the United States and Pennsylvania Constitutions. [Appellant] also maintained he was denied his right to testify at the time of his trial. [Appellant] also suggested that this Court erred when it denied his motion to suppress the evidence seized by the Ross Township Police, the identification made of him by one of the victims and his inculpatory statements made to the investigating homicide detectives. Finally, [appellant] contended that this Court intimidated one of his witnesses thereby causing that witness to refuse to testify.

This Court filed its 1925(b) Opinion and addressed all of the claims of error raised by [appellant's] appellate counsel, Thomas Farrell. Although Farrell alleged four claims of error in his statement of matters complained of on appeal, his appellate brief only addressed one issue, that being [appellant's] claim that he was denied his right to counsel. Following the decision by the Pennsylvania Supreme Court in ***Commonwealth v. Luccarelli, 601 Pa. 185, 971 A.2d 1173 (2009)***, this Court

> filed an addendum Opinion in which it maintained that [appellant] had forfeited his right to counsel as a result of his extremely dilatory conduct and obstructive behavior. On October 13, 2010, the Superior Court vacated [appellant's] sentences and remanded his cases [sic] for the purpose of a new trial. The Commonwealth filed an application for allowance of appeal to the Pennsylvania Supreme Court and Farrell responded to that application with a no answer letter. On April 29, 2011, the Pennsylvania Supreme Court issued an Order reversing the Superior Court's disposition of [appellant's] appeal and reinstated the judgment of sentence imposed on the basis of its decision in ***Commonwealth v. Luccarelli, supra.*** Farrell filed an application for reargument with the Pennsylvania Supreme Court, which was denied on July 6, 2011.
>
> On June 14, 2012, [appellant] filed a pro se petition for post-conviction relief and this Court appointed his current counsel, Robert S. Carey, to represent him in connection with that petition and to file an amended petition for post-conviction relief, which was done. A hearing was held on November 14, 2014, at which time [appellant] presented the testimony of his former counsel, Farrell. On January 8, 2015, this Court entered an Order denying [appellant's] petition for post-conviction relief from which he has taken the instant timely appeal. [Appellant] was required to file a concise statement of matters complained of on appeal and in complying with that directive, he has asserted two claims of error, the first being that his former appellate counsel was ineffective for failing to file a response to the Commonwealth's application for allowance of appeal to the Pennsylvania Supreme Court and, second, that his former appellate counsel was also ineffective for failing to address all of the issues that he originally raised in his statement of matters complained of on appeal.

PCRA court opinion, 3/10/15 at 2-4.

Appellant raises the following issues on appeal:

> 1. Whether the [PCRA] court erred in finding that appellate counsel was effective when the record establishes that Attorney Farrell had no reasonable strategic basis for failing to file a response to the Commonwealth's Petition for Allowance of Appeal and, based on counsel's omission, the Supreme Court reinstated [appellant's] judgment of sentence?
>
> 2. Whether the [PCRA] court erred in finding appellate counsel effective where the record shows that Attorney Farrell waived winning claims when he failed to brief meritorious issues that were previously identified in the Rule 1925 statement?

Appellant's brief at 3.

In PCRA appeals, our scope of review "is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party." ***Commonwealth v. Sam***, 952 A.2d 565, 573 (Pa. 2008) (internal quotation omitted). Because most PCRA appeals involve questions of fact and law, we employ a mixed standard of review. ***Commonwealth v. Pitts***, 981 A.2d 875, 878 (Pa. 2009). We defer to the PCRA court's factual findings and credibility determinations supported by the record. ***Commonwealth v. Henkel***, 90 A.3d 16, 20 (Pa.Super. 2014) (***en banc***). In contrast, we review the PCRA court's legal conclusions ***de novo***. ***Id.***

Appellant's issues assert ineffective assistance of appellate counsel.

> In evaluating claims of ineffective assistance of counsel, we presume that counsel is effective. ***Commonwealth v. Rollins***, 558 Pa. 532, 738 A.2d 435, 441 (Pa. 1999). To overcome this

> presumption, Appellant must establish three factors. First, that the underlying claim has arguable merit. ***See Commonwealth v. Travaglia***, 541 Pa. 108, 661 A.2d 352, 356 (Pa. 1995). Second, that counsel had no reasonable basis for his action or inaction. ***Id.*** In determining whether counsel's action was reasonable, we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis. ***See Rollins***, 738 A.2d at 441; ***Commonwealth v. (Charles) Pierce***, 515 Pa. 153, 527 A.2d 973, 975 (Pa. 1987). Finally, "Appellant must establish that he has been prejudiced by counsel's ineffectiveness; in order to meet this burden, he must show that 'but for the act or omission in question, the outcome of the proceedings would have been different.'" ***See Rollins***, 738 A.2d at 441 (quoting ***Travaglia***, 661 A.2d at 357). A claim of ineffectiveness may be denied by a showing that the petitioner's evidence fails to meet any of these prongs. ***Commonwealth v. (Michael) Pierce***, 567 Pa. 186, 786 A.2d 203, 221-22 (Pa. 2001); ***Commonwealth v. Basemore***, 560 Pa. 258, 744 A.2d 717, 738 n.23 (Pa. 2000); ***Commonwealth v. Albrecht***, 554 Pa. 31, 720 A.2d 693, 701 (Pa. 1998) ("If it is clear that Appellant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met."). In the context of a PCRA proceeding, Appellant must establish that the ineffective assistance of counsel was of the type "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt [or] innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). ***See also (Michael) Pierce***, 786 A.2d at 221-22; ***Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326, 333 (Pa. 1999).

Commonwealth v. Washington, 927 A.2d 586, 594 (Pa. 2007).

Appellant first complains that the PCRA court erred in finding attorney Farrell effective "when the record establishes that Attorney Farrell had no reasonable strategic basis for failing to file a response to the Commonwealth's Petition for Allowance of Appeal and, based on counsel's omission, the Supreme Court reinstated [appellant's] judgment of sentence." (Appellant's brief at 12.) To support that contention, appellant sets forth the following colloquy that took place between the Commonwealth and attorney Farrell at the PCRA hearing:

> Q You filed a no answer letter in response to the petition for allowance of appeal, right?
>
> A I did.
>
> Q Now working in the DA's Office in an appellate capacity, you would agree with me that's the standard practice in replying to petitions for allowance of appeal, correct?
>
> A To answer your question, that's correct and that's a wrong practice for a defense attorney to take in this day and age. That was wrong for me, I should have never done that and I haven't made that mistake since. Prior to that decision, the Supreme Court -- it was strongly believed that if you filed a letter and not respond with a brief, that they would -- you wouldn't red flag it, okay. So that's the purpose of not responding with a brief because you would red flag it. In this case, like I had done in the past as a defense attorney, I did not file a brief in response because I didn't want to red flag it. However, I found out from this case that other cases that the Supreme Court had changed the position. That when the Commonwealth takes an appeal that they look at their appeal real strongly and they will

> reverse without briefs or argument. So in this case I made a blunder, I made a mistake but I never will have that happen again in any other case and I have not done that since.

Notes of testimony, 11/14/14 at 17-18. Even though counsel admitted to making a mistake, we need not determine whether his failure to file a reply to the Commonwealth's application for allowance of appeal was reasonable because appellant has failed to demonstrate prejudice.

As aptly noted by the PCRA court and as reflected in the record, our supreme court reinstated appellant's judgment of sentence after finding that this court made an error of law when reversing the trial court's judgment of sentence and remanding for a new trial. (PCRA court opinion, 3/10/15 at 9; Docket #47.) After our supreme court entered that order, the record reflects that attorney Farrell filed an application for reconsideration in which he advanced his arguments. (Notes of testimony, 11/14/14 at 20.) Our supreme court denied appellant's application.[1] (***Id.***)

Therefore, regardless of whether attorney Farrell advanced his arguments in a reply to the Commonwealth's application for allowance of appeal or in an application for reconsideration, our supreme court rejected those arguments. As a result, appellant has not, and cannot, demonstrate prejudice, and this claim lacks merit.

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[1] We note that the certified record contains the order denying the application for reconsideration, but there is no sequence number associated with the entry.

Appellant next complains that appellate counsel was ineffective because he failed to raise certain claims on appeal that he raised in his Rule 1925(b) statement.

Here, attorney Farrell raised four issues in his Rule 1925(b) statement, but pursued only one issue on appeal.[2] At the PCRA hearing, attorney Farrell testified that he has several decades of appellate experience, and then he explained his strategy for selecting appellate issues, as follows:

> A What I do is I look at the brief – I'm sorry, I look at the transcript. I go through the transcript and I take copious notes, I have a

---

[2] Appellant raised the following issues in his statement of errors complained of on appeal:

> 1. Whether [appellant] was denied his 5th Amendment right to counsel during the trial under both the Pennsylvania and United States Constitution[s]?
>
> 2. Whether [appellant] was denied his absolute right to testify during trial pursuant to the Pennsylvania and/or United States Constitutions?
>
> 3. Whether the trial court erred in failing to grant the motion to suppress evidence?
>
> 4. Whether the trial court erred, and/or violated the [appellant's] due process, when it intimidated [appellant's] witness when the court informed the witness that he would be arrested for stating during testimony that he was a jitney driver?

Statement of errors complained of on appeal, 4/3/08; Docket #41. Appellant raised one issue on appeal: whether the trial court improperly deprived him of his right of counsel. (Docket #72, Appendix A (***Commonwealth v. Travillion***, No. 443 WDA 2008, unpublished memorandum (Pa.Super. filed October 13, 2010)).) In his brief, appellant mistakenly asserts that he raised two issues on direct appeal. (Appellant's brief at 18.)

pad. I don't read it like a novel but I go through the transcript and I take copious notes and read everything. I read the record, I write and have notes to make sure that I understand the record fully. . . .

I have raised almost every issue that has been objected to at trial. The reason why I do that is, if I look at an issue and I think it's really, really bad, sometimes I will not raise it but most of the time I will raise all of those issues in a concise statement to preserve. At that time, in that short period of time, I don't have time to write a brief. I don't have time to look at all the law and so forth. I'm trying to raise the issues, raise as many issues as I can -- that's really wrong. I raise all the issues that have been preserved. Now on some of them I look at it and say it's stupid, I'm not going to raise it in a concise statement. Things like sometimes the weight of the evidence and that kind of thing, I don't raise it. But for the most part, I raise all of the issues that have been preserved and that's what I do in a concise statement.

Q Mr. Farrell, so you're casting a [wider] net in the 1925 B statement than you would later in the brief?

A Absolutely. Many times I'll raise seven, eight, or maybe ten issues sometimes and I would never raise that in a brief. I would never do that in a brief. You raise two, three, four[] issues tops. I think the most I ever raised was five issues in a brief. But in a concise statement, you raise those issues, you ferret [sic] it out and you see what the trial court writes. And there's actually two cases that I had with Judge Cashman. One of them which is pending on appeal which is in front of the Supreme Court of Pennsylvania right now and the other has been reversed. In both cases I thought that the issues were frivolous.

I raised those and Judge Cashman wrote an opinion and after looking at his opinion, I realized maybe these claims did have merit and we did win both of them in Superior Court.

Q Your answer is, you said something along the lines "I would never raise ten issues in front of the Superior Court in my brief;" why is that?

A Well, Judge Aldisert's quote[3] where if you raise ten, most appellate courts think that they all have no issues. You can only win a new trial on one issue, you don't need two issues to win a trial so I try to be selective in most cases.

---

3 The approach to appellate advocacy embarked on by present counsel for Appellant brings to mind the words of the Honorable Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit:

> With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors. I have said in open court that when I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to ***any*** of them . . . [and] it is [this] presumption . . . that reduces the effectiveness of appellate advocacy.
>
> Aldisert, "The Appellate Bar: Professional Competence and Professional Responsibility -- A View From the Jaundiced Eye of the Appellate Judge," 11 Cap. U. L. Rev. 445, 458 (1982).

Commonwealth v. Robinson, 864 A.2d 460, 479-480 n.28 (Pa. 2004).

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> Q So Mr. Farrell, you would agree with me then that you're picking the best issue you think you have when you write your brief to the Superior Court?
>
> A I try to raise the best issue that I can. . . .

Notes of testimony, 11/14/14 at 12-15.

Here, attorney Farrell had a reasonable basis for pursuing one issue on appeal: he focused on the one issue that he determined was the most likely to prevail. His strategy comports with effective appellate advocacy, and his actions, therefore, were reasonable. Although our inquiry stops there, we note that appellant claims that he suffered prejudice because attorney Farrell's "omission denied the opportunity for complete appellate review." (Appellant's brief at 19.) Appellant, however, entirely fails to demonstrate how counsel's strategy so undermined the truth determining-process so that no reliable adjudication of his guilt or innocence could have taken place.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/10/2016

IN THE FIFTH JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	) CC No. 200303767; 200308353;
	) 200307963
vs.	) Superior Court No. 73WDA2015
JAMAR LASHAWN TRAVILLION	)

OPINION

On February 26, 2006, the appellant, Jamar Travillion, (hereinafter referred to as "Travillion"), was found guilty of the charges of second degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violation of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance. A presentence report was ordered in aid of sentencing and Travillion was sentenced on May 15, 2006, to the mandatory life without parole for the conviction of second degree murder and a consecutive sentence of one hundred eight to two hundred sixteen months for his conviction of the charge of robbery and a consecutive sentence of twelve to twenty-four months for his conviction of possessing a firearm without a license. Travillion did not file either post-sentencing motions or a direct appeal to the Superior Court.

On April 2, 2007, his appellate counsel filed a petition for post-conviction relief requesting that his appellate rights be reinstated. On June 4, 2007, this Court entered an order granting the reinstatement of his appellate rights and Travillion's appellate counsel filed post-sentencing motions on June 15, 2007. On

August 29, 2007, a hearing was held on those motions and an Order was entered on January 31, 2008 denying those motions. Travillion filed an appeal from the denial of his post-sentencing motions and was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In that concise statement, Travillion suggested that there were four claims of error. Initially, Travillion maintained that he was denied his right to counsel under the United States and Pennsylvania Constitutions. Travillion also maintained he was denied his right to testify at the time of his trial. Travillion also suggested that this Court erred when it denied his motion to suppress the evidence seized by the Ross Township Police, the identification made of him by one of the victims and his inculpatory statements made to the investigating homicide detectives. Finally, Travillion contended that this Court intimidated one of his witnesses thereby causing that witness to refuse to testify.

This Court filed its 1925(b) Opinion and addressed all of the claims of error raised by Travillion's appellate counsel, Thomas Farrell. Although Farrell alleged four claims of error in his statement of matters complained of on appeal, his appellate brief only addressed one issue, that being Travillion's claim that he was denied his right to counsel. Following the decision by the Pennsylvania Supreme Court in *Commonwealth v. Luccarelli, 601 Pa. 185, 971 A.2d 1173 (2009)*, this Court filed an addendum Opinion in which it maintained that Travillion had forfeited his right to counsel as a result of his extremely dilatory conduct and obstructive behavior. On October 13, 2010, the Superior Court vacated Travillion's

sentences and remanded his cases for the purpose of a new trial. The Commonwealth filed an application for allowance of appeal to the Pennsylvania Supreme Court and Farrell responded to that application with a no answer letter. On April 29, 2011, the Pennsylvania Supreme Court issued an Order reversing the Superior Court's disposition of Travillion's appeal and reinstated the judgment of sentence imposed on the basis of its decision in *Commonwealth v. Luccarelli, supra.* Farrell filed an application for reargument with the Pennsylvania Supreme Court, which was denied on July 6, 2011.

On June 14, 2012, Travillion filed a pro se petition for post-conviction relief and this Court appointed his current counsel, Robert S. Carey, to represent him in connection with that petition and to file an amended petition for post-conviction relief, which was done. A hearing was held on November 14, 2014, at which time Travillion presented the testimony of his former counsel, Farrell. On January 8, 2015, this Court entered an Order denying Travillion's petition for post-conviction relief from which he has taken the instant timely appeal. Travillion was required to file a concise statement of matters complained of on appeal and in complying with that directive, he has asserted two claims of error, the first being that his former appellate counsel was ineffective for failing to file a response to the Commonwealth's application for allowance of appeal to the Pennsylvania Supreme Court and, second, that his former appellate counsel was also ineffective for failing to address all of the issues that he originally raised in his statement of matters complained of on appeal.

In order to be eligible for post-conviction relief under the Post-Conviction Relief Act, the petitioner must meet the eligibility requirement as set forth in 42 Pa.C.S.A. §9543(a), which provides as follows:

> **§ 9543. Eligibility for relief**
>
> **(a) General rule.**—To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
>
> (i) currently serving a sentence of imprisonment, probation or parole for the crime;
>
> (ii) awaiting execution of a sentence of death for the crime; or
>
> (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
>
> (2) That the conviction or sentence resulted from one or more of the following:
>
> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
>
> (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
>
> (v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

<Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

It is clear that Travillion meets the requirements set forth in (a)(1) since he has been convicted of the crimes of second-degree murder, possession of a firearm without a license, receiving stolen property, possession of an offensive weapon, possession of a small amount of a controlled substance, resisting arrest, robbery, criminal attempt at criminal homicide, aggravated assault and recklessly endangering another person. He is currently serving a sentence of life without the possibility of parole for his conviction of second-degree murder. While it is apparent that Travillion's petition meets the eligibility requirements of the Post-Conviction Relief Act, it must also have been timely filed. Section 9545 of the *Post-Conviction Relief Act*[1] provides in pertinent part that:

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final . . .

[1] *42 Pa.C.S.A. §9545.*

This time limitation is jurisdictional in nature and cannot be waived for the sole purpose of reviewing the merits of the claims asserted in such a petition. The record in this case reveals that Travillion's petition was timely filed and, accordingly, this Court had jurisdiction to entertain that petition.

In reviewing a claim of ineffectiveness it is well settled that the law presumes that counsel was effective and that the petitioner asserting that claim of ineffectiveness bears the burden of proving it. *Commonwealth v. Khalil, 806 A.2d 415 (Pa. Super. 2002).* In *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),* the United States Supreme Court set forth the standards for the performance and prejudice for evaluating the conduct of counsel. These standards were adopted by the Pennsylvania Supreme Court in *Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987),* and require that a defendant prove a three-prong test, the first being that the claim currently being asserted has arguable merit; second, that counsel had no reasonable basis for his action or omission; and, third, that the defendant was prejudiced by his counsel's conduct. In *Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326, 333 (1999),* the Supreme Court set forth the burden of proof imposed upon a petitioner in establishing the claim of ineffectiveness.

> To show ineffective assistance of counsel which so undermined truth-determining process that no reliable adjudication of guilt or innocence could have taken place, postconviction petitioner must show: (1) that claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is reasonable probability that outcome of proceeding would have been different.

It is axiomatic that counsel's assistance is presumed to be effective and the petitioner has the burden of demonstrating otherwise. *Commonwealth v. Wright, 599 Pa. 270, 961 A.2d 119 (2008).* In demonstrating counsel's ineffectiveness the petitioner must prove that his underlying claim is of arguable merit, that his counsel's performance lacked a reasonable basis and that counsel's action or inaction caused him prejudice. *Commonwealth v. Gwynn, 596 Pa. 398, 943 A.2d 940 (2008).* In order to demonstrate prejudice, Hampton must how that there is a reasonable probability but for counsel's error, the outcome in his case would have been different. *Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203 (2001).* When it is clear that a party asserting the ineffectiveness of his counsel has failed to meet the prejudice prong of the ineffectiveness test, the claim may be dismissed on that basis alone without ever making a determination as to whether the other two prongs of the test had been met. *Commonwealth v. Rainey, 593 Pa. 67, 928 A.2d 215 (2007).* Failure to meet any prong of the test, however, would defeat an ineffectiveness claim since counsel is not ineffective for failing to raise meritless claims. *Commonwealth v. Peterkin, 538 Pa. 455, 649 A.2d 121 (1994).*

Travillion's first claim of error is that his former appellate counsel was ineffective for failing to respond to the Commonwealth's petition for allowance to take an appeal from the decision of the Superior Court vacating the judgment of sentences and remanding Travillion's cases for a new trial. At the time of the hearing on Travillion's petition, Farrell stated that he believed that he erred in not presenting an answer to that petition since he believed that had he presented an

answer, that the result might have been different. While Farrell may have believed that it was an error not to file an answer to the Commonwealth's application for allowance to take an appeal, the record in this case clearly reveals that that was not the case and Travillion was not prejudiced by Farrell's filing a no answer letter.

In reversing Travillion's convictions and remanding his case for trial, the Superior Court premised its decision on the basis that it concluded that the record failed to demonstrate that Travillion's behavior "unreasonably clog[ged] the machinery of justice or hamper[ed] and delay[ed] the state's efforts to effectively administrate justice". The Supreme Court in its Order reversing the Superior Court stated that the Superior Court's decision was "a plainly erroneous application of *Luccarelli*." The Supreme Court further went on to say:

> Some measure of deference must be shown to the trial court, which is in a better position to assess a defendant's sincerity and motivation in delaying a trial and to determine whether a defendant's conduct is genuine or obstructive. The trial court here correctly concluded that the record establishes that respondent's conduct was an orchestrated plan to manipulate the system. Accordingly, as contemplated by *Luccarelli*, respondent's behavior constituted extreme dilatory conduct sufficient to result in the forfeiture of his right to counsel.

The Supreme Court found that the Superior Court's interpretation of the decision in *Commonwealth v. Luccarelli, supra.* was patently erroneous and it is difficult to see what statements Farrell could have made in a response to the Commonwealth's application for allowance to take an appeal that would have dissuaded the Supreme Court from making the decision that it did. The Supreme Court was fully informed of Travillion's position with respect to this application for allowance to take an

appeal since Farrell testified that he put forth his position in his request for reargument which was rejected by the Supreme Court. This rejection of the request for reargument underscores the fact that even if Farrell had put forward his opposition to the Commonwealth's request for allowance to take an appeal, that the Supreme Court would not have been dissuaded from taking the action that it did. Finally, it should be noted that the Supreme Court did not need briefs or arguments to come to the conclusion that the Superior Court's action was clearly erroneous since it reversed the Superior Court by the issuance of an Order. Although Farrell may have believed that he made a mistake in this matter and has avowed to change his practice with respect to answers to petitions for allowance to take an appeal, there was no error in this case and, accordingly, Travillion was not prejudiced by this no answer letter.

Travillion next maintains that Farrell was ineffective for failing to brief all of the issues that he originally raised in his statement of matters complained of on appeal; in particular, the question of whether or not this Court properly decided Travillion's suppression motion. Farrell testified that he reviews the entire record to make a determination as to which claims of alleged error have merit and then raise only those issues which he believes that he has a reasonable chance of success in prevailing. Farrell's view of effective appellate advocacy is in accordance with the observations made by former United States Supreme Court Justice Robert H. Jackson and Judge Ruggero Aldisert. Justice Jackson, in an article on "*Efficacy before the United States Supreme Court", 37 Cornell L.Q. 1-5 (1951)*, stated:

> The mind of an appellate Judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as a number of assigned errors increase.

In *Commonwealth v. Ellis, 534 Pa. 176, 626 A.2d 1137, 1140-1141 (1993),* the Court recognized the validity of Judge Aldisert's view of effective appellate advocacy when it stated:

> Finally, both the Commonwealth and Superior Court are correct in emphasizing the importance of expert, focused appellate advocacy. While criminal defendants often believe that the best way to pursue their appeals is by raising the greatest number of issues, actually, the opposite is true: selecting the few most important issues succinctly stated presents the greatest likelihood of success. We concur with the view of an eminent appellate jurist, Judge Ruggero Aldisert, that the number of claims raised in an appeal is usually in inverse proportion to their merit and that a large number of claims raises the presumption that all are invalid. As Judge Aldisert puts it, "Appellate advocacy is measured by effectiveness, not loquaciousness." R. Aldisert, "The Appellate Bar: Professional Competence and Professional Responsibility-A View From the Jaundiced Eye of One Appellate Judge," 11 Cap.U.L.Rev. 445, 458 (1982).
>
> Com. v. Ellis, 534 Pa. 176, 183, 626 A.2d 1137, 1140-41 (1993)

Farrell made his assessment that his issue for success would be this Court's determination that Travillion had forfeited his right to counsel and that observation was initially proved to be correct as a result of the decision by the Superior Court. With respect to the remaining issues that he had initially identified. Farrell only believed that he might have had success with the question of whether or not this Court erred in denying Travillion's suppression motion. The other claims of error are predicated upon Travillion's belief that he was prevented from testifying and that this Court attempted to intimidate one of his witnesses. These three other

issues are resolved in this Court's original Opinion in connection with Travillion's direct appeal, which Opinion is incorporated herein by reference thereto. Parenthetically, with respect to the question of whether or not this Court erred in denying Travillion's suppression motion, it should be noted that the issue of whether Travillion had a legitimate suppression issue arose as a result of his interaction with the Ross Township Police at eleven o'clock at night. Travillion's car was parked behind a Bed, Bath & Beyond Store in an area where there had been a number of burglaries. When Travillion was asked to produce owner and operator information, he could only produce a passport and a rental agreement that disclosed that he was not a permitted driver of the rental car. In addition, the officer noted fertive movements being made by Travillion as he approached the car and also noticed the butt end of the revolver that Travillion was apparently trying to hid under the driver's seat. When he was taken to the police station, Travillion was advised of his Miranda rights and executed a written waiver of his rights prior to any interrogation being made. It is clear that there is no basis to grant his

suppression motion and this Court ruled correctly on the issue of his statements and the physical evidence found in his possession, which ultimately linked him to the homicide for which he was convicted.

BY THE COURT:

Cashman, A.J.

DATED: March 10, 2015

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 562 WAL 2010
	:	
Petitioner	:	Petition for Allowance of Appeal from the Order of the Superior Court entered October 13, 2010, at No. 443 WDA 2008, reversing the Judgment of Sentence of the Court of Common Pleas of Allegheny County entered May 15, 2006, at No. CP-02-CR-0003767-2003, and remanding.
v.	:	
JAMAR LASHAWN TRAVILLION,	:	
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 29th day of April 2011, the Petition for Allowance of Appeal is **GRANTED**, the Order of the Superior Court is **REVERSED** and the judgment of sentence is **REINSTATED**, pursuant to this Court's decision in Commonwealth v. Lucarelli, 971 A.2d 1173 (Pa. 2009).

A divided Superior Court panel, with one judge concurring in the result and one judge dissenting, reversed the trial court's judgment of sentence for second-degree murder and related crimes, and remanded to the trial court for a new trial, finding that the trial court improperly denied respondent his right to counsel. In so holding, the lead memorandum opined that the record failed to demonstrate that respondent's behavior "unreasonably clog[ged] the machinery of justice or hamper[ed] and delay[ed] the state's efforts to effectively administer justice." Super. Ct. Op. at 10, quoting Lucarelli, 971 A.2d at 1179. This was a plainly erroneous application of Lucarelli.

APPENDIX 5

30135

The trial court first determined that respondent had waived his right to counsel, as the trial court had done in Lucarelli. However, in the case *sub judice*, the trial court issued an addendum, concluding that respondent, in light of Lucarelli, had forfeited his right to counsel by his pattern of deliberate and dilatory behavior. That behavior included, *inter alia*, firing his original privately retained trial counsel, who was prepared to proceed to trial; refusing to hire new counsel; and refusing to meet and cooperate with two court-appointed lawyers.

Respondent's claim before the Superior Court that the trial court improperly deprived him of his right to counsel is specious. The trial court made every effort to accommodate respondent and to protect his right to counsel in spite of his obstructive behavior over a period of more than one year. While it is true that respondent was entitled to choose his own counsel, he was not "permitted to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice." Lucarelli, 971 A.2d at 1178-79. Further, respondent's refusal even to meet with court-appointed counsel illustrates his insistence on retaining private counsel. "Where a defendant knowingly and intelligently refuses appointed counsel while insisting on privately retained counsel without taking steps to secure such private counsel, the defendant must be prepared to accept the consequences of his or her choice." Id. at 1179.

Therefore, in accordance with Lucarelli, despite the initial finding of waiver of counsel by the trial court, we agree with the trial court's conclusion in its addendum -- that respondent forfeited his right to counsel. Some measure of deference must be shown to the trial court, which is in a better position to assess a defendant's sincerity and motivation in delaying a trial and to determine whether a defendant's conduct is genuine or obstructive. The trial court here correctly concluded that the record establishes that respondent's conduct was an orchestrated plan to manipulate the system. Accordingly, as

contemplated by Lucarelli, respondent's behavior constituted extremely dilatory conduct sufficient to result in the forfeiture of his right to counsel.

Madame Justice Orie Melvin did not participate in the consideration or decision of this matter.

Mr. Justice Saylor files a Dissenting Statement.

Judgment Entered April 29, 2011,

John A. Vaskov

DEPUTY PROTHONOTARY

J0137

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 562 WAL 2010
	:	
Petitioner	:	Petition for Allowance of Appeal from the Order of the Superior Court entered October 13, 2010, at No. 443 WDA 2008, reversing the Judgment of Sentence of the Court of Common Pleas of Allegheny County entered May 15, 2006, at No. CP-02-CR-0003767-2003, and remanding.
v.	:	
JAMAR LASHAWN TRAVILLION,	:	
	:	
Respondent		

DISSENTING STATEMENT

MR. JUSTICE SAYLOR **DECIDED: April 29, 2011**

I respectfully dissent from the per curiam, merits-based disposition of this case. The allocatur stage is normally reserved for making the threshold determination of whether to grant discretionary review, see Supreme Court IOP §5C, and as occurred here, the respondent ordinarily does not file a brief, as none is required. The majority, however, undertakes merits review at the allocatur stage to conclude that Respondent's behavior constituted extremely dilatory conduct sufficient to result in the forfeiture of his right to counsel under Commonwealth v. Lucarelli, 971 A.2d 1173 (Pa. 2009).

I continue to adhere to the view that the Court should exercise greater restraint at the discretionary review stage. Cf. Progressive N. Ins. Co. v. Henry, 4 A.3d 153 (Pa. 2010) (Saylor, J., dissenting); County of Berks v. Int'l Bhd. of Teamsters Local Union No. 429, 963 A.2d 1272, 1272-73 (Pa. 2009) (Saylor, J., dissenting). While, like the intermediate court, I understand the trial court's frustration with the difficult and trying problems presented by

Respondent's actions, I do not subscribe to circumventing briefing and ordinary consideration by this Court, given the factual dynamics. Cf. id.; Supreme Court IOP §3(B)(5).

J. A14035/10

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

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMAR LASHAWN TRAVILLION, Appellant	:	NO. 443 WDA 2008

Appeal from the Judgment of Sentence May 15, 2006
In the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0003767-2003

BEFORE: ALLEN, COLVILLE* AND CLELAND*, JJ.

MEMORANDUM: FILED: OCTOBER 13, 2010

Appellant, Jamar Lashawn Travillion (Travillion), appeals the judgment of sentence of the Court of Common Pleas of Allegheny County entered on May 15, 2006. Travillion argues the trial court improperly denied him his right to counsel. Based on the record presented for our review, we agree. Accordingly, we reverse the judgment of sentence and remand for a new trial.

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

> On February 26, 2006, [Travillion] was found guilty of the charges of second degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violation of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance. A presentence report was ordered in aid of sentencing and Travillion was sentenced on May 15, 2006,

* Retired Senior Judges assigned to the Superior Court.

APPENDIX K

K0140

> to the mandatory life without parole for the conviction of second degree murder and a consecutive sentence of one hundred eight to two hundred sixteen months for his conviction of the charge of robbery and a consecutive sentence of twelve to twenty-four months for his conviction of possessing a firearm without a license. Travillion did not file either post-sentencing motions or a direct appeal to the Superior Court.
>
> On April 2, 2007, his current appellate counsel filed a petition for post-conviction relief requesting that his appellate rights be reinstated. On June 4, 2007, [the trial court] prepared an order granting the reinstatement of his appellate rights and Travillion's appellate counsel filed post-sentencing motions on June 15, 2007. On August 29, 2007, a hearing was held on those motions and an Order was entered on January 31, 2008 denying those motions. Travillion filed an appeal from the denial of his post-sentencing motions and was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In that concise statement, Travillion has suggested that there are four claims of error. Initially, Travillion maintains that he was denied his right to counsel under the United States and Pennsylvania Constitutions. . . .

Trial Court Opinion (T.C.O. I), 7/6/09, at 2-3.

On appeal, Travillion raises only one issue for our review: whether the trial court improperly deprived him of his right to counsel.

In its first opinion, the trial court rejected the claim because it found Travillion, by his conduct, waived his right to counsel. T.C.O. I at 14-15. Later, in an amended opinion, the trial court stated Travillion forfeited his right to counsel, adopting the reasoning of the Supreme Court decision in ***Commonwealth v. Lucarelli***, 601 Pa. 185, 971 A.2d 1173 (2009). Addendum to Opinion (T.C.O. II), 7/20/09, at 2. We have to determine,

therefore, whether the trial court erred in finding Travillion forfeited his right to counsel "by firing his original trial counsel, who was prepared to proceed to trial, refused to hire new counsel and, finally, refused to meet and cooperate with two lawyers who were appointed for him by [the trial court]." ***Id.***

In ***Lucarelli***, our Supreme Court stated:

> The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense. Similarly, Article I, Section 9 of the Constitution of this Commonwealth affords to a person accused of a criminal offense the right to counsel. However, the constitutional right to counsel of one's own choice is not absolute. Rather, the right of an accused individual to choose his or her own counsel, as well as a lawyer's right to choose his or her clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice. Thus, while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice.

Lucarelli, 601 Pa. at 193-94, 971 A.2d at 1178-79.

Our Supreme Court also noted:

> Like the Superior Court in ***Commonwealth v. Thomas***, 879 A.2d 246, 257-59 (Pa. Super. 2005), we find persuasive the distinction between waiver and forfeiture made by the Third Circuit Court of Appeals in ***United States v. Goldberg***, 67 F.3d 1092, 1099-1101 (3d Cir. 1995). Waiver is "an intentional and voluntary relinquishment of a known right." ***Id.*** at 1099. By contrast, forfeiture, as defined by the Third Circuit, does not require that the defendant intend to relinquish a right, but rather may be the result of the defendant's "extremely serious misconduct" or "extremely dilatory conduct."

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> ***United States v. Thomas***, 357 F.3d 357, 362 (3d Cir. 2004) (quoting ***Goldberg***, ***supra*** at 1100-02). . . . .
>
> The consequences of the distinction between waiver of the right to counsel and forfeiture of the right to counsel are significant because, we now hold, Pa.R.Crim.P. 121 and its colloquy requirements do not apply to situations where forfeiture is found. To hold otherwise would permit a recalcitrant defendant to engage in the sort of obstructive behavior that mandates the adoption of the distinction between forfeiture and waiver in the first instance. Should an unrepresented defendant choose not to engage in the colloquy process with the trial court, were there no provision for forfeiture of counsel, that defendant could impermissibly clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice. Such a result would be untenable. ***See United States v. Thomas***, ***supra*** at 362 ("Forfeiture can result regardless of whether the defendant has been warned about engaging in misconduct, and regardless of whether the defendant has been advised of the risks of proceeding pro se.") (quoting ***Goldberg***, ***supra*** at 1101).

Id. at 194-95, 971 A.2d at 1179.

As noted above, the trial court found Travillion forfeited his right to counsel by engaging in misconduct. Specifically, the trial court found Travillion engaged in the following acts of misconduct: (i) fired his original trial counsel who was prepared to proceed to trial; (ii) refused to hire new counsel, and (iii) refused to meet and cooperate with two lawyers who were appointed for him by the trial court. T.C.O II at 2.

The trial court summarized the first finding as follows:

> Travillion initially retained private counsel[,] William Difenderfer, to represent him and had his case continued three times in order for Difenderfer to prepare for trial. The case was scheduled for trial in December 2004 and another request for a continuance was made which was

denied. A hearing was held on Travillion's motion to suppress and that motion was denied. Following the denial of that motion, the parties were directed to proceed to the jury room for the selection of the jury. At that point in time, Difenderfer indicated to the [trial court] that Travillion wanted to address certain issues prior to jury selection. [The trial court] informed Difenderfer and Travillion that it would not discuss the matters pertaining to a case with the defendant but, rather, it would discuss those matters with defendant's counsel. Difenderfer advised [the trial court] that he had reviewed all of the concerns that Travillion had and believed that none of the issues that Travillion wanted to raise had any merit and he would not raise those issues. Travillion became insistent that he personally wanted to discuss those matters, however, he was instructed to proceed to the jury room for selection.

Once in the jury room, Travillion became animated and overbearing, frustrating the jury selection process. Travillion returned to the courtroom once again insisting that he be heard personally on the issues that he wished to raise. [The trial court] advised Travillion that he was represented by counsel and that any issues that were to be raised regarding his case had to be raised by his counsel. His counsel once again indicated that the issues Travillion wished to raise were of no moment to his case. Again, Travillion was told to return to the jury room to select a jury; however, he advised his counsel that he would not participate in jury selection. Travillion was then sent to the bullpen to await the selection of a jury. While in his holding cell, Travillion created a disturbance in that facility and once again was returned to the [c]ourtroom and he was advised that the only way that [the trial court] would listen to his arguments on the issues that he wished to raise would be if he was representing himself but since he had counsel, he could either elect to proceed with jury selection or to be returned to the jail.

Travillion once again, went to the jury room to complete jury selection only to return to the [c]ourtroom and [the trial court] was advised by Difenderfer that he had been fired. After asking him over twenty times as to whether or not he had fired Difenderfer, and never receiving an

> intelligible answer from Travillion, [the trial court] received an acknowledgment from Difenderfer that, in fact, he had been fired by Travillion. [The trial court] then permitted Travillion to raise his issues, all of which had nothing to do with his case. The real reason for Travillion's unwillingness to participate in the jury selection process was the fact that he wanted another continuance and that request was denied. Travillion was then advised that since he was going to represent himself, he would be held responsible for his actions and that he would be bound by the same rules as a lawyer and would be expected to understand the law that was applicable to his case, the Rules of Evidence, and the Rules of Criminal Procedure as they applied to the charges that had been filed against him.
>
> Following his dismissal of Difenderfer, Travillion indicated that he was unprepared to pick a jury and he requested a continuance so that he could hire a new lawyer. Travillion's case was then continued until January, 2006, in hopes that Travillion would hire a new lawyer so that a prompt trial date could be scheduled.

T.C.O. I at 14-16.

After reviewing the record, we agree with the trial court that Travillion discharged his counsel on the eve of the trial and his conduct up to that point was clearly disruptive. Despite Travillion's conduct, it appears, however, the trial court interpreted and treated Travillion's discharge of his privately retained counsel as a waiver of counsel for the purposes of that hearing,[1] even though it did not conduct a Pa.R.Crim.P. 121 colloquy.[2]

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[1] It is highly unlikely the trial court would have found Travillion had forfeited his right to counsel but simultaneously grant Travillion leave of court to hire another counsel.

[2] "If a defendant desires to [waive his right to counsel], he must petition the court and the court must follow the appropriate legal procedure for securing a valid waiver of counsel." ***Commonwealth v. McDonough***, 571 Pa. 232,

Next, the trial court found Travillion refused to hire new counsel. T.C.O. II at 2. Specifically, the trial court found "[d]espite giving Travillion more than a year to hire a new lawyer, he did not do so and [the trial court], on its own motion, appointed the Public Defender's Office to assist him and/or to represent him." T.C.O. I at 16.

A review of the record reveals a letter dated August 24, 2005, from Travillion to the trial judge, apparently in response to an inquiry made by the court asking about the status of his search for counsel. It is not clear from the record how or when the trial court contacted Travillion. However, in his response, Travillion explained he had been unable to hire a private attorney because previous counsel refused to return to him money he paid as a retainer, he had been in the disciplinary unit of the prison for an extended period of time, and those attorneys who he was able to contact either did not respond to him or declined to represent him.

The trial court, presumably in light of Travillion's response of August 24, 2005, concluded Travillion was "unable to hire private legal counsel to

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235, 812 A.2d 504, 506 (2002) (citing Pa.R.Crim.P. 121). Because the trial court found Travillion waived, not forfeited, his right to counsel, Pa.R.Crim.P. 121 and its colloquy requirements were applicable, ***see also Commonwealth v. Houtz***, 856 A.2d 119 (Pa. Super. 2004), and are still applicable, even after ***Lucarelli*** (***see Lucarelli***, 601 Pa. at 195, 971 A.2d at 1179).

represent him," and appointed the Public Defender of Allegheny County to represent him as standby counsel. Order, 8/31/05, at 1.[3]

In the meantime, in a *pro se* "Notice" addressed to the Allegheny County Clerk of Courts,[4] Travillion asked the Clerk to accept his *pro se* filings until he found private counsel.

After Travillion learned the trial court had appointed the Allegheny County Public Defender's Office as standby counsel, Travillion filed an objection to the appointment of the Office in any capacity because of an alleged conflict of interest. Objection of Order, 9/9/05, at 1. Travillion, however, also clearly asked the trial court to "appoint counsel" while he was seeking private representation.

Therefore, there is no evidence in the record to support the conclusion Travillion refused to hire new counsel. The record only establishes Travillion was unable to hire private counsel because he did not have the opportunity and the financial ability to do so.

Finally, the trial court found Travillion refused to cooperate and meet with appointed counsel. T.C.O. II at 2. Specifically, the trial court found:

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[3] Despite the fact the Notice was processed on September 2, 2005, it appears the trial court order of August 31, 2005 was in fact in response to the Notice.

[4] The Notice is dated August 30, 2004. A stamp from the Allegheny County Clerk of Courts appears on the Notice which indicates the document was processed on September 2. The year the Notice was filed is not clear from the document itself. Based on its content, however, it is clear the Notice was processed on September 2, 2005.

> Both Christopher Patarini and Sumner Parker of the Public Defender's Office of Allegheny County attempted to meet with Travillion but he refused to discuss his case with them. Their efforts to meet with Travillion were further complicated by the fact that Travillion spent more than six months "in the hole" as a result of his being a disciplinary problem at the Allegheny County Jail.

T.C.O. I at 16.

The trial court presumably reached its conclusions based on the following exchange:

> [Commonwealth]: [T]he Commonwealth is going to request that the [c]ourt instruct the jury, if [Travillion] says to the jury that he wants an attorney and that he is being forced to represent himself, then at that point I am going to ask the [c]ourt for an instruction to the jury just basically letting the jury know that [Travillion] has had over a year to obtain counsel. The [c]ourt has made every attempt to provide him counsel, and at this point, they are to ignore his comments regarding the fact he wants counsel.
>
> [Travillion]: If I may respond, Your Honor. I have not had over a year to obtain counsel. I am being forced to go pro se. I am not able to represent myself, and I do intend to tell the jury that I am being forced to represent myself, Your Honor.
>
> As I have said, I have been locked in solitary confinement for various reasons which I have already presented to the [c]ourt. I need a lawyer. I need someone to help me.

N.T. Trial, Vol. I, 2/9/06, at 8-9.

Additionally:

> Travillion: [Counsel for Commonwealth] has made a statement that they intended – they made every effort to give me counsel or whatever she said.

> Mr. Patarini and Mr. Sumner Parker came to the jail, who are public defenders, I may also add, 23 days before I had to go to trial, Your Honor. That is totally – that is insufficient time to prepare for the case, Your Honor.
>
> [Counsel for Commonwealth] has had three years to prepare for this case. The Court is trying to force me to go to trial with unprepared counsel or giving me the option of going pro se, which is a violation of my Sixth Amendment right and also my Article I, Section 9 right of the Pennsylvania Constitution, Your Honor.
>
> I feel that I have the right to adequate counsel to assist me in preparing and arguing the case for me, and I do believe that I have a right –
>
> [Trial Court]: You can have a seat.

Id. at 11.

The trial court's conclusion Travillion refused to meet and cooperate with counsel, and therefore forfeited his right to counsel, is simply not supported by the record. In addition, while it is obviously true Travillion did not obtain counsel in the year after he discharged his original counsel, the mere passage of time, standing alone, is not sufficient to support the trial court's conclusion he has forfeited his right to counsel. To support a finding Travillion had forfeited his right to counsel, there must be facts in the record to demonstrate he had chosen to "unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice." ***Lucarelli***, 601 Pa. at 194, 971 A.2d at 1179 (citation omitted). He certainly may have chosen to do that, but this record does not establish it.

Travillion has presented difficult and patience trying problems for the trial court. Nevertheless, there is nothing in the record from which we can conclude that the trial court either held a sufficient Pa.R.Crim.P. 121 waiver of counsel hearing, or from which we can conclude Travillion had forfeited his right to counsel. Since a defendant is entitled to counsel unless he either waives counsel or forfeits counsel, and since this record does not establish that he has done either, we are constrained to reverse the judgment of sentence and remand for a new trial.

Judgment of sentence reversed. Case remanded for a new trial.

COLVILLE, J. concurs in result.

ALLEN, J. files a Dissenting Memorandum.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

DATE: October 13, 2010

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMAR LASHAWN TRAVILLION, Appellant	:	No. 443 WDA 2008

Appeal from the Judgment of Sentence May 15, 2006
In the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0003767-2003

BEFORE: ALLEN, COLVILLE* AND CLELAND*, JJ.

DISSENTING MEMORANDUM BY ALLEN, J.:

I respectfully dissent. Upon my review of the record, I conclude that Appellant's dilatory conduct throughout the proceedings resulted in the forfeiture of his right to counsel. In ***Commonwealth v. Lucarelli***, 971 A.2d 1173 (Pa. 2009), our Supreme Court adopted the forfeiture of counsel doctrine. In ***Lucarelli***, the Court first discussed the right to counsel and waiver of the right to counsel:

> The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense. ***Rothgery v. Gillespie County***, 128 S. Ct. 2578, 2583 n.8, 171 L. Ed. 2d 366 (2008). Similarly, Article I, Section 9 of the Constitution of this Commonwealth affords to a person accused of a criminal offense the right to counsel. ***Commonwealth v. McDonough***, 812 A.2d 504, 506 (Pa. 2002). However, the constitutional right to counsel of one's own choice is not absolute. ***Commonwealth v. Randolph***, 873 A.2d 1277, 1282

* Retired Senior Judges assigned to the Superior Court.

> (Pa. 2005) (citing and quoting ***Commonwealth v. McAleer***, 748 A.2d 670, 673-74 (Pa. 2000)). Rather, the right of an accused individual to choose his or her own counsel, as well as a lawyer's right to choose his or her clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice. ***Randolph, supra*** at 1282. Thus, while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice. ***Id.***
>
> We have previously stated that by insisting on particular counsel who is unavailable or by insisting on private counsel but failing to take any steps to retain an attorney, a defendant may be deemed to have waived the right to have counsel of his or her choice. ***Commonwealth v. Szuchon***, 484 A.2d 1365, 1376 (Pa. 1984). Where a defendant knowingly and intelligently refuses appointed counsel while insisting on privately retained counsel without taking steps to secure such private counsel, the defendant must be prepared to accept the consequences of his or her choice. ***Id.*** at 1377. Although we framed the issue as one of waiver in ***Szuchon***, we now conclude that a more precise analysis requires us to recognize the distinction between "waiver" of the right to counsel and "forfeiture" of the right to counsel.

Id. at 1178-79.

The ***Lucarelli*** Court then formally adopted the forfeiture of counsel doctrine:

> Like the Superior Court in ***Commonwealth v. Thomas***, 879 A.2d 246, 257-59 (Pa. Super. 2005), we find persuasive the distinction between waiver and forfeiture made by the Third Circuit Court of Appeals in ***United States v. Goldberg***, 67 F.3d 1092, 1099-1101 (3d Cir. 1995). Waiver is "an intentional and voluntary relinquishment of a known right." ***Id.*** at 1099. By contrast, forfeiture, as defined by the Third Circuit, does not require that the defendant intend to relinquish a right, but rather may be the result of the defendant's "extremely serious misconduct" or "extremely dilatory conduct." ***United States v. Thomas***, 357 F.3d 357, 362 (3d Cir. 2004) (quoting ***Goldberg, supra*** at 1100-02). ***See also Commonwealth v. Coleman***,

> 905 A.2d 1003, 1006-08 (Pa. Super. 2006) (affirming a finding of forfeiture where defendant, who had the means to retain counsel, appeared without counsel or engaged in behavior that forced counsel to withdraw).
>
> The consequences of the distinction between waiver of the right to counsel and forfeiture of the right to counsel are significant because, we now hold, Pa.R.Crim.P. 121 and its colloquy requirements do not apply to situations where forfeiture is found. To hold otherwise would permit a recalcitrant defendant to engage in the sort of obstructive behavior that mandates the adoption of the distinction between forfeiture and waiver in the first instance.

Id. at 1178-79.

Here, while represented by private counsel, Appellant was granted three continuances to prepare for his case. On the eve of trial, December 3, 2004, during jury selection, Appellant's counsel requested another continuance because Appellant believed that counsel was unprepared and failed to obtain materials necessary for his defense. The trial court denied the request, finding that there was no legal or factual basis upon which to grant the continuance.

During jury selection, Appellant "became animated and overbearing, frustrating the jury process." Trial Court Opinion (T.C.O.), 7/06/09, at 14. Appellant insisted that he wanted to raise issues personally. The trial court informed Appellant that since he had counsel, any issues that were to be raised had to be raised by his counsel. Appellant then stated that he did not want to participate in the jury selection process, and he returned to his holding cell, where he caused a disturbance. The trial court found that the

"real reason for [Appellant's] unwillingness to participate in the jury selection process was the fact that he wanted another continuance and that request was denied." T.C.O., 7/06/09, at 15. The trial court's finding is supported by the record.

Appellant later returned to the courtroom for jury selection, and he again sought to raise issues on his own behalf. The trial court advised Appellant that it would not entertain his issues because Appellant had counsel. Appellant then fired his counsel, claiming that counsel was ineffective in preparing his case. The trial court, after finding that Appellant's reasons for dismissing his counsel were frivolous, warned Appellant that if he terminated representation, he may have to proceed to trial *pro se*.

On December 6, 2004, Appellant requested a continuance so he could hire another private attorney. The trial court continued Appellant's case until January 2006 in order for Appellant to retain private counsel. The trial court instructed Appellant that this would be more than sufficient time for him to retain counsel.

Eight months later, on August 24, 2005, Appellant informed the trial court that he had not yet retained "adequate counsel" to represent him. Appellant maintained that he did not have sufficient funds to hire the particular attorneys that he wanted to represent him; that some of the attorneys he contacted did not want to take his case; and that he spent

considerable time in the Disciplinary Housing Unit, which restricted his ability to contact and hire a lawyer. On August 31, 2005, the trial court appointed the public defender's office to represent Appellant as standby counsel. On September 9, 2005, Appellant filed an objection to the appointment, claiming that he did not want to be represented by the public defender's office "in any capacity." Docket Entry #12. Appellant stated that the public defender's office was ineffective in representing him in a prior criminal proceeding. ***Id.*** For this reason, Appellant requested that the trial court "remove the public defender's office from his case and appoint counsel able and willing to prepare an adequate defense . . . until [Appellant] was able to hire effective representation." ***Id.***

In the meantime, Appellant directed the clerk of courts to accept his *pro se* filings, and he filed various legal documents *pro se* in preparation for his case. Despite Appellant's insistence that he did not want to be represented by the public defender's office, two public defenders visited Appellant three weeks before trial. Appellant refused to cooperate with the public defenders.

Appellant proceeded to trial *pro se*. At the trial, Appellant again voiced his position that the public defender's office was "inadequate," and claimed that the trial court effectively forced him to go to trial "with unprepared counsel" or to proceed "*pro se*." N.T. at 11, 1028. Aside from these bald

allegations that the public defender's office was incompetent, Appellant proffered no reasonable excuse for the absence of counsel.

In situations similar to the circumstances presented here, courts have found that a defendant forfeited his right to counsel. For example, in ***Wilkerson v. Klem,*** 412 F.3d 449, 451-56 (3d Cir. 2005), a case cited favorably in ***Lucarelli***, the Third Circuit found that this Court did not act unreasonably in applying the forfeiture doctrine.

In ***Wilkerson***, the defendant, on March 16, 1998, informed the trial court that he wanted his current counsel to "step down," and the trial court permitted counsel to withdraw. The trial court then scheduled the trial date less than a month later, on April 13, 1998, and advised the defendant that it was necessary for him to hire another attorney. The trial court also advised the defendant that if he could not afford an attorney, he could seek representation from the public defender's office.

On April 13, 1998, the defendant appeared for trial without counsel, and the trial court compelled the defendant to proceed to trial *pro se*. On appeal, this Court affirmed the judgment of sentence, finding that the defendant forfeited his right to counsel. Our Supreme Court denied review.

In a subsequent habeas proceeding, the Middle District of Pennsylvania denied relief, and the Third Circuit affirmed. In so doing, the Third Circuit upheld the application of the forfeiture doctrine to a defendant who was "duly notified of the date of his trial, who has been advised to obtain counsel

in sufficient time to be ready for trial, and who appears on the scheduled date without counsel and with no reasonable excuse for his failure to have counsel present." ***Id.*** at 454-56 (citing ***Commonwealth v. Wentz***, 421 A.2d 796, 800 (Pa. Super. 1980)). The Third Circuit emphasized that the rationale behind applying the forfeiture doctrine is that courts must be able to preserve their ability to conduct trials. ***Id.*** at 455 (quoting ***Fischetti v. Johnson***, 384 F.3d 140, 146 (3d Cir. 2004)).

In ***State v. Clay***, 11 S.W. 3d 706 (Mo. Ct. App. 1999), an indigent defendant dismissed his attorney on the eve of trial, and the court appointed the defendant another attorney. On the day of trial, the defendant dismissed his second attorney, but nevertheless claimed that he wanted to be represented by a lawyer. The trial court declined to appoint the defendant another attorney and denied the defendant's request for a continuance. The Missouri Court of Appeals found that the defendant forfeited his right to counsel:

> [The defendant] maintains that the court cannot imply a waiver of counsel as he did not have the means to hire counsel. The "implied by conduct" cases have arisen where non-indigent defendants refuse to retain counsel and also refuse to waive their right to counsel. Although [the defendant] was indigent, we believe those cases govern the issues before us. [The defendant] had a pattern of refusing to cooperate with assigned counsel and, at the same time, maintaining that he wanted to be represented by counsel - but not the counsel appointed to him. . . . It is evident that [the defendant] was playing the system in the same way that a non-indigent defendant does when he refuses to hire counsel.
>
> * * * *

> [The defendant], as an indigent defendant, was entitled to appointed counsel. . . . "A person accused of a felony has a constitutional right to have a fair and reasonable opportunity to secure counsel of his own choosing, but the accused in a criminal proceeding has no absolute right to be represented by counsel of his own choosing." ***State v. Jefferies***, 504 S.W.2d 6, 7 (Mo. 1974). An indigent defendant is entitled to the appointment of counsel. However, that right does not give the indigent defendant an entitlement to any particular attorney. ***State v. Rollie***, 585 S.W.2d 78, 85 (Mo. App. 1979).
>
> * * * *
>
> We hold that under the circumstances here . . . [the defendant's] pattern of behavior in "firing" his public defenders without justification and making it clear that he wanted to be represented by other counsel constituted an implied waiver in this case.

Id. at 714.

Finally, in ***United States v. Kelm***, 827 F.2d 1319, 1322 (9th Cir. 1987), *overruled on other grounds by* 493 F.2d 913 (9th Cir. 2007), the court found that the defendant's continued refusal to retain counsel or to accept appointed counsel was an attempt to delay trial, and thus, constituted a waiver of the right to counsel. ***See also Wenzel v. State***, 185 S.W. 3d 715, 717 (Mo. Ct. App. 2006) ("Movant's pattern of behavior in refusing to accept public defender representation without justification and his insistence on appointed counsel other than public defenders amounted to an implied waiver of his right to appellate counsel in this case."); ***Meyer v. Sargent***, 854 F.2d 1110, 1113 (8th Cir. 1988) ("[T]he right to counsel is a shield, not a sword. A defendant has no right to manipulate his right for the

purpose of delaying or disrupting the trial.") (citation omitted); ***Siniard v. State,*** 491 So.2d 1062, 1064 (Ala. Crim. App. 1986) (finding forfeiture when a defendant failed to retain counsel after eight months and two continuances); ***United States v. Brown***, 591 F.2d 307, 310 (5th Cir. 1983) ("In this case, the district court explained to Brown that he was not entitled to appointed counsel of his own choosing. Brown's persistence in refusing to accept any counsel except that of his own choosing and his insistence on proceeding [*pro se*] can only be construed as a knowing and intelligent waiver of counsel").

I conclude that the facts of this case are a hybrid of the situations presented in ***Wilkerson***, ***Clay*** and ***Kelm***. Here, on the eve of trial, Appellant fired his counsel and disrupted the jury selection process, apparently for the sole purpose of delaying trial. The trial court, in an abundance of caution, continued the case for over one year to provide Appellant with sufficient time to obtain new private counsel. Eight months later, Appellant informed the trial court that he was unable to obtain the private counsel that he wanted, and the trial court appointed the public defender's office to assist Appellant. Appellant refused to be represented by the public defender's office "in any capacity," alleging that in a prior criminal proceeding, their representation was "inadequate." Docket Entry #12. Appellant, instead, requested that the trial court appoint him counsel that

was "able and willing to prepare an adequate defense" until he found private counsel. ***Id.***[1]

Appellant, however, did not obtain private counsel, and he appeared on the day of trial without any reasonable excuse as to why he did not have counsel. The record established that Appellant wanted nothing to do with the public defender's office, and Appellant's decision to rebuff their assistance evidenced his insistence that he retain the services of private counsel or counsel that he believed to be "adequate." "Where a defendant knowingly and intelligently refuses appointed counsel while insisting on privately retained counsel without taking steps to secure such private counsel, the defendant must be prepared to accept the consequences of his or her choice." ***Lucarelli***, 971 A.2d at 1178 (citation omitted). The trial court previously warned Appellant that he would have to proceed *pro se* if did not obtain counsel. Although Appellant baldly alleged on multiple occasions that his private counsel and the public defender's office were inadequate, these unsubstantiated assertions are insufficient to suspend the trial until Appellant finds counsel worthy of his confidence.

"[W]hile defendants are entitled to choose their own counsel, they should not be permitted to unreasonably clog the machinery of justice or

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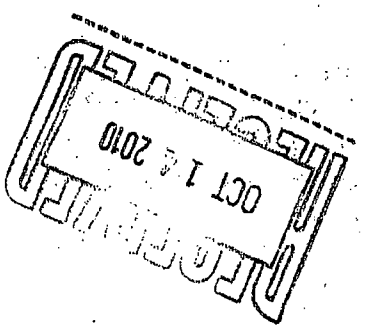
[1] I note that while Appellant continued his quest to retain private counsel, the trial court was under no obligation to appoint Appellant counsel of his own choosing. ***See*** 66 A.L.R. 3d 996, at § 3 (stating that a defendant "has no right to demand of a court that a particular attorney, or particular attorneys, be appointed to represent him."); ***Clay, supra***.

hamper and delay the state's efforts to effectively administer justice." ***Lucarelli***, 971 A.2d at 1179. Based upon the above facts, I conclude that Appellant's deliberate and dilatory conduct resulted in forfeiture of his right to counsel. The trial court found that Appellant "wanted to dictate how the system of justice was to operate with respect to his case," T.C.O., 7/06/09, at 20, and its finding is supported by the record. Appellant was advised to get counsel well in advance of the date of his trial, and he appeared on the scheduled date without counsel and with no reasonable excuse for his failure to have counsel present. Accordingly, I conclude that Appellant's behavior constituted extremely dilatory conduct, sufficient to result in the forfeiture of his right to counsel. Therefore, and unlike the Majority, I would affirm the judgment of sentence. For these reasons, I respectfully dissent.



IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	CC No. 200303767; 200307963;
	)	200308353
vs.	)	Superior Court No. 443WDA2008
JAMAR LASHAWN TRAVILION	)	

ADDENDUM TO OPINION

Previously this Court filed its Opinion in the above-captioned case on July 6, 2009. Subsequent to the filing of that Opinion, the Supreme Court issued its Opinion in the case of the *Commonwealth v. Lucarelli, 971 A.2d 1173 (Pa. 2009).* This case dealt with the same question raised in Travillion's appeal concerning his right to counsel. This Court adopts the reasoning, rationale and decision of the Pennsylvania Supreme Court in the *Commonwealth v. Lucarelli, supra.*, in that when reviewing the entire record of Travilllion's case it is clear that he forfeited his right to counsel by firing his original trial counsel, who was prepared to proceed to trial, refused to hire new counsel and, finally, refused to meet and to cooperate with two lawyers who were appointed for him by this Court.

CASHMAN, J.

DATED: 7/20/09

APPENDIX L

L 0162

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	CC No. 200303767; 200307963;
	)	200308353
vs.	)	Superior Court No. 443WDA2008
JAMAR LASHAWN TRAVILION	)	

OPINION

On February 26, 2006, the appellant, Jamar Travillion, (hereinafter referred to as "Travillion"), was found guilty of the charges of second degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violation of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance. A presentence report was ordered in aid of sentencing and Travillion was sentenced on May 15, 2006, to the mandatory life without parole for the conviction of second degree murder and a consecutive sentence of one hundred eight to two hundred sixteen months for his conviction of the charge of robbery and a consecutive sentence of twelve to twenty-four months for his conviction of possessing a firearm without a license. Travillion did not file either post-sentencing motions or a direct appeal to the Superior Court.

On April 2, 2007, his current appellate counsel filed a petition for post-conviction relief requesting that his appellate rights be reinstated. On June 4, 2007, this Court prepared an order granting the reinstatement of his appellate rights and Travillion's appellate counsel filed post-sentencing motions on June 15, 2007. On August 29, 2007, a hearing was held on those motions and an Order was

entered on January 31, 2008 denying those motions. Travillion filed an appeal from the denial of his post-sentencing motions and was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In that concise statement, Travillion has suggested that there are four claims of error. Initially, Travillion maintains that he was denied his right to counsel under the United States and Pennsylvania Constitutions. Travillion also maintained he was denied his right to testify at the time of his trial. Travillion has also suggested that this Court erred when it denied his motion to suppress the evidence seized by the Ross Township Police, the identification made of him by one of the victims and his inculpatory statements to the investigating homicide detectives. Finally, Travillion contends that this Court intimidated one of his witnesses thereby causing that witness to refuse to testify.

On February 21, 2002, James Kapinski, (hereinafter referred to as "Kapiniski"), was a graduate student at Carnegie-Mellon University and lived in an apartment located at 408 Grant Street in the Garfield Section of the City of Pittsburgh. Kapinski had gone to school early that day and sometime between ten a.m. and seven p.m., an unknown individual entered into his apartment and stole some watches, a zip drive, some electronic equipment, an MP3 player, and a .357 caliber magnum Reuger revolver. Kapinski reported the burglary and theft to the police that day.

On September 27, 2002, at approximately five a.m., Leonard Feigel, age sixty-two, and his wife Doris Feigel, were delivering newspapers for the Pittsburgh

Post-Gazette in the Bloomfield/Friendship area of the City of Pittsburgh. Leonard Feigel, who suffered from coronary disease and cirrhosis of the liver, was awaiting a liver transplant and this was the least strenuous type of employment in which he could engage. The Feigels were about to deliver the newspapers on Evangeline Street when Mrs. Feigel noticed an individual walking down that street toward them. This unknown individual came up to the driver's car door, opened it and then pulled Mr. Feigel out of the car. Mr. Feigel told him to take whatever he wanted, however, an altercation ensued as Mr. Feigel and his assailant moved up the street away from the Feigel's automobile toward an unoccupied parked car. Mrs. Feigel saw her husband's attacker pull out a gun and then she heard a shot and her husband cry out in pain. Her husband also yelled for her to get away from them.

When she heard her husband cry out in pain, Mrs. Feigel slid over to the driver's seat and put the car in gear and then drove toward her husband and his attacker in an attempt to hit this assailant. She barely touched Travillion when he then turned around and fired twice into her car and ran to the back of it and fired two more shots. He then ran down the street where one of the neighbors who had heard the shots saw him get into a dark colored foreign car which resembled a picture of a Mitsubishi Mirage shown during the course of the investigation of this crime. Mrs. Feigel, who was not hurt, got out of the vehicle and ran to several of the houses pounding on the doors, asking for someone to call the police for an ambulance.

The police and the paramedics arrived within minutes of the shooting and noted that Mr. Feigel had been shot in the leg and that he had lost a significant amount of blood. The paramedics noted that he said he was cold and believed that he was going into shock. Mr. Feigel was transported by ambulance to Presbyterian University Hospital where he underwent emergency surgery and following the surgery he was listed as critical but stable; however, the trauma associated with this wound, his significant loss of blood, together with his severe coronary artery disease and his cirrhosis of the liver, ultimately resulted in his death. Dr. Bennett Omalu performed the autopsy on Feigel and noted that the downward, backward, and through and through gunshot wound had perforated the two major arteries of the leg causing a substantial loss of blood. Based upon that autopsy, Dr. Omalu offered the opinion that the cause of death of Feigel was atherosclerotic heart disease and cirrhosis of the liver which were exacerbated by the trauma of the gunshot wound and the significant loss of blood that he sustained. The triggering factor in Feigel's death was the gunshot wound to his leg and the loss of blood.

Mrs. Feigel was interviewed by the homicide detectives and she told them that her husband's attacker was an African American in his mid-twenties to early thirties and that he was approximately two hundred twenty pounds and that he was reasonably tall. Mrs. Feigel had indicated to the homicide detectives that she was able to get a good look at the individual who not only killed her husband but, also shot at her since he was a short distance from her and the street was well-lit.

On October 10, 2002, she was shown a photo array of potential suspects; however, she was unable to identify anybody from that photo array.

During 2002 Samantha Smith owned a black Mitsubishi Mirage which was wrecked by her boyfriend, Travillion. Smith went to Enterprise Rental Company and rented a red Ford Focus automobile while awaiting payment from her insurance company so that she could purchase a new vehicle. In renting this automobile, she indicated on the rental form that she would be the only driver and that there were no other permitted drivers.

On November 24, 2002, Officer Joseph Shurina, of the Ross Township Police Department, was on routine patrol along McKnight Road checking buildings for any evidence of possible criminal activity. In the preceding weeks there had been numerous burglaries of commercial establishments along McKnight Road and it was Officer Shurina's job that night to check the buildings for evidence of any burglaries. At approximately 11:00 p.m., as Office Shurina approached the Bed, Bath & Beyond store, he noticed a vehicle parked behind the building with its lights on and engine running. Officer Shurina suspected that something might be wrong since the building was closed and the area where the car was stopped was not a parking lot nor was it used to gain ingress or egress to the parking lot for the store.

Officer Shurina pulled behind this automobile and put on his take down lights. Once he had put these lights on, Officer Shurina noticed that there was one individual in the car and that this individual started to move around in that vehicle. He also noted that the vehicle was a red Ford Focus automobile. The driver of this

vehicle was subsequently identified as Travillion who got out of the vehicle and attempted to explain why he was in the alleyway behind the store. Officer Shurina told him to get back into the car and then he ran the plate to determine the ownership of the vehicle. When he received the information that the vehicle was owned by Enterprise Rental, he went back to the car and asked the driver for owner's and operator's information. Travillion supplied him with his driver's license and told him that the car was his girlfriend's car and provided him with the rental agreement which indicated that only his girlfriend, Samantha Smith, was a permitted driver for this vehicle. Travillion then told Officer Shurina that he had pulled into the alley because he needed to urinate. When asked why he had not stopped at a restaurant that had a restroom, Travillion had no answer and seemed befuddled and then became more nervous and agitated.

Officer Shurina then called for backup and waited for his backup to arrive. After the backup officer arrived, they both approached the vehicle and saw that Travillion had bent down and was moving around inside the car. Officer Shurina asked Travillion to get out of the car so that he could perform a pat-down of him and at this point when Travillion exited the vehicle Officer Shurina noticed a barrel of a gun sticking out from under the driver's seat. Officer Shurina took possession of this firearm, noted that it was loaded, and it was a 357 Magnum. Officer Shurina then checked to determine whether or not Travillion had a license to carry a firearm and when he was advised that he did not, Travillion was arrested and subsequently transported to the Ross Township Police Department. An inventory search was

performed on the vehicle and during the search of that vehicle, a bag a of marijuana was found in the console of the car. Travillion subsequently was charged with possession of a firearm without a license and possession of a small amount of a controlled substance. From the time that Officer Shurina initially encountered Travillion until the time that he was taken from the Ross Township Police Department to the Allegheny County Jail, Travillion did not request an opportunity to go to the bathroom.

The firearm found in Travillion's car was turned over to the Allegheny County Crime Lab so that it could be examined to see if it was in good operating condition and whether or not any of the bullets fired from it matched any of those contained in open case files. The gun was examined in May of 2003 by Robert Levine, Ph.D., who was the firearm's expert for the Crime Lab and it was determined that this weapon was used in the killing of Leonard Feigel. This information was given to the Pittsburgh Homicide Detectives and they, in turn, contacted the Ross Township Police Department so that they could gather information as to the facts surrounding how they came into possession of the firearm. After receiving the information that Travillion had been arrested and charged with the crime of possession of a firearm without a license, a new photo array was prepared which included his photograph and then that photo array was shown to Mrs. Feigel who immediately identified Travillion as the individual who killed her husband.

A arrest warrant was issued for Travillion for the homicide of Feigel and on May 16, 2003, Homicide Detectives Hal Bolin and George Satler went to Travillion's last known address to arrest him. The Detectives knocked on his door and Travillion came to the door and asked what they wanted. The Detectives identified themselves and told him that they had an arrest warrant for him for the charge of criminal homicide. Satler and Bolin knew that it was Travillion at the door since they had with them the a copy of the picture that Mrs. Feigel had identified in the photo array. Initially, Travillion denied that he was Jamar Travillion and, in fact, told the police that his name was Raymont Geeter. Travillion had on him a Pennsylvania driver's license with the name Raymont Geeter. Knowing that they had the right individual, they arrested Travillion and transported him to the homicide headquarters.

After being read his Miranda warnings, Travillion signed the form indicating that he had been fully advised of his rights and that he was willing to talk to the police with respect to the death of Feigel. Initially, Travillion maintained that he had nothing to do with that death and this continued for approximately forty-five minutes when Travillion asked if he could have a couple of minutes alone. After a ten minute break, Bolin continued with his interview of Travillion and Travillion said he was responsible for Feigel's death. He stated that he was high on marijuana that was laced with formaldehyde and on the morning of Feigel's death he had driven Smith's black Mitsubishi to the Bloomfield area looking for somebody to rob because he wanted to buy more marijuana. Once he saw Feigel he approached him,

drew his gun and demanded money. He held the gun at his side, pointing low, and pointing down. The victim grabbed at the gun and it went off and he took twenty to thirty dollars from the victim and possibly his wallet. After shooting Feigel, he ran from the scene and went home. Travillion never mentioned shooting into Feigel's car at Mrs. Feigel. During the course of this interview, Bolin was taking notes and once he finished the interview, he reviewed the notes with Travillion, had him read those notes and asked him if they were accurate. Travillion indicated that the notes were accurate and that he had no additions or corrections to those notes. However, when he was asked to sign those notes he refused and he also refused to put his statement on tape.

Travillion was taken to the Coroner's office so that he could be arraigned on the charge of criminal homicide. After being arraigned, he was leaving that office when he was confronted by numerous members of the media who asked him why he killed Feigel and he denied that he had done that. While he was being taken to the Allegheny County Jail, Bolin asked Travillion why he lied to the media and he said he was mad at the detectives because he believed they were the cause of the media being there and he was informed that the detectives did not call the media, but if anyone called the media, it was probably somebody from the Coroner's office.

In Travillion's statement of matters complained of on appeal he asserts four claims of error. Initially he maintains that he was denied his Fifth Amendment right to counsel since he maintained that he was forced to represent himself. It is axiomatic that defendant has a constitutional right to represent himself in a

criminal proceeding. *Commonwealth v. El, 933 A.2d 657 (Pa. Super. 2007).* When a defendant asserts that right to self-representation, the Court must make an inquiry as to whether or not this decision is knowingly, voluntarily and intelligently made. *Commonwealth v. Doyen, 848 A.2d 1007 (Pa. Super. 2004).* Pursuant to *Pennsylvania Rule of Criminal Procedure 121*, a Court must inquire into six separate areas in making the determination that the defendant's decision to represent himself was knowingly, intelligently and voluntarily made.

Rule 121. Waiver of Counsel

(A) Generally.
(1) The defendant may waive the right to be represented by counsel.

(2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:

(a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;

(b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;

(c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;

(d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;

(e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and

(f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or

otherwise timely raised by the defendant, these errors may be lost permanently.

(3) The judge or issuing authority may permit the attorney for the Commonwealth or defendant's attorney to conduct the examination of the defendant pursuant to paragraph (A)(2). The judge or issuing authority shall be present during this examination.

(B) Proceedings Before an Issuing Authority. When the defendant seeks to waive the right to counsel in a summary case or for a preliminary hearing in a court case, the issuing authority shall ascertain from the defendant whether this is a knowing, voluntary, and intelligent waiver of counsel. In addition, the waiver shall be in writing,

(1) signed by the defendant, with a representation that the defendant was told of the right to be represented and to have an attorney appointed if the defendant cannot afford one, and that the defendant chooses to act as his or her own attorney at the hearing or trial; and

(2) signed by the issuing authority, with a certification that the defendant's waiver was made knowingly, voluntarily, and intelligently. The waiver shall be made a part of the record.

(C) Proceedings Before a Judge. When the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel.

(D) Standby Counsel. When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant. Standby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice.

The purpose of the Court making such an inquiry of this rule is to insure that the Court is convinced that the defendant has made an informed and independent decision to waive his right to counsel. *Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431 (2005)*. In making a determination as to whether or not the defendant has made an intelligent decision to represent himself, The Court must be satisfied

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that it has considered the six areas of inquiry and the Court must look to the totality of the circumstances giving rise to that decision.

> Before a defendant is permitted to proceed *pro se,* however, the defendant must first demonstrate that he knowingly, voluntarily and intelligently waives his constitutional right to the assistance of counsel. *Faretta, supra,* at 835, 95 S.Ct. at 2541; *Szuchon, supra,* 506 Pa. at 250, 484 A.2d at 1377. If the trial court finds after a probing colloquy that the defendant's putative waiver was not knowingly, voluntarily or intelligently given, it may deny the defendant's right to proceed *pro se. See, Commonwealth v. Richman,* 458 Pa. 167, 175, 320 A.2d 351, 355 (1974) (right to counsel not waived because waiver not knowingly and intelligently given). The "probing colloquy" standard requires Pennsylvania trial courts to make a searching and formal inquiry into the questions of (1) whether the defendant is aware of his right to counsel or not and (2) whether the defendant is aware of the consequences of waiving that right or not. *Szuchon, supra,* 506 Pa. at 250, 484 A.2d at 1377 (trial judge must make searching inquiry into defendant's request to proceed without counsel). *See also* Pa.R.Crim.P. 318(c) (when the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether the waiver was made knowingly, voluntarily and intelligently). Specifically, the court must inquire whether or not: (1) the defendant understands that he has the right to be represented by counsel, and the right to have free counsel appointed if he is indigent; (2) the defendant understands the nature of the charges against him and the elements of each of those charges; (3) the defendant is aware of the permissible range of sentences and/or fines for the offenses charged; (4) the defendant understands that if he waives the right to counsel he will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules; (5) defendant understands that there are possible defenses to these charges which counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and (6) the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, the objection to these errors may be lost permanently. Comment to Pa.R.Crim.P. 318.
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> ***Commonwealth v. Star, 541 Pa. 564, 664 A.2d 1326, 1335 (1995).***

In Travillion's case, although there was no single colloquy addressing these concerns, all of the areas that were required to be addressed pursuant to

Pennsylvania Rule of Criminal Procedure 121, were discussed with Travillion which enabled this Court to be satisfied that his waiver of counsel was knowingly and intentionally made, thereby permitting him to him represent himself. Travillion initially retained private counsel William Difenderfer, to represent him and had his case continued three times in order for Difenderfer to prepare for trial. The case was scheduled for trial in December of 2004 and another request for a continuance was made which was denied. A hearing was held on Travillion's motion to suppress and that motion was denied. Following the denial of that motion, the parties were directed to proceed to the jury room for the selection of the jury. At that point in time, Difenderfer indicated to the Court that Travillion wanted to address certain issues prior to jury selection. This Court informed Difenderfer and Travillion that it would not discuss the matters pertaining to a case with the defendant but, rather, it would discuss those matters with defendant's counsel. Difenderfer advised this Court that he had reviewed all of the concerns that Travillion had and believed that none of the issues that Travillion wanted to raise had any merit and he would not raise those issues. Travillion became insistent that he personally wanted to discuss those matters, however; he was instructed to proceed to the jury room for jury selection.

Once in the jury room, Travillion became animated and overbearing, frustrating the jury selection process. Travillion returned to the courtroom once again insisting that he be heard personally on the issues that he wished to raise. This Court advised Travillion that he was represented by counsel and that any

issues that were to be raised regarding his case had to be raised by his counsel. His counsel once again indicated that the issues Travillion wished to raise were of no moment to his case. Again, Travillion was told to return to the jury room to select a jury; however, he advised his counsel that he would not participate in jury selection. Travillion was then sent to the bullpen to await the selection of a jury. While in his holding cell, Travillion created a disturbance in that facility and once again was returned to the Courtroom and he was advised that the only way that this Court would listen to his arguments on the issues that he wished to raise would be if he was representing himself but since he had counsel, he could either elect to proceed with jury selection or to be returned to the jail.

Travillion once again, went to the jury room to complete jury selection only to return to the Courtroom and this Court was advised by Difenderfer that he had been fired. After asking him over twenty times as to whether or not he had fired Difenderfer, and never receiving an intelligible answer from Travillion, this Court received an acknowledgement from Difenderfer that, in fact, he had been fired by Travillion. This Court then permitted Travillion to raise his issues, all of which had nothing to do with his case. The real reason for Travillion's unwillingness to participate in the jury selection process was the fact that he wanted another continuance and that request was denied. Travillion was then advised that since he was going to represent himself, he would be held responsible for his actions and that he would be bound by the same rules as a lawyer and he would be expected to understand the law that was applicable to his case, the Rules of Evidence, and the

Rules of Criminal Procedure as they applied to the charges that had been filed against him.

Following his dismissal of Difenderfer, Travillion indicated that he was unprepared to pick a jury and he requested a continuance so that he could hire a new lawyer. Travillion's case was then continued until January, 2006, in hopes that Travillion would hire a new lawyer so that a prompt trial date could be scheduled. Despite giving Travillion more than a year to hire a new lawyer, he did not do so and this Court, on its own motion, appointed the Public Defender's Office to assist him and/or to represent him. Both Christopher Patarini and Sumner Parker of the Public Defender's Office of Allegheny County attempted to meet with Travillion but he refused to discuss his case with them. Their efforts to meet with Travillion were further complicated by the fact that Travillion spent more than six months in "the hole" as a result of his being a disciplinary problem at the Allegheny County Jail.

Difenderfer, prior to being fired, put forth the issues that Travillion wanted to discuss and his difficulty in dealing with Travillion in deciding the strategy and evidence that should be presented in his case. Rule 3.1 of the Pennsylvania Rules of Professional Conduct mandate that a lawyer not pursue frivolous issues. That Rule provides as follows.

> Rule 3.1. Meritorious Claims and Contentions
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> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in

> incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

Similarly, the American Bar Association Model Code of Professional Conduct provide that the stewardship of any case, especially a criminal case, rests in the hands of counsel after consultation with a client. Proposed Rule 122(a) provides:

> A lawyer shall abide by a client's decisions and show any objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. . ..
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> In a criminal case, the lawyer shall abide by the client's decision, . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify.

With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case after consulting with this client. In this regard, Difenderfer's decision not to raise the frivolous issues suggested by Travillion comported with the Pennsylvania Code of Professional Responsibility and the American Bar Association's model Rules of Professional Conduct.

The first issue that Travillion wanted to raise was that he did not have all of the discovery with respect to the reports that were involved concerning the arrest of Shawn Williams who was initially thought to be a suspect based upon information provided by a confidential informant. In discussing this matter with the assistant district attorney, Difenderfer was advised that when Shawn Williams became a suspect, a photo array was put together which contained his photograph and that photo array was shown to Mrs. Feigel who did not identify anyone in the photo

array. As a result of her inability to identify Williams as a possible suspect, no further investigation of him was made.

Next Travillion wanted the aerial photographs that were taken by the City Homicide Detectives in conjunction with this case. This request, however, was broader than that in that he wanted all of the aerial photographs that were taken. As explained by the assistant district attorney, every three to six months homicide detectives and the state police taken aerial photographs of the crimes scenes of numerous homicides. What Travillion wanted were the reports that were associated with unrelated criminal investigations. Travillion had been provided with the photographs and the investigative material that pertained to the homicide with which he had been charged. Travillion also maintains that he should have been entitled to the videotapes from the surveillance cameras mounted in the Ross Police cars which were used at the time of his arrest. The problem with this request is that the two vehicles that were used by Officer Scirina and his backup did not contain cameras and, accordingly, there were no videotapes.

Travillion next wanted all reports pertaining to the burglary investigation of Kapinski's apartment where the 357 Magnum was stolen. The initial report indicated that the police had fingerprinted that apartment during the course of its investigation. Travillion wanted the copies of all the fingerprints and reports that were associated with that investigation. Travillion was never charged with that burglary nor was it suggested that he was the burglar, but rather that he was the individual who was in possession of the weapon that killed Leonard Feigel when he

was stopped by the Ross Township Police. The reports of the Kapinski Burglary do not indicate whether or not any latent or usable prints were ever obtained and there is no indication that Travillion's prints were associated with that burglary.

Travillion also wanted the photographs that were allegedly shown to Mrs. Feigel while she was at the hospital and the Commonwealth indicated that there were no such photographs. In speaking with each detective that was involved in the investigation of Feigel's death, they all indicated that they did not show any photographs to Mrs. Feigel while she was at the hospital. This was an issue for credibility and not an evidentiary issue.

Difenderfer also indicated that he had a tactical disagreement with Travillion since he wanted to hire an expert to look at the issue of causation with regard to Feigel's death, however, Travillion told him, in no uncertain terms, that he did not want an expert hired. Difenderfer also indicated that there were strategic and tactical disagreements between he and Travillion which included the evidence that should have been presented at the time of the hearing on Travillion's suppression motion and that Travillion disregarded his advice when he decided to testify at that hearing.

In looking at all of these claims that Travillion wished had been asserted, it is clear that Difenderfer's assessment was correct in that they were non-meritorious and frivolous. Difenderfer was Travillion's counsel of choice and he was discharging his duties toward Travillion in accordance with his obligations under the Code of Professional Responsibility. The problem that arose between Difenderfer and

Travillion was that Travillion wanted to be not only the client but, also, the lawyer. He wanted to dictate the manner in which the strategic and tactical decisions of his case were to be made. A more fundamental problem occurred, however, and that is that Travillion also wanted to dictate how the system of justice was to operate with respect to his case.

In *Commonwealth v. Prysock, A.2d , 2009 W.L. 1058652 (Pa. Super. 2009)*, the Court detailed the balancing test between the defendant's right to counsel and the administration of justice.

> With respect to the right to counsel, The Supreme Court of Pennsylvania has stated:
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> [t]he right to counsel is guaranteed by both the Sixth Amendment to the United States Constitution and by Article I, Section 9 of the Pennsylvania Constitution. In addition to guaranteeing representation of the indigent, these constitutional rights entitle an accused "to choose at his own cost and expense any lawyer he may desire." *Commonwealth v. Novak*, 395 Pa. 199, 213, 150 A.2d 102, 109, *cert. denied*, 361 U.S. 882, 80 S.Ct. 152, 4 L.Ed.2d 118 (1959). The right to "counsel of one's own choosing is particularly significant because an individual facing criminal sanctions should have great confidence in his attorney." *Moore v. Jamieson*, 451 Pa. 299, 307-08, 306 A.2d 283, 288 (1973).
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> We have held, however, that the constitutional right to counsel of one's choice is not absolute. *Commonwealth v. Robinson*, 468 Pa. 575, 592-93 & n. 13, 364 A.2d 665, 674 & n. 13 (1976). Rather, "the right of the accused to choose his own counsel, as well as the lawyer's right to choose his clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." *Id.* at 592, 364 A.2d at 674 (internal quotations omitted). Thus, this Court has explained that while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably "clog the machinery of justice" or hamper and delay the state's efforts to effectively administer justice." *Commonwealth v. Baines*, 480 Pa. 26, 30, 389 A.2d 68, 70 (1978). At the same time, however, we have explained that " 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' " *Robinson*, 468 Pa. at 593-

94, 364 A.2d at 675 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)).

In Travillion's case, he was given three prior continuances and on the day of trial scheduled in December of 2004, was requesting a fourth as his counsel had not adequately prepared and obtain the materials which Travillion believed to be necessary for his defense. As previously demonstrated, these requests were non-meritorious and frivolous and there was no need for that material in order for the defense of Travillion's case to go forward. As noted by the assistant district attorney at the time of the hearing on Travillion's suppression motion, the Ross Township Police arrested Travillion, who was in possession of the firearm that caused Feigel's death, that he was positively identified in a photo array and subsequently in a jury trial by Mrs. Feigel as being her husband's killer and her assailant, and that Travillion had confessed to the commission of the crime of robbery which resulted in Feigel's death. The request for an additional continuance was nothing more than another attempt to hinder the administration of justice by preventing his case from going forward.

It is obvious that Travillion knew that following the death of her husband, Mrs. Feigel had moved to Florida, and that she also had some health issues. While this Court denied his request for a continuance when he was represented by Difenderfer, his case was continued to provide him with sufficient time to obtain new private counsel in an attempt to insure his right to be represented by counsel. Despite being given more than a year to obtain counsel, Travillion never did. This

Court, in an effort to protect his right to counsel, appointed the Public Defender's Office to represent him; however, he refused to cooperate and/or to meet with two different experienced homicide trial counsel from that office. When the entire record is reviewed in connection with this proceeding, it is clear that Travillion made a knowing, intelligent and voluntary decision to waive his right to counsel and proceed as his own counsel. In concluding that Travillion had made this decision, this Court permitted him to act as his own counsel in this proceeding.

At the time of trial, this Court engaged in a colloquy with Travillion about his right to remain silent and his right to testify. During this Court's colloquy with Travillion concerning his right to testify, he acknowledged that he had been previously advised of the penalties that could be imposed upon him should he be convicted of the charges that were filed against him. Travillion noted that this Court had advised him of those penalties at an earlier point in time, during the numerous hearings that were held prior to trial. When reviewing the entire record it is clear that Travillion's decision to represent himself was knowingly, intelligently and voluntarily made and was part of his orchestrated plan to manipulate the system to obtain a continuance when he was informed that no continuance would be granted. Even Difenderfer, prior to being discharged, advised this Court of his difficulties with Travillion since Travillion attempted to orchestrate and to manipulate this case and to hinder Difenderfer's ability to effectively represent him. It is clear from a review of the entire record that the dictates of Pennsylvania Rule

of Criminal Procedure 121 were met and this Court had a full understanding of the knowing, voluntary and intelligent decision made by Travillion to represent himself.

Travillion's second claim of error is that he was denied his absolute right to testify at the time of trial. This claim is patently specious. This Court went through an extensive colloquy with respect to Travillion's right to remain silent and his right to testify. When asked whether or not he made a decision whether to testify, Travillion made the following statement:

> MR. TRAVILLION: Well, I attempted to prepare to testify yesterday, but due to the fact that the testimony is going to conclude today and I don't have an attorney to cross-examine me, I am certainly not going to get on the witness stand and ask myself questions. This is just something that is not going to happen.
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> THE COURT: Are you going to testify? Yes or no.
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> MR. TRAVILLION: I wish to, but it is impossible for me to do so.
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> THE COURT: It is your decision to make.
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> MR. TRAVILLION: Yes, I do wish to testify, but I can't do it because I can't ask myself questions.
>
> THE COURT: You can get up and give a statement.
>
> MR. TRAVILLION: Well . . .
>
> THE COURT: You don't have to ask yourself a question. You can give a narrative. I will let you do that.
>
> MR. TRAVILLION: That is something I hadn't thought of, Your Honor, quite frankly, at this point.
>
> THE COURT: We will recess until 1:30. Think about it.

He did not take the witness stand but, rather, called defense witnesses and then rested. When given the opportunity to present his testimony in the form of a narrative statement, Travillion made a knowing, voluntary and intelligent decision not to exercise his right to testify.

Travillion's next claim of error is that this Court erred in failing to grant his suppression motion. This Court conducted a hearing on Travillion's suppression motion, at which hearing he was represented by Difenderfer. Travillion's suppression motion was directed to what he perceived to be the illegal and unjustifiable stop and subsequent arrest of Travillion by the Ross Township Police. Since the predicate for this claim is the alleged illegal stop and subsequent search of Travillion's vehicle, a determination must be made as to the level of interaction between the police and Travillion. In *Commonwealth v. Collins, 950 A.2d 1041, 1046 (Pa. Super. 2008)*, the Court described the three types of interaction between the public and the police as follows:

> There are three categories of police interactions which classify the level of intensity in which a police officer interacts with a citizen, and such are measured on a case by case basis.
>
> Traditionally, this Court has recognized three categories of encounters between citizens and the police. These categories include (1) a mere encounter, (2) an investigative detention, and (3) custodial detentions. The first of these, a "mere encounter" (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or "custodial detention" must be supported by probable cause.

Commonwealth v. Mendenhall, 552 Pa. 484, 488 715 A.2d 1117, 1119 (1998) (*citing Commonwealth v. Polo*, 563 Pa. 218, 759 A.2d 372, 375 (2000)).

It is clear that Officer Shurina's initial encounter with Travillion was an investigative detention and was supported by reasonable suspicion.[1]

As previously noted, Travillion was parked behind a Bed, Bath & Beyond Store at approximately 11:00 when Officer Shurina was on routine patrol along McKnight Road checking business along that road since there had been numerous burglaries of those businesses in the preceding weeks. Officer Shurina noted Travillion's car behind the building where he would not have been permitted during normal business hours and decided to investigate. When Officer Shurina asked for owner's and operator's information, Travillion produced the rental agreement for the car which was rented by his girlfriend and which indicated that only she was an authorized driver of that vehicle and his identification. When asked why he was behind the building, Travillion advised Shurina that he had pulled in and was about to relieve himself despite the fact that he was living with his girlfriend less than one hundred yards from the Bed, Bath & Beyond Store. When Officer Shurina ran the plate for that car, he noticed Travillion moving around in the car and it

[1] This is the same standard which permits a traffic stop pursuant to *75 Pa.C.S.A. §6308(b)*, which provides:

> (b) Authority of police officer.—Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

appeared to him that he was attempting to hide something and when he asked Travillion to get out of the vehicle, he noticed a gun underneath the driver's seat.

It is clear that Officer Shurina had a reasonable suspicion to detain Travillion since he was not an authorized driver for the vehicle and that he was in an area where he would not have been permitted even during normal business hours. In addition, there had been numerous burglaries of commercial establishment along McKnight Road in the preceding several weeks and Travillion's presence there led Officer Shurina to suspect that another burglary might be in the process of being committed. These facts coupled with Travillion's furtive movements in the car and the gun being in plain view, provided for the lawful seizure of that weapon.

> In the latter two cases, seizure was not from a person but from a vehicle. For Fourth Amendment purposes, the police may conduct a warrantless search of a vehicle where probable cause exists. *Carroll v. United States*, 267 U.S. 132, 147-56, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Even where a vehicle is essentially seized and immobilized, the Fourth Amendment does not preclude a warrantless search of it if probable cause exists. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). A warrantless search of a vehicle is reasonable under the Fourth Amendment because of the mobility of a vehicle, *Carroll*, at 153, 45 S.Ct. 280 and the reduced expectation of privacy an individual has in a vehicle's contents. The United States Supreme Court explained:
>
> > One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.... It travels public thoroughfares where both its occupants and its contents are in plain view. *Chadwick*, at 12, 97 S.Ct. 2476 (quotation omitted).
>
> The Commonwealth argues we should adopt the federal automobile exception under Article I, § 8. Constitutional protections are applicable to one's vehicle under Article I, § 8. *Commonwealth v. Holzer*, 480 Pa. 93, 389 A.2d 101, 106 (1978). We have not adopted the full federal automobile exception under

> Article I, § 8, *id.*, and decline to overrule that long-standing precedent today, especially because that issue is not specifically before us, but ancillary to the issue we are resolving.
>
> Nevertheless, we have adopted a limited automobile exception under Article I, § 8. "While many in our society have a great fondness for their vehicles, it is too great a leap of logic to conclude that the automobile is entitled to the same sanctity as a person's body." *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1191 (2004); *see also Holzer*, at 106 (expectation of privacy in one's vehicle significantly less than in one's home or office); *Commonwealth v. Mangini*, 478 Pa. 147, 386 A.2d 482, 487 (1978) (same). We have described two reasons why exigent circumstances allow a warrantless search or seizure of a vehicle under Article I, § 8:(1) a vehicle is mobile and its contents may not be found if the police could not immobilize it until a warrant is secure; and (2) one has a diminished expectation of privacy with respect to a vehicle. *Holzer*, at 106. Thus, even though privacy protections are implicated under Article I, § 8, the heightened privacy concerns involved in a seizure from an individual's person are not present where an object is seized from a vehicle.
>
> ***Commonwealth v. McCree*, 592 Pa. 238, 924 A.2d 621, 629-630 (2007).**

Travillion also maintained that inculpatory statements should have been suppressed since he did not make them. The record in this case clearly reveals that Travillion was advised of his Miranda rights, executive a waiver of those rights, and spoke with Detective Bolin. Bolin took notes during this interview and gave them to Travillion to review. Travillion had no corrections or additions to those notes which contained Travillion's statement that he shot Feigel during the course of the robbery. As with his other claims of error, this contention also has no merit.

Travillion's final claim of error is that this Court intimidated a defense witness to the point that that witness refused to testify in support of Travillion. Travillion called Raymond Geeter to testify and elicited some basic information to him which included the fact that on the day prior to Travillion's arrest by the Ross

Township Police that Geeter was in possession of Susan Smith's car and that he was using that vehicle as a jitney. When this information came forward, the assistant district attorney asked to approach sidebar and asked that Geeter be advised of his Fifth Amendment rights in light of the possibility of him admitting to several crimes, the least of which would be operating a jitney and the worst of which might be his involvement in the homicide of Feigel. Following a discussion in chambers with respect to the possibility of Geeter disclosing incriminating information, this Court appointed Giuseppe Rosselli to represent him and advise him of his rights in light of the purported testimony that he was to give. Geeter met in this Court's chambers with Rosselli and no one else was present. Following their meeting, Geeter indicated that he wanted to invoke his Fifth Amendment right since he had been advised by Rosselli that the testimony he might give could possibly implicate him in the death of Feigel since he was in the car which had the murder weapon in it at the time that he was using that vehicle.

At no time did this Court ever advise Geeter that it would charge him but, rather, advised him that any decision as to whether or not he would be subject to criminal charges would be made by the District Attorney's office. This Court, rather than trying to intimidate Geeter, was insuring that his rights were protected by

appointing an attorney to advise him of what his rights and options were with respect to testifying in this particular case. As with all of Travillion's claims of error, this one was also without merit.

CASHMAN, J.

DATED: 7/6/09

Additional material from this filing is available in the Clerk's Office.